

AN ETHICAL ASSESSMENT OF THE LEGAL PROSCRIPTION
OF HOMOSEXUALITY ON PUBLIC HEALTH IN ZAMBIA

BY

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A Dissertation Resubmitted to the University of Zambia in Partial Fulfilment of
the Requirements of the Degree of Master of Arts in Applied Ethics.

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ABSTRACT

This study aimed to ethically assess the legal proscription of homosexuality on HIV/AIDS management in Zambia. Background information suggest that the legal proscription of homosexuality has failed in its duty to deter people from practicing homosexuality but has instead, led many that practice and identify themselves as homosexuals to exclusion from the HIV/AIDS agenda of the country through closeting. The Zambian public health challenges arising from effects of continued closeting of homosexuals, a population already at high risk for HIV infection, is yet to be established. Thus, the objectives of this study were: (i) to establish the interlinkage between homosexual behavior and HIV/AIDS; (ii) to investigate the effects of the legal proscription of homosexuality on homosexuals' access to life-saving HIV/AIDS prevention, treatment and care in Zambia; (iii) to investigate non legal proscription barriers to the provision of prevention, treatment and care goods and services to homosexuals in Zambia; and (iv) to assess the morality of legal proscription of homosexuality in Zambia using the Hohfeldian Moral Rights Theory.

The study design was a qualitative survey. The methodology used was transcendental phenomenology as developed by Edmund Husserl. Based on a sample of ten participants, the data obtained was analysed by coding and grouping it according to common themes. The findings revealed that the homosexuals are denied access to life saving HIV/AIDS prevention, treatment and care services on the basis of the sexual orientation. However, this denial is inconsistent with the right to health that every human being has and hence the legal proscription not only compromises the health of homosexuals' but also that of heterosexual. The study recommended a more somber approach to discussing the legal proscription of homosexuality in order to achieve a better understanding of its effects on HIV/AIDS management in Zambia.

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CHAPTER ONE: INTRODUCTION

1.0 Overview

This chapter describes the conceptual basis for what the researcher will investigate, including the research questions. This chapter also develops the significance of the study by describing how the study is new and or different from other studies. The chapter will further show how the identified knowledge gap will be addressed through a brief description of the nature of the study.

1.1 Background

The Lesbian, Gay, Bisexual, Transgender and Intersex (LGBT) community is not acknowledged in Zambia. Instead, LGBTI persons in Zambia are viewed as undesirable, deviants and sinners. LGBTI persons live in constant or permanent fear of persecution and prosecution. For this reason, LGBTI persons do not publicly disclose their sexual orientation or gender identity (PSAf, 2014). In Zambia, LGBTI people live in constant fear of arbitrary arrests and discrimination in the education system, job and housing markets, and access to services. Social attitudes toward LGBTI people are mostly negative. These legal challenges and societal attitudes are peculiar to the LGBTI community and they continue to deteriorate. Zambia's legal system has a repugnancy clause that promotes the supremacy of written law in discrimination cases. It remains the incumbency of Zambia's Supreme Court to yet rule definitively on when the repugnancy standard applies in cases of sex discrimination (Numwa, 2008; Ottosson, 2008; SIDA, 2014; Amaechi and Mildner, 2014).

Commentators on the prevailing situation on sexuality and sexual orientation in Zambia and other African countries in the Southern African region, such as van Klinken and Obadare, have connected the deeply held views to the emergence of Christianity, especially in its Pentecostal-Charismatic forms. Zambia was arguably the largest recipient of Evangelical Christian Fundamentalist Doctrine and the attitudes towards sexuality and sexual orientation heavily mirror those views. However, matters of discrimination are addressed in Article 23, Clause 1 of the Constitution (1991)

which states that a law shall not make any provision that is discriminatory either of itself or in its effect. Further, Discrimination is defined in the article as affording different treatment to different persons attributable, wholly, or mainly to their respective descriptions by race, tribe, sex, place of origin, marital status, political opinions, colour or creed (Constitution of Zambia, art. XXIII, cl.1). The preamble of the 1996 Constitution makes Zambia a Christian nation. This means that Christian actors, beliefs and practices have increasingly come to manifest themselves in the public sphere, actively engage with politics, define narratives of nationhood and shape notions of citizenship. (Constitution, 1991; Fabeni; Stefano; Johnson; and Nana, 2007; Numwa, 2008; van Klinken and Obadare, 2018).

Internationally, Zambia has signed a variety of treaties that promote human rights, including the Beijing Platform for Action, the United Nations Charter on Human Rights, and African Charter on Human and People's Rights. Nevertheless, there is a significant problem in enforcing international legislation due to Zambia's following of a dualist common law doctrine. Under this system: ratified international treaties do not form part of domestic law. Zambia considers itself unobligated to follow international provisions unless those provisions have been first incorporated into domestic law. Accordingly, individuals cannot bring lawsuits pertaining to a breach of international treaties if that policy is not reflected in domestic law. Because current domestic law, primarily Article 23(4)(d), allows certain forms of discrimination, international protocols are ineffective in tackling issues of discrimination against anyone. As of 2013, none of these treaties have been entered into law (Constitution of Zambia, 1991, Ratification of International Human Rights Treaties - Zambia, 2009, Amaechi and Mildner, 2014 and Bloomberg, 2019).

1.1 Problem identified

Gay persons constitute a hard-to-reach key population in interventions aimed at achieving zero transmissions of HIV. Prevalence in this subpopulation raises problems

in fighting HIV in the country and this affects concomitant rights of not only gay persons but heterosexuals as well.

1.2 Purpose of the Study

The aim of this study was to ethically assess the effects of the legal proscription of homosexuality on HIV/AIDS management in Zambia.

1.3 Research Objectives

The objectives of this study were:

1. To establish the interlinkage between homosexual behavior and HIV/AIDS;
2. To investigate the effects of the legal proscription of homosexuality on homosexuals' access to life-saving HIV/AIDS prevention, treatment and care in Zambia;
3. To investigate non-legal proscription barriers to the provision of prevention, treatment and care goods and services to homosexuals in Zambia; and
4. To assess the morality of legal proscription of homosexuality in Zambia using the Moral Rights Theory.

