Dear Sirs,

**RE: Arrest of Tiwonge Chimbalanga and Stephen Monjeza**

I write, at the suggestion of the Director of Centre for the Development of People, with regards to the arrest of Tiwonge Chimbalanga and Stephen Monjeza on multiple charges of Unnatural Practices and Gross Indecency on Monday 28 December 2009. In this letter, The Equal Rights Trust – an independent international organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice – seeks to provide an expert opinion on this case for use by defence counsel.

In this submission, we present substantive legal arguments to show that **sections 153 and 156 of the Penal Code**, under which Messrs Chimbalanga and Monjeza and others have been charged, are contrary to:

1. The Constitution of the Republic of Malawi: in particular we will show that these sections are contrary to Article 20 (the right to equality) of the Constitution.


In so doing, we demonstrate that the arrest and charge of Messrs Chimbalanga and Monjeza violate their fundamental human rights, as guaranteed by both the Constitution of the Republic of Malawi and Malawi's international treaty obligations.

**Summary:**

The decision to prosecute Messrs Chimbalanga and Monjeza under sections 153 and 156 of the Penal Code constitutes discriminatory treatment of them on the grounds of their sexual orientation. Indeed, all applications of these articles of these sections of the Penal Code to prosecute actual and suspected gay men constitute discriminatory treatment in direct contravention of the prohibition of discrimination provided under Article 20(1) of the Constitution.

Sections 153 and 156 of the Penal Code state:
Section 153 “Unnatural offences”

“Carnal knowledge of any person against the order of nature” or permitting a male person to have carnal knowledge of [a male or female person] against the order of nature” - up to fourteen years imprisonment, with or without corporal punishment.

Section 156 “Indecent practices between males”

Gross indecency with another male person in public or private – up to five years imprisonment.”

While neither Section 153 nor Section 156 refer explicitly to homosexual sexual conduct, reports by domestic and international NGOs confirm that the two offences have been used to systematically criminalise private sexual conduct between gay men in Malawi. The Equal Rights Trust submits that these offences are used to target a certain class of people – gay men – and to subject them to arbitrary, unreasonable and unjustifiable discrimination within Malawian criminal law. In doing so, these sections of the Penal Code are applied in ways which (i) deny LGBT people their right to enjoy equal protection of the law; (ii) criminalise their ability to form private relationships; (iii) make it impossible for LGBT people to live their lives with dignity; and (iv) deny their inherent right to non-discrimination and equality. As we will argue below, these violations constitute a breach of the prohibition on discrimination provided by Article 20(1) of the Constitution.

1. The Constitution of the Republic of Malawi

Article 5 of the Constitution of the Republic of Malawi (the Constitution) states that the Constitution is the supreme law of Malawi and that any other law that is inconsistent with it shall be “invalid”. The Constitution provides a strong general commitment to equality for all people, beginning with Article 4 which states that “…all the peoples of Malawi are entitled to the equal protection of this Constitution, and laws made under it.” Article 12, which sets out the fundamental principles of the Constitution, makes plain the drafters’ commitment to protecting the equal dignity and rights of all Malawi’s people. Article 12(4) states:

“The inherent dignity and worth of each human being requires that the State and all persons shall recognize and protect fundamental human rights and afford the fullest

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1 Penal Code Cap. 7:01 Laws of Malawi, as found on the website of the International Lesbian, Gay, Bisexual, Trans and Intersex Association, accessible at: http://ilga.org/ilga/en/countries/MALAWI/Law


3 Ibid
protection to the rights and views of **all individuals, groups and minorities** whether or not they are entitled to vote.” [Emphasis added]

Most notably, the Constitution carries forth this protection of equal dignity through the specific delineation of the fundamental right to equality in Article 20.

### 1.1. The right to equality

Article 20(1) of the Constitution provides a general prohibition of discrimination and a guarantee of equal protection applicable to all persons. It states:

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

The Article provides a broad protection from discrimination, with two elements. The first part of Article 20(1) (“Discrimination of persons in any form is prohibited”) provides a principled, substantive prohibition of discrimination with general application. In line with the spirit expressed in Article 12(4), this prohibition reveals a strong general commitment to prohibiting discrimination. The second part provides a list of specified grounds on which discrimination is prohibited. Crucially, the inclusion of the phrase “other status” at the end of this list means this is an indicative, rather than prescriptive list, an approach referred to as "open list".

