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African Jurisprudence on LGBT and Possible Reforms for Malawi

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Prepared under the supervision of Professor Ebenezer Durojaye

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The Monsters You Made

It's like the heads of the State ain't comprehending the hate …We are the monsters you made

Burna Boy (2020)

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Declaration

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Dedication

For:

Shalom Msiska. You will always be my little angel☺. Lwanji Kayira, my guardian in the hospital. Twambilire Mwabungulu, thank you for always understanding friend! My cousin Matthew and wife Chisomo. My family. Thank you for always rooting for me!

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Abstract

Despite the world being pluralistic in sexuality, sexual minorities are often not recognized both in epistemology of the LGBT law and in court due to heteronormativity. Heteronormativity is grounded in a mythical epistemology that is not based on science of law. This has created a reverse-discourse which is non-conformist. Against this background, queer theory offers decolonial methodologies that expose the world as it is; queer. The extent to which the fiction in the law and jurisprudence has been condemned, and named illegal, has been missing out in scholarship. The sodomy law *ultra vires* the Constitution. The study brings attention to this undertheorized area and calls for elimination of such illegality which cannot be left out to common law's pick-and-choose in setting legal precedent. Such false epistemology must not co-exist with scientific one. It exacerbates retrogressive jurisprudence. This is the situation in Malawi. The country has failed to leverage on the emerging jurisprudence from the African Commission and other African countries with progressive jurisprudence which offers possible reforms for Malawi's LGBT law. In contributing to the discourse, I propose a model that uses anthropological and historical approaches to identify scientific queer epistemology that would create queer jurisprudence through legal reasoning, sovereignty as responsibility, Constitutional morality and international human rights law, offering both epistemological shift and jurisprudential shift towards the eradication of the myths and promotion of science hence legality of the law.

<u>Keywords</u>

Decolonial methodology, Queer theory, Epistemology, Common Law, Constitutional Morality

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List of Acronyms

(UN)GA	United Nations General Assembly
A G	Attorney General
ACHPR	African Charter on Human and People's Rights
ACmHPR	African Commission of Human and People's Rights
ACtHPR	African Court of Human and People's Rights
AHRS	African Human Rights System
CEDAW	Convention on Elimination of All Forms of Discrimination Against Women
CEDEP	Centre for the Development of People
CHREAA	Centre for Human Rights, Education, Advice and Assistance
CHRR	Centre for Human Rights and Rehabilitation
CSOs	Civil Society Organisations
EAM	Evangelical Association of Malawi
EC(t)HR	European Court of Human Rights
ECHR	European Convention of Human Rights
HRW	Human Rights Network
IACHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IHRL	International Human Rights Law
LGBT(QI)	Lesbian, Gay, Bisexual, Transgender, Queer, Intersex
NRA	Nyasa Rainbow Alliance
PHD	Doctor of Philosophy
QAS	Queer African Studies
QLT	Queer Legal Theory
SOGI	Sexual Orientation and Gender Identity
UDHR	Universal Declaration of Human Rights

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Contents

Declaration iii
Dedication iv
Acknowledgments v
Abstract vi
List of Acronyms 1
Chapter 1 : Introduction 4
1.1 Problem Statement 6
1.2 Significance of the Study 9
1.3 Literature Review 9
1.4 Research questions 16
1.5 Objective of the Study 17
1.6 Limitations of the Study 17
1.7 Methodology 18
1.8 Structure of the Dissertation 20
Chapter 2: Theoretical Framework 22
Chapter 3: The Historical, International and National Legal Framework on LGBT in Malawi 27
3.1 The Sociopolitical Context 28
3.2 The International Legal Framework ON LGBT 29
3.3 The Legal Framework on LGBT in Malawi 30
Chapter 4: Findings and Discussion 32
4.1 LGBT Court Case in Malawi 32
4.1.1 Attorney General's Interpretation of the Law 33
4.1.2 Evangelical Association of Malawi's Interpretation of the Law 34
4.1.3 CSOs' Interpretation of the Law 35
4.1.4 Malawi Concluding Observations on Sexual Minorities 38
5.2 African Jurisprudence on LGBT 38
5.2.1 Case Law Interpretation in the Malawi Court Case 39
5.2.1.1 National Coalition for Gay and Lesbian Equality v Minister of Justice 40
5.2.1.2 Eric Gitari v NGO Coordination Board and Others 41
5.2.1.3 Motshidiemiang v AG of Botswana & Dausab v The Minister of Justice of Namibia 43
Chapter 5: Conclusion and Recommendations 46

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5.1 Conclusion 46
5.1.1 Summary of Key Findings 47
5.1.2 Addressing Key Questions 49
5.1.2.1 How Malawian Institutions are Developing LGBT Epistemology 50
5.1.2.2 How the Legal Framework in Malawi addresses LGBT issues 51
5.1.2.3 Implications of the African Rhetoric on LGBT Jurisprudence in Malawi 51
5.1.2.4 How Challenging the African Rhetoric can Improve LGBT rights in Malawi 52
5.1.3 Limitations of the Study 52
5.2 Recommendations 53
5.2.1 Academia 53
5.2.2 Court and the State. 54
5.2.2.1 Legislative Reforms 55
5.2.3 Malawi Human Rights Commission (MHRC) 56
5.2.4 Civil Society Organisations (CSOs) 56
5.3 Further Research 57
Bibliography 59

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Chapter 1 : Introduction

The development of jurisprudence on LGBTQI offers great potential for addressing legalized and State-perpetrated homophobia. Such homophobia is manifested through the anti-LGBT African rhetoric which claims that homosexuality is un-African and therefore a Western concept.[1] It also recognizes heterosexuality as the norm (heteronormativity).[2] The term heteronormativity has been associated with Michael Warner who is known to have introduced it in 1993.[3] He regards it as ideological, arguing, "theoretical languages can produce the ideology of heterosexual society".[4] Emerging scholarship has challenged such an epistemology that reinforces heteronormativity.[5] However, queer theorists such as Turner[6] and De Lauretis[7] have argued that such scholarship has failed to produce an epistemology that could challenge the universal African rhetoric. Epistemology is defined as the philosophical nature of human knowledge in regard to its origin and limitations and questioning such knowledge might reveal inconsistencies or false connotations in belief of that knowledge.[8] This study interrogates the epistemology of the LGBT rhetoric. The African Human Rights System (AHRS) has a critical role to play for its members that are divided on the position of sexual minority rights and possess contradicting epistemology of the LGBT law. However, the AHRS has been accused of contradiction itself. Whilst the Commission has been applauded for developing Resolution 275 in 2014 which denounces hate crimes against LGBTQIs and human rights defenders, it has been condemned for denying observer status to organisations working with LGBTs. In 2022, it denied applications of three human rights NGOs affiliated with LGBT. The reasons given by the African

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[1] C Ngwena 'What is Africanness? Contesting nativism in race, culture and sexualities'; S Tamale 'Confronting the Politics of Nonconforming Sexualities in Africa' (2013) 56 *African Studies Review* 31; A Msosa 'Human Rights and sexual intimacies in Malawi, PHD thesis' (*University of Essex*, October 2017) <https://core.ac.uk/download/pdf/151209214.pdf> accessed 14 May 2023; U Mwakasungula '13 The LGBT situation in Malawi: an activist perspective in C Lennox & M Waites (eds) in Human Rights, Sexual Orientation and Gender Identity in the Commonwealth: Struggles for Decriminalisation and Change' (2013) <https://core.ac.uk/download/pdf/13120164.pdf> accessed 15 May 2023; E Baisley 'Framing the Ghanaian LGBT rights debate: competing decolonisation and human rights frames: Canadian Journal of African Studies / Revue canadienne des études africaines: Vol 49, No 2' (24 July 2015) <https://www.tandfonline.com/doi/abs/10.1080/00083968.2015.1032989> accessed 10 May 2023; J Brimmer '"Un-African" African Sexualities: Post-Colonial Nation Building and the Conditioning of Citizenship in sub-Saharan with Analysis of Uganda and Kenya' (2020) <https://www.etd.ceu.edu/2020/brimmer_jesse.pdf> accessed 11 May 2023; S Murray O and W Roscoe 'Boy-Wives and Female Husbands: Studies of African Homosexualities. New York: St. Martin's Press. - Google Search' (1998) <https://www.arcados.ch/wp-content/uploads/2012/06/MURRAY-ROSCOE-BOY-WIVES-FEMALE-HUSBANDS-98.pdf> accessed 10 May 2023.

[2] Ngwena (n 1).

[3] 'Heteronormativity' (*Oxford Reference*) <https://www.oxfordreference.com/display/10.1093/oi/authority.20110803095934139> accessed 26 May 2024.

[4] M Warner and Social Text Collective (eds) *Fear of a Queer Planet: Queer Politics and Social Theory* (1993) xvi.

[5] Ngwena (n 1); Msosa (n 1).

[6] WB Turner *A Genealogy of Queer Theory* (2000).

[7] T de Lauretis 'Queer Theory: Lesbian and Gay Sexualities An Introduction' (1991) 3 *differences* iii.

[8] 'Epistemology' (3 July 2020) <https://www.sheffield.ac.uk/philosophy/research/themes/epistemology> accessed 18 May 2023.

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Commission were that "sexual orientation is not an expressly recognized right or freedom under the African Charter" and that it was "contrary to the virtues of African values".[9] The African Court for Human and People's Rights, which is part of the AHRS has been criticized for being inefficient as it has hardly received any complaints on homosexuality. Ironically such complaints have to be received via the African Commission, which has already presumably failed to address homosexual issues.[10] There are quite serious constraints where only 8 out of 34 countries have signed article 34 (6) Declarations of States to allow individuals and CSOs to lodge their complaints with the court.[11] Malawi is one of those countries. Johnson reveals that there has been an evolution of the ECHR jurisprudence on LGBT which only occurred due to ECHR broadening the scope of homosexual rights involving ECtHR "actively constructing and `making up' the homosexual subject of human rights". He relates the ECHP situation to Africa where he feels it could equally evolve LGBT rights through the African Commission of Human and People's Rights (ACmHPR) and the African Court of Human and People's Rights (ACtHPR). He observes, "ECHR jurisprudence shows that this `ontological struggle' is central to making the homosexual subject a subject of human rights".[12] This is by no means a suggestion for the ACmHPR and the ACtHPR to replicate ECHP but to draw inspiration on the systemic processes for systemic change. He feels both the ACmHPR and the ACtHPR are not only gatekeepers but grant human rights and "are mechanisms through which the subjects of rights are constructed and given legal and social coherence".[13] Malawi is one of the many African countries that sits at a praxis of a sodomy law on the one hand in its penal code and progressive provisions in its Constitution under the Bill of Rights on the other. Out of the 69 countries that criminalise same-sex relationships in the world, almost half, at 33, are African countries.[14] What is quite paradoxical is that this occurs against the backdrop of advancing jurisprudence within the AHRS such as Resolution 275[15] and other African countries that have not only decriminalized the sodomy law but have also made great strides on LGBT jurisprudence.

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[9] Article 19 'African Commission: Protect and promote LGBTQI+ rights' (*ARTICLE 19*, 19 December 2022) <https://www.article19.org/resources/african-commission-protect-and-promote-lgbtqi-rights/> accessed 1 June 2023.
[10] P Johnson *Homosexuality and the African Charter on Human and Peoples' Rights: What Can Be Learned from the History of the European Convention on Human Rights* (2013).
[11] Amnesty International 'Why the African Court should matter to you' (*Amnesty International*, 9 June 2023) <https://www.amnesty.org/en/latest/campaigns/2023/06/why-the-african-court-should-matter-to-you/> accessed 20 May 2024.
[12] Johnson (n 11) 265.
[13] As above.
[14] Human Rights Watch 'Progress and Setbacks on LGBT Rights in Africa — An Overview of the Last Year' (*Human Rights Watch*, 22 June 2022) <https://www.hrw.org/news/2022/06/22/progress-and-setbacks-lgbt-rights-africa-overview-last-year> accessed 26 April 2023.
[15] ACHPR '275: Resolution On Protection Against Violence and Other Human Rights Violations Against Persons On the Basis Of Their Real Or Imputed Sexual Orientation Or Gender Identity' <https://www.chr.up.ac.za/images/researchunits/sogie/documents/resolution_275/Resolution_275_booklet_ENGLISH_02_WEB.pdf> accessed 26 April 2023.

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The other two systems, the European (ECtHR) and Inter-American (IACHR), have also made jurisprudential progress that Malawi and similar countries could leverage on. However, this has not been the case. The key question is; How is the African rhetoric on LGBT addressed in Malawian jurisprudence? Under this interrogation, the research's objective is to find out (1) Whether institutions should be promoting the existing epistemology on LGBT in Malawi (2) How the legal framework in Malawi addresses LGBT issues (3) What implications of the rhetoric are on the efficacy of jurisprudence on LGBT rights in Malawi (4) How challenging the rhetoric could make emerging jurisprudence effective to promote LGBT rights in Malawi.

Extant literature indicates that there is emerging scholarship that argues that homosexuality is not un-African and a Western concept by scholars such as Ngwena,[16] Tamale,[17] Murray and Roscoe,[18] Msosa,[19] and Mwakasungula.[20] However, such scholarship fails to dominate. Burna Boy's quoted song summarises the study very well on the role the state plays on *legal homophobia* when he sings 'It's like the heads of the State can't comprehend the hate … we are the monsters you made'.[21] It is against this backdrop that the study was conducted. The study has a key focus on ontological and epistemological philosophical approaches. Ontology is defined as the nature of reality which could either be objective or subjective. Epistemology focusses on what is acceptable knowledge in a discipline of study.[22]

1.1 Problem Statement

Same-sex relationships are criminalized under sodomy laws in Malawi's penal code under sections 153, 154, 156, and 137A, which was added later on lesbians. This has resulted in gross violations of human rights for sexual minorities. Such criminalization has been driven by the dominant epistemology that it is un-African and a Western concept. Such claims are based on a mythical rhetoric that has infiltrated both the narrative of LGBT rights and common law. There are barely any studies in the country that have interrogated this further in terms of the myths and how to integrate queer consciousness in both the scholarship and the

[16] Ngwena (n 1).
[17] Tamale (n 1).
[18] Murray and Roscoe (n 1).
[19] Msosa (n 1).
[20] Mwakasungula (n 1).
[21] 'Burna Boy (Ft. Chris Martin) – Monsters You Made' <https://genius.com/Burna-boy-monsters-you-made-lyrics> accessed 21 May 2024.
[22] M Saunders, P Lewis and A Thornhill *Research Methods for Businesss Students* (Fifth Edition, 2009).

