

MALAWI / JUDGMENT

Mbele v The Director of Public Prosecutions (Constitutional Case 2 of 2024) [2025] MWHC 21 (17 July 2025)
[2025] MWHC 21

COURT

High Court of Malawi

CASE / FILE NUMBER

Constitutional Case 2 of 2024

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ee AE a perry Scanian) i REPUBLIC OF MALAWI IN THE HIGH COURT OF MALAWI LILONGWE DISTRICT REGISTRY CONSTITUTION REFERRAL No, 2 OF 2024 (Being Criminal Case No. 43 of 2022 before Senior Resident Magistrate’s Court sitting at Lilongwe) (BEFORE Hon. Justice Dr. C. J. Kachale) (BEFORE Hon. Justice F. A. Mwale) (BEFORE Hon. Justice M. E. G. Mvula) BETWEEN: JOSHUA CHISA MBELE ccssesscccscenssaeneesneveses bee naseaseucueececeasuenes CLAIMANT AND THE DIRECTOR OF PUBLIC PROSECUTIONS ccccceceeeeneeeeeeeeees .. DEFENDANT THE ATTORNEY GENERAL 0.0... ccccseencenteseeneeeeeenen ees seseneenes INTERESTED PARTY CORAM: THE HONOURABLE JUSTICE DR. C. J. KACHALE THE HONOURABLE JUSTICE F. A. AMWALE THE HONOURABLE JUSTICE M. E. G., MVULA Khonyongwa/Mwafulirwa, of Counsel for the Claimant Gwaza/Kaunde, of Counsel for the Defendant Bonomali, of Counsel for the Interested Party Ndhrazi, Court Clerk/Official Interpreter Migolo, Court Reporter Kuchingale, Judicial Research Officer Kachale (Dr), Mwale, Mvula JT. JUDGMENT

INTRODUCTION The Claimant brings this Constitutional Referral to protect his constitutional rights in light of criminal charges brought against him before the Senior Resident Magistrate’s Court at Lilongwe under Criminal Case Number 43 of 2022. In those criminal proceedings the Claimant faces the offence of criminal defamation contrary to section 200 of the Penal Code. The particulars of the charge assert that Joshua Chisa Mbele made allegations that General Vincent Numdwe (who at the time was still serving as Army Commander) had corruptly benefitted from a sum of Four Billion Malawi Kwacha from deals with a businessman called Zuneth Sattar. In the present referral the Claimant contends that the penal provision infringes his right to freedom of expression under section 35 of the Constitution and is inconsistent with Malawi’s obligations under relevant international human rights instruments. In particular, the Claimant raises the question whether the criminalisation of defamation is constitutional, especially since it is punishable by imprisonment. According to the Claimant’s argument, adequate remedies exist under the ordinary civil law for the utterance of defamatory statements, making the criminal sanctions unnecessary and even disproportionate. When the Claimant approached the High

Court on that basis, he obtained stay of his criminal trial, pending the constitutional certification of the questions raised i.e, the constitutionality and validity of section 200 of the Penal Code. Thereafter, the Attorney General challenged the stay order obtained in the High Court before a single Justice of Appeal in the Malawi Supreme Court of Appeal and eventually before the full bench of the apex court. In both instances, the Malawi Supreme Court of Appeal confirmed the order of stay pending constitutional certification, affirming that the Claimant was raising serious constitutional questions that required proper adjudication before a fully empanelled bench sitting as a Constitutional Court. Subsequently, the Chief Justice certified the matter as a constitutional referral and further empanelled our bench to hear the present constitutional challenge of section 200 of the Penal Code.

For the avoidance of doubt, the scope of the present proceedings in as far as the Constitutional Court is concerned does not extend to whether the Claimant, in fact or in law, defamed the former Army Commander. Neither is this Court required to decide whether General Vincent Nundwe has any legal grounds on which to sue Joshua Chisa Mbele for defamation. Those questions are the subject of separate judicial processes, which are currently in abeyance pending this application, This Court is therefore only concerned with the broader constitutional question of whether the very existence and enforcement of section 200 of the Penal Code is compatible with our Constitution, particularly section 35 thereof, which protects the right to freedom of expression and other applicable international human rights instruments. A BRIEF CASE HISTORY 5. This matter originated as Criminal Case No. 43 of 2022 before the Senior Resident Magistrate's Court in Lilongwe, wherein the Defendant, Mr. Joshua Chisa Mbele, was charged with criminal defamation contrary to section 200 of the Penal Code. Upon being charged, the Defendant challenged the constitutionality of the said provision, and the High Court granted a stay of the proceedings in *Mbele v Republic*, Misc. Criminal Case No. 4 of 2022, pending referral to the Constitutional Court. After certification by the Chief Justice on 7 May 2024, the case was re-entitled *Attorney General v Chisa Mbele*. The Court later revisited this citation as a preliminary issue, noting that the referral had been made by the Court itself under Order 19 rule 3(3) of the Civil Procedure Rules. Although by Directions dated 26" November 2024, the Court initially took the view that the Attorney General should be the Claimant, it accepted the Attorney General's observations that such citation would be procedurally improper. The Court agreed that the burden of proof lies with the party asserting unconstitutionality, namely, Mr. Mbele. Accordingly, the original party designations were reinstated: Mr. Joshua Chisa Mbele as Claimant, the State as Defendant, and the Attorney General as merely Interested Party. The Court's ruling on this preliminary point was delivered on 17 December 2024. Subsequently the Claimant filed their skeleton arguments on 21 January 2025, the Attorney General as an Interested Party and Defendant filed their skeleton arguments on 23 January 2025. The Claimant and the Defendant then filed their closing submissions

on 14" February 2025. The Court then heard final oral submissions by all parties on 28" January 2025 and the proceedings were closed. 8. Before the Court could deliver its determination on the matter, the Interested Party filed an application without notice for an introduction of an expert report and for the re- opening of a proceeding after trial file on 25 February 2025, This was

followed by the Interested Party's submissions on the expert report on 26 May 2025. The Court allowed the expert report and invited all parties to make their respective submissions in response, which neither the Claimant nor the Defendant did. THE CLAIMANT'S POSITION 9. The Claimant's position focuses on two connected constitutional questions: 9.1 Does section 200 of the Penal Code infringe section 35 of the Constitution, which guarantees the right to freedom of expression? 9.2 Is section 200 of the Penal Code consistent with Malawi's obligations under international human rights instruments, including Article 9(2) of the African Charter on Human and Peoples' Rights as well as Article 19 of the International Covenant on Civil and Political Rights (ICCPR)? 10. In this respect, the claimant identified three legal questions arising from the referral: 10.1 Whether section 200 amounts to an unconstitutional limitation on the right to freedom of expression. 10.2 Whether that limitation is saved by section 44(2) of the Constitution, which allows restrictions only if they are lawful, reasonable, recognized by international human rights standards, and necessary in a democratic society. 10.3 If the challenge is unsuccessful, whether an adverse costs order would be appropriate, in light of the public interest nature of the present litigation.

11. The Claimant has presented a constitutional and policy critique of section 200, summarized as follows: 11.1 Freedom of expression is foundational to constitutional democracy. This right is central to civic engagement, government accountability, and the protection of other rights. Within a society governed by democratic principles, this right should be protected with vigilance, 11.2 The civil law of defamation provides sufficient remedies for reputational injury. Individuals whose reputation may be harmed by untruthful or malicious publications have access to civil suits, such as damages or retractions. These remedies offer sufficient redress without affecting liberty or discouraging public discourse on matters of general interest. 11.3 Criminal defamation laws are inherently disproportionate. Criminal sanctions involve social stigma, possible imprisonment, and long-term consequences for personal and professional life. These consequences may not be proportional to the aim of protecting individual reputation. 11.4 Section 200 is overbroad and vague, The language of section 200 lacks precision, as it does not require dissemination of the defamatory statement or proof of harm, making the provision susceptible to misuse. 11.5 Section 200 law creates a chilling effect. The risk of prosecution could discourage individuals from legitimate criticism or commentary, particularly about public figures, which they suggest may conflict with the principles of democratic discourse and social accountability. 11.6 Less restrictive means are available. Civil defamation laws provide a more proportionate means of achieving the goal of reputation protection. It does not entail arrest, detention, or the imposition of a criminal record. 11.7 The process itself inflicts harm. Undergoing criminal prosecution—even without a conviction—can be punitive due to arrest, public accusation, and prolonged litigation,
13. 14. which they argue constrains freedom of expression. Consequently, the possibility of criminal proceedings may discourage free speech. 12, The Claimant's arguments must be understood from the basis of their claim that section 200 of the Penal violates section 35 of Constitution (the right to freedom of expression, which includes the freedom to hold

opinions without interference and to seek, receive, and impart ideas and information) and does not align with the lawful restrictions under section 44(2) of the Constitution (the limitation on fundamental rights and freedoms, which requires that any restriction on these rights must be lawful, reasonable, and necessary in a democratic society). Further that civil remedies for defamation and criminal sanctions under the Electronic Transactions and Cyber Security Act Cap 74:02 of the Laws of Malawi (“the ETCSA”) provide adequate alternative remedies. To substantiate the critique on section 200 of the Penal Code, the Claimant has ably cited a broad range of domestic decisions, regional human rights jurisprudence, and comparative foreign case law, discussed below. In order to emphasize that constitutional interpretation must promote democratic values and be informed by international human rights norms and comparative law, per section 11 of the Constitution, the Claimant cited *Chakuamba v Attorney General and Others* [2000-2001] MLR 26 and *Longwe & Others v AG* [1993] 16(1) 256. According to the Claimant the Supreme Court’s guidance in the *Chakuamba* Case on interpreting the Constitution holistically, considering its open and democratic foundation, supports the argument that section 200 of the Penal Code, which criminalises expression, cannot be upheld under such principles. The Claimant thus proposes that laws incompatible with these constitutional values, including laws on criminal defamation, must be declared unconstitutional. The *Longwe* Case was cited as an early affirmation of the right to political speech under Malawian law. The Claimant used it to demonstrate that freedom of expression includes political dissent and criticism, even if controversial. This supports their position that section 200, by criminalizing such expression, infringes on core democratic rights that courts have long recognized as deserving constitutional protection. Further, the case of *Nseula v Attorney-General and Another* [1999] MLR 313 was cited to illustrate the principle that the Constitution must be interpreted broadly and purposively, avoiding narrow legalistic reasoning. Thus, section 35 of the Constitution

15. 16. 17. 18. (freedom of expression) must by necessity be interpreted in a generous manner that affirms its wide scope. Consequently, the Claimant argued that there is no other option within this constitutional framework than to repeal section 200 of the Penal Code as it is inconsistent with the Constitution’s noble aim of protecting robust democratic discourse and social accountability. The Claimant further proposed how the judiciary has already exhibited a reluctance toward criminalizing political speech. In *Rep v Harry Mkandawire & Jeremiah Chihana*, Criminal Case No. 5 of 2010 (unreported), Chikopa J (as he then was) acquitted two accused politicians who were prosecuted for criticising government policies. The learned judge held that freedom of expression includes speech that displeases authorities. Such a decision, it has been argued, supports the Claimant’s position that criminal defamation laws like section 200 disproportionately suppress legitimate political critique and have a chilling effect on free speech, even where acquittals occur. The Claimant further highlighted section 44(2) of the Constitution which permits limitation of constitutional rights based on a cumulative test comprising of four principles; that they must be prescribed by law, reasonable, recognised by international human rights standards,

and necessary in a democratic society. The case of *Jumbe & Another v Attorney General*, Constitutional Cases Nos. 1 and 2 of 2005 is central to the limitation analysis of section 200's constitutionality and the Claimant therefore argues that this penal section fails the test and must be struck down. The Claimant relied on *Gwanda Chakuamba v The State*, Constitutional Case No. 5 of 2015 to reinforce the argument that criminal sanctions can be a disproportionate and unnecessary method of limiting rights. In *Gwanda's Case*, the Court warned against the misuse of criminal statutes in ways that overly burden fundamental rights. Applying this logic, the Claimant argued that prosecuting defamation under section 200 of the Penal Code is neither proportionate nor the least restrictive means, especially when civil remedies are available to protect reputation. *Rep v Moses, Lipiyasi, Mwangomba, Maloni & Others*, Criminal Case 14 of 2018 was cited as another example of how Malawian courts have increasingly recognised the relevance of international human rights standards in domestic constitutional analysis. The