Most jurisdictions have adopted a variant of one of two broad approaches when setting the personal scope of the prohibition of discrimination. The first is termed a closed-list approach. It narrowly construes the right to equality so it applies to a limited range of protected grounds or respective personal characteristics, such as race, sex or disability, on the basis that these characteristics have historically resulted in discrimination and victimisation against such classes of individuals. While the closed list approach permits greater legal certainty, it is often too restrictive and inflexible in its application. By contrast, the open list approach allows for new grounds to be added by the courts should they deem it necessary to consider discrimination on grounds analogous to the grounds listed explicitly.

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4 Ibid
5 Ibid
6 The United Kingdom and the European Union follow this approach. In the European Union in particular, the limitation to only six grounds of discrimination on which binding directives establishing minimum standards can be adopted – sex, race (including ethnic origin), religion or belief, sexual orientation, disability and age – is based on Article 13 of the Treaty of the European Union. However, all 27 EU Member states in their national legislation prohibit discrimination on various further grounds.
It can be directly inferred from the use of the open list that the framers of the Malawian Constitution intended the protection from discrimination to be interpreted to cover all forms of discrimination. Further evidence for this assertion can be found in the jurisprudence of the Malawian courts. For example, the High Court of Malawi in *Marinho v SGS (Blantyre) Pvt Limited*⁷, in considering an award of compensation for discrimination, drew this conclusion, stating:

"It must also be born in mind that **any type of discrimination is forbidden.** Its practice must really have been detested by framers of the Constitution that right in the constitution they provided for two things that underline the attitude that this court must have when faced with this sort of matter. First, the constitution makes the right non-derogable. Secondly, the Constitution allows affirmative action by legislators to punish violators and to pass laws that promote respect for equality." [Emphasis added]

Thus, while sexual orientation is not explicitly listed as a prohibited ground of discrimination within Article 20(1), a solid legal basis exists for the conclusion that Article 20(1) prohibits discrimination on the grounds of sexual orientation.

In particular, two conclusions can be drawn from Malawian precedent, which support this conclusion:

i. Article 20(1) explicitly protects all persons from discrimination and permits the Courts to create new grounds of discrimination in cases which are analogous to those explicitly listed;

ii. Sexual orientation is covered through a test for adding new grounds to the grounds enumerated in Article 20(1).

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experience similar unjust discrimination.

The Industrial Relations Court of Malawi used this flexibility provided by Article 20(1) to expand the list of prohibited grounds to a discrimination case involving HIV status. In *Banda v Lekha*\(^8\), the Court relied on the reasoning provided by the South African Constitutional Court in *Hoffman v South African Airways*\(^9\) that the prohibition of discrimination under the Constitution extends beyond the grounds explicitly listed therein. Chairperson Banda, in finding for the appellant in *Banda* stated:

“Section 20 of the Constitution **prohibits unfair discrimination of persons in any form.** Although the section does not specifically cite discrimination on the basis of one's HIV status, it is to be implied that it is covered under the general statement of anti discrimination in any form.”\(^{10}\) [Emphasis added]

A strong inference can be drawn from the Court’s position in *Banda* that, because the Court was willing to extend the list of grounds of discrimination in a case in which the discriminatory treatment was analogous to that of another case involving a ground of discrimination not expressly included in the Malawi Constitution, the question of whether sexual orientation constitutes a ground of discrimination at least merits consideration.

ii) Sexual orientation is covered through a test for adding new grounds to the grounds enumerated in Article 20(1).

In order to explore whether sexual orientation could be considered as a prohibited ground of discrimination under the Malawi Constitution, it is important to note that the Court in *Banda*, while establishing the principle that new grounds could be admitted, did not set out an explicit or detailed test for the addition of new grounds, relying instead on the proximity of the facts of that case to those in *Hoffman* in order to adopt an identical judgement. However, this passive approach by the Court gave implicit endorsement to two principles from which tests to determine a new ground of discrimination can be derived:

a) The reference of the Court in *Banda* to the *Hoffman* case, without defining its own test for establishing a new ground for discrimination, suggests the Court’s implicit support for the particular test adopted in the *Hoffman* case.