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courtroom. Msosa[23] has conducted a ~~historical~~ analysis but for different contexts than the study and not necessarily deconstructing jurisprudence. His focus has been on the local language without necessarily interrogating and challenging the myth in the law and legal precedent. A historical analysis and jurisprudential analysis is key in tracing how the epistemology of the LGBT law is socially constructed and how these myths are developed in the rhetoric and common law and most importantly, how to remove them. The historical analysis reveals the anthropological oversights that largely ignored the African history of the existence of homosexuality even during the pre-colonial period.[24] Despite emerging scholarship on scientific epistemology from Africa, little has been done for this scholarship to be authoritative enough to overthrow the false rhetoric and replace it with a scientific or empirical one.[25] What exacerbates the situation is that this false epistemology has been institutionalised. The courts which have a critical role in applying legal principles based on legal rules and legal reasoning, have provided conflicting direction on jurisprudence resulting in both retrogressive and progressive jurisprudence being allowed to co-exist in courts despite the Constitution providing guidance.[26] This area of jurisprudence is also an area that has been under-theorized. Constitutional morality has not been fully understood and social morality has unfortunately guided courts in Malawi and other African countries that refuse to decriminalize anti-homosexuality laws. The court has failed to be jurisgenerative and as a result, has treated LGBT rights as 'outside jurisprudence'. African jurisprudence on LGBT, juxtaposed with progressive jurisprudence and retrogressive jurisprudence, reveals that there is no such thing as "African values".[27] While IHRL is explicit that non-discrimination includes SOGI, jurisdictions that criminalize homosexuality argue that it does not.[28] The penal code contradicts IHRL. This *ultra vires the* Constitution, creating illegality in court which is a serious crime and manifestation of State impunity. Human Rights Watch (HRW) reveals that this penal law is a remnant of British colonialism which was first imported into India in 1860 as a model law for the rest of the British colonies.[29] One of the key issues pointed out by HRW has been the definition of *carnal knowledge against the order of nature*. It has been regarded as ambiguous with nature or God as victim. Gupta[30] and Misra[31] also concur with the latter assertion. Such ambiguity was the reason why it was outlawed by its proponents

[23] Msosa (n 1).
[24] Murray and Roscoe (n 1); Tamale (n 1); Ngwena (n 1); Mwakasungula (n 1); Msosa (n 1).
[25] Turner (n 6); de Lauretis (n 7).
[26] Akster *Jam Willem Akster v Attorney General (Constitutional Referral 2 of 2021) [2021] MWHC 208 (16 November 2021)* (2021).
[27] As above; *NGO Coordination Board v Eric Gitari and others* (2023) 16 of 2019 (Supreme Court of Kenya).
[28] 'National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998)' <https://www.saflii.org/za/cases/ZACC/1998/15.html> accessed 31 March 2024; *NGos Coordination Board v Eric Gitari and others* (n 31); Akster (n 30).
[29] Human Right Watch 'This Alien Legacy: The Origins of "Sodomy" Laws in British Colonialism'.
[30] A Gupta 'Section 377 and the Dignity of Indian Homosexuals' 41 *Economic and Political Weekly* (2006).
[31] G Misra 'Decriminalising homosexuality' 17 *Reproductive Health Matters* (2009).

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the British Empire through the Wolfenden report in 1957. According to Lennox and Waites,[32] there were public debates in 1954 in Britain over the anti-homosexuality law. The Home Office and Scottish Home Department Joint Committee chaired by John Wolfenden held a meeting in 1957 that resulted in the popular Wolfenden report that outlawed sodomy law. Part of the report read "homosexual relationships between adults by mutual consent and privacy, are … not within the province of criminal law and should be removed from our statutes".[33]

Following this report, England and Wales enacted the Sexual Offences Act of 1967 which was adopted by Scotland in 1980 and Northern Ireland in 1982. ECtHR had found the UK in Breach of the convention on sodomy laws in the case of *Dudgeon v UK* in 1981 and the *Norris v Republic of Ireland* in 1988, illustrating ECtHR's contribution to jurisprudence on sexual minorities. Dryden[34] observes that during Margaret Thatcher's reign, section 28 of the Local Government Act prohibited local councils from promoting homosexuality and all funding was cut for educational activities surrounding it. However, it was repealed in 2003, and in 2009. In the continued fight for equality, in 2004, a Civil Partnership Act was enacted which accepted partnerships amongst same-sex couples in England and Wales and Scotland in 2014. It was followed by a Marriage Act in 2013 that included same-sex couples and Northern Island in 2019 which made same-sex marriage legal by January 2020 for the latter. Dryden also points out that the Equality Act of 2010 offered protection from discrimination against homosexuals. So far this is the progress that Britain has made on sodomy law. Paradoxically, this is the same law that Malawi wants to cling to over 66 years since being outlawed after the 1957 Wolfenden report.

The HRW continues to argue that the law targets a group of people, and not the perceived crime, "… enforcement usually aims selectively at despised groups".[35] The HRW reveals that initially the sodomy law had applied to both heterosexuals and homosexuals but leaned towards the latter more.[36] Gupta quotes the Wolfenden report "There must remain a realm of private morality and immorality which is, in brief, and crude terms, not the law's business".[37] This is quite critical because the report has been used to provide grounds for repealing of law and advance jurisprudence as in the case of India. The judge held, "The

[32] C Lennox and M Waites 'Human Rights, Sexual Orientation and Gender Identity in the Commonwealth: Struggles for Decriminalisation and Change Edited' 14.
[33] UK Government *The Wolfenden Report Of The Committee On Homosexual Offenses And Prostitution* (1957) 10.
[34] S Dryden 'A Short History of LGBT Rights in the UK' (*The Good Men Project*, 27 October 2019) <https://goodmenproject.com/social-justice-2/a-short-history-of-lgbt-rights-in-the-uk/> accessed 31 July 2024.
[35] Human Right Watch (n 33) 26.
[36] As above 36.
[37] Gupta (n 34) 4818.

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criminalization of 'carnal intercourse' against the order of nature affects criminalizing the entire class of LGBT".[38]

There are emerging counter-narratives on the current ontological and epistemological rhetoric, however queer theory reveals that there has been no alternative framework that has successfully challenged the dominant mythical one. This study therefore contributes to the discourse by providing a model that addresses these myths hence advancing knowledge on the epistemology of LGBT law in scholarship and common law in court, providing material, language and discipline for queer consciousness that has been lacking.

1.2 Significance of the Study

There are barely any studies in Malawi and Africa that interrogate LGBT rights using queer methodologies or decolonial methodologies to identify myths in both the epistemology of LGBT and common law and suggest how that could be removed. The study posits that there is a lacuna in both the penal code and Constitution which must be addressed by holding institutions that legalise a mythical rhetoric accountable. It therefore contributes significantly to the discourse. This study advances the work of some key scholars in Africa that have called for a local or African epistemology and a radical epistemology by developing a jurisgenerative model that calls for a scientific epistemology that could create scientific jurisprudence so that there is no *ultra vires of the Constitution* by the penal code and ensure that there is no co-existence of a mythical epistemology or mythical jurisprudence where LGBT is concerned as this is illegal since the world is queer and therefore LGBT rights can no longer be an 'outside jurisprudence' hence enhancing queer consciousness in both the epistemology and common law.

1.3 Literature Review

This section interrogates the foundation of the rhetoric upon which homophobia is built. Prior research disproves the dominant rhetoric. Ngwena navigates the question of what Africanness is.[39] It is his contestation that Africa resides "in a multiplicity of histories, cultures and subjectivities which speak less to an African identity"[40] where sexuality is constructed within a history of pluralistic sexualities. He further notes that such a history has been distorted by colonialism which legitimized a different epistemology. He

[38] *Johar V Union of India* (Supreme Court of India) 48.
[39] Ngwena (n 1).
[40] As above 10.

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views it as a history that does not only create stigma but criminalises divergent sexualities. He suggests an alternative epistemology, a counter-discourse that would recognize diversity. He envisages that such a radical epistemology would be transformative as it would disrupt the discourse on heteronormativity and blur the lines of *sexual majorities* against *sexual minorities*. Ngwena argues that an African epistemology cannot be situated without its historical context hence rejecting the ideology of a pure African episteme. He observes that another epistemology emanated from religion, reinforcing binaries and intolerance for sexual minorities. He cites political and cultural institutions as other authorities that legitimize heteronormativity grounded in injustices of a predominant and privileged cultural narrative that marginalizes and oppresses sexual minorities. He denounces what he calls *epistemological doctrines* that are not in tandem with the Constitution in a democratic era. Alongside religion, he also faults colonial anthropology where Africa had been misrepresented. All this demonstrates that homophobia is exacerbated by systemic discrimination by various institutions as described further by Ngwena

> When it is accompanied by an official imprimatur and is underwritten by dominant cultural, religious and legal frameworks, the claim of a homogeneous heteronormative sexuality becomes more than simply an expression of moral difference.[41]

He condemns the hegemony that has been institutionalised and equates it to state impunity. He points out, "State and culturally sanctioned demonisation of transgressive sexualities can become a tool for impunity: an instrument for legitimising violence – even killing – against members of sexual minorities".[42] Central to this debate is the ontological and epistemological conceptualisation of systemic discrimination that emanates from religious, State or political discrimination which informs culture.[43] Kaoma refers to this as *protective homophobia* which is *politically and religiously* orchestrated.[44] Tamale also refers to it as S*tate-orchestrated moral panics*[45] a tactic for distracting citizens from pertinent issues the State fails to implement. In dispute of the un-African narrative, Tamale[46] argues that history and anthropology have revealed that same-sex relationships existed even during the precolonial era in countries such as Uganda, Zimbabwe, Botswana, Sudan, Rwanda, Burundi, Democratic Republic of Congo and Nigeria. She reveals that it was never criminalised, adding, '…it is not homosexuality that was exported to Africa from Europe but rather

[41] As above 203–204.
[42] As above 204.
[43] Ngwena (n 1).
[44] K Kaoma 'Is Homosexuality an African or Un-African Human Rights Issue?' in Kaoma *Christianity, Globalisation and Protective Homophobia: Democratic Contestation of Sexuality in Sub-Saharan Africa* (2018).
[45] Tamale (n 1) 33.
[46] Tamale (n 1).

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legalised homophobia…in the form of Western codified and religious laws.'[47] She points out that there were even local names for the practice. Just like Ngwena, Tamale also views homophobia as contradicting democracy. She also demonstrates that it is not only used as political propaganda but religious one also that is heavily funded by the right-wing American neo-conservative Evangelical Church. She also considers it as a rhetoric of dominance. She is concerned that homophobia in Africa is regarded as ahistorical, has legal codes and thrives on Western impositions of morality.

Baisley focuses on the framing of LGBT rights.[48] According to her, there are two key frameworks of *decolonisation* which are *corruption* and *preservation.* The first, corruption, is used by anti-gay activists who regard homosexuality as a colonial concept as well as un-African. Decolonisation in their case means getting rid of homosexuality because it is a Western import that would destroy African values. The second part of decolonisation, preservation, is used by LGBT activists in rejection of the *corruption* frame and acknowledging plurality in sexuality as always inherent in Africans. Decolonisation in this case means getting rid of colonial homosexual laws. Baisley reveals that around 2006 when these frameworks were debated, and again around 2011, it was the LGBT opponent's framing that became more persuasive against the preservation. The opponents and proponents also interlocked on the human rights framework where the opponents challenged that it was cultural imperialism. Baisley reveals that the human rights framework did not work in Ghana because the counter-narratives from the anti-gay groups dominated the discourse even though there were provisions like the 2007 Yogyakarta Principles that were explicit on human rights based on SOGI. Murray and Roscoe disclose that homosexuality could be traced to the early 1900s.[49] Their book; *Boy-Wives and Female Husbands: Studies of African Homosexualities* is a significant contribution to anthropological analysis of what they call 'prejudice' and 'wilful ignorance' in denial of Africa's diverse sexualities. Murray and Roscoe echo Ngwena and Tamale that anthropology had either ignored or dismissed homosexuality amongst Africans. It is also their contention that most of what is regarded as African tradition was derived from writers who were part of the colonial system that disrupted the African culture as Africans were not writing their history prior to the 19th century. They also show how the *moral rhetoric* has hardly changed in centuries where homosexuality has been regarded as *unnatural, utter filth, alien to our culture, a very serious psychological problem,* all of which was regarded as the *rhetoric of the colonial discourse*.

[47] As above 36.
[48] Baisley (n 1).
[49] Murray and Roscoe (n 1).

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They point out ‘It becomes apparent that discourse of sexualities has changed little…even though Africans now produce it’.[50]

Brimmer[51] argues that if we reject the framework of same-sex relationships as being un-African, it would be a misrepresentation of reality and a contradiction of precolonial history that also rejects a monolithic framing. The history of criminalising homosexuality has a chilling past of extrajudicial killings. To inherit such a past, is to inherit such murderous intent. There is already evidence of extrajudicial killings of LGBT people which prompted Human Rights Watch (HRW) to embark on a global campaign to have it addressed at the United Nations General Assembly (UNGA).[52] HRW further points out that the Special Rapporteur on Torture had insisted that issues of LGBT be included in the UN resolution on extrajudicial killings, which has been done after initial rejections by some African countries in 2010. Despite this, in 2022, UNGA had it reinstated amidst further protests from some corners.[53]

Historically, the sodomy law can be traced back to medieval times during the 13th century in Europe through the *Fleta* and *Britton treatises.*[54] Through Fleta, an alleged homosexual would be buried alive whilst, with Britton, one would be burnt under *buggery* laws. These were Christian laws at a time when the church had its own courts but they later became secular laws through the State when King Henry VIII broke away from the Roman Catholic Church. He came up with a statute in 1533 that made homosexuality punishable by death. These horrific laws existed until 1861. It is argued that sexuality is complex and takes complex forms.[55] One such complexity lies in the institutions that have supported colonial ideologies of heteronormativity at the expense of the lives of sexual minorities, ideologies that can be more persuasive than the truth as shown by the evidence. The sodomy law has had so many inconsistencies. Reinforcing the absurdity of this law, HRW remarks, “The paradox remains that a democratic government promoted these repressive legislations as part of indigenous values although it extended old, undemocratic colonial

[50] As above 24.
[51] Brimmer (n 1).
[52] HRW ‘Restoring protection for LGBT people against extrajudicial executions’ (14 February 2011) <https://www.hrw.org/news/2011/02/14/restoring-protection-lgbt-people-against-extrajudicial-executions> accessed 11 May 2023.
[53] ISHR ‘UNGA 77: Resolution on Extrajudicial and Arbitrary Executions adopted again with a reference to sexual orientation and gender identity’ (*ISHR*, 11 November 2022) <https://ishr.ch/latest-updates/unga-77-resolution-on-extrajudicial-and-arbitrary-executions-adopted-again-with-a-reference-to-sexual-orientation-and-gender-identity/> accessed 11 May 2023.
[54] Human Right Watch (n 33).
[55] Brimmer (n 1).

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statutes."[56] In order to dismantle and contribute to deconstructing such an epistemology, a conceptual framework has been developed below.

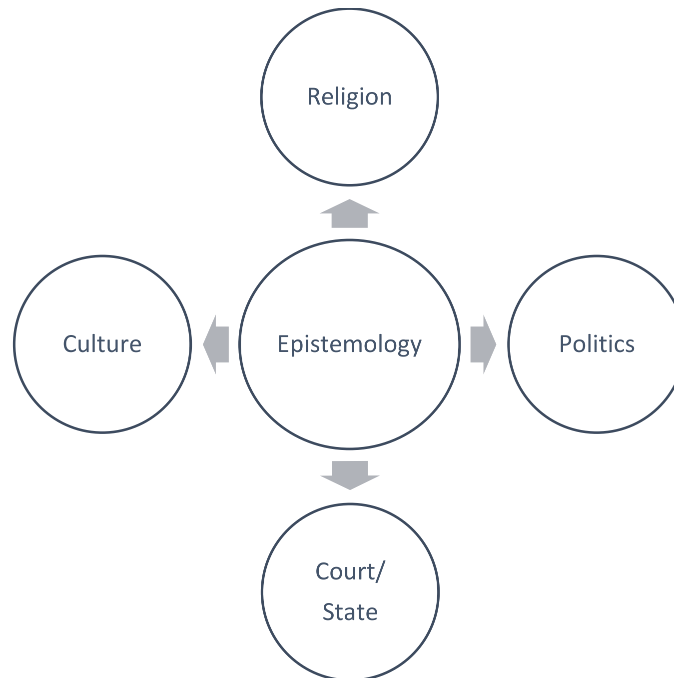

Figure 1: Conceptual Framework

Deconstructing the dominant epistemology requires interrogating the institutions identified above. I will look at a few similar studies ever conducted. A Malawian study that comes close is the PHD paper conducted by Msosa.[57] His research focuses on exploring local language or local epistemology for the naming of LGBT beyond *mathanyula,* a local Chewa word equivalent to homosexuality, literally meaning anal sex, which he feels fails to recognise the distinctiveness of the other sexualities in the movement. He shows evidence that Malawi had same-sex relationships even during pre-colonial times. He is however quick to note that Africa offers complexity in framing of its epistemology due to its equally complex history which has attempted to erase the authentic epistemology and has replaced it with a dominant Western epistemology. It has been pointed out that crimes that were considered unnatural were also recorded by colonial masters around 1903 in Malawi. He therefore considers Africa as a social construct in terms of both geography and epistemology. Like, Ngwena he suggests having an epistemological shift. Whilst Ngwenya recommends a *radical epistemology,* Msosa calls for a *local or African epistemology.* The diversity of the African continent

[56] Human Right Watch (n 33) 62.
[57] Msosa (n 1).