19. 20. Court in that case accepted the UN Human Rights Committee's General Comments (like General Comment 34 on freedom of expression) as persuasive soft law. Consequently, this is a recognition that the Malawi Courts are moving towards aligning with the global movement away from criminal defamation laws that fail proportionality tests. These cases reinforce the argument that criminalising defamation is anachronistic and incompatible with Malawi's democratic constitutional order. Similarly, *Chipwaila & 4 Others v Malawi Electoral Commission & Attorney General*, Civil Cause 130 of 2024 was cited to show the Malawian judiciary's willingness to incorporate international human rights standards and instruments like the United Nations International Covenant on Civil and Political Rights ("the ICCPR") and the African Charter into domestic constitutional interpretation. From such cases, it is no longer in dispute that Malawi is bound by these standards and that domestic laws such as section 200 must be assessed against these international benchmarks to determine their constitutional validity. Other cases in which the courts have acknowledged the binding nature of Malawi's external obligation include *S v The President of Malawi & Others*, ex parte Mponda, Soko & Others, Judicial Review 13 of 2020, where the court acknowledged the binding nature of Malawi's international obligations and relied on General Comment 34 to interpret freedom of expression rights, In *Malawi Telecommunications Lid v Makande & Omar*, MSCA Civil Appeal No. 2 of 2006 (unreported) the African Charter on Human and Peoples' Rights was held to be part of Malawi's domestic law by virtue of section 211 of the Constitution, in which instruments that are ratified are deemed to be part of Malawi law. The Claimant uses this to argue that the African Commission's Declaration on Freedom of Expression, calling for decriminalisation of defamation, has legal force in Malawi. The same was held in respect of the ICCPR in the case of *The Attorney General v Msiska* [2000-2001] MLR 378. The Claimant also referred the Court to instructive academic commentary, particularly Professor Danwood Chirwa's analysis of constitutional rights in Malawi which was relied on by the apex court in *Mutharika and Electoral Commission v Chilima and Chakwera*, Constitutional Appeal No. 1 of 2020 as a legitimate aid in understanding constitutional provisions like section 35. Chirwa's text is heavily cited to frame freedom of

expression as broad, political, and requiring protection from criminalization.

21, 22, 23, 24. The Claimant further highlighted that there has been a progressive train of jurisprudence in recognition of the current Constitution, which contrasts with earlier decisions like *Chakufwa Chihana v Rep*, Criminal Appeal Number 2 of 1992, in which the Court upheld a conviction for sedition. Sedition is an example of outdated, authoritarian-era criminal offence which like section 200, lacks alignment with modern constitutional and international human rights standards. Later jurisprudence under the current Constitution, as discussed above, demonstrates a different approach. *M'nthambala v AG* [1993] 16(1) 336 was also invoked to show judicial support for the protection of robust and even unpopular speech. These cases reflect a continuum of Malawian jurisprudence that affirms expressive rights and add weight to the claim that section 200's criminal penalty unjustifiably restricts speech that the Constitution intends to protect, particularly in the political and public-interest context. In assisting the Court with relevant authorities to support its claim, the Claimant was not confined to national legislation or local jurisprudence in general. The Claimant also cited various foreign cases in which similar issues have been discussed and further referenced international instruments, both soft and hard law that have direct bearing on their arguments against the unconstitutionality of section 200. These cases are discussed below. To begin with, the case of *Rafael Marques de Morais v Angola* Communication No. 1128/2002, U. N. Doc. CCPR/C/83/D/1128/2002 (2005) was discussed to underscore the idea that criminal defamation laws targeting public figures are incompatible with Article 19 of the ICCPR. Marques, a journalist, was convicted despite attempting to expose corruption. The UN Committee found that such criminal sanctions were disproportionate, especially where the speech related to matters of public interest. This supports the Claimant's argument that section 200 permits punishment for political criticism and fails the necessity and proportionality test expected under international human rights law. Similarly, by citing *Alexander Adonis v The Philippines* Communication No. 1815/2008, U. N. Doc. CCPR/C/103/D/1815/2008/Rev.1 (2012) the Claimant sought to demonstrate how even when imprisonment is provided for by law, it may still violate Article 19 if it chills public discourse. The UN Committee held that locking up a

25. 26. 27. journalist for defamation, despite lawful grounds, did not meet the threshold of necessity in a democratic society. The Claimant thus argued that in Malawi, section 200's criminal penalties similarly go too far because of its chilling effect, especially when civil alternatives exist. Further, the Claimant cited *Victor Ivan Majuwana Kankanamge v Sri Lanka* Communication No. 909/2000, U. N. Doc. CCPR/C/81/D/909/2000 (2004) to show how discouraging scrutiny of those in power suppresses investigative reporting. The UN Committee recognised in this and a series of other cases that public interest reporting, even when controversial, deserves robust protection. The Claimant also cited General Comment ("GC") No. 34 of the United Nations Human Rights Committee (2011) CCPR/C/GC/34, an essential tool for the interpretation and understanding of article 19 of the ICCPR on freedom of opinion and expression which provides direct guidance on defamation. The Claimant cited paragraph 47 of the GC to argue that States should avoid criminal defamation altogether and, where it exists, imprisonment should never be an option. The GC supports

the view that Malawi's section 200, which permits custodial sentencing, is fundamentally at odds with modern international expectations. In addition to the United Nations international legal framework, the Claimant also referred the Court to decisions from the African continent beginning with the African Court on Human and People's Rights. The first of these decisions was *Lohé Issa Konaté v Burkina Faso* Application No. 004/2013 which the Claimant used to argue that section 200 cannot be justified when weighed against binding regional human rights standards. In that case, a journalist was imprisoned for criticizing a public prosecutor, just as the Claimant is charged for comments about a military figure. The African Court held that the punishment was disproportionate and that criminal sanctions for defamation violate the African Charter on Human and Peoples' Rights. The Claimant further cited a decision of the African Commission on Human and People's Rights which unlike the African Court that makes binding judgments, makes non-binding recommendations. The Commission's decision in *Agnes Uwimana-Nkusi & Saidati Mukakibibi v Rwanda* (Communication 426/12) [2021] ACHPR 526 establishes that even high-profile convictions of journalists for allegedly dangerous speech must pass strict human rights scrutiny. The African Commission held that the criminal penalties imposed in that scenario were excessive and discouraged the press from performing its 10

28. 29. 30. 31. functions in the same way that section 200 of our Penal Code puts journalists and activists at risk simply for speaking truth to power. The Claimant also cited a decision from the Court of Justice of the Economic Community of West African States ("the ECOWAS Court") *The Federation of African Journalists v The Gambia* (2018) ECW/CCJ/APP/36/15 which discussed the chilling effect of defamation laws on journalism. The ECOWAS Court in no uncertain words ordered the Gambia to immediately "repeal or amend" laws such as our section 200, that violated the right to freedom of expression, and to not only align them with international obligations, but also to award damages to the journalist who experienced torture and persecution. The breadth of the Claimant's submissions went as far as decisions from other African countries. In the Zimbabwean case of *Nevanji Madanhire v Attorney General (Zimbabwe)* Const. Application No CCZ, 78/12 the Constitutional Court struck down a criminal defamation provision very similar in substance to our section 200. The court focused on the historical origins of the offence and concluded it was a relic of monarchical insecurity of colonial rule rather than democratic necessity. Similarly in another Zimbabwean case of *Misa-Zimbabwe v Minister of Justice* Case no. CCZ/07/15 (2015) the Constitutional Court reaffirmed the unconstitutionality of criminal defamation under both the old and new Zimbabwean constitutions. The two cases demonstrate that criminal defamation laws are not only outdated but unsustainable even under revised constitutional frameworks. Moving on to Lesotho, the Claimant cited *Peta v Minister of Law, Constitutional Affairs and Human Rights (Lesotho)* CC11/2016 (unreported, decided on 18 May 2018) as directly comparable. A journalist faced charges for criticizing a soldier. The Lesotho court found that such criminalization of defamation was unconstitutional and overly restrictive. The Claimant draws a parallel, arguing that section 200 creates the same kind of overreach in Malawi, particularly when the speech concerns powerful individuals or institutions. The

Claimant also cited the Kenyan case of Jacqueline Okuta & Jackson Njeru v Attorney General, Director of Public Prosecution & Article 19 of East Africa (Kenya) [2017] KEHC 8382 in which the Court described criminal defamation (in a similar provision to our section 200) as legally disproportional and therefore 1]

32. 33, 34, unconstitutional. The court emphasized that defamation should be addressed through civil remedies, From Tanzania, the case of Paul Kisabo v Minister of Information, Communication and Information Technology & Others(Tanzania) (Misc. Civil Cause No. 27860 of 2024) was also cited. This case reinforced the idea that overly broad speech laws such as section 200 violate constitutional rights. Tanzanian courts are now evaluating criminal law's effect on expression with heightened scrutiny. Similar jurisprudence also obtains in South Africa as seen from the case of Qwelane v South African Human Rights Commission and Another(South Africa) [2021] ZACC 22 which involved hate speech, not defamation, but the court's reasoning on how to balance rights is relevant supporting the argument that section 200 criminalizes speech that should be constitutionally protected, particularly when it involves public officials. In addition to African Cases, the Claimant also finds support from African international instruments, both soft and hard. For example, the Claimant relies on soft law in the form of the Declaration of Principles on Freedom of Expression in Africa's core principle that custodial sentences for defamation violate the right to freedom of expression. The Declaration promotes civil alternatives and recognizes public interest as a defence. The Claimant argues that section 200 fails to reflect these modern standards. Further, ACHPR/Res.169 (XLVIID) 10 resolution, which calls on States to repeal criminal defamation laws, is used to show consensus among African human rights bodies that such laws are not compatible with a democratic society. Thus, the Claimant frames section 200 of the Penal Code as a violation of Malawi's obligations under the African Charter and out of step with prevailing continental legal developments. Further afield, away from Africa, the Claimant cited other judicial pronouncements. Beginning with the Indian case of Ramlila Maidan Incident v Home Secretary (India) (UOT)(2012) S SCC 1 the argument is clothed with a powerful philosophical basis with persuasive force rather than technical similarity. Free speech is foundational to democracy, thus criminal defamation contradicts democratic openness, especially when alternatives like civil defamation exist. To demonstrate the dangers of provisions like section 200 the US case of *The New York Times v Sullivan* (US) 376 U. S. 254 held that public figures must tolerate more criticism and that actual malice must be proven in defamation. The Claimant thus argues that section 200 sets a dangerously low bar for 12

35, 36. 37, 38, criminal liability as it lacks protective standards, making it open to abuse by those in power. The Austrian case of *Lingens v Austria* No. 9815/82 8ECHR 407 demonstrates how even non-custodial criminal penalties can deter critical journalism. The Claimant argued that Malawi's section 200, with its potential for arrest and imprisonment, creates an even more dangerous chilling effect. This decision was used to highlight the global consensus that civil remedies are sufficient for reputational harm. The Spanish case of *Castells v Spain* Application No, 11798/85, ECHR was cited for its core holding: governments should not use criminal law to silence critics.