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8 *Banda v Lekha* (IRC 277 of 2004), [2005] MWIRC 44, 1 June 2005.
b) The Court gave an implicit recommendation to refer to comparative jurisprudence in order to identify further grounds.

a) The test applied in Hoffman v South African Airways

As stated above, the Court in Banda relied on the close factual parallel in that case to the facts in Hoffman to adopt an identical judgment. It did not however expand upon the reasoning in Hoffman, preferring instead to rely on the proximity of the facts to apply the judgment’s conclusion in full. While acknowledging this, it should be noted that the Court did not demur from or seek to limit the application of the reasoning in Hoffman, so it can be inferred that the Court accepted the reasoning provided by the South African Court in reaching its own judgment.

In Hoffman, the test that was adopted to determine new grounds of discrimination was derived from the approach that the South African Constitutional Court previously developed in Harksen v Lane NO and Others\(^{11}\). This approach involved examining alleged infringements of the right to equality with reference to “three basic enquiries”: (i) whether a provision makes a differentiation which bears no rational connection to a legitimate government purpose; (ii) whether the differentiation amounts to unfair discrimination; and (iii) whether it can be justified under the limitations provision in the Constitution.

In applying this test and handing down the unanimous judgment in Hoffman, Justice Ncobogo concluded that it was not necessary to address the first question (“to embark upon the rationality enquiry”) because the differentiation in question constituted a clear case, in the Court’s view, of unfair discrimination. Then, again relying on the judgment in Harksen, Justice Ncobogo stated that the determining factor in evaluating whether a differentiation constitutes unfair discrimination is the impact on the affected person. In this respect, he provided three relevant considerations that should be taken into account in assessing such impact:

> “the purpose sought to be achieved by the discrimination, the extent to which the rights or interests of the victim of the discrimination have been affected, and whether the discrimination has impaired the human dignity of the victim.”\(^{12}\)[Emphasis added]

Moreover, this test was applied by the Constitutional Court of South Africa in National Coalition for Gay and Lesbian Equality v Minister of Justice\(^{13}\), when considering whether to strike down South Africa’s sodomy laws – laws that had an analogous impact to that of the Malawian legislation currently under scrutiny in the case of Messrs. Chimbalanga and Monjeza. In that case, the Court found that the sodomy

\(^{11}\) The three stage test was set out in Harksen v Lane NO and Others 1998 (1) SA (CC); 1997 (11) BCLR 1489 (CC).

\(^{12}\) Hoffman v South African Airways, [2000]21 ILJ 2357 (CC), 28 September 2000, para 27

\(^{13}\) National Coalition for Gay and Lesbian Equality v Minister of Justice, CCT 11/98, 1998.
laws violated the right to equality contained in section 9 of the Constitution of South Africa. Justice Ackerman considered the three tests established in *Harksen* and confirmed that the discriminatory impact which the sodomy law had on gay men was unfair. First, the discrimination is on a specified ground. Gay men are a permanent minority in society and have suffered in the past from patterns of disadvantage. The impact is severe, affecting the dignity, personhood and identity of gay men at a deep level. It occurs at many levels and in many ways and is often difficult to eradicate. Second, the nature of the power and its purpose is to criminalise private conduct of consenting adults which causes no harm to anyone else. It has no other purpose than to criminalise conduct which fails to conform to the moral or religious views of a section of society. Third, the discrimination which the sodomy laws constituted has, for the reasons already mentioned, gravely affected the rights and interests of gay men and deeply impaired their fundamental dignity. 14

The necessary consequence of the Court’s reliance on *Hoffman* is that the question of whether sexual orientation constitutes an analogous ground should be decided by assessing the impact on the individuals concerned, with reference to the three considerations set out in *Harksen*. The South African Constitutional Court in *National Coalition for Gay and Lesbian Equality v Minister of Justice* has applied this test in considering the criminalisation of homosexual conduct and found it to breach the right to equality.

b) **International jurisprudence on establishing a new ground for discrimination**