1.4 Research Questions

1. Is there a linkage between homosexual behavior and HIV/AIDS?
2. Does the legal proscription of homosexuality affect homosexuals access to HIV/AIDS prevention, treatment and care in Zambia?
3. Are there any non-legal proscription barriers to the provision of HIV/AIDS prevention, treatment and care goods and services to the homosexuals in Zambia?
4. Is the legal proscription of homosexuality in Zambia morally right?

1.6 Delimitations

This was a public health ethics study of the legal proscription of homosexuality in Zambia. This study was, therefore, restricted to ethically assessing the effects of the legal proscription of homosexuality on the public health agenda in Zambia.

1.7 Limitations

The legal proscription of homosexuality in Zambia is found in CAP 87 of the laws of Zambia. This law also puts a demand on people with information on homosexual behaviour to inform the government of any such activities. This clause in the law left most respondents in an insecure position. The said law had put the study in jeopardy.

At the time this study was being conducted, the legal proscription of homosexuality was highly topical in the country and some prominent members of the Zambian society issued comments against decriminalisation of homosexuality. This worked against some of the respondents who had different views from those of opinion formulators to come out strongly in support of their views for fear of victimisation.

Other respondents were very suspicious of the researcher's work and thought they were being targeted and investigated by security wings. However, the respondents that agreed to participate in the study, did so after being given assurances of confidentiality and academic immunity enjoyed by academic studies. These two assurances were coupled with triangulation in the methods to increase internal validity of findings.

1.8 Significance of the study

This study was significant in that it contributed towards the existing body of knowledge on homosexuals' access to life saving HIV/AIDS prevention, treatment, and care services. The knowledge stemmed from an understanding of the ethical viewpoint of the effects of the legal proscription of homosexuality on homosexuals' health rights, sexual and reproductive health rights, stigma and discrimination and the effects thereof on the HIV/AIDS agenda in Zambia.

1.9 Definition of Key Terms

Ethical assessment: the use of ethical theories and principles to assess a phenomenon; legal proscription of homosexuality.

Homosexuality: a sexual act practiced by persons of the same gender.

Legal proscription: is the act or practice of forbidding something by law; banning.

1.10 Organisational Structure

This dissertation is arranged in seven chapters. Chapter one presents the background, statement of the problem, research objectives and questions, significance of the study, delimitations and limitations of the study. The critical review of literature on the legal status of homosexuality is done in chapter two. The theoretical framework was discussed in chapter three. Chapter four presents the methodology and methods used in this study. The research findings as well as the discussion and analysis are presented in chapter five. The sixth chapter, which involves an ethical assessment, applies the theoretical framework to the research findings. The seventh chapter sums up the discussion, draws conclusion and makes recommendations.

1.11 Summary

Chapter one presented background information on the subject of the legal proscription of homosexuality in Zambia and the effects it has on public health and human rights. The chapter also presented the aim of the study, the research objectives and questions, significance of the study and statement of the problem. The chapter closed with the organisational structure of the dissertation.

CHAPTER TWO: REVIEW OF RELATED LITERATURE

2.0 Overview

This chapter reviewed related literature on the legal proscription of homosexuality on HIV/AIDS management in Zambia. Selected studies that were conducted before were reviewed to show global, African and Zambian trends on the subject. This review was done with an intention of establishing what had been done on the subject, in order to indicate gaps in the body of knowledge and to show what this study would achieve in order to fill the identified knowledge gap.

2.1 Historical Global Legal Development on Homosexuality

A brief look at the historical development of the legal proscription of homosexuality indicates that it owes its origins to predominantly fundamental Christian values while decriminalisation efforts have been predominantly a human rights agenda (Llanelli LGBTQ+ Support Group, 2021).

The arrival of the twentieth century saw the English-speaking world begin repealing sodomy laws enmasse and the birth of modern gay rights movement was born in the United States of America. Islamic countries began to modernise but fell back into anti-gay religious fundamentalism. Asian countries maintained mostly a silent tolerance of homosexuality while Western Europe began offering equitable marriage rights for gay couples (Galva, 2014).

Currently, seventy-two countries outlaw homosexuality of which thirty-three are in Africa. Zambia is among many African countries where homosexuality is.

Despite gaining independence from Britain in 1964, Zambia held on to some of its colonial-era laws including the Penal Code criminalizing same-sex practices. Homophobia is further 'justified' by the fact of Zambia being a Christian nation with same-sexuality perceived as un-Christian. The Penal Code on 'Unnatural Acts' has escaped interrogation as part of decolonization efforts, in relation to the argument that homosexuality is unChristian, un-African, foreign and 'western'. Efforts to support and defend LGBTI human rights are seen as part of an agenda driven by western donors, threatening local

cultures, traditions and values. These beliefs and assertions, contradictory as they are, have gained political, social and community currency in Zambia. (Phiri, 2017)

The adverse effects of the legal proscription of homosexuality in Zambia, as observed by PSAf (2014) is that Lesbian, gay, bisexual, transgender and intersex (LGBTI) persons have become one of the most vulnerable groups in Zambia. Firstly, they live in constant fear of arbitrary detention, secondly they are discriminated against in education, employment, housing and access to services such as health. In short, the legal proscription has led to the LGBTI community to be closeted from all public services.

2.2 What is Public Health

Public health comprises two concepts, which in and of themselves derive different meanings and definitions. To start with, the term public means different things to different people. As an adjective, in general, and in most of the senses, the opposite of private. Therefore, 'Public' means relating to the government or state, or things that are done for the people by the state. (Oxford English Dictionary, 1989, and Collins Dictionary, 2020).

The word health originally came from Old English and it meant the state and the condition of being sound or whole. More precisely, health was associated not only with the physiological functioning, but with mental and moral soundness, and spiritual salvation, as well. Though both positive and negative qualifiers such as good, bad or poor, have often preceded the word health it has always been regarded as a positive entity (World Health Organisation, 1947; Dolfman, 1973; Balog, 1978; Boruchovitch and Mednick, 1997).