Political speech, particularly from journalists or dissidents, must be robustly protected. This supports the Claimant's broader argument that section 200 grants the state too much power to punish dissenting voices, with no real benefit to democratic governance. In the Inter-American case of *Herrera-Ulloa v Costa Rica* Ser. C No. 107 struck down criminal defamation laws for imposing undue burdens on journalists. The Claimant uses it to reinforce that defamation laws should not penalise individuals for reporting on public affairs, especially where the statements concern corruption or governance. It has been discussed to substantiate the assertion that section 200 falls short of international democratic expectations. In addition to the authorities cited above, the Claimant took time to show defects in the reasoning and authorities cited by the Defendant and at times the Interested Party. Thus, the Claimant has criticized their reliance on inappropriate foreign jurisprudence such as *Subramanian Swamy v Union of India* (India), *Sullivan v Attorney General* (2016) 7 SCC 221 (Seychelles), and *George Worme v Commissioner of Police* (Grenada) [2004] UKPC 8, in which the respective courts had upheld criminal defamation laws. According to the Claimant, these decisions are of limited persuasive value in the present circumstances: firstly, because they do not engage with the African Charter or other regional human rights instruments in their legal analyses. In contrast, the Claimant cited *Lohé Issa Konaté v Burkina Faso* Application No. (04/2013 as a more relevant case authority from the African Court on Human and Peoples' Rights that directly condemns the criminalization of defamation, particularly where it results in custodial sentences, 13

39, 40, 41, 42, 43. Secondly, the Claimant impugns the reasoning of the Defendant and Interested Party as they cited case authorities from jurisdictions that have begun repealing or reforming these laws, acknowledging their conflict with core democratic principles. Even where criminal defamation has been retained, the laws tend to be narrowly defined and applied with considerable restraint, a far contrast from section 200 of the Penal Code, which is vague, broadly worded, and capable of encompassing speech that should be protected. The Claimant further entreats the Court not to adopt a narrow reading of the penal provision focused solely on the custodial aspect. While imprisonment is undoubtedly severe, the Claimant maintains that the harm caused by criminalization arises from the entire process, including arrest, trial, and the public stigma arising from the whole experience. The Claimant referred the Court to jurisprudence from Zimbabwe and Kenya as more comparable jurisdictions, where criminal defamation laws were struck down in their entirety rather than salvaged through piecemeal amendment. Specifically, the Claimant drew attention to *Jacqueline Okuta & Jackson Njeru v Attorney General* (Kenya) [2017] KEHC 8382 and *MISA-Zimbabwe v Minister of Justice* Case no. CCZ/07/15 (2015), which both underscored the fundamental incompatibility of such provisions with constitutional guarantees of freedom expression in a democratic society. In response to the Defendant's comparison of defamatory utterances to hate speech during oral submissions the Claimant highlighted the distinction between defamation and hate speech: namely that while defamation concerns personal reputation, hate speech outlaws criminal incitement against protected groups or individuals. In order to buttress his argument that there are more proportionate laws for redressing the type of utterances made online by the Claimant, the recently enacted Electronic Transactions and Cybersecurity Act Cap 74:02 of the laws of Malawi

(“the ETCSA”) was identified as a more suitable instrument. Thus, section 200 of the Penal Code is described as anachronistic and redundant in the digital age, duplicating recent legislation and retaining unnecessary criminal liability. In response to the State’s argument that *Jumbe v Attorney General* Constitutional Cases Nos. 1 and 2 of 2005 had been overruled, the Claimant argued that the core interpretative principle from that case remains applicable. Specifically, the requirement that any limitation on constitutional rights must meet all four cumulative criteria under 14

44, section 44(2) is grounded in the Constitution itself, not in the continued authority of *Jumbe*. The State, according to the Claimant, did not adequately rebut this point. In conclusion, the Claimant urged the Court to declare section 200 of the Penal Code unconstitutional in its entirety. The provision was said to be incompatible with Malawi’s domestic constitutional values and its binding international obligations. While the State proposed a reformist approach that would preserve some version of the offence, the Claimant maintained that full invalidation was the only remedy consistent with constitutional principles and regional human rights jurisprudence discussed extensively, THE DEFENDANT’S POSITION 45. 46. In a similar manner to the Claimant, the Defendant in their submissions drew comparisons with jurisprudence from African countries like Botswana, Zambia, Gambia, and further afield like India and the UK, where criminal defamation laws either remain in place or are upheld under certain conditions. The Defendant has also cited international cases and provisions from regional and international frameworks to argue that Malawi is not out of step with global democratic standards and that its approach is neither excessive nor unusual. Consequently, the Defendant vehemently argues that section 200 of the Penal Code, which criminalizes libel in Malawi, is constitutional and aligns with both domestic and international human rights standards. Whilst acknowledging the Claimant’s challenge the Defendant is resolute that section 200 is reasonable, clearly defined, and necessary for protecting individuals in a democratic society. The Defendant emphasises that while freedom of expression is vital, it is not an unlimited right, it must be balanced against other equally important rights, such as the right to dignity and protection from harm; this is supported by the case of *The Attorney General v Fred Nseula and Malawi Congress Party*, MSCA Civil Appeal No. 1 of 1997 which underscores that constitutional provisions must be read harmoniously and purposively, promoting democracy and human rights without allowing one provision to nullify another. At international level, the case of *Shaheed Ali Khan, Tariq Khan, Assad Mughal and Rockstar Group Limited v Yasmin Kouser Mughal* [2020]KECH 858 (KLR) was cited to argue that the right to freedom of expression is not absolute and must be exercised in ways that respect peace, 15

47. 48, 49. rights, and reputations of others. *Dr. D. C. Saxena v. Hon. the Chief Justice of India* (1996) 7 SCC 216 was cited to assert that freedom of expression can be democratically restricted to uphold public order and democratic values. The Defendant first argues that constitutional interpretation in Malawi must be broad, purposive, and principled. The Defendant thus cited the case of *The State and the Malawi Electoral Commission ex parte Rigtone Mzima*, MSCA Civil Appeal No. 17 of 2004 to affirm that constitutional interpretation must begin with Section 11 of the Constitution, employing broad and purposive

interpretation. Thus, the Constitution should not be interpreted in isolation or narrowly, but in a way that reflects its spirit, context, and societal needs. The case of *Director of Public Prosecutions v Norman Paul Chisale & 6 Others* (Constitutional Reference 1 of 2021) [2022] MWHC 7 was also cited to support the use of a broader, purposive interpretative method in constitutional matters, core to Defendant's interpretation philosophy. Further in terms of foreign cases, the Defendant has argued with reference to *Minister of Home Affairs and Another v Fisher and Another* [1979] 3 All ER 21 (PC) that constitutions require generous, non-legalistic interpretation; supporting purposive reading of section 200 of the Penal Code within the broader constitutional context. The Defendant also cited *Tuffour v Attorney General* [1980] GLR 637 (Ghana SC) to argue that the constitution be viewed as a living instrument thus requiring dynamic and contextual interpretation that respects history and evolving societal needs. Other cases all extremely dated, were also cited to support the interpretation argument such as *James v Commonwealth of Australia* [1936] AC 578 highlighting the principle that constitutions must not be interpreted narrowly or pedantically, reinforcing the broad interpretative stance the Defendant urges the Court to adopt. Another case cited was *A. K. Gopalan v State of Madras* [1950] SCR 88 (India SC) with the purposing of emphasising that interpretation must follow the Constitution's language and established rules, not merely assumed "spirit" a caution against overreach. Other cases of a similar nature and of a dated period were also cited. The Defendant has also argued that when assessing whether a law violates the Constitution, there is a legal presumption that the law is valid. It is the Claimant who bears the burden of proving otherwise, namely, that the law is vague, arbitrary, or fails 16

30, 51. the test of reasonableness under section 44(1) of the Constitution (*Attorney General v Malawi Congress Party and Others* [1997] 2 MLR 181 (MCSA) was used to support the presumption of constitutionality of statutes). The Defendant argues that section 200 is valid unless clearly shown to violate the Constitution. The burden-shifting principle, that it is the Claimant's duty to prove unconstitutionality, is not unique to Malawi and has been affirmed in Kenya in the case of *Kenya Human Rights Commission v Attorney General & Another* [2018] eKLR. The Defendant also argues with reference to the relationship between the State and its citizens, highlighting that the Constitution itself permits reasonable restrictions on rights when necessary to protect public order and individual dignity. The Defendant thus argues that through a social contract Malawians entrusted the State with certain powers, including the power to enact penal laws, to protect the collective welfare and ensure that rights are exercised responsibly. The Defendant also addresses criticisms that section 200 only targets political figures, by citing jurisdictions where similar provisions have been applied across different sectors and contexts, not just to quell speech with political implications or criticizing high profile officials. Thus, the case of *Rep v Mbisa* [1991] 14 MLR 434 (HC) demonstrates historical and practical enforcement of criminal libel in Malawi involving non-political figures, to rebut claims of selective prosecution. However, even where such public officials are involved, protecting their reputation is not such a bad thing as shown in the Zambian case of *Fred M'membhbe, Bright Mwape v The People & Fred M'membe, Masautso Phiri, Goliath Mungonge v The People* [1996] ZMCSC 8 (Zambia) where criminal defamation laws

that protect public order and leaders' reputation were upheld. In addressing the necessity of criminal sanctions for defamation, the Defendant argues that civil remedies alone are not enough to deter harmful conduct, especially in cases where the perpetrator is wealthy, influential, or unrepentant. They highlight the enduring damage defamation can cause to a person's life and reputation and insist that criminal sanctions are essential for deterrence, justice, and the preservation of human dignity. They note that freedom of expression cannot be used as a shield for spreading deliberate falsehoods that harm others, especially in a society where many cannot afford civil litigation. The case of *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 was cited to emphasize that protection of reputation is an essential component of human dignity, 17

32. 53. 54. which extends beyond the individual and affects society as a whole. The Defendant thus argues that libel justifies criminal sanctions, not just civil remedies, because reputational harm carries public consequences and long-lasting societal harm. The Defendant maintains that Section 200 of the Penal Code strikes an appropriate balance between freedom of expression and the protection of individual reputation. Thus, in the Defendant's view, the provision satisfies all constitutional criteria outlined in section 44(1) of the Constitution and is consistent with international human rights obligations, including Article 9 of the African Charter and Article 19 of the ICCPR. The law is clear, proportionate, and necessary for maintaining dignity and order in society. Consequently, the Defendant asks the court to uphold the constitutionality of Section 200 of the Penal Code. In arguing that provisions such as section 200 can be justified in constitutional democracies, the Defendant cited *Tammer v Estonia* (2003) Application no. 41205/98, ECtHR which supports the view that criminal defamation laws can comply with human rights principles if penalties are proportionate. The Defendant cites this case to show that modest fines (e.g., 10 times daily wages) were upheld by the European Court, thus demonstrating that proportional criminal sanctions can be compatible with freedom of expression under international norms. In the same vein, the Defendant cited *Hoho v The State* [2008] ZASCA 98 to argue that libel justifies criminal punishment because it protects societal interest in dignity and public order. Thus, society should not only compensate victims but also actively discourage defamatory lies through criminal law, especially where civil remedies may be inadequate or symbolic. Similarly in the case of *R v Lucas* (1998) 157 DLR (4th) 423 (SCC) it was held that criminal sanctions for defamation remain necessary even where civil remedies exist, The Court's finding that those who knowingly publish lies deserve punishment reinforces the Defendant's claim that criminal defamation is a legitimate and necessary form of legal control. Further, the case of *S v Makwanyane and Another* 1995 (3) SA 391 (CC) was cited to argue that dignity is the foundation of all human rights and as criminal libel protects dignity, which is constitutionally enshrined in Malawi, limiting speech that harms dignity is therefore not inconsistent with constitutional values. Thus, in keeping with *Dikeke v Mokhatla* 2007 (1) BCLR 1 (CC), defamation laws serve a legitimate purpose of 18

35, 56, 57. deterring harmful speech. The Defendant expressly argued that the “chilling effect” discussed in *Dikoko* was a necessary feature of responsible speech in a constitutional democracy where dignity must sometimes prevail over expression. The Defendant also cited other cases to show that criminal defamation can be justified in certain cases. The case of *Cumpana and Mazire v Romania* (2004) 41 EHRR 200 demonstrates that the ECtHR has not categorically ruled out criminal defamation. The Defendant relies on this to argue that criminal penalties for defamatory speech can be valid if they are proportionate and serve legitimate aims such as protecting others’ rights. Similarly, the Defendants argued with reference to *Pedersen and Baadsgaard v Denmark* (2006) 42 EHRR 486 that criminal defamation laws are permissible under European human rights jurisprudence. It reinforces the idea that reputation is a legitimate interest that justifies certain restrictions on expression. In the same manner, *Lindon, Otchakovsky-Laurens and July v France* (2007) 46 EHRR 35 supports the position that criminal defamation convictions are not inherently violations of freedom of expression and can be lawful when proportionate and clearly prescribed by law. In addition, according to *Mokone v Attorney General and Others* (Botswana, unreported, 2 Feb 2018) criminal defamation laws are constitutionally valid when restrictions meet legal tests for reasonableness and necessity. With respect to the binding nature of domesticated international instruments which favour the repeal of criminal defamation, the Defendant has argued with reference to *Abacha v Fawehinmi* [2000] 6 NWLR 228 (Nigeria) that domesticated international instruments like the African Charter can override ordinary laws, but not the Constitution, emphasizing lawful restriction boundaries. The Defendant also cited *Handyside v United Kingdom* (ECHR, App No. 5493/72) to support deference to national authorities in determining moral and legal limits on expression, showing that context and societal needs justify certain restrictions. In sum, the Defendant argues through *Gwanda v State* (Constitutional Case No. 5 of 2015) [2017] MWHC 23 that limitations on rights must be lawful, reasonable, and of general application, and contends that section 200 of the Penal Code meets this test under section 44 of Malawi’s Constitution. 19