In choosing to rely on the *Hoffman* judgment, the Court applied Article 11(2)(c) of the Constitution, which provides that in interpreting the Constitution, a court shall “where applicable, have regard to current norms of public international law and comparable foreign case law”. This principle has been widely applied by the Malawian courts in interpreting the Constitution, including by the Supreme Court of Appeal in *Chakuamba and Others v Attorney General and Others* 15. Giving the judgment in that case, Justice Banda reaffirmed the Constitutional principle:

“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 believe that the principles of interpretation

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15 *Chakuamba and Others v Attorney General and Others* (MSCA Civil Appeal No. 20 of 2000) [2000] MWSC 5 (23 October 2000)
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 Constitution intended to effectuate the general purpose of the Constitution.” 16 [Emphasis added]

Thus, the application of Article 11(2)(c), supports an examination of comparative jurisprudence from national courts and international treaty bodies, which have found that sexual orientation constitutes a ground on which discrimination can be based.

Primary among these sources is the South African Protection of Equality and Prevention of Unfair Discrimination Act 2000, implemented by the legislature to address the question of how new grounds should be admitted under an open list system. This Act builds on the jurisprudence of the South African Courts in the Hoffman, Harksen and National Coalition for Gay and Lesbian Equality cases and sets out a three-part test for the admission of new grounds. The test adopted in the Protection of Equality and Prevention of Unfair Discrimination Act 2000, which is similar to that laid down in Hoffman, is widely regarded as the strongest approach to navigating the difficulties presented by both the closed and open list systems for grounds of discrimination. As such, it was adopted in The Declaration of Principles on Equality, a document that was agreed upon by a group of experts from all regions of the world and which represents both the most progressive international legal understanding of the principles on equality and the moral and professional consensus on equality17. In particular, Principle 5 of the Declaration of Principles on Equality states:

“Discrimination based on any other ground must be prohibited where such discrimination (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on the prohibited grounds stated above.”18

Therefore, applying the test set out in this document of good practice19, in order for sexual orientation to constitute a prohibited ground of discrimination, it must be shown that either:

16 Ibid.
17 See, for example, Naz Foundation v. Government of NCT of Delhi and Others, WP(C) No.7455/2001, para. 93.
19 The approach to this issue in the Declaration of Principles on Equality is based on the same three-step test provided in the South African Protection of Equality and Prevention of Unfair Discrimination Act 2000, Article 1. Experts from diverse jurisdictions agreed that the South African approach represents the best practice on this issue.
(a) Discrimination on the grounds of sexual orientation causes or perpetuates systematic disadvantage in Malawi; or

(b) Discrimination on the grounds of sexual orientation undermines human dignity in Malawi; or

(c) Discrimination on the grounds of sexual orientation adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on the prohibited grounds.

We now turn to examine whether the criminalisation of homosexual conduct in practice under Sections 153 and 156 of the Penal Code is compatible with this modern understanding of the prohibited grounds of discrimination.

(a) Discrimination on the grounds of sexual orientation causes or perpetuates systematic disadvantage in Malawi

Sections 153 and 156 of the Penal Code have been applied in ways that punish individuals on the grounds of their sexual orientation. These sections exacerbate and perpetuate the existing discrimination, victimisation and disadvantage experienced by LGBT people as a result of societal prejudice. Criminalising same-sex activity is an obvious form of systematic disadvantage against LGBT people. In a statement to the UN Human Rights Council in December 2008, sixty-six UN member states confirmed the systematic disadvantage that laws, which criminalise homosexual conduct, have. The statement reads:

“We are also disturbed that violence, harassment, discrimination, exclusion, stigmatisation and prejudice are directed against persons in all countries in the world because of sexual orientation or gender identity, and that these practices undermine the integrity and dignity of those subjected to these abuses [...]”

We urge States to take all the necessary measures, in particular legislative or administrative, to ensure that sexual orientation or gender identity may under no circumstances be the basis for criminal penalties, in particular executions, arrests or detention.”

South Africa has acknowledged the disadvantageous and negative impact that laws criminalising homosexual conduct have had on gay men. In the leading judgment of the Constitutional Court, which

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declared such provisions unconstitutional in South Africa, Justice Ackerman stated:

"I turn now to consider the impact which the common law offence of sodomy has on gay men in the light of the approach developed by this Court [...] (a) The discrimination is on a specified ground. Gay men are a permanent minority in society and have suffered in the past from patterns of disadvantage. The impact is severe, affecting the dignity, personhood and identity of gay men at a deep level. It occurs at many levels and in many ways and is often difficult to eradicate."