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prompts him to claim that essentialising homosexuality is an *epistemological fallacy*. He proposes an epistemology that is Afro-centric. Msosa's study focuses on the local language. Mwakasungula[58] has also written on LGBT rights in Malawi also arguing that homosexuality had always been there and that the penal code contradicts the Constitution. He takes note of the remnant colonial discourse but does not focus on the myth in the law.

Kangaude[59] assesses the logic of enacting a criminal law under section 137A on same-sex relationships for women. The law was enacted in 2011 with submissions from the Law Commission on grounds of equality before the law. Kangaude questions the merit of this on the basis of substantive equality. He provides a historical context of the sodomy law and shows how same-sex relationships for women were not criminalised. He faults the Commission for acting against its mandate of promoting laws that conform to the Constitution. The law is considered a double tragedy for women due to intersecting forms of historical inequality such as gender. The significance of Kangaude's work is that it also questions the legality of decisions on criminalising homosexuality by institutions such as the Law Commission which impudently legalises homophobia. The point of departure from the current research is that it focusses on multiple institutions and approaches for systemic change. His interest is neither in the persistent rhetoric that fuels homophobia nor in identification of the myths in the law.

Kapindu and Kanyongolo's studies also pertain to some of the issues. However, these are not exclusively LGBT papers but deal with complications of the justiciability of social and cultural rights under the International Covenant on Economic and Social and Cultural Rights (ICESCR). Kapindu[60] does an analysis of the Constitution and highlights sections where it is stipulated that domestic law should be considered valid when it conforms to IHRL. He reveals that there has been some progress in incorporating the norms of IHRL into local jurisprudence but further acknowledges that it has not been extensively and properly done. He continues to illustrate that IHRL must be supreme over contradictions in domestic law. However, dualism shuns IHRL based on sovereignty. Kapindu finds this problematic. He quotes the committee on ESCR that determined that where an international treaty was self-executing, the court had jurisdiction over the application and there was no need for legislating. Kapindu[61] further argues that in a dualist State like

[58] Mwakasungula (n 1).
[59] GD Kangaude 'A review of the role of Malawi's law reform agency in criminalization and decriminalization of female same-sex sexual conduct' (2019) 23 *Journal of Lesbian Studies* 306.
[60] R Kapindu 'The relevance of international law in judicial decision-making in Malawi' (2015) <https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/9Kapindu.pdf> accessed 16 May 2023.
[61] As above 74–75.

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Malawi, IHRL ought to automatically become part of the legislation. He notices however that this has sometimes raised protests in the name of sovereignty. He notices how such arguments no longer hold due to emerging scholarship on 'sovereignty as responsibility' where it is argued that sovereignty can no longer be used as an excuse to circumvent human rights. He further points out that the International Court of Justice (ICJ) has held similar arguments. He reveals

> A new understanding of "sovereignty as responsibility" has emerged which subjects international treatment of people by the State to international legal scrutiny and supervision. The International Court of Justice has emphatically stated that how a State treats its own citizens is no longer a matter within the exclusive domestic concern of the State, and that it is now a matter of international concern.[62]

He further notices that adopting such a perspective would be problematic. He realises there would always be 'jurisprudential tension' amongst those that regard the primacy of domestic legislation against those that believe in no restrictions in the application of IHRL in a dualist State. He acknowledges that there has been some progress in the adoption of IHRL in the courts albeit insignificantly to influence local jurisprudence. He attributes this to lack of knowledge in IHRL amongst judges and practitioners, lack of training, lack of material and lack of literature. He is hopeful that with advances in jurisprudence, there would be more effective application of IHRL in Malawian courts.

Gloppen and Kanyongolo,[63] also focus on the courts, Constitution and IHRL. They analyse how the courts deal with issues of the marginalised, in particular, the poor, and the domestic and international provisions intended to protect them. They note that even though independence resulted in the drafting of a new Constitution that promised pro-poor jurisprudence, there has been less progressive jurisprudence. The marginalised have weak legal voice and protection. Social rights are not directly justiciable even though they appear in the Constitution. They recommend what they call an *activist judiciary* for jurisprudential development. Concurring with Kapindu, they feel the contradiction of dualism is overcome by effective interpretation of the Constitution. They observe that social rights jurisprudence is underdeveloped compared to civil and political rights and that in situations that the court could have exploited to introduce pro-poor jurisprudence, they have failed to do so. There have been no landmark judgments on interpreting socio-economic rights that address structural inequalities. They continue to claim that the country has no

[62] As above 75.
[63] S Gloppen and FE Kanyongolo 'Courts and the poor in Malawi: Economic marginalization, vulnerability, and the law' (2007) 5 *International Journal of Constitutional Law* 258.

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jurisprudence on social rights. They warn "When the law and the legal system lack legitimacy … this dampens any inclination to turn to the State for support".[64]

The authors attribute the lack of pro-poor jurisprudence to a legal culture that is largely conservative and patriarchal. The Judges are described as unwilling to regard the courts as an avenue for social transformation hence failing in interpretation. Another concern is that there are contexts in which judgments are not circulated so setting precedent becomes a barrier in developing jurisprudence. They are further concerned by the courts' response to social rights, with poor litigants due to the complications such as locus standi regulations, the judges' held norms and their perception of social rights, lack of societal awareness of social rights, public discourse on social rights, type of legal systems, the jurisdiction of the court and the personal and professional background of judges. Their concerns on litigation include the burden of cost, inability to produce transformational jurisprudence, reactive court and inadmissibility of evidence. Their analysis of the challenges of the legal process include voice of litigants, *responsiveness of the court, capability of judges, implementation, systemic change.* The significance of their study is determined by their focus on challenges in the development of jurisprudence to improve social rights. Even though the authors specifically target the poor and advocate for pro-poor jurisprudence, the issues raised apply to all the marginalised that are treated with discrimination. The next section will look at the historical context of the anti-homosexuality law in the country.

1.4 Research questions

This study is based on the following key question; How is the African rhetoric on LGBT addressed in Malawian jurisprudence? Under it, there are following sub questions:

1. How are Malawian institutions developing an LGBT epistemology?
2. How does the legal framework in Malawi address LGBT issues?
3. What are the implications of the African rhetoric on LGBT jurisprudence in Malawi?
4. How could challenging the African rhetoric improve LGBT rights in Malawi?

Existing scholarship that offers counter-narratives disproves that homosexuality is un-African and a Western concept. It is the argument of this study that after having developed such counter-narratives, in practice, it

[64] As above 277.

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should provide ammunition to emerging jurisprudence from common law for the effective promotion of LGBT rights.

1.5 Objective of the Study

This study explores ways in which fiction in epistemology of LGBT law could be eradicated and how materials for queer consciousness could be developed. The study focuses on Malawi in relation to similar jurisdictions in common law Africa. The findings are relevant to any common law African country whether they have decriminalized the law or not, as most are still dealing with public homophobia. The study is based on these five key objectives:

1. To identify how Malawian institutions promote existing epistemology on LGBT
2. To understand how the legal framework in Malawi addresses LGBT issues
3. To assess the implications of the African rhetoric on LGBT jurisprudence in Malawi
4. To interrogate how challenging the African rhetoric would improve LGBT rights in Malawi

1.6 Limitations of the Study

This study is a desk research. The University College London has underscored some of the key challenges that arise when conducting secondary research with secondary data.[65] The researcher would have no control over the data since they didn't collect it. There would be no knowledge of how the data was collected. It could affect originality and limit analysis. Finally, one would have to work with predefined variables. I overcame such challenges by sifting the data so that only relevant sources were extracted. Gaps in data were not an issue as triangulation with authoritative texts to check the authenticity and reliability of data was done using documents such as case law, penal codes, Constitutions, case laws and international treaties. Case law, statutes, IHRL are also considered as primary data sources. In order to enhance the originality of the work, a conceptual framework was developed which gave room to building new concepts through the grounded theory approach. My positionality as a cisgender female researching LGBT people could be regarded as bringing biases, however, awareness of this fact and having been trained on LGBT issues and being an activist of sexual minority rights meant I had heightened awareness of how to dispel such biases

[65] UCL 'Secondary Data Analysis' <https://ethics.grad.ucl.ac.uk/forms/Secondary-data-analysis-file-note.pdf>.

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without compromising the results of the study. Relevant authoritative texts were also of great support to dealing with bias issues.

1.7 Methodology

This study is based on the recent Malawi court case which is used as a case study. It also uses case law within the court case which guide legal precedent through common law. It also used common law outside the court case. Case law used included countries like South Africa, Kenya, Botswana and Namibia drawing inspiration from other jurisdictions such as ECtHR and IACHR. The study uses data from several amici curiae in a recent court case in Malawi that challenges the constitutionality of the law. This data was in form of skeleton arguments that were made by CSOs and their lawyers in strategic litigation, and the Attorney General. The case had a panel of 3 judges and controversial applicants; one a 27 year old transgender female sex worker who had allegedly lied about her identity to men, had sex with them and demanded money and mobile phones from them using threats.[66] The other, a 51 year old Belgian volunteer under Timotheus Foundation who had been defiling and raping boys and young men entrusted in his care.[67] The snippets of the recent court proceedings have been reported in the media.[68] By the time the study was completed, the case had been dismissed and the court did not find the impugned provisions unconstitutional. Amnesty International had condemned the decision as perpetuating violence against sexual minorities and being defiant to the Constitution, ACHPR and IHRL.[69] The case that was presided over by Justice Joseph Chigona, Chimbizgani Kacheche and Vikochi Chima has been described as a 'setback' to sexual minority rights in the country.[70] This ruling was made on 28th June, 2024.[71]Case law from similar jurisdictions has also been used to assess progress in developing jurisprudence on sexual minorities despite the failures of the recent court case.

The research onion below outlines the methods used for this study.

[66] 'S v Jana Gonani (Criminal Case 547 of 2021) [2021] MWMCM 1 (23 December 2021); | MalawiLII' <https://old.malawilii.org/mw/judgment/magistrate-court-mangochi/2021/1> accessed 26 June 2023.
[67] *Jam Willem Akster v Attorney General (Constitutional Referral 2 of 2021) [2021] MWHC 208 (16 November 2021)* (2021).
[68] Nation Online 'Same sex law on trial | The Nation Online' (8 April 2023) <https://mwnation.com/same-sex-law-on-trial/> accessed 26 June 2023.
[69] Amnesty International 'Malawi: Decision to uphold ban on consensual same-sex conduct is a bitter setback for human rights' (*Amnesty International*, 28 June 2024) <https://www.amnesty.org/en/latest/news/2024/06/malawi-decision-to-uphold-ban-on-consensual-same-sex-conduct-is-a-bitter-setback-for-human-rights/> accessed 6 July 2024.
[70] A Gupta 'Malawi court dismisses case to legalize same-sex relationships' (29 June 2024) <https://www.jurist.org/news/2024/06/malawi-court-dismisses-case-to-legalize-same-sex-relationships/> accessed 6 July 2024.
[71] L Masina 'Malawi court rejects same-sex marriage' (*Voice of America*, 28 June 2024) <https://www.voanews.com/a/malawi-court-rejects-same-sex-marriage-/7677548.html> accessed 7 July 2024.

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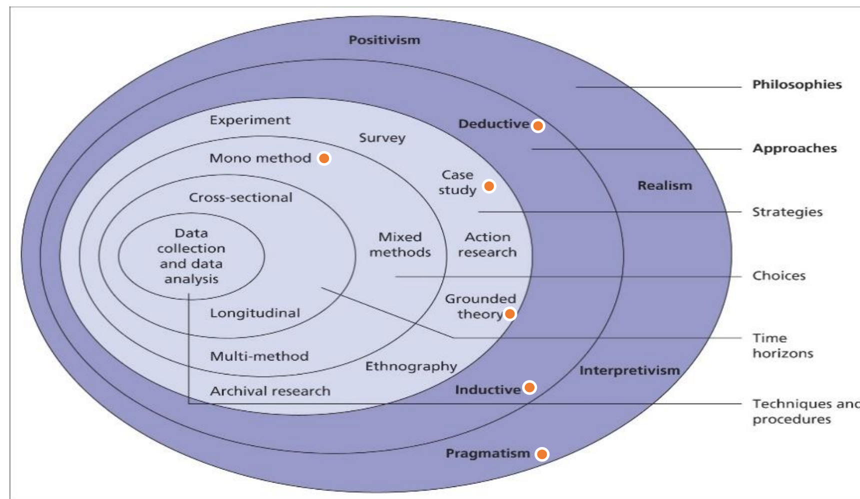

Figure 2: The Research Onion [72]

This was a desk research hence exclusion of *time horizons*. It was a qualitative study based on case study. A grounded theory strategy has been used as well as an existing theory hence using a combination of inductive and deductive approaches. Pragmatism philosophy has been chosen because it integrates positivism and interpretivism allowing for both empirical objectivist observations to avoid bias.. It is pointed out that pragmatism philosophy is also an integrated approach which uses both interpretivism and positivism philosophy in which the former is concerned with social construction of reality and the latter is concerned with observable social reality. It has further been pointed out that pragmatism's ontology is based on adopting multiple approaches of investigation dependent on the research question and its epistemology is based on the observable phenomenon and applied research since it takes both the positivist and the interpretivist approaches.[73] This background is quite critical in understanding context in terms of the decisions made on using the social constructivism approach, why certain philosophies have been used, approaches and strategies as well as ontological and epistemological perspectives taken. The next section will focus on interpretations of cases reviewed.. Emanating from this analysis, I have developed the following model as a methodological approach for interrogation of LGBT rights.

[72] Saunders, Lewis and Thornhill (n 26) 138.
[73] Saunders, Lewis and Thornhill (n 26).

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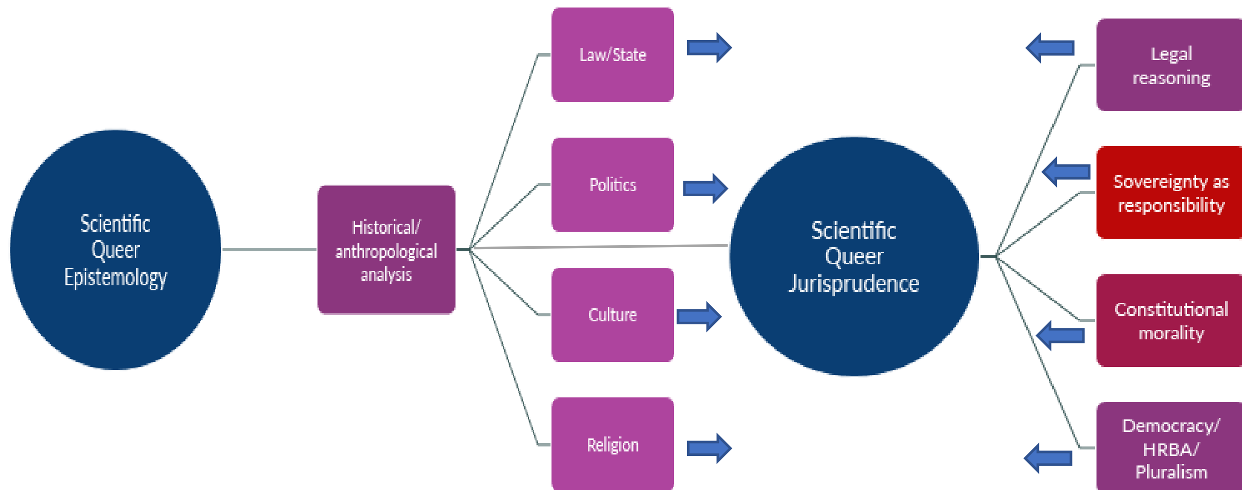

Figure 3: Research Model

The research model proposed suggests that a scientific queer epistemology could be developed through an interrogation into the anthropological, archaeological and historical theories. Such an epistemology would then translate into a scientific queer jurisprudence. The next chapter is findings and discussion which focusses on the recent LGBT court case in Malawi to understand how the institutions in the conceptual framework influence LGBT jurisprudence in the country. These findings are then compared with other case laws within the same case; those within similar jurisdictions or other jurisdictions which set legal precedent in the country on LGBT. The arguments are assessed from both pro-LGBT perspectives from defense lawyers and anti-LGBT from the State and other anti-gay amici to appreciate the contrast of how the same case laws can be used differently for either progressive jurisprudence or retrogressive jurisprudence.