THE INTERESTED PARTY’S POSITION 38, 59, 60, 61. The Attorney General appeared as an Interested Party consistent with the practice in Constitutional Referrals. In such circumstances, the Attorney General’s role as guardian of the Constitution and the rule of law is to maintain an unbiased and independent stance. The expectation therefore is that the Attorney General as an Interested Party, presents an objective analysis of constitutional issues rather than simply advocating the state’s position. The Interested Party in this case maintains the constitutionality of section 200 of the Penal Code and presented arguments that were very similar to those of the Defendant displaying no independence of thought or legal analysis. Thus, the Interested Party simply reiterated the arguments on principles of constitutional interpretation, and the practical implications of criminal defamation, adopting a balanced approach, and balancing the right to freedom of expression under Section 35 of the Constitution against the rights to dignity and privacy under Sections 19 and 21. Since the arguments of the Interested Party are mostly the same as those of the Defendant, only a few of the salient points are reproduced below for the purposes of highlighting their approach to the proceeding. In one breath, the Interested Party countered the Claimant’s argument that criminal defamation laws chill free speech since if properly

applied, these laws do not discourage legitimate expression but only target speech that is knowingly false and injurious; yet in the next breath, the Interested Party went on record arguing that one of the real justifications for retaining the offence of criminal defamation is the fear that the presence of such a law on our penal statute would instil in people, whether they be journalists, activists or ordinary citizens and public commentators. Hence the Court was urged to be slow in removing such a potent legal weapon from the penal lexicon. In defending section 200 of the Penal Code as not being too broad, the Interested Party has argued that commission of the offence is dependent on intent. According to this argument, since only intentional defamation is criminalized this makes the provision more focused and less prone to abuse. Further the Interested Party also argues that the legal elements that must be satisfied for a conviction under section 200 of the Penal Code establish a high threshold that prevents arbitrary enforcement and ensures due process. These elements are: publication of defamatory matter, the content's capacity to lower 20

62. reputation; its reference to an identifiable individual; the unlawfulness of the publication, and the intent to harm. Drawing on the African Charter on Human and Peoples' Rights and the International Covenant on Civil and Political Rights (ICCPR), the Interested Party argues that the international and regional framework accommodate reasonable restrictions on freedom of expression to protect the rights and reputations of others. Section 200 of the Penal Code, by this argument, complies with these standards by targeting only intentional, unlawful, and harmful speech. Therefore, General Comment No. 34 of the UN Human Rights Committee, which reinforces the requirement that any restriction must be necessary and proportionate is satisfied as there is nothing that may be deemed unconstitutional in the current penal provision on account of its broadness, vagueness or lack of proportionality. In responding to the specific argument that section 200 of the Penal Code is redundant in view of the criminalisation of similar conduct under sections 86 and 87 of the ETCSA which provide that: 86. (Prohibition of cyber harassment) Any person who uses any computer system and continues - (a) making any request, suggestion or proposal which is obscene, lewd, Jascivious or indecent; or (b) threatening to inflict injury or physical harm to the person or property of any person; or (c) knowingly permits any electronic communications device to be used for any of the abovementioned purposes, commits an offence known as cyber harassment and shall, upon conviction, be liable to a fine of K2,000,000 and to imprisonment for five years. 87. (Prohibition of offensive communication) Any person who willfully and repeatedly uses electronic communication to disturb or attempts to disturb the peace, quietness or right of privacy of any person with no purpose of legitimate communication whether or not a conversation ensues, commits a misdemeanour and shall, upon conviction, be liable to a fine of K1,000,000 and to imprisonment for twelve months. The Interested Party's response is that these provisions target cyber harassment and offensive communication, which differ materially from criminal defamation. The Interested Party thus argues that the ETCSA addresses threats, indecent messages, and privacy violations, it does not capture reputational harm caused by false publication. 21

63. Consequently, section 200 of the Penal Code continues to serve a distinct and necessary societal purpose. All in all, the Interested Party defends criminal defamation as a tool that promotes equality before the law using many of the same cases cited by the Defendant and a few others that do not warrant distinction. The Interested Party argues that the requirement for a formal complaint by the aggrieved person ensures that prosecutions are not politically motivated or frivolous. The Interested Party also emphasizes that the availability of criminal prosecution allows individuals who cannot afford civil suits to access justice, thereby reinforcing the principle of equal protection under the law. COURT'S REASONED DETERMINATION 64. In view of the preceding arguments, the Court has identified issues for its determination as reasoned below, What is the role of the Attorney General as an Interested Party in Constitutional Referrals? 65, Before delving into the substantive issues, it behooves the Court to first reiterate the role of the Attorney General as an Interested Party in such proceedings, due to the manner in which the matter was argued. As Interested Party, the Attorney General's role is essential for maintaining the integrity of the legal system and ensuring adherence to constitutional principles. By acting as a legal advisor, a protector of rights, and a facilitator of judicial dialogue, the Attorney General contributes significantly to the rule of law and the functioning of a democratic society. The expectation that the Attorney General will objectively assist the Court, rather than merely align with adversarial interests, underscores the importance of this position in promoting justice and accountability in constitutional litigation. Thus, in constitutional litigation, the Attorney General occupies a unique institutional position. Unlike the litigants involved in the dispute, the Attorney General is both a legal adviser to the Government and a constitutional actor tasked with upholding the rule of law who must transcend the dispute. This element was absent in this case. The Interested Party aligned itself with and advocated for the interests of the Defendant. 22

5.2 66. 67. 68. Procedural rules and case law define the Attorney General's role in constitutional matters as assisting the Court, not representing adversarial interests. Order 19 rule 8 of the Courts (High Court) (Civil Procedure) Rules provides as follows: "Every process under this Part shall be served on the Attorney General whether or not the Attorney General is a party to the proceeding." Further, in *Jam Willem Akster v Attorney General* (Constitutional Referral No. 2 of 2021) [2021] MWHC 208, the Constitutional Court interpreted this provision in light of the Attorney General's constitutional responsibilities: "Our understanding and interpretation of this rule is that there are circumstances where the Attorney General is not or may not be a party to the proceedings. The reason why the Rules demand service on the Attorney General is in recognition of the constitutional role played by the Attorney General in constitutional matters. It is up to the Attorney General after service has been effected on him or her to join the proceedings or not." This excerpt of the Court's judgment affirms that the Attorney General's involvement in constitutional litigation is not dependent on being named as a party. The obligation to serve him with process reflects a recognition of his broader public function in constitutional adjudication. It provides him with the opportunity to assess whether to intervene, based on the constitutional issues raised, The jurisprudence further establishes that this is not

merely a procedural formality but a constitutional imperative. In *Khoviwa v The Republic*, MSCA Criminal Appeal No. 12 of 2017 (unreported), the Supreme Court of Appeal underscored the necessity of involving the Attorney General in any challenge to the constitutionality of legislation: “It is imperative that the Attorney General be put on notice regarding the constitutionality of a law or statutory provision that is the subject of the proceedings that are likely to end in that law or provision being declared unconstitutional. Further still, the views of the Attorney General must be sought before any such declaration is made...” 23

69. 70, 71, 72. This instruction reflects the elevated status of the Attorney General as a constitutional actor whose views are considered indispensable before a statute may be declared invalid. The Court does not regard his participation as optional in such matters but as central to the constitutionality review process. Further clarity is provided in the Supreme Court of Appeal’s decision in *Professor Arthur Peter Mutharika and the Electoral Commission v Dr. Saulos Klaus Chilima and Dr. Lazarus Chakwera*, MSCA Constitutional Appeal No. 1 of 2020, as quoted in *Akster* (cited above): “we also note that Order 19 rule 8 of the Courts (High Court) (Civil Procedure) Rules provides that every process relating to matters under the Constitution shall be served on the Attorney General, whether or not the Attorney General is a party to the proceedings. The Attorney General thus becomes a party to the proceedings and is expected to assist the court in resolving the issues before the court.” The Court in this case shifted the focus from the Attorney General’s right to be heard to the obligation placed upon him once he has been served. His role is not to act as a partisan litigant but to assist the Court. The goal is to offer clear, objective guidance on constitutional issues, without adopting an adversarial stance. The same decision further clarifies the appropriate conduct of the Attorney General upon certification of a constitutional referral: « when the matter became a constitutional referral the Attorney General, as a Law Officer number one and custodian of the Constitution, should have stepped back and ceased to represent the second appellant. The Attorney General, having withdrawn from representing the second appellant, should have taken up the role of assisting the Court below to resolve the three constitutional issues on matters of law which had been referred to the Court.” This Court thus affirmed that the Attorney General’s position must change when a matter becomes constitutional in nature. The moment a case transitions from a regular dispute to a constitutional referral, the Attorney General must relinquish any partisan representation and adopt a neutral stance. His constitutional duty as “Law Officer number one” and “custodian of the Constitution” compels him to offer impartial legal support to 24

73. 74, 75. the Court rather than advocate for a specific party. Consequently, the Court in the *Jam Willem Akster* case (cited above) went on to state that: “His or her role is strictly to assist the court to resolve the constitutional issues before it. The Attorney General is not supposed to take sides as Law Officer of the court. It is therefore in keeping with this proposition that it becomes problematic to indicate the Attorney General as a defendant in these matters.” This was a recognition by the Court of the importance of correctly framing the Attorney General’s participation in constitutional litigation. He is not to be cast in the role of a

defendant, which would improperly position him as a partisan adversary. Rather, his function is that of a legal adviser to the Court, a neutral participant aiding the judicial function of constitutional interpretation. This delineation is especially important where the constitutional referral arises from a criminal case. In such circumstances, the respective mandates of the Attorney General and the Director of Public Prosecutions must be clearly distinguished. As the Jam Willem Akster makes clear at paragraph 26: “We are of the view that the distinction between the Attorney General as provided in section 98 of the Republican Constitution and the DPP as provided in section 99 should be respected... When it comes to criminal prosecution, the DPP is responsible, and the Attorney General is the Government principal legal adviser whose duties as already stated include fostering rule of law and constitutionalism.” The above quotation from the Jam Willem Akster affirms that although both the Attorney General and the DPP institutionally operate within the Ministry of Justice premises, their constitutional functions are distinct. The DPP is tasked with conducting prosecutions and bears responsibility for criminal litigation, while the Attorney General is charged with upholding legal order and ensuring the constitutionality of state action. Where a criminal prosecution gives rise to a constitutional referral, it is the Attorney General, not the DPP, who bears the responsibility of assisting the Court in its constitutional deliberations. His interest lies in preserving the integrity of the legal system as a whole, not in securing a conviction. Taken together, these authorities establish a coherent and consistent framework: in constitutional referrals, particularly those involving the potential invalidation of legislation, the Attorney General must be notified, must adopt a non-partisan posture, and 25