The Canadian Supreme Court also recalled in the case of *Vriend v Alberta* that its previous jurisprudence declared that sexual orientation was analogous to other grounds contained in section 15(1) of the Canadian Charter of Rights and Freedoms because of the disadvantage LGBT people suffered.

"In Egan, it was held, on the basis of "historical social, political and economic disadvantage suffered by homosexuals" and the emerging consensus among legislatures (at para. 176), as well as previous judicial decisions (at para. 177), that sexual orientation is a ground analogous to those listed in s. 15(1)."

Accordingly, the South African and Canadian jurisprudence illustrates that laws which systematically criminalise the activities of LGBT people inherently disadvantage them and infringe their constitutionally guaranteed right to equality.

*(b) Discrimination on the grounds of sexual orientation undermines human dignity*

The second test to establish whether another ground of discrimination should be added to the list of protected grounds is whether it undermines human dignity. The jurisprudence of the Canadian

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23 Section 15(1) of the Canadian Charter of Rights and Freedoms states "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."


25 Principle 11 (b) of the Declaration of Principles on Equality requires states to: “(b) Take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that conflict or are incompatible with the right to equality.” Similarly Principle 2(b) of the Yogyakarta Principles provides the duty of states to repeal laws which prohibit consensual sexual activity among people of the same sex in order to give effect to the right to equality: “States shall...Repeal criminal and other legal provisions that prohibit or are, in effect, employed to prohibit consensual sexual activity among people of the same sex who are over the age of consent, and ensure that an equal age of consent applies to both same-sex and different-sex sexual activity.” (See The Yogyakarta principles: The Application of International Human Rights Law in Relation to Sexual Orientation and gender Identity, 2006, http://www.yogyakartaprininciples.org)
Supreme Court in the case of *Vriend v. Alberta*, has declared that recognising the human dignity of people with a different sexual orientation is critical to ensuring their right to equality under section 15 (1) of the Canadian Charter of Rights and Freedoms:

“It is so deceptively simple and so devastatingly injurious to say that those who are handicapped or of a different race, or religion, or colour or sexual orientation are less worthy. Yet, if any enumerated or analogous group is denied the equality provided by s. 15 then the equality of every other minority group is threatened. That equality is guaranteed by our constitution. If equality rights for minorities had been recognized, the all too frequent tragedies of history might have been avoided. It can never be forgotten that discrimination is the antithesis of equality and that it is the recognition of equality which will foster the dignity of every individual.”

[Emphasis added]

The Indian judiciary recently moved to strike down section 377 of the Indian Penal Code, which criminalised homosexuality, and declared it unconstitutional. In the *Naz Foundation* decision, the Delhi High Court held that the discrimination perpetuated by section 377 severely affects the rights and interests of gay mens and deeply impairs their dignity. It found that the inevitable conclusion was that the discrimination caused to the gay community was unfair, unreasonable and in breach of Article 14 (right to equality) of the Constitution of India. The High Court found that section 377 also violated Article 15 (right to non-discrimination) of the Constitution and concluded “that sexual orientation is a ground analogous to sex and that discrimination on the basis of sexual orientation is not permitted by Article 15”.

As referred to above, the South African courts in *National Coalition for Gay and Lesbian Equality v. Minister of Justice* also placed a heavy emphasis on the importance of dignity in concluding that the criminalisation of homosexual conduct violated the Constitutional right to equality.

The centrality of human dignity to the reasoning of the Canadian, South African and Indian courts in striking down laws and policies that discriminate against people on the ground of their sexual orientations has important implications for the situation in Malawi. At their most fundamental level, the provisions criminalising homosexual conduct undermine the human dignity of gay men.

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27 *Naz Foundation v. Government of NCT of Delhi and Others*, WP(C) No.7455/2001. It should be noted that Section 377 is a variant of the Colonial laws introduced in the second half of the 19th Century across the British Empire, and for this reason it bears a resemblance to Sections 153 and 156 of the Penal Code of Malawi.
28 Article 14 of the Constitution of India states: “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”
throughout Malawi. What is more, treating a person as a criminal because of a characteristic which is innate to them not only violates the human dignity of the individual, it violates the dignity of all Malawians by betraying their wish to embed respect for human rights in the Constitution, based on the “inherent dignity and worth of each human being”, as expressed in Article 12(4).