1.8 Structure of the Dissertation

This study contains five chapters. These are Introduction, Theoretical framework, Legal Framework, Findings and Discussion and Conclusion and Recommendations. This is the generic and traditional structure.[74] Chapter 1 is the **Introduction.** It defines the problem, identifies objective of the study, elaborates on the significance of the study what the purpose of the study is, identifies key questions, and has also looked at the limitations of the study and how the study has been organized. Chapter 2 identifies the gap through the **literature review** starting with the broad perspectives of the LGBT rhetoric that creates

[74] D Jansen 'Dissertation Structure & Layout 101 (+ Examples)' (*Grad Coach*, 24 July 2019) <https://gradcoach.com/dissertation-structure/> accessed 10 August 2024.

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homophobia and that has been institutionalized and legitimized as well as the historical context and sociopolitical context. The gap informs the theoretical framework which is the second part of the chapter. This is followed by the theoretical framework that attempts to address the gap. Chapter 3 focuses on the **historical context, legal framework at regional and international level** including development of jurisprudence through common law by human rights systems and provides the local context in terms of the legal framework on LGBT in Malawi. Chapter 4 is the core of the study on **Findings and Discussion** which analyses the Malawian case law to understand how LGBT jurisprudence is developed in Malawi using common law. This includes an analysis of LGBT case law from Malawi in comparison with other case laws that have been progressive in developing LGBT jurisprudence from which the country could draw its inspiration to develop its own queer jurisprudence. This section further looks at the regional and international standards and norms that inform jurisprudence on LGBT. Chapter 5 is the final chapter, on **Conclusion and Recommendations** which summarises the key findings, responds to the key questions and objectives, provides recommendations and also addresses limitations and where future research could focus on.

The next chapter looks at the theoretical framework which provides background the scientific background to the study.

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Chapter 2: Theoretical Framework

Queer theory is the key theoretical framework used for this study. I also use the concept of epistemology of sexual minorities. Watson[75] traces queer theory to Teresa De Lauretis who was the first to use the phrase in her work in 1991. She argues, "… the political and epistemological system rests on universal statements about human identity making equality impossible".[76] She feels that queer theory has the potential of addressing the complexity of sexualities and disrupting heteronormativity by questioning its normativity.[77] Turner argues, "Queer theory begins with a suspicion: that the predominant modes of intellectual and political activity in Western culture … do not serve the needs and interests of queers …"[78] She is concerned that despite finding queer theory's identification of the core problem, queer theorists have not been able to identify an equally dominant one that is disruptive. De Lauretis[79] recommends confronting this history and reinventing another discursive discourse. She reveals that homosexuality is under-theorised. Epistemology is defined as *the theory of knowledge* and the nature of that knowledge. Turner[80] and Watson[81] have accredited the foundations of queer theory to early theorists such as Michel Foucault and Eve Sedgwick who challenged heteronormativity. Foucault's contestation is that the law is repressive where sexuality is concerned. He is further concerned with power domination of the legislator and how the law is implemented in what he calls "juridico-discursive character".[82] He also attributes it to institutions or devices that exacerbate social domination such as taboos, the State, family, and interpersonal level, demonstrating that discrimination against SOGI is systemic. He reveals that the dawn of the 19th century that brought interpretation of homosexuality as perverse in psychiatry, jurisprudence and literature, also brought with it a counter-discourse (reverse discourse) that rejected such conceptualisation. He observes, "Homosexuality began to speak on its own behalf, to demand that its legitimacy … be acknowledged, often in the same vocabulary, using the same categories by which it was medically disqualified".[83] He therefore confirms that the rhetoric is based on the colonial discourse.[84] Homosexuality continues to be conceptualized narrowly

[75] K Watson 'Queer Theory' (2005) 38 *Group Analysis* 67.
[76] As above 76.
[77] Turner (n 6).
[78] As above 9.
[79] de Lauretis (n 7).
[80] Turner (n 6).
[81] Watson (n 142).
[82] M Foucault *The History of Sexuality* (1978) 83.
[83] As above 101.
[84] Murray and Roscoe (n 1).

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within the debates of heteronormativity against homonormativity. Homonormativity is known to have been introduced by Duggan.[85] He defines it as "a politics that does not contest dominant heteronormative assumptions and institutions but upholds and sustains them." It is for this reason that Foucault suggests a conceptual shift where power is no longer associated with "the privilege of the law" but objectivity, nor the "privilege of prohibition" but calculated efficacy and "prohibition of sovereignty" with a multiplicity of relations.[86] Foucault's thoughts echo Kapindu[87] on sovereignty where he argues for sovereignty as responsibility. He condemns "theoretical privilege of law and sovereignty" and argues that "we shall try to rid ourselves of a juridical code and negative representation of power, and cease to conceive of it in terms of law, prohibition, liberty, and sovereignty".[88]

Sedgwick,[89]argues that the conceptualization of homosexuality as a minority reinforces the sexuality binaries. She refers to this as minoritising, which restricts the analysis to a few people. She mainly argues that homosexuality shouldn't be a concern of a few individuals but everyone, in what she also calls universalising. She further reveals that it is entrenched in culture and language while the essentialist perspective is 'gay-affirmative' and 'gay-genocidal'.[90] Sedgwick is also concerned with the adjudication of cases in the Supreme Court of the USA due to systemic oppression of homosexuals manifested through 'contradictory constraints of discourse'.[91] Such contradictory discourse of the binaries of homosexuality and heterosexuality in conceptual space is what she calls 'conceptual deadlock'. She is concerned with historical 'homophobic pressures' and suggests having an anti-homophobic theory because she felt there was no framework for addressing SOGI as it was based on the "Western project or fantasy of eradicating that identity".[92] She further felt that there was 'no epistemological grounding' for the binaries. She argues that Western culture is responsible for constructs of the homosexual identity and heteronormativity.

It is against this contextual background on the work of Foucault and Sedgwick that contemporary theorizing on queer theory has been attributed to by scholars such as Turner[93] and Watson.[94] The subsequent scholars

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[85] Oxford Reference 'Homonormativity' (*Oxford Reference*) <https://www.oxfordreference.com/display/10.1093/oi/authority.20110803095943383> accessed 2 July 2024.
[86] Foucault (n 149) 102.
[87] Kapindu (n 74).
[88] Foucault (n 149) 90.
[89] EK Sedgwick 'EPISTEMOLOGY OF THE CLOSET'.
[90] As above 40.
[91] As above 70.
[92] As above 41.
[93] Turner (n 6).
[94] Watson (n 142).

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all base their queer theoretical analysis on the same. Queer theory rejects viewing homosexuality as tainting a conservative culture which must be swept clean to keep it pure, "… queer theory offers a way of basing politics in the personal without acceding to this pressure to clean up personal identity".[95] It is further expounded that it thrives to acknowledge the world as queer. Sedgwick's conceptualization takes the minoritising and universalizing approach to advance the discourse. It is argued that the shift from homosexual to heterosexual creates "the use of incoherent and multiple identities not to deconstruct a monolithic cultural binarism, but to enforce it".[96] Queer theory is thought to be a mere discursive discourse by a few theorists than disruptive. It is observed, "The assumption that relations of dominance and subordination are purely discursive must give way to an analysis of the ways in which concrete exertions of power intervene".[97] It is also regarded as the power to control knowledge.[98] The rules that govern SOGI are also perceived as residing in power. It is further argued that 'epistemological superiority' has been assigned to a moral obligation where institutions construct knowledge.[99]

Arguably, legal discourse has contributed to heteronormativity as homosexuality is outside the law.[100] What queer theory does is to then advocate for both legal and social reform. Its methodological intent is to offer a paradigm shift by reframing homosexuality as 'jurisgenerative' (creating law) and making queer thinking a reality. Mazel's interest is in developing queer jurisprudence that is disruptive and is non-conformist. She reveals that "Queer theory … is constrained by the very system it opposes, political success itself is seen to be constrained".[101] She points out, "the project of the legal system is the project of universalisation".[102] Mazel sees the transformative legal approach as derived out of international human rights law (IHRL) in instances where there are gaps in domestic legislation. *Toonen V Australia* is cited as the first successful case that granted access to justice for sexual minorities using IHRL and demonstrating that the principle of non-discrimination included SOGI and was also a violation of right to privacy according to the ICCPR. Since hate and prejudice could be pervasive and legitimised by law, Mazel suggests using the same law to reform the law. Queer legal theory (QLT) is when queer theory is used to deconstruct heteronormativity. It is regarded as 'outside jurisprudence' as it resides outside the traditional definition of law with the mission

[95] Warner and Social Text Collective (n 4) xxvii.
[96] J Halley E 'The Construction of Heterosexuality' *Fear of a Queer Planet - Queer Politics and Social Theory* (1993) 98.
[97] As above.
[98] C Patton 'Tremble, Hetero Swine!' *Fear of a Queer Planet - Queer Politics and Social Theory* (1993).
[99] As above.
[100] O Mazel 'Queer Jurisprudence: Reparative Practice in International Law' (2022) 116 *AJIL Unbound* 10.
[101] As abve 11.
[102] As above.

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to liberate sexual minorities and give them a voice in the law.[103] QLT is considered as a narrow concept in regard to minoritising. Developing queer jurisprudence and the use of IHRL are some of the key recommendations Mazel offers to defy the binary deadlock.

It is argued that there is limited queer legal scholarship.[104] Kepros is concerned with the lack of integration of QLT into jurisprudence into law school and how that has inhibited juridical reform.[105] She further suggests integration of social science into law. She recommends that QLT must develop literature to provide materials for courts to eliminate 'heterosexist fiction'.[106] QLT could simultaneously offer a legal voice to homosexuals. She suggests having a queer judicial narrative which could "both reflect and construct social reality".[107] It would furthermore have an 'anti-discrimination doctrine' which could potentially challenge both religion and mythology. She opines, "Overall, a meaningful goal of QLT must be to call attention to the legal (and social) fiction of "homosexuality".[108] She believes that "queer theory should first establish itself in the academia before engaging a wider audience".[109] She argues that QLT is revolutionary as it "gives teeth to a legal critique of constructed sexual identity … QLT needs to be in the law school … QLT offers solutions to the false identities burdening the law".[110] QLT is viewed as raising queer consciousness into jurisprudence and relevant to both homosexuals and heterosexuals. Kepros feels queer theory could reveal inequality in law but is concerned that it does not explicitly address LGBT inequality. She views queer theory as challenging the heteronormative 'ideological framework' while piggybacking on postmodernism. Taking the social constructivist viewpoint, she points out, "Foucault and the queer theorists recognize "homosexual" is not an objective term at all but a social invention with a "heavy complement of ideological baggage."[111]

Queer theory is still developing and faces definitional challenges. Besides this, queer African studies have emerged to probe queer theory of its Western foundational influences.[112] These studies are meant to provide an 'epistemological shift' that recognizes a non-binary Africa and the gap in historical Western theorizing.

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[103] D Banović 'Queer Legal Theory' in Dragica Vujadinović, Antonio Álvarez del Cuvillo and Susanne Strand (eds) *Feminist Approaches to Law: Theoretical and Historical Insights* (2023).
[104] 'The Bridge: Critical Theory: Queerlaw' <https://cyber.harvard.edu/bridge/CriticalTheory/critical5.htm> accessed 30 May 2024.
[105] LR Kepros 'NLGLA WRITING COMPETITION' (2000) 9 *QUEER THEORY*.
[106] As above 296.
[107] As above.
[108] As above 297.
[109] As above 299.
[110] As above 308–310.
[111] As above 285.
[112] G Asante 'Queer African Studies' *Oxford Research Encyclopedia of Communication* (2022).

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The studies take a decolonial approach to reject colonial and postcolonial conceptions of a homogenous African culture. Ontologically, it is argued that 'black queer' has no positioning and presents a methodological challenge due to lack of recognition and not being understood. It has no grammar for black queer and therefore conceals violence. It is pointed out, "the black queer and the violence that engenders it present methodological problems that are unresolvable".[113] Macharia continues to argue that queer theory might not exist for Africans as it relies on Western anthropology, language and disciplines, observing, "queer and queerness often assume a vernacular life that does not … exist in queer theory and queer studies". It is argued that postcolonial thinking is still entrenched in the colonial rhetoric that denies the existence of homosexuality. It regards homosexuality as un-African and a Western phenomenon.[114] It is further argued that the force of colonialism still dictates culture today requiring decolonization of knowledge. This epistemological hegemony has been attributed to both historical rhetoric in the penal codes and research, reinforcing the colonial episteme.[115] These scholars concur that scanty studies emanate from the Global South, with the Global North reproducing colonial epistemologies that are often inherited by the Global South. It is pointed out, "another way in which coloniality continues is through the persistence of knowledge regimes encoded in legislation inherited from colonial authorities, which enforce colonial constructions of sexuality".[116] The rhetoric has been known to be advanced by African political leaders, legitimising the colonial rhetoric which defines queerness. This has therefore exacerbated the 'politico-economic' struggles in queer Africa. This subsequently perpetuates violence against sexual minorities. It is argued that decolonizing the LGBT epistemology should go with decolonizing the thinking around it. However, decolonial methods alone are considered not "sufficient for epistemic justice".[117] Decolonial thinking is regarded as an ongoing project for negotiating colonial structural inequalities. Others feel queer theory can potentially achieve substantive equality.[118] In summary, queer theory is quite critical for conceptualizing African jurisprudence on LGBT. It concretises the key arguments of the study on the mythical epistemology of the LGBT law against the scientific epistemology and the need for a counter-discourse.

[113] C Warren 'Onticide: Afropessimism, Queer Theory, and Ethics' 9.
[114] JC Hawley *Postcolonial, Queer: Theoretical Intersections* (2001).
[115] T Meer and A Müller 'The messy work of decolonial praxis: insights from a creative collaboration among queer African youth' (2023) 24 *Feminist Theory* 555.
[116] As above 4.
[117] As above 21–22.
[118] Kepros (n 172).

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Chapter 3: The Historical, International and National Legal Framework on LGBT in Malawi

Malawi has a penal code that dates back to around 1929 which was adopted from the British colonial masters.[119] It is modeled on the 1860 Indian penal code which was inherited from the British colonial rule and used as a model for several countries including Malawi.[120] The HRW points out that there was a more broader version of the anti-sodomy law which was used, the Penal Code of the Australian Colony of Queensland (QPC). It was compiled by Sir Samuel Griffiths in 1899 which expounded the law beyond penetration to attempts to commit such offences. It became operational in 1902 and was firstly used in Papua Guinea and then exported to British Africa and was first used in Nigeria in 1904. It was the second most widely used after the Indian Penal code. The anti-homosexuality law under section 377 of the Indian penal code was decriminalized in 2018 between consenting adults.[121] In the Malawi Penal Code on anti-homosexuality law, section 153 refers to *unnatural offences* and 154, to *attempt to commit unnatural offences* and 156 on *indecent practices between males.*[122] In 2011, through the Malawi Law Commission, another section 137A was added which criminalized same-sex relationships amongst females.[123] Malawi has a Constitution with a Bill of Rights that has incorporated the Universal Declaration of Human Rights (UDHR), International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Convention on Civil and Political Rights (ICCPR). These instruments have expounded non-discrimination grounds to SOGI. The Constitution is not explicit on non-discrimination based on sexual orientation however it provides for non-discrimination and the framers of Bill of Rights have interpreted that to include SOGI as it will be noted in *Toonen v Australia*. The country has also adopted the ACHPR. Through this, it is a party to the 2014 African Commission's Resolution 275. According to the Resolution, the African Commission condemns "other forms of persecutions of persons on the basis of their imputed or real sexual orientation or gender identity … (it) specifically condemns the situation of systematic attacks by State and non-State actors …"[124]

[119] LC Bande 'A history of Malawi's criminal justice system : from pre-colonial to democratic periods' (2020) 26 *Fundamina : A Journal of Legal History* 288.
[120] Human Right Watch (n 33).
[121] *Johar V Union of India* (n 42).
[122] DPP 'Penal Code Chapter 7:01 of the Laws of Malawi' 65.
[123] Kangaude (n 73).
[124] ACHPR (n 19) 2.