76. 77, 78, 79, must endeavor to assist the Court. His duty is to the Constitution, not to the success of any party. This function is distinct from the roles of other participants in the litigation and must be respected in both form and substance throughout the proceedings. In practical terms, one would expect the Attorney General to present well-rounded written submissions and maybe refrain from presenting partisan oral arguments in the course of dealing with the constitutional referral. It's important to recall that the Attorney General holds a special role in constitutional matters, not as a typical party to the dispute, but as a constitutional officer whose responsibility is to assist the Court in understanding and resolving the legal issues at stake. His duty is to rise above partisanship and provide balanced, principled input that supports the constitutional process. In this case, however, some of the submissions made by the Attorney General seem to go beyond that neutral role, taking on a tone that is more adversarial than supportive. While it is within his right to participate, his contribution should ultimately serve the Court and the Constitution, not one party's success. In that vein, the Court notes with grave concern the striking similarities (sometimes reflected in verbatim reproductions) between the arguments put forward by the DPP as Defendant and the Attorney General as Interested Party. It would appear there was close collaboration between the two offices, which defeats the very purpose of involving the Attorney General whose proper role has been discussed in the preceding paragraphs. In that same spirit, it was rather interesting to receive from the Interested Party the purported

expert report prepared by Professor Chiwoza Bandawe on the psychological impacts of defamation. The purpose of the report which the Court allowed, was purportedly to highlight the psychological effect of defamation, albeit criminal, on the victim, as a justification for the retention of section 200. Without commenting much on that report, we have found it a rather curious oddity in addressing the fundamental question whether section 200 of the Penal Code passes constitutional muster. While the report may raise important social concerns, it does not assist with the legal analysis as framed in the issues identified in this decision. Indeed, the approach the Interested Party adopted in these proceedings does not seem to align with the stated policy of the Government as reported in the media, which matter 26

was raised in the course of oral argument but received no satisfactory response. The Media Institute of Southern Africa as reported on the Africa Lex website (<https://www.afticafex.org/freedom-of-expression/malawian-mps-decriminalise-insulting-the-president>), dated December 10, 2022 reports as follows: “We applaud government for repealing bad laws. Members of Parliament (MPs) on Tuesday, November 29, 2022 amended Section 4 of the Protected Flag, Emblems and Names Act of 1967 by removing the word ‘President’ from the Act. This means ‘insulting’ the ‘President’ is no longer a criminal offence under the Act. Flag, Emblems and some names remain protected from ‘insults’. Section 4 of the Act initially read: “Any person who does any act or utters any words or publishes or utters any writing calculated to or liable to insult, ridicule or to show disrespect to or with reference to the President, the National Flag, the Armorial Ensigns, the Public Seal, or any protected emblem or protected likeness, shall be liable to a fine of 1000 pounds and to imprisonment for two (2) years”. A number of Malawians have been jailed for allegedly insulting the President based on the Protected Flags, Emblems and Names Act. Malawi’s Minister of Justice Titus Mvalo told the media after the amendment that with the name President protected, the Act was criminalizing free speech which is inconsistent with democracy. The amendment comes a week after the MPs repealed sedition laws that also criminalized freedom of expression.” The rationale behind the amendment of the law aligns with the rationale expressed by the Claimants in support for the repeal or amendment of section 200 of the Penal Code. When the Court read out the media report to the Interested Party, they were not able to provide the Court with justifiable reasons for the different approach adopted in these proceedings. The Interested Party therefore failed to convince the Court of its neutral and objective defence of the Constitution in these proceedings. Do principles of constitutional interpretation support the constitutionality of section 200 of the Penal Code? 80. The Constitution sets out a clear framework for its own interpretation. Its supremacy is not merely formal but operational. Section 10(1) mandates that in the interpretation of all laws and in the resolution of political disputes, the provisions of the Constitution “shall be regarded as the supreme arbiter and ultimate source of authority.” 27

81. 82. 83. Section 10(2) further directs that in the application and formulation of any Act of Parliament, and in the application and development of the common law and customary law, “the relevant organs of State shall have due regard to the principles and provisions of this Constitution.” The interpretive function of the courts is given particular emphasis in section

11(1), which requires that: “appropriate principles of interpretation of this Constitution shall be developed and employed by the courts to reflect the unique character and supreme status of this Constitution.” Section 11(2) then outlines specific duties of the courts when interpreting constitutional provisions, including the promotion of democratic values, full regard for the Bill of Rights and the foundational constitutional principles, and reference to public international law and comparable foreign case law where applicable. The judiciary has long recognised that this interpretive framework imposes a duty to give effect to the Constitution’s foundational values. In *Chakuamba & Others v Attorney General & Others* (MSCA Civil Appeal 20 of 2000) [2000] MWSC 5, the Supreme Court of Appeal articulated the interpretive mandate under section 11 in the following terms: “Section 11 of the Constitution expressly empowers this court to develop principles of interpretation to be applied in interpreting the Constitution. The principles that we develop must promote the values which underlie an open and democratic society; we must take full account of the provisions of the fundamental constitutional principles and the provisions on human rights. We are also expressly enjoined by the Constitution that where applicable we must have regard to current norms of public international law and comparable foreign case law, We are aware that the principles of interpretation that we develop must be appropriate to the unique and supreme character of the Constitution. The Malawi Constitution is the supreme law of the country. We believe that the principles of interpretation that we develop must reinforce this fundamental character of the Constitution and promote the values of an open and democratic society which underpin the whole constitutional framework of Malawi. It is clear to us therefore that it is to the whole Constitution that we must look for guidance to discover how the framers of the 28

84. 85. 86. 87. Constitution intended to effectuate the general purpose of the Constitution. There is no doubt that the general purpose of the Constitution was to create a democratic framework where people would freely participate in the election of their government. It creates an open and democratic society.” The Court in the *Chakuamba* case rightly treated the Constitution not as an ordinary statute but as a living document animated by a democratic ethos. This understanding finds resonance in the reasoning of comparative courts, whose approaches Malawian courts are constitutionally encouraged to consider under section 11(2)(c). In *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391, the South African Constitutional Court expressed the comparative view that historical and contextual materials, including debates and preparatory works, may aid in understanding the values that shaped the constitutional text. The Court observed: “In countries in which the constitution is similarly the supreme law, it is not unusual for the courts to have regard to the circumstances existing at the time the constitution was adopted, including the debates and writings which formed part of the process.” Such an approach affirms that Constitutions are to be interpreted not only by reference to their literal text but also with sensitivity to the historical and societal conditions that prompted their adoption. As in the *Makwanyane* case (cited above), interpretive legitimacy arises not from abstract formalism but from alignment with the Constitution’s founding purpose and enduring

values. Within such a broad context, section 44(1) of the Constitution imposes a stringent threshold on limitations of rights. No restriction may be placed on the exercise of any right or freedom unless it is “prescribed by law, which [1 is] reasonable, recognized by international human rights standards and necessary in an open and democratic society.” Section 44(2) further prohibits any limitation that negates the essential content of a right. The language of necessity and proportionality reflects a deliberate intention by the framers to guard against arbitrary incursions on constitutional freedoms. In this context, 29

88. purposive and value-sensitive interpretation is not optional, it is constitutionally mandated. Finally, the significance of international human rights instruments in Malawian constitutional interpretation is buttressed by section 211, which provides that any international agreement ratified by an Act of Parliament forms part of the law of Malawi. Courts are thus required to consider international norms not as persuasive reference points alone, but as binding components of the domestic legal framework when interpreting constitutional rights. Taken together, these provisions and authorities demonstrate that the Constitution demands a mode of interpretation that is purposive, holistic, historically informed, and aligned with democratic values which on any reading fail to support any finding other than that section 200 of the Penal Code fails to live up to constitutional standards. We believe that the penal provision fails the constitutional test under section 44(2) of the Constitution and as such cannot be redeemed by uncritical application of anachronistic case law and naive consideration of relevant principles in international human rights standards. Does section 200 of the Penal Code unjustifiably limit the right to freedom of expression as protected under section 35 of the Constitution? 89. 90. In addressing this question, recourse must be had to the impugned provision, section 200 of the Penal Code which reads as follows: “Any person who, by print, writing, painting, effigy, or by any means otherwise than solely by gestures, spoken words, or other sounds, unlawfully publishes any defamatory matter concerning another person, with intent to defame that other person, shall be guilty of the misdemeanour termed “libel.” Section 35 of the Constitution provides that: “Every person shall have the right to freedom of expression.” The Claimant challenges the constitutionality of section 200 of the Penal Code, which creates the offence of criminal defamation. He argues that the provision unjustifiably limits the right to freedom of expression, protected under section 35 of the Constitution, and that the restriction cannot be justified under section 44(2). 30
91. 92. 93. 94. This right, like all rights under the Constitution, may be limited, but only under strict conditions. Section 44(1) provides that any restriction on constitutional rights must be: “prescribed by law, which [is] reasonable, recognized by international human rights standards and necessary in an open and democratic society.” Section 44(2) adds that such laws must not: “negate the essential content of the right or freedom in question and shall be of general application.” What emerges from the constitutional framework is a high threshold: for any law to justifiably limit freedom of expression, it must be lawful, reasonable, rights-compatible, and truly necessary in a democratic society. It must also preserve the core of the right and apply equally. There is no dispute that section 200 of the

Penal Code is a law properly enacted by Parliament. The issue is whether it passes the remaining tests. The Claimant argues that it does not, particularly because Malawi already has civil remedies for defamation that can offer redress without criminalizing speech. In his view, once civil remedies are available, resorting to criminal penalties is excessive and disproportionate. This position is supported by regional human rights instruments. The Declaration of Principles on Freedom of Expression and Access to Information in Africa (2019), under Principle 22(2), provides that: “States shall repeal criminal defamation laws or insult laws which impede freedom of expression and should not prohibit speech that merely lacks civility or respect.” The African Court on Human and Peoples’ Rights has taken a similar view. In *Lohé Issa Konaté v Burkina Faso* (cited above), it held that criminal sanctions for defamation, especially imprisonment, are disproportionate and not necessary in a democratic society. The Court found that civil remedies are sufficient to protect reputation and that criminal defamation laws are likely to discourage public interest speech, particularly investigative journalism. The Attorney General and the Defendant oppose this position. They argue that freedom of expression cannot be read in isolation. The Constitution must be interpreted as a whole.; they cite section 19 (which protects human dignity) and section 31

2.1(which protects privacy) of the Constitution as being implicated in the present analysis pertaining to the right to freedom of expression guaranteed under section 35. In their view, section 200 of the Penal Code serves a legitimate purpose by protecting these rights (of dignity and privacy) and maintaining public order. They also argue that criminal defamation acts as a deterrent, especially where reputational harm is serious and civil remedies may be ineffective, for instance, where the wrongdoer is untraceable or without means. 95. In support of their position, they rely on the decision in *Nseula v Attorney General* and 96. 97, 98. Another (cited above), where the Supreme Court of Appeal stated: “No constitutional provision should be interpreted in such a way as to destroy another provision. The Constitution must be read as a whole in order to maintain its internal consistency and to give effect to its underlying values.” {n the mind of the Court, the principle of internal consistency and philosophical coherence within the various aspects of the Constitution is quite important. Thus, the right to freedom of expression cannot be allowed to completely override the rights to dignity and privacy. But that, in our view, is a different proposition than to suggest that criminal defamation laws are the only or best way to strike that internal equilibrium between those rights. What is critical for the present analysis is whether the means chosen to protect those other rights are the least restrictive available, and whether they preserve the essential content of freedom of expression. The Court notes that civil law in Malawi already allows those who are defamed to sue for damages, demand retractions, or seek injunctive relief. These remedies offer flexibility and compensation without the punitive effects of a criminal conviction. Unlike criminal sanctions, they do not carry the risk of imprisonment or the chilling effect that often discourages legitimate expression. The Supreme Court of Appeal in *Chakuamba v Attorney General and Others* (cited above) captured the values at the heart of this debate when it held: “We believe that the principles of interpretation that we develop must reinforce this fundamental character of the Constitution and promote the values of

an open and democratic society which underpin the whole constitutional framework of Malawi.”
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99. A democratic society thrives on open discussion, critical debate, and public accountability. If criminal defamation laws suppress these values, they must be viewed with constitutional skepticism, especially where less restrictive options, like civil remedies, are available and effective. 100, This approach is consistent with comparative jurisprudence. In *S v Makwanyane and Another* (cited above), the South African Constitutional Court stated: “In countries in which the constitution is similarly the supreme law, it is not unusual for the courts to have regard to the circumstances existing at the time the constitution was adopted, including the debates and writings which formed part of the process.” This emphasis on the founding spirit of the Constitution is instructive. Malawi's Constitution was adopted to break away from an authoritarian past and to establish a democratic society grounded in human rights. That historical context reinforces the need to interpret section 35 generously, and to subject restrictions like section 200 to the highest constitutional scrutiny. Thus, “Until the end of the single party era in 1994 Dr Hastings Kamuzu Banda and his Malawi Congress Party (MCP) maintained control partly by imposing on the nation and its people a culture of silence! People were afraid to speak against the government and censored themselves in word and deed. A single government-owned radio station pumped out only what the President wanted the people to hear. A monolithic newspaper publishing house was run by and for the party's leadership. Censorship laws were used to protect the nation from subversive ideas (such as those found in George Orwell's *Animal Farm* or Simon and Garfunkel's *Cecilia*). Poets and other free thinkers who dared to write and speak aloud were imprisoned or murdered...” At *The Crossroads: Freedom of Expression in Malawi: Final Report of the 1999 Article 19 Malawi Election Media Monitoring Report* (March 2000) (See also *Where Silence Rules: The Suppression of Dissent in Malawi* (New York: Africa Watch, October 1990)). 101. The approach adopted by the Constitutional Court in Zimbabwe in the case of *Nevanji Madanhire v Attorney General* (Zimbabwe) Const. Application No CCZ 78/12 has been quite persuasive in our consideration of the issues herein. This decision struck down Zimbabwe's criminal defamation provision. In declaring the offence of criminal defamation unconstitutional and inconsistent with the protection of the right to freedom 33
102. 103. of expression under their old Constitution, the ConCouwt was of the opinion that the criminalization of defamatory statements lacked proportionality and was not a necessary means to protect the reputation, rights and freedoms of individuals. The Court further found the imposition of criminal sanctions against the publication of inaccurate or erroneous statements inherently carries the adverse effect of silencing the free flow of information on public matters. On November 6, 2011, the Standard Newspaper, an independent media outlet, published an article to the effect that a certain medical aid society was in financial distress and was failing to pay its employees. The editor was later arrested and charged under section 96 of the Criminal Law Code of Zimbabwe, which states that distributing false information with the intent to harm another's reputation constitutes criminal defamation and is punishable by a fine or up to two years' imprisonment. In *MISA-*