Taken together; the topics of public and health provide a foundation for understanding what public health is and why it is important. From the foregoing, a conceptual framework that approaches public health from a systems perspective is introduced to identify the dimensions of the public health system and facilitate an understanding of the various images of public health that coexist today.

The public health system, which has been defined as activities undertaken within the formal structure of government and the associated efforts of private and voluntary organisations and individuals, is the organisational mechanism for providing such conditions. Further, the International Organisation for Migration (IOM) provided a practical definition of what characterises public health by stating that it is an act of fulfilling society's interest in assuring conditions in which people can be healthy (Winslow 1920; IOM, 1988 and Ramos-Cerqueira, 1994). However, "sexual health interventions against sexual contraction and transmission of HIV in most developing countries such as Zambia, are often biased towards heterosexual sexual health interventions. This act tends to exclude minority sexual groups such as men who have sex with men whose existence could affect the transmission and spread of the virus" (Libati, Chitabanta and Mwale, 2019).

2.3 Legal proscription of homosexuality

Proscription is an act of posting notice listing citizens of a proscribing country who have been declared outlaws and in most instances the outlaws being condemned to death while at the same time having their goods, services and or property confiscated by the state. Rewards are offered by the state to anyone killing or betraying the proscribed and severe penalties are inflicted on anyone harboring them. In simple terms, proscription means to denounce, prohibit or condemn an act and actors of the said act by passing legislation that criminalises the said act, and consequent outlawing of actors of the act as is the case for homosexuality and homosexuals in Zambia. The laws proscribing homosexuality have been called state homophobic laws. The laws are called homophobic because they are based on contempt, prejudice, aversion, hatred or antipathy, and irrational fear and ignorance of homosexuality and homosexuals. These laws are often related to religious beliefs and have been termed state sponsored by most human rights watch groups. This view of state sponsorship is because legal proscription is a responsibility of the government through the legislature (Merriam-Webster, 1996; Ratification of International Human Rights Treaties - Zambia, 2009; Amaechi and Mildner, 2014;

Constitution of Zambia, 2016; van Klinken and Obadare, 2018; Bloomberg, 2019; and ILGA World, 2019).

As a term, homophobia has many faces. It is made of two terms; '*homo*' and '*phobia*'. Homo, noun, and plural, homos. Slang: Extremely disparaging and offensive. A contemptuous term used to refer to a homosexual, especially a male homosexual. Phobia is a Greek word meaning fear. In modern English, the term homophobia translates to 'heterosexism'. Heterosexism has come to be conceptualised as the fear of lesbians, gay men, bisexuals, transgender and intersexual persons (LGBTI). Heterosexism, or the fear of LGBTI individuals, is often the impetus for discrimination, which can be expressed through either institutional or informal means. Institutional discrimination involves the state apparatus. If heterosexist discrimination is institutional, it means either that non-heterosexual sex acts are criminalised or that LGBTI individuals are denied the same legal rights as heterosexuals. Informal discrimination is not necessarily sanctioned by the state but involves social pressures against LGBTI individuals, behaviors, and identities.

Heterosexism is a pervasive phenomenon that has been known to occur since the dawn of human history. The manifestation of informal discrimination ranges from having antagonistic attitudes toward homosexuals to engaging in violent acts against them. These social attitudes towards homosexuals stems from deep entrenched feelings from heterosexuals to have their own manhood questioned and or threatened. Culturally, heterosexism produces fear of or prejudice against homosexuals that sometimes manifests itself in legal restrictions or, in extreme cases, bullying or even violence against homosexuals; commonly called "gay bashing" (Weinberg, 1972; Fish, 2006; Anderson, 2016; ILGA World, 2019 and Dictionary.com, 2020).

Studies have shown that heterosexism is more pronounced in individuals with an unacknowledged attraction to the same sex and who grew up with authoritarian parents who forbade such desires. Furthermore, other have studies also revealed that men with homophobic tendencies gaze more at homosexual imagery than other heterosexual men and such men even show an increase in penile erection when exposed to male homosexual stimuli (Adams, 1996; Fish, 2006; Weinstein, *et al*, 2012, and Cheval, *et al* 2016).

This goes to show that a man's heterosexuality is proved, not in his relationship with a woman, but in his not being gay (Fish, 2006). (Some) heterosexual men, therefore, assert their heterosexuality by marking the separation between their own perceived status as 'real' men and that of gay men. While female heterosexuality is proved by a woman's relationship with a man, the threat of being called lesbian is used to intimidate (heterosexual and lesbian) women into female heteronormative appearance or behaviour (Adams, 1996; Weinstein, *et al*, 2012, and Cheval, *et al* 2016).

Further, the view of homophobia based on fear being the driving force for antigay activism has been critiqued on grounds that the anti-gay hostility is more consistent with anger; and its association with aggression, rather than fear. The emotions of disgust and repulsion are those that are most commonly articulated about lesbians and gay men. Other views have been suggested to explain why heterosexuals conduct themselves the way they do towards homosexuals (Kitzinger, 1996; and Herek, 2004). Valentine and McDonald (2004) and Fish (2006) state that one such explanation is the view that looks at heterosexism as a mental disorder. This means that if heterosexists are mentally ill, they should be treated with compassion and leniency. Phobia, as a terminology, suggests that behaviour which is irrational and out of control is a 'normal' response to homosexuality. It makes possible a homosexual panic defense as a mitigating circumstance for murder. There have been cases in both the United States of America and the United Kingdom where charges of murder of gay men have been reduced to manslaughter on these grounds.