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It has been pointed out by HRW that by having the anti-homosexuality law, the country is in breach of its international human rights obligations on the ACHPR, ICCPR and the ICESCR. According to Msosa and Sibande,[125] there are some *epistemological ambiguities* in the debate on sexual minorities in Malawi. They argue that most judicial officers have failed to abide by legal rules and have been constrained by their own homophobia to pass lawful judgements. Such homophobia has been attributed to the heightened tension on the issue at the regional level. It is argued that where legal rules are concerned, an objectivist epistemology should take precedent. Interpreting of the law should follow a liberal jurisprudence where the law responds to the reality of the fabric of its society.[126] The next section focuses on the socio-political environment of Malawi.

3.1 The Sociopolitical Context

The most prominent prosecution on sodomy law in Malawi has been the *republic v Monjeza and Chimbalanga*[127] in 2010. Since then, there have been fewer prosecutions but the law remains unchanged. In 2012, Former president Joyce Banda committed to having the laws repealed and asked the Minister of Justice to issue a moratorium to stop prosecutions under sodomy law for consenting adults. This was reaffirmed by Justice Tembenu in 2015 with a call to have communities and law enforcers sensitized and to remind the government of its human rights obligations such as the Resolution 275.[128] The moratorium was however challenged in 2016 in *R v Minister of Justice & others.*[129] President Chakwera's position on sexual minorities when he took over office in 2020 had been that the public should decide through a referendum.[130] There has been a backlash from human rights bodies on this decision. Some members of parliament have openly spoken against homosexuality in the country. Some speakers and legislators on their recent visit to

[125] A Jjuuko and others 'Queer lawfare in Africa: Legal strategies in contexts of LGBTIQ+ criminalisation and politicisation' (2022) 83–203 <https://www.pulp.up.ac.za/latest-publications/355-queer-lawfare-in-africa-legal-strategies-in-contexts-of-lgbtiq-criminalisation-and-politicisation> accessed 26 June 2023.
[126] C Mackinnon 'Feminism, Marxism, Method, and the State: An Agenda for Theory on JSTOR' (1982) 658 <https://www.jstor.org/stable/3173853> accessed 26 June 2023.
[127] *Republic v Monjeza* (2010) 359 0f 2009 (Chief Resident Magistrate Court).
[128] Human Rights Watch 'Malawi: Moratorium on Anti-Gay Arrests Reaffirmed' (*Human Rights Watch*, 21 December 2015) <https://www.hrw.org/news/2015/12/21/malawi-moratorium-anti-gay-arrests-reaffirmed> accessed 21 March 2023.
[129] mwhc *R v Minister of Justice & Constitutional Affairs & Ors.|Ex-Parte Kammasamba & Ors. (None) [2016] MWHC 503 (10 May 2016)* (2016).
[130] L Mkandawire 'Chakwera refers same sex rights to public | The Nation Online' (8 December 2020) <https://mwnation.com/chakwera-refers-same-sex-rights-to-public/> accessed 20 March 2023.

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Uganda, commended the country for passing the Anti-Homosexuality Act citing solidarity on guarding Africa's sovereignty on its values.[131]

3.2 The International Legal Framework ON LGBT

As part of the ACHPR, the country is bound by Resolution 275 which prohibits discrimination and violence based on SOGI. The ACmHPR provides guidance in developing LGBT jurisprudence for its members even though it can be conflicted.[132] The ACHPR does not expressly mention SOGI on non-discrimination, however, it is pointed out in Resolution 275 that section 45 of the Charter provides mandate to the ACmHPR to interpret the Charter hence the resolution.[133] It interprets that article 2 of ACHPR is 'open ended and inclusive' adding, "hence the inclusion of sex, gender, and sexual orientation as prohibited ground of unfair discrimination". It is further pointed out that the Protocol to the ACHPR on the rights of women (Maputo Protocol) includes SOGI in its prohibition of violence against women. Rudman reveals that both the ACmHPR and the African Court on Human and People's rights (ACtHPR) have not directly received complaints but in 2006 in *Zimbabwe Human Rights NGO Forum v Zimbabwe,* the Commission had indicated that section 2 of the ACHPR included non-discrimination on sexual orientation.[134] Presenting cases before the ACtHPR is hampered by limitations of countries that have signed article 34 (6) of the Declaration of States for CSOs to escalate cases to the Court as earlier indicated.[135] Apart from ACHPR shaping jurisprudence in Africa, individual African countries do the same through common law. However, Africa resides at an intersect of progressive jurisprudence and retrogressive jurisprudence as the case law reveals. The AHRS is considered 'the youngest' among the three human rights system.[136] It therefore draws inspiration from the ECHR and the IACHR which are advanced in the development of LGBT jurisprudence. Rudman refers to case law such as *Dudgeon v United Kingdom* (1981) and *Goodwin v United Kingdom* (2002) under ECtHR and Toonen v Australia (1994) under Human Rights Committee of CCPR, *Henry and Edwards v Jamaica* (2019) under IACHR and Flamer-Caldera v Sri Lanka (2022) under the UN Committee on CEDAW. Rudman also refers to the Yogyakarta Principles which urge states to adhere to IHRL and

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[131] Apofeed 'Uganda: Malawian Members of Parliament applaud Parliament for passing Anti-gay law' <https://african.business/2023/07/apo-newsfeed/uganda-malawian-members-of-parliament-applaud-parliament-for-passing-anti-gay-law> accessed 28 July 2023.

[132] Article 19 (n 10).

[133] Resolution 275 (2014) 1.

[134] Rudman, Annika 'The Protection Against Discrimination Based on Sexual Orientation under the African Human Rights System' (2015) 15 *African Human Rights Law Journal.*

[135] 'Why the African Court should matter to you' (n 12).

[136] IJRC 'African Human Rights System' https://ijrcenter.org/regional/african/.

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protect human rights. She also makes references to different UN documents including recommendation, general comments and the work of Special Rapporteurs that prohibit discrimination based on SOGI. The next section will look at the legal framework on LGBT in Malawi to assess its jurisprudence on LGBT against the African jurisprudence and draw lessons that can shape the development of its queer jurisprudence.

3.3 The Legal Framework on LGBT in Malawi

This study has indicated that Malawi still uses the sodomy laws that were adopted in entirety from colonial rule over 160 years ago under section 153, 154, 156 and 137A of the penal code. The study was a review of the penal code with its colonial provisions on the one hand, and the IHRL through the Constitution on the other. IHRL has a non-discrimination principle domesticated under the Constitution.[137] The Constitution as a living document subscribes to all the changes effected under IHRL instruments such as the ICCPR, ICESCR, ACHPR which have expounded the principle of non-discrimination to SOGI amidst the indecisiveness of the court on State sovereignty. Relevant courts such as ECtHR and IACHR contribute significantly to common law on LGBT.[138] However, as it will be observed in the other chapters, the courts in Malawi have failed to leverage on emerging progressive jurisprudence to develop the country's jurisprudence on LGBT. It is the mandate of the constitutional court to interpret the law and protect human rights, however, where LGBT is concerned, the courts have shelved the responsibility to the legislators even though they have the mandate to strike out any law that contradicts the Constitution. The Constitution also mandates the Malawi Human Rights Commission to protect human rights and make necessary investigations of violations of human rights, however, it has been weak in responding to human rights violations of the LGBT community, Strategic litigation as in the recent case law assessed in the court reveals that the expertise from the pro-gay amici curiae is a huge untapped resource for developing LGBT jurisprudence in the country.[139] The biggest challenge remains that the courts have chosen to totally disregard such amici. The big difference with similar countries that are yet to decriminalize the law such as Kenya is that their approach is totally different as they value the contribution of amici curiae and acknowledge their contribution that the anti-homosexuality law is archaic and has colonial influences and must be reformed. The country has equally ignored global calls to decriminalize homosexuality during Universal Periodic

[137] Malawi Government *Constitution* 2012.
[138] 'Toonen v. Australia, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).' <http://hrlibrary.umn.edu/undocs/html/vws488.htm> accessed 5 April 2024.
[139] *Jam Willem Akster v Attorney General (Constitutional Referral 2 of 2021) [2021] MWHC 208 (16 November 2021)* (n 46).

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Reviews. Malawi's penal code is archaic while its Constitution was developed after independence in 1994. These two pieces of legislation present challenges in co-existence, with the former retrogressive and the latter progressive. This further exacerbates methodological challenges in terms of development of LGBT jurisprudence in the country.

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Chapter 4: Findings and Discussion

This chapter focuses on the review of different documents including the current court case and case law on LGBT from countries such as South Africa and Botswana. Even though the Botswana and Namibia cases were not cited in the Malawi case as case law, these have also been added as they have similar jurisdictions with Malawi. The chapter is divided into two parts. The first part looks at the current court case which has just been concluded. This is done using the recent submissions by the government and amici curiae in their skeleton arguments and case law from other countries. The second part looks at case law with similar jurisdiction. It also draws inspiration from more progressive jurisprudence from other jurisdictions in the ECHR comparing it with the AHRS.

4.1 LGBT Court Case in Malawi

The recent court case in the High Court of Malawi with claimant *Jan Willem Akster and Jana Gonani v the State and the Attorney General*[140] is the most recent one concerning sexual minorities. Skeleton arguments were presented before the court from the Attorney General (AG), which were anti-homosexuality, amici curiae representing CSOs working on minority rights and a religious institution, Evangelical Association of Malawi (EAM) that was anti-gay rights. The Evangelical Association of Malawi (EAM) made their anti-gay submission on 2ndJune, 2023, and the Attorney General on 8th March, 2023. The claimants were challenging the constitutionality of the anti-homosexuality law in the penal code section 153, 154,156 and 137A as a violation of their human rights on the key principles of human dignity, non-discrimination and right to privacy. This case has just recently been concluded on 28th June, 2024. The court quashed all arguments citing that the applicants failed to demonstrate how the sodomy law discriminated against sexual minorities and that should they wish to do so, appeal with the Supreme Court or to approach lawmakers for law review.[141] The skeleton arguments that were made in court by the Attorney General and the amici curiae are assessed for ideologies and fiction using queer theory and epistemology of LGBT.

[140] Akster (n 30).
[141] Gupta (n 49).

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4.1.1 Attorney General's Interpretation of the Law

The AG emphasized on the importance of democratic values and use of public international law in comparison with foreign law as guiding principles to interpret the Constitution. He felt this was key in preserving the country's history and tradition. The AG's interpretation of promoting democratic values to mean national values contradicts the United Nation's (UN) description where it is pointed out that "democracy is a universal value based on freely expressed will of people…".[142] It is universal, not essentialist. The UN reveals that a holistic democracy must comprise of the majorities and the minorities. It further reinforces that "democracy does not belong to any country or region … the ideal of democracy is rooted in the philosophies and tradition from many parts of the world". It fosters the "development of a culture of democracy". The AG shows his lack of understanding of the origin of the law which is the Victorian era's prescription of morality, not that of Malawians. The AG also refers to the values of Africa apart from the national values citing the ACHPR.[143] Africa is divided. There is no such thing as collective African values on homosexuality. The ACHPR developed Resolution 275 to provide progressive jurisprudence on SOGI. The ACHPR is inspired by IHRL which recognizes LGBT rights. The AG argued that the penal code had values that were expressed by Malawians to the State.[144] The penal code's sodomy laws do not embody the wishes of Malawians but the British. The sweeping generalization he makes of Malawians seems to disregard sexual minorities or to insinuate that it's only the majority's voice that matter. This reinforces the binaries. Such erasure is not a true reflection of the sexual diversity of its people. The Constitution is inclusive in its reference to "the people of Malawi".[145] The AG pronounces the provisions as not ambiguous, contrary to some findings. Prior research has established such ambiguities. The AG based this argument on a 2016 case from the High Court of Kenya on *EG v Attorney General.* The court held that "… the impugned phrases have been clearly defined in law dictionaries and in a catena of judicial pronouncements …".[146] Citation of this case law reveals the same short-sightedness in understanding the historical context of these ambiguities. This shows some of the shortfalls of common law in setting precedent. The AG's argument doesn't take cognizant of the historical contextualisation of the debate on ambiguity as noted by HRW, the Wolfenden report, amongst others. He disputed all grounds of human rights violations and further argued that the provisions did not discriminate against homosexuals as "in fact

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[142] UN 'Values of open and democratic society united nations - Google Search' <https://www.un.org/democracyfund/sites/www.un.org.democracyfund/files/un_sg_guidance_note_on_democracy.pdf> accessed 31 December 2023.
[143] LA Bonomali 'Attorney General's Skeleton Arguments' 11.
[144] Bonomali (n 311) 11–12.
[145] Bonomali (n 311) 10.
[146] Bonomali (n 311) 12.

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they apply to any person regardless of identity or orientation".[147] Again, a historical overview provided in this study indicates otherwise. The AG was quite emphatic that the law was non-discriminatory, arguing it targeted carnal knowledge and not a group of people.[148] The AG also submitted on what he considered the repulsive act that defied morality and culture reinforcing what Murray and Roscoe call the rhetoric of colonial discourse. The AG insisted on heteronormativity arguing the laws were enacted to uphold socio-cultural values and morals of Malawians.[149] Paradoxically, he cites those values as those stipulated in the penal code, which are foreign values. The Constitution which he has consistently quoted, stipulates in chapter one that "The judiciary shall have the responsibility of interpreting, protecting and enforcing this Constitution … in … regard only to legally relevant facts and the prescriptions of law".[150] His assertions are therefore not based on 'legally relevant facts' considering the contradictions between the constitution and the penal code. It is evident that the AG's arguments have not been based on the legality of the law.

4.1.2 Evangelical Association of Malawi's Interpretation of the Law

EAM's skeleton arguments[151] through their lawyer Nicholls and Brookes were also anti-gay. The religious leaders also took the morality approach based on religion and culture. They found same-sex relationships as "unfathomable and repulsive to the Malawian social and moral order"[152] continuing that the petitioners were "discreetly duping the legal system to radically impose a new moral order on unsuspecting Malawians". Again, there is lack of understanding of the origin of the sodomy law as stipulated in the penal code and the misconception that the penal code is based on the views and interest of Malawians yet it is based on colonial epistemology. They added, "the clear purpose of section 153 and related provisions of the penal code is to uphold and protect public morality about sexual acts". It has been revealed that in criminal law, *mens rea* or criminal intent must be established. Therefore 'upholding and protecting public morality' as justification for criminalization of same sex relationships between consenting adults may not pass for *mens rea.* The religious leaders cite that these are offences against morality, arguing it "reflects the strongly held moral convictions of the people of Malawi … So strong is the repulsion to these acts that the people of Malawi have decided … to impose criminal sanctions for their commission".[153] The study found out that

[147] As above 15–16.
[148] As above 18–19.
[149] As above 22.
[150] Malawi Government 'Constitution' 1 <https://www.malawi.gov.mw/index.php/resources/documents/constitution-of-the-republic-of-malawi> accessed 17 December 2023.
[151] EAM 'Skeleton Arguments by Third Amicus Curiae - EAM'.
[152] As above 2.
[153] EAM (n 325) 9.

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use of words such as 'repulsion' to describe homosexuality is in itself an adoption of the epistemology of the West which paradoxically those supporting criminalization of homosexuality are bent to disown. The amici feel the State has the obligation to protect the nation's morals and that the restrictions on human rights alluded to in section 12 (2) of the Constitution were reasonable in the case of same-sex relationships. They continued to argue, "To protect public moral and the social fabric of society in Malawi … the provisions thereof represent the validated public morality of Malawians regarding sexual conduct".[154] Democracy was considered the will of the majority. Just like the AG's arguments, this is an incorrect interpretation of the Constitution. It again reinforces heteronormativity as it is implied that homosexuality is against the law. They do not only use the colonial language on pervasiveness but they also disregard queer reality of the nation. This is problematic as it does not take away the fact that Malawi is queer. EAM continued to argue that anal sex couldn't be the only option and that the science behind it was still debatable providing insufficient grounds for court decisions and that society's consensus in Malawi is that buggery is so morally reprehensible that it warrants criminal sanction.[155] However, science has already proved that homosexuality is inherent.