Zimbabwe and another-v-Minister of Justice et al, the above conclusion was affirmed and held to apply even under Zimbabwe's new constitution, The court focused on the historical origins of the offence and concluded it was a relic of monarchical insecurity rather than democratic necessity. In this Court's considered opinion, due to our shared colonial legacy with that jurisdiction, where section 200 of the Penal Code also prescribes imprisonment for political commentary, it is challenging to uphold the constitutional validity of such a law within an open and democratic society. In light of all the above, the Court finds that the continued existence of section 200 of the Penal Code fails to meet the standard set by section 44(2). Civil remedies for defamation remain available and effective. Criminalising speech, especially with the threat of imprisonment, is not the least restrictive option and cannot be said to be necessary in a democratic society. The limitation imposed by section 200 negates the essential content of freedom of expression and is therefore unconstitutional. We are fortified in our conclusion by the trend emerging from different jurisdictions regionally and internationally concerning the validity of such provisions within the context of protection of the right to freedom of expression in a democratic society. As has been demonstrated earlier, open and democratic societies thrive upon the freedom of citizens to share their opinions and discuss matters of public interest without the stifling inhibition that penal sanctions produce. Indeed, the democratic cornerstone of public accountability and openness requires a robust culture of inquiry and debate of issues that might be uncomfortable to 34

certain people, but to curtail such discourse by the instrument of criminal penalties would be excessive. Is section 260 of the Penal Code consistent with international human rights principles? 104. It is important to acknowledge the argument advocated by the Defendant and the 105. Interested Party and the reliance placed on decisions such as *Buwembo & Others v. Attorney General*, Constitutional Reference No. 1 of 2008 (Const. Ct. Uganda, Dec. 1, 2009), the Constitutional Court of Uganda upheld the constitutionality of section 179 of the Penal Code, which criminalizes libel. The petition was brought by four Daily Monitor journalists who were charged for publishing articles about the Inspector General of Government. They argued that criminal defamation violated Article 29(1)(a) of the Constitution, which guarantees freedom of expression. However, the Court found that protecting reputation serves both individual and public interest and is a justifiable limitation under Article 43. The Court reasoned that: "The continued existence of the parallel but distinct civil and criminal sanctions mean that while the victims of such wrongs may well deserve to be compensated, perpetrators who willfully and knowingly publish lies calculated to damage the public reputation of a member of a democratic society ought to be punished." The Court further held that freedom of expression does not extend to malicious falsehoods, stating: "Although it is important to recognize the right of the person defamed to sue for monetary damages it is equally if not more important that society discourage the intentional publication of lies calculated to expose another individual to hatred and contempt." The petition was dismissed and the trial ordered to continue. This Court finds the approach adopted in that jurisdiction to perpetuate or justify the principle of the chilling effect of criminal defamation legislation: we are persuaded that such a judicial approach does not accord

with the democratic aspirations of the people of Malawi. As we shall demonstrate in due course, one should not ignore the historical context within which our constitutional evolution emerged should inform how we interpret and enforce the human rights protections which our law provides against a political culture of suppression of dissent. 35

106. The approach of the court in Uganda should be contrasted with that of the East African 107. 108. Court of Justice with respect to similar laws from the neighboring jurisdiction: in *Media Council of Tanzania and Others v. Attorney General of the United Republic of Tanzania*, Reference No. 2 of 2017, East African Court of Justice (First Instance Division), Judgment of 28 March 2019, the East African Court of Justice (EACJ) held that several provisions of Tanzania's Media Services Act No. 12 of 2016 unjustifiably infringed the right to freedom of expression and therefore violated the Treaty for the Establishment of the East African Community. The application was brought by three Tanzanian non-governmental organizations; the Media Council of Tanzania, the Legal and Human Rights Centre, and the Tanzania Human Rights Defenders Coalition- who argued that the Act criminalized speech, imposed burdensome restrictions on the press, and gave the state wide powers over media operations, all of which were incompatible with Tanzania's obligations under the Treaty. The applicants contended that the Act breached Articles 6(d), 7(2), and 8(1)(c) of the Treaty, which require Partner States to uphold the principles of democracy, rule of law, transparency, accountability, and human and peoples' rights in line with the African Charter on Human and Peoples' Rights. The Court reaffirmed its earlier jurisprudence that freedom of expression is fundamental to democratic governance. Referring to its decision in *Burundian Journalists Union v. Attorney General of the Republic of Burundi*, Reference No. 7 of 2013, the Court stated: "There is no doubt that freedom of the press and freedom of expression are essential components of democracy." The Court evaluated the challenged provisions using the three-part test derived from international human rights law: legality, legitimacy, and proportionality. Citing *R v. Oakes* [1986] 1 SCR 103 and *CORD v. Kenya*, High Court Petition No. 628 of 2014, the Court summarized the applicable standard as follows: "Is the limitation one that is prescribed by law? It must be part of a Statute, and must be clear, and accessible to citizens so that they are clear on what is prohibited. (b) Is the objective of the law pressing and substantial? It must be important to the society. (c) Has the State, in seeking to achieve its objectives, chosen a proportionate way to do 36

so? This is the test of proportionality relative to the objectives or purpose it seeks to achieve." Applying this standard, the Court first found section 7(3) of the Act vague and imprecise. The provision prohibited publication of content that could "undermine national security," "impede due process," or constitute "hate speech," among others. The Court held: "The word 'undermine' which forms the basis of the offence, is too vague to be of assistance to a journalist or other person who seeks to regulate his or her conduct... 'impede' is vague and would not meet the UN Human Rights Committee's guidance that 'laws must contain rules which are sufficiently precise, to allow persons in charge of their application to know what forms of expression are legitimately restricted and what forms of expression are unduly restricted.'" "Tn addition, the term 'hate speech' is not defined which means the provision is vague and potentially too broad...

‘unwarranted invasion’ also in our view fails the test of clarity and precision.” 109. Turning to criminal defamation, the Court rejected Tanzania’s justification that it was 110. necessary to protect the honour of national founders or reputations of individuals. Referring to *Federation of African Journalists v. Republic of The Gambia*, ECW/CCJ/JUD/04/18 and *Kimel v. Argentina*, IACHR Series C No. 177 (2008), the Court emphasized the chilling effect of criminal penalties. It held: “To meet the criterion of proportionality, the mode of restriction adopted should “be the least intrusive protective function’... criminal sanctions must be a measure of last resort or ultimum remedium.” “Section 35 which defines defamation is not sufficiently precise to enable a journalist or other person to plan their actions within the law... The offence created by Section 35 falls short on clarity.” The Court found similar defects in the provisions governing seditious publications and the publication of false news. It held that section 52 and 53, which criminalized intentions to “bring into hatred or contempt” or “excite disaffection,” failed the legality test because they were overly subjective. The Court held that: “The definitions of sedition fail the test of certainty required in the first limb of the test. They are hinged on the possible and potential subjective reactions of audiences to whom the publication is made.” 37

111. On the issue of media accreditation, the Court accepted that regulation is not per se objectionable but found that the provisions in sections 19 to 21 imposed disproportionate limitations on media freedom. The Court was particularly critical of sections 58 and 59, which allowed the Minister “in his absolute discretion” to prohibit importation or publication of any material considered a threat to public interest, national security, or safety. The Court rejected the Attorney General’s argument that judicial review was sufficient to cure the provision’s vagueness, holding instead: “This submission does not answer the question of the subjectivity of the Minister’s judgment in deciding when to exercise the powers, and more importantly, that this subjectivity denies persons the precision and certainty that would enable them to plan their actions.” “The absolute nature of the discretion granted to the Minister, as well as the lack of clarity on the circumstances in which such Minister would impose a prohibition, in our view, makes the provision objectionable relative to the rights restricted.” 112. Ultimately, the Court held that sections 7(3)(a) through (j); 19; 20; 21; 35; 36; 37; 38; 39; 40; 50; 52; 53; 54; 58; and 59 violated the Treaty. Sections 13 and 14 were found not to violate the Treaty. The Court directed Tanzania to take all necessary legislative measures to bring the Act into compliance with its regional obligations. In our view, such persuasive jurisprudence from a regional body to which Uganda is a party places the decision in *Buwembo & Others* (above) in its proper light in so far as its compatibility (or otherwise) with human rights protection trends are concerned. If such limitation is established, does it satisfy the test set out in section 44(2) of the Constitution? 113. Section 44(2) of the Constitution provides as follows: “Without prejudice to subsection (1), no restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those prescribed by law, which are reasonable, recognized by international human rights standards and necessary in an open and democratic society.” 38

As pointed out in the preceding paragraphs, a similar analysis undertaken by the East African Court of Justice established that in order to satisfy this test, not only is the limitation to come in a statute (as does section 200) but it must serve a pressing and substantial society need and more importantly, the State must choose the most proportionate means to achieve its intended purposes. In our understanding, there is no disputing that people living in a democratic ought to be protected from malicious utterances and publications that would harm their reputation and even cause considerable emotional or psychological distress. However, as the jurisprudence which has been elaborated earlier demonstrates, for an open and democratic society to thrive, there is a need to guard jealously the freedom to share ideas and debate issues of common interest without the fear of criminal sanctions; in that sense, therefore, the purported limitation of section 35 of the Constitution through section 200 of the Penal Code (which was placed on our statute books long before our current constitutional dispensation) is neither reasonable nor necessary in our current democratic set up. Does civil defamation law constitute a sufficient and less restrictive means for the protection of individual reputation, thereby rendering section 200 constitutionally redundant? 114. On careful consideration of the matter, our Court has reached the firm conclusion that section 200 of the Penal Code is not the only vehicle through which one whose reputation has been harmed might seek an appropriate and adequate legal remedy. As the Interested Party acknowledged in the course of oral argument, one chief reason for invoking the criminal law would be to threaten anyone who might be inclined to publish such harmful content from even contemplating such a course of action. Such sentiments betray the real motivation for the State's vigorous efforts to retain section 200 on our statute books. In a free and democratic society, the law should not be used as an instrument of oppression or to depress and suppress dissenting or disagreeable voices and opinions. Democratic debate and civic interrogation and exposure of possible abuse of public power might create uncomfortable experiences sometimes, but even where in the course of such legitimate pursuit of truth mistakes occur and harm is occasioned, we believe the civil law remedies would adequately compensate one who has no desire to choke democratic discourse (as might occur if we insist on the restrictive penal defamation provisions). To 39

repair reputational harm, we need not sanction disproportionate and emotive responses. The lawful way in an inclusive society should always endeavor to be evenhanded and deliberately measured. Is the process of criminal prosecution for defamation necessary and does it impose disproportionate burdens on the exercise of freedom of expression, even where no conviction results? 115. 116. 117. The comparative jurisprudence from African and regional courts is conclusive that criminal defamation laws, especially when accompanied by custodial sentences and vague statutory language, are increasingly seen as incompatible with democratic ideals and the protection of fundamental rights. This judicial trend is grounded in a commitment to freedom of expression as a cornerstone of democracy, and in a recognition of the chilling effect that criminal sanctions have on public discourse. In *Lohe Issa Konaté v Burkina Faso* (cited above), the African Court on Human and Peoples' Rights held that imprisoning a journalist for defamation, even where the statements were false, was a disproportionate restriction on freedom of expression. The Court stated emphatically that freedom of expression is "a cornerstone of

democracy and a necessary condition for the realization of transparency and accountability in public affairs.” In finding Burkina Faso’s criminal sanctions excessive, it declared that “the custodial sentence of the Applicant for defamation and the accompanying fine are disproportionate,” and that the State had violated Article 9 of the African Charter and Article 19 of the ICCPR. The Court’s remedy was not only compensatory but structural: it ordered legislative reform to decriminalize defamation. Similarly, in *Federation of African Journalists v The Gambia* (cited above), the ECOWAS Court underscored the impermissibility of criminal provisions that are vague, excessive, and open to abuse. It held that “the existence of: criminal defamation and insult or sedition laws are indeed unacceptable instances of gross violation of free speech and freedom of expression,” and that their continued use “has a chilling effect that may unduly restrict the exercise of freedom of expression of journalists.” The Court reiterated that restrictions on free speech must be “couched in the narrowest possible terms” and ordered the decriminalization of the offending laws. 40