(c) Discrimination on the grounds of sexual orientation adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on the prohibited grounds.

The third basis upon which other grounds of discrimination must be prohibited is when the discrimination on that ground seriously affects the equal enjoyment of a person’s right in a manner comparable to the discrimination on the explicitly prohibited grounds. The provisions of the Penal Code have been used to criminalise homosexual conduct in a way that seriously restricts several rights and freedoms including, inter alia, the rights to equality and privacy. The treatment of Messrs Chimbalanga and Monjeza in this specific case has infringed various other rights including the right to liberty and the right to be free from torture or cruel, inhuman or degrading treatment or punishment.

In determining whether the discrimination on grounds of sexual orientation would be comparable to discrimination on the grounds enumerated in Article 20(1), several factors have been identified as material by courts in other jurisdictions. As previously noted, the South African Constitutional Court in the landmark decision of *Harksen v. Lane*,30 opined that there will be discrimination on an unspecified ground if it is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner. The Canadian Supreme Court has stated that what prohibited grounds of discrimination have in common “is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity.”31 Based on this jurisprudence, the Delhi High Court in the *Naz Foundation* case cited above32 held that sexual orientation was analogous to sex and was therefore covered under Article 15 of the Indian Constitution.

To assess the degree of similarity of sexual orientation to the listed protected characteristics, one should ask the question: would the same treatment that criminalisation under Sections 153 and 156 of the Penal Code extends to gay men be acceptable if it were extended to people on the grounds of their race or gender? In the context of Malawi, it would seem highly unlikely that the *de jure* discrimination and criminalisation would be tolerated on grounds of race or sex. This would be analogous to

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imprisoning anyone who does anything to express – even in private – their sexual nature or their ethnic identity. Similar to race and sex, sexual orientation is a fact of nature and a permanent or long-lasting characteristic of the human person. It has been defined as follows:

"Sexual orientation is understood to refer to each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender." ³³

Indeed, the Constitutional Court of South Africa has considered the analogy between discrimination on grounds of race or sex and that of sexual orientation, concluding:

"Just as apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity and a breach of section 10 of the Constitution." ³⁴

It is clear therefore that under all three tests set out in the Declaration of Principles on Equality 2008 and the South African Protection of Equality and Prevention of Unfair Discrimination Act 2000 discrimination on grounds of sexual orientation – which clearly includes criminalisation of homosexual conduct – also runs counter to the Malawian Constitution. Sections 153 and 156 of the Penal Code have been applied in ways which plainly cause and perpetuate systematic disadvantage, undermine human dignity and adversely affect the enjoyment of rights in a manner similar to that which would have been caused if the Sections criminalised the possession of one of the characteristics expressly protected by Article 20(1).

While only one of these tests needs to be satisfied to require a ground of discrimination to be prohibited, the fact that the discrimination caused by these provisions satisfies all three tests is a clear indication that sexual orientation is a ground of discrimination that should be read into Article 20(1).

1.2 Limitations and exceptions permissible by the Constitution of Malawi

Having considered whether the protection provided by Article 20(1) implies protection from discrimination on grounds of sexual orientation and established a strong case to suggest it does, it is necessary to consider whether such discrimination may be compatible with any limitation on


fundamental rights permitted by the Constitution, in which case the discrimination in this case would not be a violation of the Malawi Constitution per se. In this respect, we turn to Article 44 of the Constitution, which sets out the permitted limitations on fundamental rights.

Article 44(1)(g) of the Constitution addresses the question of limiting the application of the right to equality directly, stating that:

“There shall be no derogation, restrictions or limitation with regard to ... the right to equality and recognition before the law;”

This provision is clear and absolute. It is sufficient alone to answer in the negative the question of whether the discriminatory application of Sections 153 and 157 of the Penal Code can be justified by reference to any limitation or exception.