A competing view offered by Kitzinger (1996) suggests that homophobia takes its origins in psychology. Psychology locates the problem of homophobia in an individual's psychopathology and replaces political explanations with personal ones. It has been observed that the problem of locating antigay prejudice with individuals is that it is easy to dismiss homophobia as pertaining to the actions and behaviour of a small number of extreme people: it marks a separation between them and me. It is also indicated that individual prejudice can be eradicated by self-awareness, 'by learning the facts and by personal encounters with lesbians and gay men' (Ben-Ari, 2001). Fish (2006) and Kapembwa (2018) use 'heterosexism' instead of homophobia to stress the learning

dimension. Fish (2006) further noted that there are social and political conditions that help to reproduce discrimination.

Going by the sentiments of ILGA, world discrimination against lesbians, gay men and bisexual people was and still is explicitly sanctioned in legislation in all the countries that still have such legislation on their law books. As of May 2019, having sex with a partner of the same sex was illegal in seventy countries. In Bangladesh, Barbados, Guyana, Sierra Leone, Qatar, Uganda and Zambia, one could go to prison for life. Nine countries punish homosexuality with death. These include Afghanistan, Brunei, Iran, Iraq, Mauritania, Pakistan, Saudi Arabia, Sudan and Yemen. These countries have created a social and political environment palatable for irrational and out of control behaviour against homosexual acts and behaviour, hence, state sponsored homophobia (Kitzinger, 1996; ILGA, 2019 and Amnesty International, 2020).

2.4 The Legal Proscription of Homosexuality in Africa

Today, homosexuality is still punishable by death in some countries on the African continent. Uganda, for example, criminalises non-heterosexual sex acts and most Ugandans consider non-heterosexuality to be taboo. In October, 2009, a member of the Ugandan Parliament introduced the Uganda Anti-Homosexuality Bill to broaden the criminalisation of same-sex relationships and apply the death penalty to repeat offenders. Under the statutes of the bill, individuals convicted of a single act of non-heterosexual sex would receive life imprisonment. Additionally, individuals or companies promoting LGBTI rights would be nationally penalised. The bill also created a public policing policy under which Ugandan citizens would be required to report any homosexual activity within twenty-four hours or face a maximum penalty of three years in prison. Additionally, if Ugandan citizens were found to be engaging in same-sex sexual or romantic activities outside the country, Uganda would request extradition.

At the same time, a marked increase in attacks, rhetorical abuse, and restrictive legislation against sexual minorities or 'homosexuality' makes activism for sexual rights a risky endeavour in many African countries.

Campaigns for sexual rights and ‘coming out’ are frequently perceived as a form of Western cultural imperialism, leading to an exportation of Western gay identities and provoking a patriotic defensiveness. Despite the many claims or perceptions on homosexuality, the act and practice is not new to the African continent. There is documentation of same sex sexual practice and gender transgression in all places and at all times throughout history. Today, thirty-two of fifty-four countries on the African continent criminalise same-sex intimacy. The situation of LGBTI persons in African countries is generally very difficult (Epprecht 2012; Sida, 2014; Carroll and Mendos, 2017).

‘Heterosexism’ in society now plays out in many different forms, both subtle and explicit. More obvious forms of ‘heterosexism’ include laws and regulations geared towards discrimination and undermining the basic human rights of lesbian, gay, and bisexual people. The less physical include anti-gay slurs and lack of acceptance of sexual minorities into communities and families. The psychosocial impact of living under criminal laws is huge and the consequent and continual threat of arrest or violence constitutes in itself a violation of the right to peace, safety and security of the person. The impact includes depression, anxiety, substance (drug and alcohol) use and addiction with social and psychological consequences for those affected. Living openly, or even just being perceived as an LGBTI person, often brings a risk of being rejected when applying for employment, housing and education. It also makes them be denied access to food and health care, including SRHR services and information (Epprecht 2012; Sida, 2014; Carroll and Mendos, 2017).

The borgen project observed that in South Africa, where same-sex marriage is legal, homosexuals, especially lesbians, still face violence and corrective rape. Also by denying a large number part of health care access to homosexuals, the rate of HIV/AIDS continues to climb among the LGBTI community, especially among men who have sex with other men. UNAIDS observed that criminalisation introduced structural factors. These Structural factors, such as stigma, discrimination and violence based on sexual orientation and gender identity and the criminalisation of same-sex sexual practices, contribute to hindering the availability, access and uptake of HIV prevention, testing and treatment services among gay men and other men who have sex

with men (The Borgen Project Report, 2014; The Gap Report, 2014; Sida, 2014; UNAIDS 2014 and Amnesty International, 2020).

In South Africa, the rate of HIV/AIDS among gay men is as high as 38 per cent. Although the South African constitution guarantees sexual and gender minority people the right to non-discrimination and the right to access healthcare, homo- and transphobia in society abound. Müllers' research unearthed four major barriers in the South African Healthcare system. In his observation, these challenges: - were Availability: Lack of public health facilities and services, both for general and LGBT specific concerns; Accessibility: Healthcare providers' refusal to provide care to LGBT patients; Acceptability: Articulation of moral judgment and disapproval of LGBT patients' identity, and forced subjection of patients to religious practices; Quality: Lack of knowledge about LGBT identities and health needs, leading to poor-quality care. Participants had delayed or avoided seeking healthcare in the past, and none had sought out accountability or complaint mechanisms within the health system (Meyer, 1995; The Borgen Project Report, 2014 and Muller, 2017).

The borgen project report noted that, to avoid discrimination, these men avoid seeking medical care and avoid discussing their health issues with health care professionals. This delay in seeking treatment is detrimental and without proper care and education, infected individuals may spread the disease. The incidence of HIV/AIDS has a strong foothold in South Africa, with the overall prevalence rate being 17.8 per cent. Sida concluded that this deplorable situation obtaining in South Africa, is generally the case for LGBTI in health on the entire continent of Africa (The Borgen Project Report, 2014; SIDA, 2014; UNAIDS 2014 and Muller, 2017).