118. 119. 120. 121, National courts have followed suit. The Kenyan High Court in *Okuta & Nijeru v Attorney General* (cited above) found that criminal defamation served no legitimate public interest and was “absolutely unnecessary,” especially in the presence of civil remedies. Justice Mativo eloquently wrote: “Freedom of speech and expression in a spirited democracy is a highly treasured value... it permits argument, allows dissent to have a respectable place, and honours contrary stances.” This emerging consensus, however, is not universal. The South African Supreme Court of Appeal in *Hohe v The State* (cited above) upheld the common law crime of defamation, emphasizing the need to balance freedom of expression with the right to dignity. The Court reasoned that the criminal standard of proof and existing safeguards render the offence justifiable in extreme cases where civil remedies are insufficient, particularly where the accused deliberately conceal their identity. Likewise, in *Buwembo & Others v Attorney General* (cited above), the Ugandan Constitutional Court upheld criminal libel as a legitimate tool to protect public reputation. The Court held: “The continued existence of the parallel but distinct civil and criminal sanctions mean that... perpetrators who willfully and knowingly publish lies... ought to be punished.” It viewed reputation as a public good whose protection can, in some cases, justify criminal prosecution. Our Court respectfully finds these decisions to be out of step with the emerging trends towards stronger and better protection of freedom of expression, especially in the historical context of repressive political regimes, which our jurisdiction is evidently emerging from. Finally, the East African Court of Justice in *Media Council of Tanzania v Attorney General of Tanzania* (cited above) offered a comprehensive denunciation of vague and overbroad speech laws. The Court found that the Media Services Act’s use of imprecise terms like “hate speech,” “impede due process,” and “undermine national security” failed the test of legality. It emphasized that “criminal sanctions must be a measure of last resort or ultimum remedium,” and that unclear laws delegating unfettered discretion to ministers violate rule of law standards. It ultimately struck down over twenty provisions. The comparative analysis reveals a significant jurisprudential shift: criminal defamation is increasingly seen as an outdated, excessive response to reputational harm, particularly

when civil remedies are available. Courts across Africa and regional bodies have 41

122. 123. emphasized that democratic societies must tolerate robust, even offensive, speech, particularly about public figures, and that the burden of protecting reputation must not come at the expense of silencing dissent. Where criminal defamation survives scrutiny, it is only in narrowly tailored and exceptional cases, with stringent safeguards to prevent abuse. The constitutional validity of such laws must therefore be assessed through the lens of necessity, proportionality, and their real-world impact on public discourse. In the case of *Konate v Burkina Faso* (Application No. 004/2013) [2013] AfCHPR 39 (4 October 2013) the African Court on Human and Peoples' Rights considered an application by Mr. Konaté, a journalist sentenced to one year in prison and heavy fines for criminal defamation. He challenged the sentence as a violation of his right to freedom of expression under Article 9 of the African Charter and Article 19 of the ICCPR. The Court held that the custodial sentence and excessive fines imposed for defamation were disproportionate and incompatible with a democratic society's commitment to free speech. The Court emphasized that while protection of reputation is legitimate, criminal sanctions, particularly imprisonment, have a chilling effect on journalistic freedom and should be reserved only for extreme circumstances. It found that Burkina Faso had violated Mr. Konaté's rights and ordered the State to amend its laws and compensate him. The case marked a significant turning point for media freedom across Africa, establishing that civil remedies are more appropriate in defamation matters than criminal punishment. The African Court's decision in *Lohe Issa Konaté v. Burkina Faso* (cited above) was grounded in the principle that criminal penalties for defamation, especially custodial sentences, constitute a disproportionate interference with the right to freedom of expression and are incompatible with democratic values. First, the Court affirmed that freedom of expression is not only a personal right but a structural pillar of democracy, stating that it is "a cornerstone of democracy and a necessary condition for the realization of transparency and accountability in public affairs." This foundational view shaped the Court's conclusion that any restriction on expression must meet strict standards of legality, necessity, and proportionality. Burkina Faso's criminal defamation regime failed that test because the penalties imposed were unduly harsh. The Court found that "the custodial sentence of the Applicant for defamation and the accompanying fine 42

124, are disproportionate and therefore violate Article 9 of the Charter and Article 19 of the ICCPR." The Court underscored that civil remedies provide a less restrictive and more appropriate avenue for protecting reputational interests. It expressly stated, "the legitimate aim of protecting the honour and reputation of individuals can be achieved through civil sanctions, which are more proportionate and less harmful to the right to freedom of expression." Furthermore, the Court cautioned that criminal punishment for speech causes a chilling effect, thereby suppressing open public discourse. This was captured in its finding that: "The imposition of a prison sentence for defamation has a chilling effect that discourages critical reporting by journalists and undermines public debate." 125. Lastly, the Court made it clear that states have a positive obligation to align domestic 126. legislation with human rights standards. It therefore

ordered legislative reform, by insisting that “Burkina Faso must amend its legislation on defamation to bring it in conformity with its obligations under the Charter and other international human rights instruments.” In summary, the ratio decidendi of the judgment is that imprisonment for defamation is a disproportionate measure that violates the right to freedom of expression, particularly when less intrusive remedies, such as civil damages, are available and sufficient in a democratic society. In *Federation of African Journalists & Ors v. President of the Republic of The Gambia*, ECOWAS Court (Aug. 14, 2018), the ECOWAS Court found that the offences of sedition, criminal defamation, and false news under The Gambia’s Criminal Code violated international protections for freedom of expression. The case was brought by four exiled Gambian journalists and the Federation of African Journalists, who argued that these laws were overly vague, punitive, and used to suppress critical journalism. The Court agreed, holding that the provisions were too broad, subjective, and had a chilling effect on free speech. It emphasized that such criminal laws were not necessary in a democratic society, and that their continued existence imposed an excessive burden on journalists. The Court ordered The Gambia to repeal or amend the laws and awarded compensation to the journalists, including higher damages for those subjected to torture. 43

127. 128. 129. 130. 131. The judgment also confirmed violations of the rights to liberty, freedom of movement, and the prohibition against torture. The decision is a landmark ruling in West African human rights jurisprudence, reinforcing that freedom of expression must be protected from vague and excessive criminal sanctions that deter open public debate. The ECOWAS Court’s decision rested on the finding that criminal sanctions for speech-based offences are inherently disproportionate and incompatible with democratic values, especially where such laws are vague or overly broad. The Court held that freedom of expression is central to democracy, stating: “The right [to freedom of expression] is not only the cornerstone of democracy, but indispensable to a thriving civil society.” The ECOWAS Court recognized that freedom of expression may be limited under international law but emphasized that such limitations must be narrowly tailored. The impugned Gambian provisions failed this standard because: “Restrictions on the freedom of speech must be couched in the narrowest possible terms to enable speakers to appreciate the boundary between legality and illegality in their speeches/actions.” In assessing the criminal provisions, the ECOWAS Court found their wording excessively vague and open-ended, stating: “The definitions were so broad as to be capable of diverse subjective interpretations... [this] indeed amounts to censorship on publication.” Further, the Court acknowledged the broader harm caused by these laws on journalism, noting: “The existence of criminal defamation and insult or sedition laws are indeed unacceptable instances of gross violation of free speech and freedom of expression.” The ECOWAS Court explicitly recognized the chilling effect caused by these provisions: “The criminal sanctions for sedition, defamation, and false news... has a chilling effect that may unduly restrict the exercise of freedom of expression of journalists.” 44

132. 133. 134. 135. 136, The Court stressed the disproportionality of such punishments: “The criminal sanctions imposed on the applicants are disproportionate and not necessary in a democratic society where freedom of speech is a guaranteed right under the international provisions cited.” The Court concluded that The Gambia’s criminal speech laws violated core international human rights obligations: “The provisions cast excessive burden upon the applicants in particular and all those who would exercise their right of free speech and violates the enshrined rights to freedom of speech and expression under Article 9 of the African Charter, Article 19 of the ICCPR and Article 19 of UDHR.” As a result, it ordered comprehensive legal reform: “The legislations on sedition, criminal libel, defamation and false news publication of The Gambia be reviewed and decriminalized to be in conformity with the international provisions on freedom of expression..” This judgment thus affirms that criminal laws which restrict expression must be repealed or reformed if they are vague, excessive, or have a chilling effect, as they infringe the core right to freedom of expression in a democratic society. In *Jacqueline Okuta & Jackson Njeru v. Attorney-General & 2 Others*, HCCC Petition No. 397 of 2016 (Kenya High Court, Feb. 6, 2017) the High Court of Kenya declared section 194 of the Penal Code, which criminalized defamation, unconstitutional. The Petitioners had been charged under this law for posts made on Facebook and challenged the provision on the grounds that it unjustifiably infringed their right to freedom of expression under Article 33 of the Constitution. The Court ruled that criminal defamation was not a reasonable or justifiable restriction under Article 24 of the Constitution and that it served a private interest rather than a legitimate public interest. The Court applied a proportionality test and found that the criminal offence imposed excessive burdens, including arrest, prosecution, and imprisonment, which had a chilling effect on speech. Furthermore, it held that civil remedies were sufficient to protect reputational interests. The Court concluded that section 194 was “a disproportionate 45
137. 138. instrument” for protecting reputation and that it was “absolutely unnecessary to criminalize defamatory statements.” Accordingly, it declared the section unconstitutional and invalid. The judgment marked a significant affirmation of free speech rights in Kenya and aligned the country with international and comparative jurisprudence on decriminalizing defamation. The Court held that section 194 of the Penal Code could not survive constitutional scrutiny because it unjustifiably infringed on the right to freedom of expression. The foundation of the Court’s reasoning was the high value placed on freedom of expression in a democratic society stating: “Freedom of speech and expression in a spirited democracy is a highly treasured value. The media, [a]uthors, philosophers and thinkers have considered it as a prized asset to the individuality and overall progression of a thinking society, as it permits argument, allows dissent to have a respectable place, and honours contrary stances.” Applying Article 24 of the Constitution, which allows for limitations of rights only if they are “reasonable and justifiable in an open and democratic society,” the Court held that criminal defamation failed this test: “Defamation of a private person by another person cannot be regarded as a ‘crime’ under the constitutional framework.” 139. The Court emphasized that the law must pursue a proper public purpose

and that its restrictions must be proportionate: “Criminal defamation aims to protect individual interest while the limitations under Article 24 seek to protect public interest as opposed to personal or individual interests.” 140. The Court found that criminal defamation had adverse effects on free expression, noting that: “This had a stifling or chilling effect on freedom of expression.” The chilling effect was exacerbated by the “drastic” sanction attached to the law: “The drastic maximum sentence of two years in prison.” 46