1.3 The case of Messrs Chimbalanga and Monjeza

To this point, we have considered the legality of the provisions under which Messrs Chimbalanga and Monjeza have been charged. We have established that the treatment which they have suffered constitutes a clear case of discrimination as it is clearly unfavourable, differential treatment based on their membership of a class of people – gay men. We have examined the precedent set by the Industrial Relations Court for admitting an analogous ground to the list of grounds prohibited by Article 20(1) and established that there is an overwhelming case to support the view that a prohibition of discrimination on grounds of sexual orientation is implied by Article 20(1). Finally, we have established that this discrimination cannot be justified by reference to any limitation or exception.

On this basis, it is clear that Messrs Chimblanga and Monjeza have been subject to discrimination as a result of being charged under laws which violate Article 20(1). Having established this, it is necessary to consider whether there has been any other violation of their rights under the Constitution.

In particular, we should examine the rights provided by Articles 42 and 46 of the Constitution, which provide protection for the right to a fair trial. As you will be aware, the appeal lodged by Messrs Chimblanga and Monjeza requesting a constitutional review of their case on the basis that their fundamental rights had been violated was denied by the Chief Justice on 22 February 2010. According to news reports of the hearing, the Chief Justice Lovemore Munlo is quoted as saying:

“There are no elements in the case that relate to the interpretation or application of the constitution [...the proceedings] deal with criminal offences under the penal code, namely

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the offence of buggery and indecent practices.”

Chief Justice Munlo’s judgement relies on the assertion that none of the fundamental rights of Messrs Chimblanga and Monjeza were at issue in this case. However, as we have established above, there is a strong case to support the view that the complainants’ right to non-discrimination under Article 20(1) has been violated. It is our firm view therefore that the denial of the constitutional review constitutes a discriminatory application of the law, and violates sub-sections 42(1)(e) and 46(2)(a) of the Constitution.

Article 42(1)(e) states:

“Every person who is detained, including every sentenced prisoner, shall have the right […] to challenge the lawfulness of his or her detention in person or through a legal practitioner before a court of law…”

It is undisputed that the complainants are currently detained and were so at the time of their appeal. It is also clear from the facts that they were denied the opportunity to challenge the lawfulness of their detention before a court of law, in this case the panel of judges which they had requested undertake the constitutional review.

Article 46(2)(a) states:

“Any person who claims that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled […] to make application to a competent court to enforce or protect such a right or freedom…”

As argued above, there is substantial evidence to support the view that the complainants’ were arrested, charged and detained under a legal provision which violates their right to non-discrimination as provided by Article 20(1). Their application to a competent court – in this case a panel of judges to undertake a constitutional review – was denied on the basis that no fundamental rights were at issue in this case. Given that this view has been called into question, the complainants’ request should be considered anew.

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36 As reported by AFP news service on 23 February 2010, available at: http://www.google.com/hostednews/afp/article/ALeqM5iSL_9flpIW4xy2aPKlRt2e5T6oMA


38 Ibid
2. International Law

In addition to directly contradicting the express aims of the Malawian Constitution to provide equality to all persons before the law and prohibit discrimination, laws which criminalise homosexuality contravene Malawi's international legal obligations. This section sets out the legal foundations of this assertion.

2.1 The right to non-discrimination in international human rights law

Malawi is a state party to a significant number of international human rights treaties, including three which have particular relevance in this context: the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the International Convention on the Rights of the Child. Each of these treaties contains strong provisions relating to the rights to equality and non-discrimination.

Furthermore, as previously referred to, current interpretations of the rights to non-discrimination and equality by bodies charged with overseeing these treaties have included sexual orientation and gender identity as prohibited grounds of discrimination. Interpretations by the UN Human Rights Committee, the Committee on Economic, Social and Cultural Rights and the Committee on the Rights of the Child are in consensus on the need to include these as prohibited grounds.

*International Covenant on Civil and Political Rights*

Article 2(1) (non-discrimination) and article 26 (equal protection of the law) of the ICCPR require that states provide protection from discriminatory laws, policies and practices across an “open list” of grounds: that is to say, both articles state that discrimination is prohibited on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or “other status”. While sexual orientation is not explicitly mentioned within article 2(1) or article 26 the UN Human Rights Committee, the treaty body which has authority to interpret the ICCPR, has stated in its communications that discrimination on grounds of sexual orientation is prohibited under the ICCPR. On several occasions the Human Rights Committee has also expressed concern about the criminalisation of homosexuality and discrimination on the grounds of sexual orientation in its concluding observations.