4.1.3 CSOs' Interpretation of the Law

The rest of the amici curiae made their submission on 16th May, 2023 through their lawyer Khumbo Bonzoe Soko challenging the anti-homosexuality laws. Despite the fact that the case was lost, they still raised queer consciousness which is unrecognized by the court and the State. Both the AG and EAM had argued that it was the mandate of the legislators to consider law reform. The amici counter-argued, "However, it is not solely within the legislature's remit to do so. Indeed this court has a constitutional duty … to protect human rights … and to strike out any Act of Parliament that violates such rights".[156] The amici provided a historical context of how the anti-homosexuality law was inherited from the British common law and statutes such as the Offences Against the Person Act of 1861 under section 61 which criminalized 'abominable Crime of Buggery' which attracted life imprisonment and Criminal Law Amendment Act of 1885 on 'gross indecency' between males. The amici argued, "When taken in their historical context, … Malawi's anti-homosexuality provisions are firmly rooted in the moral attitude of the British Empire".[157] This background

[154] As above 11.
[155] EAM (n 325) 24.
[156] KB Soko 'Skeleton Arguments Filed by the Registered Trustees of Centre for Development of People, The Registered Trustees of Centre for Human Rights and Rehabilitation and the Registered Trustees of Network of Religious Leaders Living with or Personally Affected by HIV and AIDS' 1.
[157] As above 7.

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is quite critical as understanding such history has a bearing on understanding and interpreting the law. This is evident in how the AG and the EAM have misinterpreted the law and misguided the court that the penal code reflect the views and interest of Malawians. The amici also show that by the time Malawi gained independence from British colonial rule in 1994, decriminalization of the same-sex relationship had already been tabled through the 1957 Wolfenden report which pushed for decriminalization of homosexuality between consenting adults and a decade later the Sexual Offences Act was passed in the UK and Wales in 1967. They further reveal that law reform was made possible due to the active role played by CSOs and test case litigation. This is also a manifestation of the colonial epistemology. The amici pointed out that ECtHR recognized same-sex relationships as a human rights issue requiring protection in 1981 and through *Dudgeon V United Kingdom* case, extending decriminalization to the Northern Ireland. There was a concern on how the law was being interpreted. The amici noted that the country was bound by IHRL and jurisprudence "in a strict sense and also in understanding and interpreting the fundamental rights enshrined and protected in its Constitution".[158] Instruments cited included ICCPR, CEDAW and ACHPR. The amici observed that the UN Human Rights committee which was responsible for interpreting the ICCPR explicitly declared that criminalization of same-sex relationships between consenting adults in private or discrimination was a violation of their human rights and in particular right to privacy as noted in *Toonen v Australia*. It was noted that the CEDAW Committee also found that criminalization of same-sex relationships between females violated their rights and was also discriminatory in *Rosanna Flamer-Caldera v Sri Lanka.* Amici further reminded the court that both the Supreme Court and High Court had treated IHRL as part of its domestic law including 'comparable foreign case law', as required by Constitution, also adding, "many foreign courts have (also) considered international jurisprudence, international human rights instruments and foreign jurisprudence".[159] The amici referred to the IACHR's report which quotes the UN Special Rapporteur on Torture as pointing out that there was a "clear link … between criminalization of lesbian, gay, bisexual and transgender persons and homophobic and transgender hate crimes, police abuse, community and family violence and stigmatization".[160] The amici noted that even though sometimes this law was hardly used, its mere existence was enough to have implications as "they reduce gay men … to … 'unapprehended felons', thus entrenching stigma and encouraging discrimination ...".[161] The amici demonstrated that there was enough scientific evidence available unlike EAM, revealing, "there is now an overwhelming body of jurisprudence to support the contention that sexuality is an inherent characteristic

[158] As above 9.
[159] As above 10.
[160] As above 17.
[161] As above 18.

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which gives rise to essential needs".[162] They felt section 20(1) of the Constitution on 'sex' and 'other status' should be interpreted to include sexual orientation to fit with the interpretation of the IHRL. They submitted that in the case of *Toonen v Australia*, ICCPR article 2 and 26 on sex was clarified by the Human Rights Committee that it had to be construed to include sexual orientation and so did the ICESCR committee on article 2. Similarly, they noted that the ACHPR article 2 and 3 also included sexual orientation. The ACtHPR pointed out that article 2 included grounds of discrimination that might not have been thought of when the charter was initially adopted. The amici noted that there were arguments that the provisions applied to both homosexuals as well as heterosexuals as they were gender neutral hence non-discriminatory, however, they argued that they were not treated as such as homosexuals were disproportionately affected. It has been observed that there is lack of substantive equality to recognize that sexual minorities are disproportionately affected by the law. On issues of morality they continued to argue, "public opinion or popular morality alone is not a sufficient justification for infringement of right to privacy … realm of private morality and immorality which is, in brief and crude terms, not the law's business".[163] They added, "the amici suggest that public opinion cannot, by itself, constitute a justifiable reason for maintaining an unconstitutional law".[164] The amici also guided the court on how they ought to approach the immorality issue, "The rejection … of the popular morality does not mean that a court is not guided by (moral) values". [165] They further argued that the court must be guided by constitutional morality. Referring to the Constitutional Court of South Africa in *National Coalition for Gay and Lesbian Equality*, they noted, "the court emphasized that a State that "recognize[d] difference" was not a "State without morality" or one that was "neutral in its value system".[166] They found the provisions to violate the Constitution and the IHRL and therefore unconstitutional and requested that they be declared as such. Both the AG and EAM have shown that there is confusion between constitutional morality and social morality. This shows failure to leverage on amici's expertise and the progress made by several African countries that have successfully decriminalized the sodomy law.

The next section looks at recommendations for Malawi on Concluding Observations on sexual minorities under the ACHPR and the UN General Assembly which also assesses adherence to the human rights framework on LGBT persons.

[162] As above 19.
[163] Soko (n 334) 30.
[164] As above 34.
[165] Soko (n 334) 37.
[166] As above.

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4.1.4 Malawi Concluding Observations on Sexual Minorities

The country submitted its combined periodic report of its 2nd and 3rd reporting to the African Commission on the ACHPR which was adopted by the Commission in 2022.[167] The ACmHPR does not explicitly address the issue of sexual minorities but observed that the country had been slow in implementing Constitutional reforms to comply with the African Charter and develop laws to ensure the fulfillment of human rights under the charter. In the Concluding Observations of the UN Human Rights Council of the country's Universal Periodic Review (UPR) report, several countries called out for the decriminalization of the impugned provisions on grounds that they defied human rights principles such as non-discrimination and to ensure no sexual minorities were exposed to de jure and de facto discrimination, to fight impunity, expound legislation to include non-discrimination based on SOGI and to mandate the Malawi Human Rights Commission to protect the rights of sexual minorities.[168] There were about 13 countries that expressed concern including Spain, USA, Canada, Chile, France, Switzerland, Iceland, Ireland, Italy, Netherlands, New Zealand, Norway and Australia, indicating the ongoing overwhelming global concern. The law must be enforced including enforcement of sovereignty as a responsibility by the ICJ. The next section will focus on legal precedent that shapes the development of LGBT jurisprudence in the country.

5.2 African Jurisprudence on LGBT

The ACmHPR which is supposed to provide guidance on jurisprudence to its member States has at some point used the same rhetoric to deny LGBT-affiliated NGOs observer status. However, the same ACmHPR in its 2014 Resolution 275, had expounded the principle of non-discrimination to include SOGI, which it violated in 2022 by denying observer status to the three NGOs. The resolution forbids violence based on SOGI and expounds section 2 of the ACHPR, declaring, "The interpretation of article 2 of the African Charter is open ended and inclusive … **hence the inclusion of sex, gender and sexual orientation as prohibited ground of unfair discrimination**.[169]Article 2 of the ACHPR is similar to section 20 (1) of the

[167] A ACHPR 'Concluding Observations and Recommendations on the 2nd and 3rd Combined Periodic Report of the Republic of Malawi, 2015-2019' (*African Commission on Human and Peoples' Rights*, 19 June 2024) <https://achpr.au.int/index.php/en/state-reports/concluding-observations-and-recommendations-2nd-and-3rd-combined-periodic> accessed 8 July 2024.
[168] UN HRC 'Report of the Working Group on Universal Periodic Review (UPR) of Malawi - Feb 2021 | United Nations in Malawi' <https://malawi.un.org/en/122906-report-working-group-universal-periodic-review-upr-malawi-feb-2021, https://malawi.un.org/en/122906-report-working-group-universal-periodic-review-upr-malawi-feb-2021> accessed 8 July 2024.
[169] ACHPR (n 19) 3.

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Malawian Constitution where sexuality is not explicit under non-discrimination. .[170] The last part is what the Commission interprets as "open ended and inclusive". The ACmHPR has also not offered proper guidance to Malawi in its Concluding Observations on the issue of sexual minorities which could guide the development of its jurisprudence. It has only managed to show that the country has been slow in enacting reforms in the Constitution and weak in implementing laws to promote human rights for all in compliance with the ACHPR without explicitly referring to the issue of SOGI. Despite the controversies with the ACmHPR in providing direction on LGBT jurisprudence to its member States, different African countries have responded differently to the epistemology of LGBT law with some countries being progressive in their jurisprudence and others being retrogressive. Apart from the jurisprudence of the ACmHPR, the study will also focus on jurisprudence that is coming out of African countries with similar jurisdictions. This is what the next section will focus on. It will first focus on case law that has been used in the Malawi court case to understand how the law is interpreted in court and whether that interpretation is based on science or the myth based on QLT.

5.2.1 Case Law Interpretation in the Malawi Court Case

The skeleton arguments presented in court by both the AG and the amici from both sides; pro-gay and anti-gay rights activists included different interpretations of case law from other jurisdictions. It was interesting to observe how the same case law could be interpreted mythically and scientifically depending on whether one rejected decriminalisation of sodomy law or supported it. The challenge with common law is that in the end, it didn't matter how one interpreted it, they were both right. The implication of this is that both scientific epistemology and scientific jurisprudence as well as mythical epistemology and mythical jurisprudence were accepted; legitimised and legalised. Case law from African countries cited in the Malawi court case include RSA and Kenya. There are other African countries that have made significant progress but were not mentioned such as Botswana and Kenya. These two will be reviewed. There were other case laws outside Africa that were referred to also from the ECtHR and the Inter-American Court of Human Rights (IACHR).

[170] Malawi Government (n 324) 16.

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5.2.1.1 National Coalition for Gay and Lesbian Equality v Minister of Justice

The AG referred to the South African case of *National Coalition for Gay and Lesbian Equality v Minister of Justice*[171] to argue that the principle of privacy did not forbid States from interfering just because the acts were done in privacy. Furthermore, that it did not give freedom to individuals to do whatever they wanted. However, the AG ignored the broader ruling of the case where the judgment proved the unconstitutionality of the anti-homosexual law. Quoting the above case, the judge footnoted, "depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values …".[172] Drawing inspiration from ECtHR on *Dudgeon v United Kingdom*[173] and *Norris v Ireland*,[174] the court held that sodomy laws violated constitutional provision of privacy, contrary to the AG's claims. The South African Constitutional Court, therefore, demonstrated queer consciousness. The AG hence failed to learn from this case law in order to develop jurisprudence on LGBT in the country. The AG had also made reference to the ECtHR in *Willis v United Kingdom*[175] on the definition of discrimination without acknowledging progressive jurisprudence on LGBT in the UK. The court he refers to found the views on the concept of marriage as dictated by heteronormativity as being possessed by "crude bigots".[176] Religion regardless of its 'honesty' and 'sincerity' was perceived as not a dictate of the Constitution. Again this contradicted the AG's pronunciation on the concept of marriage being determined by religion as only between male and female. The court also made distinctions between cultural morality and constitutional morality. The court condemned morality that was based on beliefs instead of the Constitution, demonstrating further that State morality or political morality can be different from constitutional morality. The court held "The enforcement of the private moral views … which are based … on nothing more than prejudice, cannot qualify as such a legitimate purpose".[177] It was further noted, "… the Bill of Rights is … founded on deep political morality.[178] This is important to demonstrate that cultural morality is hardly based on legal principles but on fiction, something that queer theory condemns. Political morality was described as follows, "when governments define the ambits of morality … they are obliged to do so in accordance with

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[171] 'National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998)' (n 32).
[172] 'National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998)' (n 32) 112–113.
[173] *Dudgeon v the United Kingdom* [1981] ECtHR 28519/10, 52630/10, 52697/10, 57473/10.
[174] *Norris v Ireland* [1988] ECtHR 57547/00.
[175] *Willis v the United Kingdom* [2002] ECtHR 36042/97.
[176] As above 344.
[177] As above.
[178] 'National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998)' 132 <https://www.saflii.org/za/cases/ZACC/1998/15.html> accessed 31 March 2024.

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constitutional guarantees not with unwarranted assumptions".[179] Again 'unwarranted assumptions' references the ideological baggage of the law which is interrogated by queer theory. The court demonstrated how sodomy laws were invalidated in most of the mature democracies. It was held "… the Court has failed to promote substantive as opposed to formal equality. Indeed, his judgment is itself a good example of a refusal to follow a formal equality test...".[180] It also condemned systemic inequality.

5.2.1.2 Eric Gitari v NGO Coordination Board and Others

The other case law that the AG had used is from the Supreme Court of Kenya on *Eric Gitari v NGO Coordination Board and Others* where the applicant had sued the Board for refusing to register an NGO with a name that had Gay and Lesbian included.[181] In his argument, the AG insisted that the sodomy law is neither unclear nor ambiguous, agreeing with the Gitari case that the dictionary has a definition for carnal knowledge. His insistence on continued criminalization of homosexuality and the fact that he did not find anything wrong with the sodomy law, demonstrates rejection of co-existence of homosexuality with heterosexuality. This case was quite interesting as the judgment seemed to be conflicted. There were parts that were retrogressive and others that were not. What is even more interesting is how acknowledgement and articulation of progressive jurisprudence was developed. This was groundbreaking in terms of queer consciousness in developing LGBT jurisprudence as it responds to the landmark ruling on *Toonen v Australia*. The court also held that human rights applied to all including LGBTQI but that enjoying such rights was supposed to be in conformity with domestic legislation. This was a drawback as the Constitution of Kenya is not explicit on SOGI on the principle of non-discrimination. It was further pointed out that there was a reason why sexual orientation was not included in the Kenyan Constitution and attributed limitations to the UDHR, ICCPR, ACHPR not being explicit on sexual orientation either, restricting it to male and female sex. It was argued that the Constitution was prone to misinterpretation as its drafters and those who were responsible for ratifying it would not have wanted to register an LGBTQI organisation that was not in conformity with the law. However, the contradiction with this is that the Bill of Rights in any constitution is inspired by UDHR, ICCPR and the ICESCR which together form the International Bill of Rights.[182] The drafters' intent can therefore only be derived from these instruments. The same UN that developed the instruments has declared that discrimination against LGBT persons is a violation of IHRL and that States

[179] As above 133.
[180] As above 119.
[181] *NGO Coordination Board v Eric Gitari and others* (n 31).
[182] OHCHR 'International Bill of Human Rights' (*OHCHR*) <https://www.ohchr.org/en/what-are-human-rights/international-bill-human-rights> accessed 5 April 2024.