2.5 The Effects of Legal Proscription of Homosexuality on HIV/AIDS management

Globally, homosexuals; especially male homosexuals, are at a heightened risk for HIV infection compared with men who have sex only with women. HIV risk is largely determined by national laws, policies, and attitudes toward homosexuality. Homosexual men in homophobic countries are denied the

resources, including psychological resources like open self-expression, that are necessary to stay healthy. While 'heterosexism' keeps homosexual men in the closet and suppresses their opportunities to meet and have sex, it also keeps them uneducated about the risks of unprotected sex and unskilled in the use of condoms in their sexual relationships, which can facilitate HIV transmission. The pervasiveness of hate crimes and physical violence is also a constant source of stress for many who live in communities where these are not isolated incidents. Another study demonstrated that individuals who belong to a sexual minority group within a heteronormative society are prone to high rates of internalised homophobia; lack of acceptance of one's own sexuality, stigma, and experiences of discrimination and violence. Stigma, which occurs when an individual possesses a socially devalued identity, has been theorised to exacerbate the spread of HIV.

Stigma restricts homosexuals' public visibility and keeps them hidden from prevention efforts due to fear of discrimination or physical harm upon disclosure of their sexual identity and or behaviour. People who are victims of homophobia are more likely to suffer from mental illness, anxiety and depression. These individuals face mental health conditions because of the society's stigma towards gay people, discrimination and the denial of their civil and human rights. People in this community often struggle with depression, trauma, anxiety and self-acceptance because of facing continuous discrimination (Meyer, 1995; Parker and Aggleton 1998; Beyrer *et al*, 2005; Crocker *et al*, 2012 and Greenwood, 2015).

Bancroft (1988) (in Turner, Miller and Moses, 1989), further suggested that those living a homosexual lifestyle were at greater health risk predominantly [as] a consequence of social stigma due to criminalisation. Criminalisation does little to change behaviour, while actively contributing to increased stigma. One of the greatest health risks created through the criminalisation of homosexuality relates to the treatment and prevention of HIV (Bränström and Van der Star, 2013).

Some researchers have conducted parallel studies. Based on their studies, they have refuted Bancroft (1988) claims and posited that the mechanism by which social stigma would produce more frequent bestiality,

participation in orgies, hand balling, or exposure to feces is obscure. Cameron, Cameron and Proctor (1989) further questioned the role of social stigmatisation in leading LGBTI persons in frequently having sex that would at the most infect others, in having larger numbers of sexual contacts, or to more frequent sexual unfaithfulness and the possibility of stigmatisation leading to making obscene phone calls, or having sex in public. In their view, all of the activities listed above reflected personal choice, and those who so choose bore the responsibility.

Bränström and van der Star (2013) however, contested the position taken by Cameron, Cameron and Proctor (1989). They stated that knowledge gathered from decades of research across stigmatised and socially excluded groups, such as sex workers, injecting drug users and men who had sex with men, showed that criminalisation did little to change behaviour. It instead actively contributed to increased stigma and marginalisation of these groups. This amplifies the health risks by driving stigmatised communities underground, isolating them from health or support initiatives. Criminalisation forces LGBTI men and women to live in stressful circumstances, and amplifies the stigma and marginalisation these groups experience. It renders LGBTI people invisible and creates significant barriers to openly accessing relevant health services and treatment.

Further, men who have sex with men account for a substantial minority of those affected by HIV, with their risk of infection more than double that of the general population. Many African countries also harbor 'heterosexism' cultures and attitudes. Together, this creates an environment where homosexuality is highly stigmatised, with homosexual people socially isolated and marginalised. Recent studies from both North America and Europe also show that LGBT youth are at greater risk for suicide attempts than non-LGBT youths and have higher prevalence of depression and anxiety diagnoses.

Some studies have also found higher rates of certain health-related behaviours such as tobacco use in sexual minority groups, higher rates of unsafe sexual practices among gay men, higher risk of drug use among male-to-female transgender individuals and higher rates of heavy alcohol use and obesity among lesbians. Furthermore, there is a concern that some LGBT

populations have an increased risk of specific cancers owing to reluctance to participate in screening programmes, for example, breast and cervical screening among lesbian women, and unique exposures to risk, for example anal Human Papilloma Virus in gay men. These findings show a need for clinicians and public health professionals to develop programmes that specialise in the care and public health needs of LGBT populations (Bränström and van der Star, 2013 and UN, 2013)

Bränström and van der Star (2013) observed that the current situation in Uganda provides a striking case study of how the law can affect responses to HIV. Uganda was once considered a regional leader in HIV prevention. Just over 7 per cent of the Ugandan population were HIV positive. This is significantly lower than the rate of 15 per cent, which was projected two decades ago. Uganda's success in preventing HIV transmission is often attributed to an early, progressive, and ambitious government response. However, in recent years the Ugandan government has taken an increasingly conservative approach to HIV; prevention and supporting abstinence, only programmes and refusing to promote condom use. This has been accompanied by a major crack down on homosexuality in the form of the Anti-Homosexuality Bill, signed into law in 2014, although it was later annulled. The Ugandan government plans to introduce further anti-gay legislation, and homosexuality remains illegal. Similar legislation has also been introduced in The Gambia (Bränström and van der Star, 2013; Avert, 2014; Shutterstock, 2015 and UNAIDS, 2015).

The legal proscription of homosexuality has brought about multifactorial barriers to health. Smalley *et. al* (2018) divided these barriers into individual, system based, and environmental factors. Individual barriers are those that exist on a personal level, such as resource limitations, lack of insurance, and transportation challenges. System-based barriers relate to health system policies, health care practices and guidelines, and availability of LGBT competent providers. Environmental barriers refer to the context in which care is delivered, including the physical and sociocultural environment.

Research suggests that LGBT individuals face health disparities linked to societal stigma, discrimination, and denial of their civil and human rights.

Discrimination against LGBT persons has been associated with high rates of psychiatric disorders, substance abuse and suicide. Another researcher observed that discrimination is bad for anyone's health. In the LGBT community, this stigmatisation can lead to varying types of chronic health issues; like high blood pressure and earlier onset of disabilities, according to a recent Kaiser Family Foundation Research report. On top of that, LGBT adults face more challenges in getting healthcare. Stress and anxiety that's fueled by discrimination are the likely culprits, say many experts. These stresses can occur on many fronts, such as hearing about constant LGBT legal battles, workplace discrimination, or being denied healthcare (Remafedi, 1998; Ibane, *et. al*, 2005; McLaughlin, 2010 and Gustke 2017).