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**International Covenant on Economic, Social and Cultural Rights**

The right to non-discrimination is also contained within article 2(2) of the CESCR. As with the non-discrimination protections within the ICCPR, article 2(2) of CESCR does not explicitly prohibit discrimination on the grounds of sexual orientation. However, the UN Committee on Economic, Social and Cultural Rights has, through its general comments and its concluding observations, expressed concern over discrimination on grounds of sexual orientation. More significantly, the Committee has recently provided an authoritative interpretation of the article 2(2) in General Comment No. 20 where it has explicitly stated that discrimination on the grounds of sexual orientation is prohibited by the “other status” classification of article 2(2). The General Comment sets out:

"Other status" as recognized in article 2(2) includes sexual orientation...In addition, gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the work place.\(^{44}\)

**International Convention on the Rights of the Child**

Article 2 of International Convention on the Rights of the Child (CRC) also requires that state parties ensure that children and adolescents enjoy the rights set out in the Convention without discrimination. As with the ICCPR and CESCR, the Committee on the Rights of the Child has – in its General Comment No 4 on health and development – interpreted article 2 as covering sexual orientation and health status. The General Comment sets out:

"State parties have the obligation to ensure that all human beings below 18 enjoy all the rights set forth in the Convention without discrimination (art. 2) including with regard to ‘race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. These grounds also cover adolescents' \(^{45}\)


\(^{42}\) See for example, Concluding Observations, Trinidad and Tobago, E/C.12/1/Add.80, June 5, 2002, para. 14; Concluding Observations: (Hong Kong) China, E/C.12/1/Add.58, May 21, 2001, para 15 (c); Concluding Observations: Kyrgyzstan, E/C.12/1/Add.49, September 1, 2000, para. 17.

\(^{43}\) Committee on Economic, Social and Cultural Rights, “General Comment No. 20 (Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2))”, E/C.12/GC/20, 10 June 2009.

\(^{44}\) Ibid, para. 32.

sexual orientation and health status (including HIV/AIDS and mental health).” 46

As a party to the ICCPR, CESC and CRC, Malawi has an obligation to protect the human rights of all people, including gay men, in a non discriminatory manner and to address any legal measures which seek to criminalise or discriminate against people on the basis of their sexual orientation. Moreover, as a party to these treaties, Malawi is not only bound to their provisions by international law, it is also obliged to implement law and policy in order to give effect to these provisions. In practice, this means that Malawi should be taking steps to end the discrimination, marginalisation and oppression of people because of their sexual orientation. Furthermore, under Article 11(2)(c) of the Constitution, as applied in the Banda case, the Constitution of Malawi should be interpreted with reference to international norms such as those set out by these bodies.

2.2. Regional human rights law obligations

The right to equality and non-discrimination is guaranteed by Articles 2, 3 and 28 of the African Charter on Human and People’s Rights, a treaty to which Malawi became party in 1990. Article 2 of the Charter provides: “Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.”

Consequently, African regional human rights law imposes further obligations on Malawi to protect the rights of every individual, both on the basis of specified grounds and on analogous grounds. Malawi cannot negate this obligation by claiming that sexual orientation does not fall within the scope of the Charter because in a similar manner to the ICCPR and the ICESCR the explicitly proscribed grounds are illustrative and the Charter recognises the rights and freedoms of everyone “without distinction of any kind”.

3. Conclusions

As this analysis makes clear, Sections 153 and 156 of the Penal Code violate both the spirit and the word of the Constitution of the Republic of Malawi. The commitment of the Constitution’s framers to securing equality for all is given clear expression throughout the document and is clearly guaranteed by the use of an open list of grounds in Article 20(1). What is more, the Malawian courts have already employed the flexibility provided by this approach in finding that HIV-status constituted a prohibited ground of discrimination.

Further, these Sections of the law are in direct contravention of Malawi’s international legal

46 Ibid, para. 32.
obligations, particularly provisions under the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the International Convention on the Rights of the Child.

We hope that you find this analysis and information of use in formulating the further defence of Messrs Chimbalanga and Monjeza. If we can be of any further assistance, please do not hesitate to contact us.

Yours sincerely

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The Equal Rights Trust