141. 142. 143. 144. Ultimately, the Court concluded that the offence was not the least restrictive means of protecting reputation, given that civil remedies were available: “It is absolutely unnecessary to criminalize defamatory statements.” And finally Section 194 was a disproportionate instrument for achieving the intended objective of protecting the reputations, rights and freedoms of others. On that basis, the Court declared section 194 unconstitutional and invalid. In *Hoho v The State* (493/05) [2008] ZASCA 98 (17 September 2008), the Supreme Court of Appeal of South Africa upheld the constitutionality of the common law offence of criminal defamation. The appellant, Luzuko Kerr Hoho, a former parliamentary researcher, had been convicted on 22 counts of criminal defamation for publishing anonymous leaflets accusing public officials of corruption and other misconduct. He challenged the offence as unconstitutional, arguing that it infringed his right to freedom of expression. The Court dismissed the appeal, finding that criminal defamation still exists in South African law and that it does not violate the Constitution. The Court held that the crime contains safeguards such as the requirement to prove both unlawfulness and intention beyond a reasonable doubt. It emphasized that freedom of expression must be balanced against the right to dignity. Ultimately, the Court found that exposing a person to a criminal conviction for defamatory statements made unlawfully and intentionally “constitutes a reasonable and not too drastic a limitation” on the right to free speech. The Court concluded that in certain extreme cases, criminal defamation is justified, especially where civil remedies would be inadequate, as was the case here where the perpetrator was initially unknown. The Court upheld the constitutionality of criminal defamation on the basis that it is a lawful, reasonable, and proportionate limitation on the right to freedom of expression, especially in cases where the defamatory publication is made intentionally and unlawfully. First, the Court confirmed the legal definition of the offence: “The crime of defamation consists of the unlawful and intentional publication of matter concerning another which tends to injure his reputation.” 47
145. It clarified that this offence excludes justified speech: “This excludes lawful publications, such as truthful defamatory statements published in order to benefit the public, or [that] constitutes fair comment or is published on a privileged occasion.” 146. The Court argued that the requirement to establish both intention and unlawfulness to a criminal standard provided some safeguard in the use of the criminal defamation law. Thus, the Court found that criminal defamation survives constitutional scrutiny because it is reserved for cases involving serious reputational harm, where intention and unlawfulness is clearly established, and civil remedies are inadequate. We have found the approach of the Supreme Court of South Africa to be rather unpersuasive as it seems to deliberately underplay the

chilling impact of such laws on freedom of expression generally. In any event, the Supreme Court appears to suggest that such laws should be invoked especially in scenarios where the publisher conceals his identity (and apparently is unavailable to answer any civil court proceedings). It even suggested that the right to sue for common assault does not extinguish the need for the criminal offence of the same description. 147. | The comparison the Supreme Court made between common assault and defamation while interesting represents a rather misleading oversimplification of complex constitutional issues. In all earnestness, no serious jurist would argue that we need to protect the right of anyone to exercise physical force against another in a society founded on human dignity and substantive lawfulness, which explains why the use of criminal sanctions alongside civil law remedies against common assault is fundamentally justifiable. In contrast, the discussion around freedom of expression underscores the essential instrumentality of such a right to establish and promote a democratic society. Uncircumscribed limitation of such a foundational right to a democratic society would be inimical to the very existence of a free and open society whose basic currency of exchange is free flow of information, ideas and thoughts; this democratic imperative necessitates the vigilant opposition to any attempts to whittle down that right as that would undermine democracy as a foundation for inclusive society. In that sense, it is quite unfortunate to draw simplistic comparisons between common assault and criminal defamation. Constitutional provisions must be interpreted 48

and applied within the socio-political and historical contexts within which they have been developed. Encroachments on the right to freedom of expression would easily erode the foundational tenets of open debate and civic criticism of public actors and others. One wonders if the outcome might have been different had the matter been litigated before the Constitutional Court (as opposed to the Supreme Court) in South Africa. SUMMARY OF FINDINGS AND CONCLUSIONS 148, 149. In view of all the authorities cited above, this Court finds, in keeping with the decision in *Nevanji Madanhire v Attorney General (Zimbabwe)* Const. Application No CCZ 78/12 in which the Zimbabwe Constitutional Court struck down Zimbabwe's criminal defamation provision being of the opinion that the criminalization of defamatory statements lacked proportionality and was not a necessary means to protect the reputation, rights and freedoms of individuals. The Court further found the imposition of criminal sanctions against the publication of inaccurate or erroneous statements inherently carries the adverse effect of silencing the free flow of information on public matters. The court's analysis focused on the historical origins of the offence and concluded that it was a relic of monarchical insecurity rather than democratic necessity. Considering the similarity between the impugned provision and Malawi's section 200 of the Penal Code as well as all the other reasons discussed above, section 200 of the Penal Code does not stand up to Constitutional muster and is hereby struck down. By expressly advocating the retention of section 200 of the Penal for its chilling effect, the Interested Party intends to take the country down an undemocratic era in which human rights and especially the right to freedom of speech were not recognized. This is inconsistent with the Constitution, and the Court cannot countenance such deliberate regression. Three decades ago, the people of Malawi adopted a constitutional order that sought to curtail the abuses of the past

and entrench protections that would prevent their society from similar legal but illegitimate repression. “Until the end of the single party era in 1994 Dr Hastings Kamuzu Banda and his Malawi Congress Party (MCP) maintained control partly by imposing on the nation and its people a culture of silence! People were afraid to speak against the government and censored themselves in word and deed. A single government-owned radio station pumped out only what the President wanted the people to hear. A monolithic newspaper publishing house was run by and for 49

the party’s leadership. Censorship laws were used to protect the nation from subversive ideas... Poets and other free thinkers who dared to write and speak aloud were imprisoned or murdered...” At The Crossroads: Freedom of Expression in Malawi: Final Report of the 1999 Article 19 Malawi Election Media Monitoring Report (March 2000). There is a clear acknowledgement of this oppressive history as demonstrated in paragraph 79 above, where similar anachronistic laws were repealed in November 2022. CONCLUSION 150. 151. 152. 153. This Court has considered the constitutional challenge to section 200 of the Penal Code in light of the principles underlying Malawi’s constitutional democracy, including the centrality of freedom of expression, the need to protect individual dignity and reputation, and the requirement that any limitation of fundamental rights be lawful, necessary, and proportionate in a democratic society. At the heart of this matter lies the tension between two important values: the freedom to speak, to criticize, and to participate in public discourse, and the right of individuals to enjoy their reputation free from malicious harm. The Court has no doubt that both values are protected by the Constitution and must be given effect in a manner that maintains their essential character. The task before the Court has therefore not been to prioritize one right over another, but rather to assess whether the means chosen by the Legislature to protect reputation, namely, the criminalization of defamatory speech, satisfy constitutional standards. The Court finds that they do not. Section 200, as currently framed, imposes criminal liability for defamation without clear safeguards to ensure that it is only applied in the most serious cases. It does not distinguish between deliberate and negligent speech, between matters of public interest and private dispute, or between factual reporting and malicious falsehood. Nor does it require proof of actual harm or that civil remedies would be inadequate. This breadth creates the real risk of arbitrary enforcement and unjustified interference with public discourse, especially in a context where criminal prosecution is initiated by the State. Moreover, the existence of civil remedies for defamation provides a less restrictive and more proportionate alternative for individuals seeking redress. In civil proceedings, the 50

154. 155. 156. 157. individual retains control of the process, the threshold of proof is lower, and the remedies available, such as damages or retractions, adequately protect reputational interests without the added consequences of a criminal record, imprisonment, or state-led censorship. While the Court acknowledges that the protection of reputation is a legitimate aim and may, in principle, justify some restriction on speech, that restriction must meet the test of proportionality required under section 44 of the Constitution. The use of the criminal law, especially with its attendant sanctions, must be a measure of last resort, not the first line of defence. The chilling effect of criminal defamation laws on investigative journalism, dissenting voices, and public debate cannot be overlooked in a constitutional order that

embraces transparency, accountability, and participation. In this light, the Court finds that section 200 of the Penal Code fails the constitutional standard. It constitutes an unjustified limitation on the right to freedom of expression under section 35 and cannot be saved by section 44(1). The offence of criminal defamation, as presently defined, is neither necessary nor proportionate in a democratic society governed by the rule of law. Before we conclude, the Court would like to address the argument put forward by the Attorney General as Interested Party and the State, asserting that the Court should refrain from striking out Section 200 of the Penal Code due to its alleged inconsistency with the Constitution, as doing so would basically amount to judicial usurpation of legislative power. However, such a view ignores the judiciary's key role in constitutional governance. Firstly, it is vital to recognize the doctrine of separation of powers, which delineates the distinct functions of the legislative, executive, and judicial branches of government. While it is true that the legislature is tasked with enacting laws, the judiciary possesses the authority to interpret those laws and assess their compliance with the constitution. This judicial mandate to review legislation is not only a legitimate constitutional function but a necessary one, ensuring that legislative actions do not violate constitutional principles. Under the principle of separation of powers, parliament can make or unmake any law. However, this does not grant parliamentary enactments immunity from judicial 51

158. scrutiny. The courts have the power to review legislation, particularly when there are claims of constitutional inconsistencies. The landmark decision in *Gwanda Chakuamba v State* (Constitutional Case 5 of 2015) [2017] MWHC 953 unequivocally confirms the judiciary's authority to excise or invalidate unconstitutional provisions within a statute, such as section 200 of the Penal Code, without necessitating the annulment of the entire Penal Code. This is supported by the principle of severance, which the Court in *Gwanda* recognised as a legitimate aspect of judicial review. As the Court stated: "The application of the doctrine of severability or separability in the judicial review of legislation has the effect that if a particular provision is held to be unconstitutional, and that provision is independent of and severable from the rest, only the offending provision will be declared invalid." 159. The Constitutional Court further buttressed by citing the Irish decision in the *King v Attorney General* [1981] 1 LR 245 at 257, in which the Irish Supreme Court explained the power of severance which allowed Irish courts, particularly in relation to pre-Constitution laws, to excise unconstitutional parts of such laws and leave the remainder intact. In particular, the Irish Supreme Court held that: "The power of severance which is given to the Courts by Article 50, s. 1, requires that pre-Constitution statutory provisions which are inconsistent with the Constitution be held to have been put out of existence by the Constitution, but only to the extent of such inconsistency; thus enabling so much of such laws as are not tainted with inconsistency to be preserved in truncated form as laws which have not failed the test of constitutionality." 160. By extension such reasoning directly supports the argument that section 200 of the Penal Code can be struck out without undermining the Penal Code as a whole. The Court further clarified the guiding principle in determining when severance is appropriate, stating that: "A provision within the legislative power may be allowed to stand if

it is separable from the bad. But no provision, however unobjectionable in itself, can stand unless it appears both that, standing alone, the provision can be given legal effect and that the 32

legislature intended the unobjectionable provision to stand in case other provisions held bad should fall.” 161. Contrary to the arguments of the Attorney General, The removal of section 200 of the Penal is therefore not a usurpation by the Court of Parliament’s legislative function. By removing section 200 of the Penal Code, this Court is fulfilling its constitutional duty to eliminate provisions that conflict with the fundamental doctrine of constitutional supremacy. If the courts were to accept the AG’s argument uncritically, they would effectively abdicate their responsibility to uphold the Constitution and protect citizens from potentially oppressive or unlawful legislation. 162. The argument that the courts’ review of legislative provisions constitutes a usurpation of legislative power also fails to recognize the checks and balances that are inherent in a constitutional democracy. Judicial review acts as a safeguard against potential abuses of power by the legislature, ensuring that laws are not only enacted but also applied in a manner that is just and equitable. The courts serve as a crucial forum for individuals to challenge the legality of legislative provisions, thereby reinforcing the rule of law. 163. Additionally, the Attorney General’s argument overlooks the historical context in which constitutional referrals of this nature have evolved. English common law principles applied in constitutional referrals such as the *Gwanda v State* case (cited above) have long reinforced the necessity for judicial intervention when legislation conflicts with higher legal norms, including constitutional provisions. This is evident in cases where courts have invalidated statutes that were found to be incompatible with fundamental rights, thus affirming the Judiciary’s role as a guardian of the constitution. 164. In conclusion, we hold the view that the argument put forth by the Attorney General and the State that the review of legislative provisions such as section 200 of the Penal Code by the courts constitutes a usurpation of legislative function is fundamentally flawed. Courts have a legitimate and essential role in reviewing legislation to ensure its conformity with constitutional standards. This function is crucial for upholding the rule of law, protecting individual rights, and maintaining the delicate balance of power among the branches of government. By striking down 33

legislation that is inconsistent with the Constitution, the Courts are not overstepping their bounds but rather fulfilling their duty to uphold justice and the rule of law. FINAL ORDER 165, Section 200 of the Penal Code is hereby declared unconstitutional for violating section 35 of the Constitution of the Republic of Malawi for being unnecessary in an open and democratic society. a. The said provision is struck down with immediate effect and shall have no legal force or effect for being an excessive public law response to what should properly remain a civil law process. b. Anyone who has suffered injury to their reputation is at liberty to pursue civil remedies in appropriate cases of alleged defamation, but no person shall be prosecuted under section 200 from the date of this judgment. c. The parties shall bear their own costs. Pronounced in Open Court at Lilongwe on this 17th day of July 2025. Hon. Justice Dr. C. J. Kachale Coy Hon. Justice F. A. Mwale AWWLO.. Hon. Justice M.2E. G. Mvula 54

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