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parties have an obligation to protect their rights.[183] In *Toonen V Australia* the UN Human Rights Committee made a similar observation.[184] The ICESCR 2016 General Comment 22, prohibits discrimination based on SOGI.[185] In the same year, the UN Human Rights Committee created the role of the Independent Expert on Sexual Orientation and Gender Identity in recognition that the UDHR condemned any kind of discrimination including one based on SOGI.[186] The court also failed to mention that under ACHPR, there is progressive LGBT jurisprudence through Resolution 275 which condemns discrimination based on SOGI. Despite such questionable interpretations of the Constitution, the difference in State arguments between this case law to the Malawian court case with the AG's skeleton arguments is that the former tried to balance arguments with some progressive case laws. For instance, there were reservations on the penal code. It was pointed out "Talking of Kenya's penal system … was transplanted and adapted to the exigencies of the British Colonial administration … The relevance of some of these laws remains controversial debate".[187] It was noted that such laws included sodomy laws under *Offences Against Morality*. The stand of the Kenyan court on the issue of morality is that application of human rights can be dependent on the determinants of public morals. It was stated, "the moral foundations of any society serve as the basis for our laws found in the Constitution and the various statutes enacted by parliament. The laws must be observed and respected."[188] The Kenyan court had also made reference to the case of *Johar v Union of India*.[189] It noted that section 377 on sodomy law was found unconstitutional between consenting adults and "manifestly arbitrary". On morality, it also quoted the Wolfenden report[190] on the argument that consensual sex amongst consenting adults was not "the law's business" therefore it should not be criminalised. It was pointed out, "the social values and morals have their space but they are not above the constitutionally guaranteed freedom".[191] It was further pointed out that constitutional morality included pluralism and inclusiveness. It also quoted the following regarding religion from the case of *Wisconsin v Yoder*[192]"…the fact that certain religious groups condemn the

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[183] OHCHR 'About LGBTI people and human rights' (*OHCHR*) <https://www.ohchr.org/en/sexual-orientation-and-gender-identity/about-lgbti-people-and-human-rights> accessed 5 April 2024.
[184] 'Toonen v. Australia, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).' (n 192).
[185] OHCHR 'UN Human Rights Treaty Bodies 'Tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f22&Lang=en' <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f22&Lang=en> accessed 5 April 2024.
[186] OHCHR 'Independent Expert on sexual orientation and gender identity' (*OHCHR*) <https://www.ohchr.org/en/special-procedures/ie-sexual-orientation-and-gender-identity> accessed 5 April 2024.
[187] *NGO Coordination Board v Eric Gitari and others* (n 31) 74.
[188] As above 36–37.
[189] *Johar V Union of India* (n 42).
[190] Gupta (n 34).
[191] *Johar V Union of India* (n 42) 72.
[192] 'State v. Yoder' (*Justia Law*, 16 April 2024) <https://law.justia.com/cases/wisconsin/supreme-court/1971/state-92-4-2.html> accessed 7 April 2024.

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behaviour of sodomy gives the State no license to impose their moral judgement on the entire citizenry of the United States".[193] This emphasizes the fact that social morality should not be misconstrued for Constitutional morality. The Indian court also highlighted the supremacy of the Constitution by demonstrating that it was designed to avoid any manipulation but to guide the court on legal doctrine. Adherence to legal rules also means preventing fiction or ideological baggage to infiltrate the law. The court also illustrated that human rights were non-negotiable, observing

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right … may not be submitted to vote; they depend on the outcome of no elections".[194]

These sentiments also draw attention to the relevance of legal rules and legal reasoning that are required to address the issue of LGBT rights in court. The cases cited in this section were those that were mentioned in the Malawi court case by both amici curiae and the AG. However, there were other African countries with similar jurisdictions that were not included such as Botswana and Namibia with its recent court case. The next section will focus on case law from these two countries.

5.2.1.3 Motshidiemiang v AG of Botswana & Dausab v The Minister of Justice of Namibia

The Botswana case, *Motshidiemiang v Attorney*, displays queer consciousness which responds to some key arguments made in the study. The court held that the arguments made by the respondents were not based on science and that the public interest or public morality argument was not "buttressed by any factual, scientific and cogent evidence".[195]Amici curiae were commended for providing scientific evidence on the negative impact of the sodomy law, adding as friends of the court they were 'friends indeed'. The Botswana High Court further held that the sodomy law was *ultra vires* to the Constitution, demonstrating illegality as the Constitution is supreme law. The court found the law unreasonable and unjustifiable. The penal code defied Constitutional ethos and was found to be a remnant of the archaic Victorian era requiring 'mummification', shelving or putting into a museum as archive. The court also referred to the former president Nelson Mandela whom it cited as having mentioned that homosexuality was not un-African but rather a different expression of sexuality. The court also found lack of *mens rea* as it held that in consensual sex amongst

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[193] *Johar V Union of India* (n 42) 23.
[194] As above 25–26.
[195] 'Motshidiemang v. Attorney General Botswana (2019)' (*Human Dignity Trust*, 12 June 2019) 105 <https://www.humandignitytrust.org./resources/motshidiemang-v-attorney-general-botswana-2019/> accessed 11 July 2024.

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adults in same-sex relationships, there was no complainant and no victim. Referring to the Wolfenden Report, it also emphasised that "there must remain a realm of private morality and immorality which is not the law's business".[196] If it's not the law's business, then making it one is also tantamount to pushing illegality into law which is no different from myth-making.

In the recent Namibia case, *Dausab v The Minister of Justice,*[197] the court also held that sodomy laws were unconstitutional and struck down all statutes containing the law and declared them invalid. The court acknowledged that we live in a pluralistic world. It also held that society's mere dictates of morals and values did not make certain actions criminal. This was again a manifestation of queer voice and queer consciousness in developing LGBT jurisprudence. The judge reasoned, "By whose moral values is the State guided?".[198] The judge also noted that public opinion could be characterised by prejudice. He opined that no reasonable man could provide legal basis for their anti-homosexuality views. He further reasoned that the principles of democracy were not dependent on factors such as blind hate, irrationality, personal moral convictions, popular morality and personal aversions. The court buttressed that a democratic society with a progressive constitution was not "reasonably justifiable to make an activity criminal just because a segment, maybe a majority, of the citizenry consider it to be unacceptable".[199]

Reminding the court of the *doctrine of separation of power,* the judge observed that the power to interpret the Constitution was vested in the court and not in the public opinion or parliament. It further noted that if that power had rested in the public, constitutional adjudication would not be necessary. It further reiterated what the Botswana court had held that giving that power to parliament would be bringing back parliamentary sovereignty and disregard for the new legal order brought by the Constitution of vesting that power with the courts. The court further held that this new legal order was intended to protect the marginalised such as sexual minorities. The court also held, "We thus come to the conclusion that the law of consensual sodomy is arbitrary and unfair and is based on irrational considerations."[200]

Evidence from the study indicates that queer consciousness is emerging in Africa from the ACmHPR through Resolution 275 and in countries such as RSA, Botswana and Namibia through the development of

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[196] 'Motshidiemang v. Attorney General Botswana (2019)' (n 380) 122.
[197] 'Dausab v The Minister of Justice (HC-MD-CIV-MOT-GEN- 2022/00279) [2024] NAHC 331 (21 June 2024) - NamibLII' <https://namiblii.org/akn/na/judgment/nahc/2024/331/eng@2024-06-21> accessed 13 July 2024.(2024)
[198] As above 15.
[199] As above 3.
[200] 'Dausab v The Minister of Justice (HC-MD-CIV-MOT-GEN- 2022/00279) [2024] NAHC 331 (21 June 2024) - NamibLII' (n 385) 18.

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LGBT jurisprudence. Kenya however is an interesting case study. It has not yet decriminalised the sodomy laws. However, it shows a court that is more liberal as its judges have made some strides. They have acknowledged that the penal code's sodomy laws are archaic and require law reform and have also, most significantly, admitted that the non-discrimination principle includes SOGI even though its Constitution is not explicit on this. This is different from Malawi. The country has not bulged.

The final chapter looks at the conclusion and recommendations. This section will revisit the objectives to demonstrate how the findings respond to each objective through the corresponding key questions. It will focus on the key findings. It will further show how these findings contribute to and advance studies on LGBT rights and in particular LGBT jurisprudence. It will also focus on contributions on theoretical advances. Finally, it will also provide pointers to areas that could be investigated further in future research.

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Chapter 5: Conclusion and Recommendations

This section is divided into two sections: conclusion and recommendations. The first part will focus on concluding remarks of the study, which will focus on the key findings and limitations of the study. The second part will focus on the key recommendations which will also be specific to different key stakeholders. It will also focus on areas of further research.

5.1 Conclusion

This study set out to interrogate the epistemology used for LGBT law which also has implications for the epistemology used in the courtroom. This epistemology claims that homosexuality is a Western concept and therefore un-African and against African values.[201] It reinforces heteronormativity with no legal backing.[202] Queer theory condemns this and advocates for a queer world in both scholarship and jurisprudence to reflect the social reality of a queer society.[203] The counter-narrative, has also been faulted for being essentialist through minoritising instead of universalizing.[204] Prior studies have revealed that this epistemology is not based on empirical evidence. Such studies correlate with some historical and anthropological findings by scholars such as Murray and Roscoe that homosexuality existed even during the pre-colonial era.[205] These studies therefore concur with queer theory's assertions that the world is queer and has always been queer. However, such studies fall short of disrupting the dominant mythical epistemology.[206] The study interrogated this epistemology through a conceptual framework that looked at court and the State, politics, culture, and religion and suggests having a scientific queer theory that would create a scientific queer epistemology of LGBT and also scientific queer jurisprudence. It therefore advances the current queer theory which has been criticized for failing to overtake the dominant universalistic epistemology. Above all, it calls attention to the fictitious nature of the law exacerbated by such a false rhetoric. This aspect can never be ignored as it undermines the law. The second part will answer the key questions from the findings. The last part will focus on the recommendations.

[201] Murray and Roscoe (n 1).
[202] Foucault (n 149).
[203] Mazel (n 167).
[204] Sedgwick (n 156).
[205] Murray and Roscoe (n 1).
[206] de Lauretis (n 7).

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5.1.1 Summary of Key Findings

The objective of this study was to interrogate African jurisprudence on LGBT to find out if it can offer possible reforms for Malawi. This is in the wake of counter-narratives on the dominant rhetoric and epistemology that homosexuality is a Western concept hence Un-African.[207] These counter-narratives through queer theorizing demonstrate that despite the world being queer, there is still a false epistemology being advanced. This research was significant because studies in this area are scanty in Malawi and Africa in general. Prior studies have shown that there is need for a different epistemology that would overthrow the predominant one that is not based on empirical evidence.[208] However, such studies have been limited to pointing out how this epistemology should look like; radical epistemology or local or African epistemology without actually bringing out the paradigm shift it talks about. Such epistemological shift would require denouncing myths and fiction in the law. This study advances the discourse by revealing the myths in the law, which is a serious concern of existence of illegality in court. This interrogation was conducted through the recent LGBT case which has just been concluded in the High Court of Malawi.[209] The findings indicate that there is no linear path that the country can follow for law reform as progressive jurisprudence and retrogressive jurisprudence co-exist in common law in Africa making it problematic to adopt the scientific epistemology of law. This is the implication of common law on setting legal precedent, which remains largely unregulated resulting in lack of accountability from the judiciary. In a democratic society, the way common law is expected and allowed to perform, can no longer be left up to judicial officers with pick-and-choose games based on beliefs and not legal rules.

The findings reveal that the country is using the same rhetoric on LGBT that is used by some countries with retrogressive jurisprudence. This is a huge threat to protection of LGBT rights. It is also State impunity to deliberately act unlawfully. The insistence on using the old laws of over 160 years ago in the penal code is an insistence to use colonial knowledge to dictate the law. It confirms what Murray and Roscoe[210] in their anthropological exploration found out that the dominant rhetoric used on LGBT in Africa is not authentic but has just been adopted. This makes justification of protective homophobia or legalized homophobia problematic, demonstrating that this dominant epistemology is just a fallacy that remains unsubstantiated. Understanding this historical context is quite critical as evidence from the court case revealed.

[207] Ngwena (n 1); Tamale (n 1).
[208] Sedgwick (n 156); Foucault (n 149); Ngwena (n 1); Tamale (n 1); Msosa (n 1).
[209] *Akster and Another v Director of Public Prosecutions and Another (Constitutional Case 2 of 2021) [2024] MWHC 25 (28 June 2024)* (2024).
[210] Murray and Roscoe (n 1).

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Unfortunately, with common law, setting legal precedent can be based on what is legal as well as what is illegal.[211] The court's integrity is undermined by accepting that the judiciary should act against the rule of law. The judiciary seems to lack structures of accountability with an authoritative voice to ensure that common law is based on science and not beliefs.

The proposed research model suggests having a scientific queer epistemology based on historical and anthropological analysis that interrogates institutions that legitimize the mythical rhetoric. Queer theory rejects this dominant epistemology that is driven by institutions that ought to be credible. Exacerbating the situation is how such an epistemology has infiltrated the courts and influences jurisprudence, by-passing whatever authorities are there that ensure the law is based on legality.[212] Sovereignty of the State and African essentialism have been cited as some of the reasons why queer consciousness is rejected. However, other scholars and the ICJ have shown that with the concept of sovereignty as responsibility, playing politics of sovereignty and essentialism is no longer a valid argument.[213] The belief that culture dictates the morality of a nation has influenced the courts which have argued that public morality is more important than the views of the minority and Constitutional morality. The study has revealed that the court cannot be guided by social morality as dictated by culture or religion over Constitutional morality as this puts the court in disrepute. Social morality on LGBT can be undemocratic. It has been pointed out that democracy accommodates diversity in perspectives of both the majority and the minority. A concern was raised that most courts were applying the formal equality approach instead of substantive equality. The latter must be promoted.

According to the findings, poor interpretation of the Constitution has been identified as one key area where there persist challenges. One of such challenges in the country is the controversies surrounding whether a dualist State can automatically apply IHRL in court. Poor interpretation has also been attributed to lack of understanding of IHRL, lack of materials, lack of literature, lack of circulation of judgements to set legal precedent, judges' held beliefs and their professional background, regulations such as locus standi, lack of landmark judgements on socioeconomic rights in the country hence lack of jurisprudence on social rights

[211] *Akster and Another v Director of Public Prosecutions and Another (Constitutional Case 2 of 2021) [2024] MWHC 25 (28 June 2024)* (n 406).
[212] *Akster and Another v Director of Public Prosecutions and Another (Constitutional Case 2 of 2021) [2024] MWHC 25 (28 June 2024)* (n 406).
[213] Kapindu (n 74).

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and perceptions of social rights amongst others. It has been suggested that an activist judiciary is required and could be relied upon to bring forth robustness to the development of jurisprudence.[214]

Strategic litigation by amici curiae in the current court case was key in providing the comparison of progressive jurisprudence against retrogressive jurisprudence by CSOs who were pro-LGBT rights and those who were anti-LGBT rights. There is no doubt that strategic litigation plays a fundamental role in advocating for minority rights including court advocacy as it raises queer consciousness. However, strategic litigation might not be enough as it has been pointed out that it is reactive.[215] There have been no landmarks judgments in the country hence no production of transformative jurisprudence. The influence of religion was also quite clear on the case and counter-mobilisation. A court that is only reactive and not proactive and that is moved by litigation only on the rights of the marginalized, positions itself weakly. LGBT discourses on African essentialism against universalism is an epistemological fallacy that should never have been allowed to infiltrate the courts. On the other hand, the court should be leveraging on the emerging scholarship and jurisprudence in other jurisdictions that reveal the scientific epistemology of LGBT rights and integration of queer consciousness in the courtroom which respond to a queer world.[216] It has been suggested that QLT should be able to introduce literature or materials that could provide a queer narrative in courts. Pointing out that these institutions have gaps, is not a new phenomenon. However, identifying the fiction in the law and naming the illegality of the law and jurisprudence is. The study's key contribution to the discourse is its recommendation of an epistemological shift through outlawing of illegality where LGBT rights are concerned especially in the courtroom in order to develop scientific jurisprudence that would emanate from scientific epistemology.

5.1.2 Addressing Key Questions

The main objective of the study was to find out if the dominant epistemology on LGBT was also prevalent in Malawi. Evidence shows that Malawi legitimizes heteronormativity even though the country is pluralistic. It has refused to decriminalize sodomy laws therefore refusing to decolonize the law and refusing to promote decolonial thinking since these archaic laws were brought by colonialism. A refusal of decolonial methods

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[214] As above; Gloppen and Kanyongolo (n 77).
[215] Gloppen and Kanyongolo (n 77).
[216] 'National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998)' (n 361); 'Motshidiemang v. Attorney General Botswana (2019)' (n 380); *NGos Coordination Board v Eric Gitari and others* (n 31); 'Dausab v The Minister of Justice (HC-MD-CIV-MOT-GEN- 2022/00279) [2024] NAHC 331 (21 June 2024) - NamibLII' (n 385).