Another study, from a trusted source, of over 68,000 American adults found that lesbian, gay, and bisexual adults drank and smoked more heavily than heterosexual adults. Gonzales, who co-authored the study, describes smoking and drinking as a coping mechanism for dealing with discrimination. It could be drowning feelings by self-medicating, he said. According to studies, gay men were seven times more likely to report bingeing and twelve times more likely to report purging than heterosexual men. Dr. Stephanie Setliff, medical director at the Eating Recovery Centre in Dallas, told Healthline that bingeing could also lead to social isolation as feelings of shame and guilt arise (McLaughlin, 2010 and Gustke 2017).

Amnesty International (2020) observed that many intersex people around the world are forced to undergo dangerous, invasive and completely unnecessary surgeries that can cause life-long physical and psychological side effects. According to a University of Washington study that examined health conditions among LGB adults over 50, lesbian and bisexual women are more likely to have chronic health conditions than heterosexual women (Gustke, 2017). These health conditions include strokes, heart attacks, and asthma. Aging gay men, lesbians, and bisexual people also usually lack family support and end up living alone. They report higher rates of mental distress and isolation, according to a policy brief by the UCLA Centre for Health Policy Research. However, when moving into nursing homes, elder abuse is rampant, too. According to surveys, 43 per cent of LGBTQ seniors have either been

abused by caretakers or witnessed abuse, such as being evicted from long-term care facilities. This abuse is a hard one, said Gonzales. When health deteriorates, some will enter nursing homes. Often, that process leads them to go back into the closet (McLaughlin, 2010 and Gustke 2017)

The IOM's (2011) report on improving the health of LGBTI people identified that one of the main challenges in understanding their health needs is the lack of data. Given the discrimination and stigmatisation that LGBTI individuals face, questions about sexual orientation and gender identity must be asked competently and carefully. Depending on how sensitively the questions are asked, LGBTI individuals may not disclose and thus accurate data may not be captured (Daniel *et al.*, 2015).

Compared to heterosexual individuals, sexual minority individuals are more likely to delay or avoid necessary medical care. This may be secondary to prior negative health care experiences, concerns about confidentiality, and or fears of homophobic or stigmatising reactions. A survey by Lambda Legal (2010) found that 8 per cent of sexual minority and 27 per cent of transgender individuals have been refused needed health care, and almost 11 per cent of sexual minority and 21 per cent of transgender people reported health care professionals using harsh or abusive language toward them.

Likely, as a result, many LGBTI individuals continue to be reluctant to disclose their sexual orientation or gender identity when receiving medical care. All of these findings may lead LGBTI patients to avoid needed medical care or withhold information important to their medical treatment. The American Academy of Paediatrics acknowledged that the effects of homophobia and heterosexism could contribute to health disparities, particularly mental health disparities (Mayer *et al.*, 2008, Lambda Legal, 2010, Levine *et al.*, 2013 and Khalili *et al.*, 2015).

LGBTI individuals face barriers when interacting with the physical space of the health care environment as well as the procedural environment. Most health care spaces do not signal that they are safe spaces for LGBTI individuals. The majority of posters, pamphlets, and materials from the clinical space show heterosexual individuals or couples. Additionally, rainbow pride flags for the LGBT social movement are rarely visible. Gender affirming and

inclusive bathrooms are not commonplace. On a more individual level, barriers for LGBTI individuals permeate into the medical record, where incorrect names and pronouns are used, and intake forms frequently lack affirming language regarding relationship status. Taken together, these can lead to unwelcoming or poor experiences for LGBTI individuals that may discourage them from interacting with the health care system itself. Despite these important findings, there is an absence of mainstreaming of health and social care provision for LGB people. Due to this limitation, policy and practice will be piecemeal and reliant upon the attitudes and innovation of individuals and forward-thinking organisations (Fish, 2006, Smalley, 2018, Deutsch and Feldman, 2013).

2.6 Legal Proscription of Homosexuality on HIV/AIDS management in Zambia

The Zambian Penal Code explicitly criminalises same-sex sexual relations between both men and women. In 2005, the Zambian Penal Code was amended to, clearly outline the penal code for males, females and children separately who engage in homosexual acts, that is, act of gross indecency with a female child or person (section 158). Also, section 155a states that it is criminal for any person who has carnal knowledge of any person against the order of nature and this could be interpreted to include women, transgender and intersex people as well. Under this code, gay and bisexual men have been arrested and charged. This law clearly and explicitly creates a homophobic environment in Zambia where several persons practicing homosexuality have been arrested and charged and others successfully convicted under this statute (Sida, 2014 and Bloomberg, 2019).

Sida, (2014) further notes that while there is no legislation protecting LGBTI people from discrimination, there is implicit protection against discrimination in the anti-discrimination clause in Article 23 of the 1996 Zambian Constitution. According to Article 23(1), no law shall make any provision that is discriminatory either of itself or in its effect. Article 23(2) further prohibits discrimination by any person acting by virtue of any written law or in the performance of the functions of any public office or any public

authority, and Article 23(3) defines discrimination as extending to differential treatment of people on the basis of race, tribe, sex, place of origin, marital status, political opinions, color or creed.

Since 2011, there has been a process of revising the Constitution. In October 2014, a final draft was released but only sections of it were adopted and amended in 2016. When it comes to marriage, the 2016 constitution also states that everybody above nineteen years has the right to choose a spouse of the opposite sex and marry (Sida, 2014, Constitution 2016 and Bloomberg, 2019).

The Law Association of Zambia (LAZ) stated that it is impossible to respect LGBTI rights as long as the current legislation criminalises same-sex acts, and that people who engage in protecting LGBTI rights face penal sanctions. Zambia's laws concerning homosexuality not only violate international conventions that Zambia has ratified, but reinforce negative social stigma and homophobia against sexual and gender non-normative behaviour (Sida, 2014).

In a legal study conducted by Lungu (2000) on the 1991 and 1996 amended constitution, in particular Article 87 of the laws of Zambia, she stated that there was a problem with the statute because it does not specifically state or codify what actually amounts to unnatural acts. Harper (2016), in his Etymological studies stated that nature, in the broadest sense, is the natural, physical, or material world or universe and can refer to the phenomena of the physical world, and also to life in general. If nature means life in general, then the observation made by Lungu (2000) in her study that the actual inclusion of the homosexuality in the interpretation of this piece of legislation leaves much to be desired, is true. For it could either imply that homosexuality takes life or homosexual acts are lifeless, in which case both positions are illogical and inconsistent with reality, because both the practice and act involve living human beings who are erotically attracted to each other. This has led some sections of society to question the criminalisation of homosexuality.

Another legal study on criminology, conducted by Couvaras (2012) observed that for an act or practice to qualify to be considered a criminal act or practice it should be one which constitutes a serious offence against an

individual or state and is punishable by law. This means that an act or practice qualifies to be a criminal offence only in the instance when such an act or practice is done against an individual or state whose punishment should be a deterrent to would be offenders. Amnesty International (2008), observed that homosexuality is practiced by consenting adults. The second part of the argument is that of the state. Homosexuality, like any sexual activity, is conducted in private, in which case it does not qualify to be offensive to the state.

Therefore, both criminalisation and the punishment in section 155 and 157 as well as 158 of The Penal Code CAP 87 of the laws of Zambia of imprisonment up to 14 years, is against the basic tenets of criminalisation or criminal law. Further, the deterrent effect expected from the punishment cannot be realised because the targeted persons engage in homosexuality not as an opportunity but as a way of life. To this end Couvaras contends in her study that, there is no justifiable reason for criminalization of homosexuality in so far as satisfying the common principles and purpose of criminalisation is concerned (Amnesty International, 2008; Couvaras, 2012 and Epprecht, 2012).

It could, thus far be correct to conclude that the Zambian penal code is a heterosexist law because it is discriminatory in nature, in that it offers disadvantages and harm on homosexuals in a bid to promote a heterosexual society. Further, homosexuality as an orientation, has so far been proven to be immutable and not under the control of a person practicing it (Kahlenberg, 1996; Malupande, 2000 and Epprecht, 2012).

The prevailing legal environment in Zambia; that is, the legal proscription of homosexuality, has led to a heterosexual analysis of the spread of HIV. This heterosexual analysis has overshadowed critical thought towards the effects or contribution of sexual minorities in the prevalence of HIV, which in turn has weakened critical thought of the patterns of sexual contraction and transmission of HIV amongst sexual minorities in the country (Libati, Chitabanta and Mwale, 2019).

Notable longitudinal study results in Zambia from such institutions as (Central Statistical Office [Zambia], Central Board of Health [Zambia], and ORC Macro, 2003; Central Statistical Office (CSO), Ministry of Health

(MOH), Tropical Diseases Research Centre (TDRC), University of Zambia, and Macro International Inc, 2009; Central Statistical Office (CSO) [Zambia], Ministry of Health (MOH) [Zambia], and ICF International, 2014), have indicated a considerable reduction in the prevalence rate between men and women from 15 percent and 18 percent to 11 percent and 15 percent respectively over a period of 13 years (2001 to 2014).

These results have led researcher like Dowsett (2003) to provide some plausible possible reasons for such vulnerability by women to HIV as due to two factors; their biological nature and secondly, a structural nature; women's almost universally unequal access to social and economic resources, which often led to powerlessness, greater poverty and inequality, and their consequences; possible sexual violence and resort to sex work for income. The positive effect of Dowsett's thinking has been the rise of the feminist movement, which has many institutions, including governments to apportion economic means of production to women and youths. However, there is a knowledge gap in that due to the legal proscription of homosexuality, it is not clear yet how much of a contribution homosexuals' have made towards the overall country HIV prevalence and infection rate. With this in mind, is it morally right to continue legally proscribing homosexuality?

2.7 Summary

This chapter presented a review of related literature on the legal proscription of homosexuality on HIV/AIDS management in Zambia with a view to show the gap that exist in knowledge. According to the literature reviewed, the prevailing legal environment in Zambia; that is, the legal proscription of homosexuality, has led to a heterosexual analysis of the spread of HIV. This heterosexual analysis has overshadowed critical thought towards the effects or contribution of homosexuals in the prevalence of HIV, which in turn has weakened critical thought of the patterns of sexual contraction and transmission of HIV amongst homosexuals. This is because these homosexuals are sexually active but remain closeted from public services including public health services. The question therefore asked was, was it morally right to maintain this law?

CHAPTER THREE: THEORETICAL FRAMEWORK

3.1 Overview

This chapter presents the researchers' epistemology. A researcher's epistemology according to Holloway (1997), Mason (1996) and Creswell (1994) is literally his theory of knowledge, which serves to decide how the social phenomena will be studied. My epistemological position regarding this study was the Rights Theory. The Rights Theory chosen because it focusses on the intrinsic value of an act itself, as opposed to the rightness or wrongness of the consequences of an action.

3.2 Rights

The spirit of human rights has been transmitted consciously and unconsciously from one generation to another, carrying the scars of its tumultuous past. Today, invoking the United Nations Universal Declaration of Human Rights (UDHR), adopted by the General Assembly in 1948, one may think of human rights as universal, inalienable and indivisible, as rights shared equally by everyone regardless of sex, race, nationality and economic background. Yet conflicting political traditions across the centuries have elaborated different visions of human rights rooted in past social struggles. That historical legacy and current conflicting meanings of human rights are, despite the admirable efforts of the architects of the declaration, all reflected in the structure and the substance of this important UN document. The UDHR was adopted by the Third United Nations General Assembly in December 1948, and became a model for the constitutions of many countries and domestic and international non-governmental organizations (NGOs) (Morsink, 2009). Following the UDHR, human rights slowly entered international law through, among others, the European (1950) and American (1969) Conventions and the International Covenants (1966) (Crufts, Liao, and Renzo, 2015).