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therefore is also a refusal of queer theory and a promotion of the predominant mythical rhetoric of LGBT persons.

The study was based on the following key question; How is the African rhetoric on LGBT addressed in Malawian jurisprudence? How it is addressed would reveal whether the rhetoric was based on a myth and not science. The study found out that the country uses the same rhetoric that most African countries with retrogressive LGBT jurisprudence use.[217] Such arguments were used by the anti-gay amicus curiae EAM, which is a religious institution. It was also used by the AG. However, the pro-gay amici curiae, which were institutions working with sexual minorities, were the ones that were challenging the dominant rhetoric in court. Unfortunately, their views were not considered by the court. These amici show the possibility of strategic litigation in providing an alternative view to the dominant discourse, shaping the direction of LGBT jurisprudence in the country. Regardless of the response of the court, they provide expertise and queer consciousness in interpretation of the Constitution and IHRL.

Apart from the main question, the study was also based on the following key questions:

1. How are Malawian institutions developing an LGBT epistemology?
2. How does the legal framework in Malawi address LGBT issues?
3. What are the implications of the African rhetoric on LGBT jurisprudence in Malawi?
4. How could challenging the African rhetoric improve LGBT rights in Malawi?

5.1.2.1 How Malawian Institutions are Developing LGBT Epistemology

The institutions referred to in the study are the ones highlighted in the conceptual framework; the court/State, politics, culture and religion. They are all contributing to exacerbating the dominant epistemology. The Malawi case law reveals how the courts have used culture, religion and morality argument to justify maintaining the archaic homosexuality law in the penal code. The implication of heteronormativity is the promotion of a false rhetoric. Social morality has taken precedence over Constitutional morality and legally relevant facts. Social morality was misinterpreted as Constitutional morality.[218]

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[217] *Akster and Another v Director of Public Prosecutions and Another (Constitutional Case 2 of 2021) [2024] MWHC 25 (28 June 2024)* (n 406).
[218] As above.

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5.1.2.2 How the Legal Framework in Malawi addresses LGBT issues

Where the legal framework on LGBT is concerned in Malawi, on the one hand there is the anti-homosexuality law in the penal code,[219] on the other hand, there is the Constitution.[220] Calls to have decriminalization of the homosexuality law are based on the fact that it contradicts the Constitution hence the IHRL. As a State party to the African Union, the country has also committed to Resolution 275 on SOGI.[221] Both the Constitution and Resolution 275 have potential to guide the country in development of progressive LGBT jurisprudence. In the just ended court case, the judges relied on social morality to quash the case as guided by legal precedent on retrogressive jurisprudence in similar jurisdictions. Even though this is not based on legality, this lacuna in common law means countries like Malawi will continue to operate illegally in the name of common law and will continue to use common law as a benchmark for creating its jurisprudence and choosing to be retrogressive as there remains no legal consequences for such illegal acts.

5.1.2.3 Implications of the African Rhetoric on LGBT Jurisprudence in Malawi

How the legal framework addresses LGBT has implications in the country. It has made both mythical epistemology of the law and scientific epistemology of the law legal. The lacuna in common law lies in the fact that fiction or ideological baggage is accepted in the court, making the courts act illegally. This is exacerbated by various institutions that legitimize it. Institutions that have created this dominant rhetoric remain largely unchecked, criticized and called to account for the atrocities committed. Scholarship and jurisprudence have both provided enough empirical evidence that the dominant rhetoric is false yet not much has been done to prohibit this dominant mythical epistemology. Lastly, challenging this African rhetoric could improve LGBT rights in Malawi because the country would adopt scientific epistemology and decriminalize the homosexuality law. Above all, the country would stop undermining the judicial system by following legal principles based on legal reasoning. Malawi is a queer country, its legal response should be able to reflect the realities of this era and include queer consciousness in the law.[222] This is not a matter of option but a must and not a matter of fiction through religion, culture and social morality.

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[219] DPP (n 82).
[220] Malawi Government (n 324).
[221] ACHPR (n 19).
[222] Kepros (n 172).

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5.1.2.4 How Challenging the African Rhetoric can Improve LGBT rights in Malawi

Challenging the mythical epistemology has the potential to offer epistemological shift that would not only allow decolonisation through decolonial methods but would also provide queer consciousness into the court's proceedings on LGBT cases.[223] Queer theory advocates for development of queer narrative, materials or literature that must be adopted by the courts. Such queer consciousness would remove State impunity and allow for the State to fulfill its obligation of protecting sexual minorities. Ultimately, it would allow the courts to rectify its mistakes and act legally by getting rid of myths. The court would also be guided by Constitutional morality.

5.1.3 Limitations of the Study

There were several limitations for this study. Desk research was a recommendation by the course due to time constraints. As a result, there was no primary data collected from the field. However, this did not significantly impact on the study as primary legal sources such as case law and statutes such as the penal code were used. The Constitution and other international human rights instruments were also used. Research coming out of Malawi is quite limited on the topic. It is equally sparse at regional level. Despite this, it justified conducting studies on the topic in order to further studies in this field. What the study is recommending is a big ask. Law reform is not easy, especially at the level this is being requested. It does not only ask for simple law reform within the country, but a paradigm shift in how common law is treated. New ways of operations of the court in regard to common law. Isolation of progressive jurisprudence from retrogressive jurisprudence and integration of queer consciousness and queer thinking in courts. This is a request for the judicial system to admit it has been wrong all along. This might not therefore achieve the desired change as expected for now, however, asking the right questions at this point is progress on its own to kickstart queer thinking along these perspectives. Even if things don't change immediately, the fact that we know the judiciary is operating illegitimately is enough to send stringent warning of the weakened position of the court. Changing the beliefs of the majority will not be easy. Social mobilization plays a critical role in eradicating social homophobia. While it has been argued that it is the law that has to influence societal norms, in a legal pluralist country, it will not be easy even though the Constitution is clear that informal law must not contradict the Constitution.

[223] Meer and Müller (n 182).

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The scope of this study was largely based on case law cited in the Malawi case,[224] however, there are more countries with examples of both progressive jurisprudence and retrogressive jurisprudence, however, this was done to make this manageable and most importantly not to lose focus of the debate at hand. This study's core focus wasn't about strategic litigation or social mobilization. However, these are quite important areas to look at as equally there are hardly any comprehensive studies in this area coming from Malawi and the region.

5.2 Recommendations

Emanating from all the issues identified and raised, this study has proposed a research model for addressing them. This research model offers a paradigm shift from the debate that queer theory, despite identifying the need for a new epistemology, has failed to do so as the false rhetoric still dominates. The model demonstrates that scientific queer theory can be developed from historical or anthropological analysis of the key institutions that legitimize the mythical rhetoric be it through protective homophobia or legal homophobia. Such analysis if conducted in court, would result in scientific queer jurisprudence. These recommendations will be made according to the institutions identified in the conceptual frameworks and also those that emerged in the study.

5.2.1 Academia

It has been pointed out that one of the reasons QLT is not popular is because it is not well established in the law school to raise queer consciousness. This is manifested through scanty literature. It has further been pointed out that there is need for an anti-discrimination doctrine that should be used by the courts to make jurisprudence queer. In all this, the law school has a critical role to play to ensure that queer epistemology of law is not only developed but legitimized in court to guide development of queer jurisprudence.[225] In countries where there is progressive jurisprudence, a move has already started to use scholarship,[226] legal precedent and expertise from amici curiae to develop such queer material, however, not much emphasis has been placed on identifying fiction from the law to ensure that the law is only based on science. This area needs to be intensified.

[224] *Akster and Another v Director of Public Prosecutions and Another (Constitutional Case 2 of 2021) [2024] MWHC 25 (28 June 2024)* (n 406).
[225] Kepros (n 172).
[226] 'Motshidiemang v. Attorney General Botswana (2019)' (n 380).

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Challenging heteronormativity in scholarship can take the non-conformist approach into homonormativity.[227] This can create the exact opposites and promote essentialism in sexual minorities which has been conceptualized as minoritising against universalizing. In order to create an epistemological shift, it does not only require to acknowledge these extremes, but to reinforce the fact that queerness is not only an issue of sexual minorities alone but that it affects all of us. This also means that such conceptualization is not only about queer scholars but every scholar.

There is another kind of decoloniality that is being proposed for African queer theorizing. This one argues for an essentialist continent that ought not to depend on the Western theories.[228] While decolonial methods of the colonial epistemology from the penal code is encouraged, the decoloniality of an essentialist Africa is discouraged. Queer legal theory's goal should remain removing fiction from the law and not creating essentialism between the West and Africa in LGBT theorizing. This is not to say that African theorizing must stop but it must desist from creating spaces of its own demise in the name of decolonial methods of an African epistemology that is totally detached from its Western counterpart in a world that is integrated into a global village. It would also be reproducing the very same inequalities that emanate from created by an essentialist West.

5.2.2 Court and the State.

Homosexuality is considered outside jurisprudence.[229] The court has a critical role to make homosexuality jurisgenerative. Common law exacerbates the situation as there are no authorities to intervene to ensure the court does not operate illegally. This study suggests developing judicial structures or empowering existing ones to regulate common law. Gaps in interpretation of law could be addressed through training of the judicial officers to address judicial bias. Courts must also improve dissemination of progressive jurisprudence to all judicial officers and other materials. The judiciary must also develop an anti-discrimination doctrine.[230]

[227] Sedgwick (n 156).
[228] Asante (n 179).
[229] Mazel (n 167).
[230] Kepros (n 172).

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In summary, the study provides guidance to the country on how African jurisprudence on LGBT can be utilized to instigate reforms in the country and shape jurisprudence. It contributes to queer discourse by developing a model that uses historical and anthropological analysis to assess institutions that legitimize a false epistemology into law and jurisprudence and recommending a scientific epistemology that would create scientific jurisprudence ensuring that queer consciousness is integrated both into the law school and the court. It therefore offers an epistemological shift that has the possibility of overthrowing the dominant epistemology of the LGBT law and LGBT jurisprudence.

5.2.2.1 Legislative Reforms

The penal code which was adopted from British colonial rule has been used with little changes. This is a serious concern as the LGBT law has been inherited from the British archaic Victorian culture. Those that gave us the law over 160 years ago haven't been using it for over 60 years. Due to this, this study recommends decriminalizing the law for lack of *mens rea;* criminal intent, and legal reasoning in general. Apart from that, the penal code needs serious review from the usual tweaking once in a while. The State must also comply with its IHRL obligations. Sovereignty is not an excuse.

Meanwhile strategic litigation which takes the decolonial method approach[231] has proved to be beneficial for the country in providing an anti-discrimination doctrine[232] as we seek long-term solutions to eliminate institutionalized homophobia. It has equally shown the possibility of the pro-gay movement through the amici to influence progressive jurisprudence and integrate queer consciousness through their expertise in IHRL. Strategic litigation must be intensified. The court should take the example of other countries that take advantage of expert opinion of the amici instead of disregarding it entirely.

Some judges who have frowned at retrogressive jurisprudence in court have spoken against a heteronormative perspective to case handling. They note that under such circumstances, the court forsakes substantive equality for formal equality, exacerbating discrimination in court. Other scholars have also expressed concern with other structures such as the Malawi Law Commission for failing to exercise substantive equality over formal equality.[233] Whether the LGBT law changes or not, prejudices are bound

[231] Meer and Müller (n 182).
[232] Kepros (n 172).
[233] Kangaude (n 73).

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to continue due to heteronormativity. Substantive equality should be promoted in court and so should enforcement of law.

In dealing with LGBT as a human rights issue, the courts have been mostly reactive instead of proactive.[234] It has also been noted that justiciability of social rights and developing social rights jurisprudence is another challenge. This makes it difficult in developing progressive jurisprudence. It is recommended that the courts be aggressive enough to pursue their mandate in interpretation of the Constitution. It is further recommended that adjudication of cases over the marginalized be improved and subsequently development of social rights jurisprudence.

5.2.3 Malawi Human Rights Commission (MHRC)

MHRC has a key mandate of bringing checks and balances on human rights violations in the country and flag those issues with the government and relevant bodies regionally and globally. However, there has been no strong voice from the institution to condemn State impunity on LGBT rights violations including on the just ended court case. The State has openly shown its heteronormative position through statements of some parliamentarians, the speech of the president and the court arguments of the AG. MHRC must take central role of condemning such impunity and ensure adherence to IHRL and the Constitution. Since the court is known to be only reactive towards LGBT cases that are brought to court to assess unconstitutionality of the sodomy law,[235] MHRC must provide a forum where the courts can be proactive through its reporting.

5.2.4 Civil Society Organisations (CSOs)

CSOs have a critical role to ensure that queer consciousness is integrated in courts.[236] The recent court case is an example of the role that pro-gay rights CSOs played in strategic litigation.[237] We need more NGOs involved in strategic litigation in court to provide expertise on decolonial methodologies. Such CSOs are few in the country mostly due to backlash and threats levelled at institutions working with minority rights. Malawi fortunately is one of the 8 African countries out of 34 that have signed Declaration of States article

[234] Gloppen and Kanyongolo (n 77).
[235] As above.
[236] Kepros (n 172).
[237] *Akster and Another v Director of Public Prosecutions and Another (Constitutional Case 2 of 2021) [2024] MWHC 25 (28 June 2024)* (n 406).

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34 (6) to allow CSOs to lodge complaints with the court.[238] CSOs should take advantage of this space to take LGBT issues to the court.

5.3 Further Research

A growing body of African scholarship has taken the African essentialist approach to queer theorizing with a different type of decolonial methodologies for Queer African Studies (QAS) that reject Western queer theories. Some critics have counter-argued that it would be problematic to take this approach which would mean breaking away from Western anthropologies, language and discipline. Even though the study has found reason in such arguments, this is not an area that has been fully exploited. Further studies could focus on how such African essentialism could be developed into QAS to prevent reproducing inequalities.

The study found a lacuna in both the penal code and common law. An anthropological and historical analysis reveals that both law and legal precedent are characterized by fiction due to lack of regulation. This has serious repercussions as it makes the law illegal, where sexual diversity remains outside the law as outside jurisprudence. It is argued that conceptualization has been more discursive than disruptive. There is need to have more studies that will not only challenge heteronormativity but also provide both epistemological shifts and jurisprudential shifts through jurisgenerative approaches to LGBT rights. This would accelerate development of anti-discrimination discourse and elimination of colonial discourse in both law and jurisprudence.[239]

Sovereignty as responsibility is a strong declaration by the ICJ that can hold States accountable for crimes committed in the pledge for sovereignty. The Court declared that sovereignty could no longer be an excuse to violate human rights.[240] It was not part of the study to analyse how this is being implemented and whether such implementation impacted on SOGI. It would be interesting to findout if it has been useful at all.

This study was a desk research as per requirement of the university due to time constraints. It could have benefitted more from robust methods that could include interviews with the relevant structures such as courts, academia, CSOs. Further research could focus more on producing that kind of primary data which

[238] 'Why the African Court should matter to you' (n 12).
[239] Murray and Roscoe (n 1).
[240] Kapindu (n 74).

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could enhance understanding of why States cling to colonial discourse to triangulate with other forms of primary data and secondary data.

The study has focused on how queer consciousness could bring legal and social reform.[241] It is clear that legal interventions can influence the public. However, the study has not addressed issues of social mobilization which is also quite key in addressing social homophobia. This is important because it has been noted that law reform alone has not been able to eliminate discrimination towards sexual minorities. However, this is not to suggest that public opinion must override legality.

In general, queer theory,[242] including QAS,[243] has not generated much interest in recent years as most of the research was done around the 1990s. Future research could interrogate this to understand the reasons. This would help not only in building scholarship in this discourse but also increasing the voices of those that would want queer consciousness to be integrated into the law for concerted effort.

Word Count: 20000

[241] Kepros (n 172).
[242] de Lauretis (n 7).
[243] Asante (n 179).

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