Tierney (1997) and Brett (1997) contend that the idea of rights held by all in virtue of their humanity can be found long before 1948, for example in the 1776 American Declaration of Independence and the 1789 French

Declaration of the Rights of Man and the Citizen. In the guise of ‘natural rights’; rights held by people as a matter of natural law, the idea can be found in the influential seventeenth-century and eighteenth-century work of Grotius, Pufendorf, Locke, and Kant. Indeed, recent scholarship claims that this idea of natural rights first originated much earlier, either in early medieval thought or before (Crufts, Liao, and Renzo, 2015). Simply put, rights are an age old idea of creating a basis for promoting a world where liberty and freedom are the pinnacle of humanity and a measure of interaction with each other.

Ishay (2004) states that throughout history, the human rights projects reflected in the declaration generated internal contradictions concerning both how to promote human rights and who should be endowed with equal human rights. For instance, while the modern nation-state was originally justified by claims that it would promote human rights, the subsequent prevalence of *realpolitik* and particularism inspired 19th and 20th century efforts to embody universalism in the form of a succession of international organizations.

As it became clear during the 19th century that the masses of ordinary working people had been excluded from the liberal human rights vision of the Enlightenment, a new socialist conception of internationalism laid claim to the universal promise of human rights. At the same time, the contradictory achievements of the liberal and socialist human rights projects contributed to the rise of nationalism and cultural rights (Ishay, 2004).

Today, these particularist perspectives, though directed against universalist promises have become an integral part of the universal declaration, as well as subsequent human rights covenants, and have remained a continuing source of division within the human rights community (Ishay, 2004).

Adding to this divisive view is Thomas Hobbes’s use of the idea of a ‘right of nature’ in *Leviathan* which can be reduced to being idiosyncratic: for Hobbes, unlike the other thinkers, a person’s ‘right of nature’ is not a right entailing duties that others must fulfil, but consists rather in the person’s liberty, in the state of nature without government, to do whatever she wishes to others in order to preserve her own life (Crufts, Liao, and Renzo, 2015).

Hobbes initial conception of rights has made other philosophers delineate rights into categories like the four distinct categories developed by Hohfeld.

Hohfeld presents us with a concise and analytical scheme which separates rights into four distinct categories whose relationship is based on a judicial dispensation and exemplifies a number of analytical distinctions between various legal positions. Importantly, Hohfeld's analysis of rights lies in the descriptive exercise of the legal positions which are connected with each other by means of logical relations of entailment and negation. Hohfeld's analysis is engaged in an analytical and definitional enterprise and does not concern itself with substantive or empirical enquiry into the concept of a right. It follows that Hohfeld's ambition was to provide a conceptual understanding for our use of right (claim-right), power, immunity, or liability in practice, thus facilitating a better understanding of the nature of our rights. It was not, however, to inform us what rights, duties, claims and liberties are or should be or what their moral foundation is or what is necessary for something to count as a right, duty, claim or liberty.

What follows is a brief consideration of Hohfeld's conceptual and practical and analytical which splits rights into four different categories of jural relationships and exemplifies a number of analytical distinctions between various legal positions. This understanding of the nature of rights underlie, and animate, contemporary political battles over human rights, in particular, homosexuals' rights.

3.2.1 The Nature of Rights: Logic, Substance and Strength

Right

To say that X has a legal claim-right means that he is legally protected from interference by Y or against Y's withholding of assistance with respect to X's project Z. Conversely, Y, who is to abstain from interference, or is required to provide assistance in connection with X's project Z, is under a correlative duty to do so. The correlativity stipulation commands that if X has a claim-right against Y, this entails Y owing a duty to X, (*Lake Shore and MSR Co v Kurtz*, 1894), for example, if X has a claim-right that Y should deliver him goods, this entails Y having a duty to deliver goods to X. He who has the right must be

able to pinpoint another person with a correlative duty either in terms of shield or assistance. For instance, in ordinary parlance we refer to an individual having a right not to be tortured. This is not a 'right' in the strict Hohfeldian sense because the state (or any other person) is under no correlative duty to abstain from torturing people. Instead, the person's 'right' not to be subjected to torture is protected by the array of normative protections guaranteed by the state through the general laws against assault, trespass and violation of privacy. Therefore, the general right not to be assaulted sets the protective perimeter within which a person's legal 'right' to be free from torture can exist (Kramer, 1998).

Liberty

In short, liberty is merely an absence of a duty to abstain from the action (Kramer, 1998). The correlativity of this jural relationship shows that the person against whom the liberty is held has a no-right concerning the activity to which the liberty relates. This, however, does not mean that he himself does not have a liberty to interfere in the activity. Suppose that I am irritated by people who smoke in my vicinity. I meet S (smoker) in a public place, who starts to smoke in my presence. I ask him to stop, but S tells me he has a 'right' to smoke here (given the absence of any legal prohibitions). S is confusing his entitlement. He does not have a right (in the Hohfeldian sense) to smoke, but merely a liberty (a weaker right).

Although I have a no-right concerning his activity of smoking, I do have a liberty myself (within the constraints imposed on me by S's genuine rights) to impede his smoking, say, by raising my voice or encouraging other people to make fun of S for his smoking habit, which may make him stop. The important point is that in almost every circumstance outside the Hobbesian state of nature, a person who acts in line with his liberty, such as S, would effectively be shielded, albeit imperfectly, from the encroachment on his liberty by possession of some basic legal Hohfeldian rights such as the rights against assault, battery, and trespass (Halpin, 1985). Hohfeld's analysis therefore provides a clear understanding as to what the legal position of S is; that is, what rights he has. As we can see, had it not been for Hohfeld providing us with a precise vocabulary, S would mistake his liberty for a right, and

accordingly would be unable to accurately report the effect of his entitlement. He would be wrong in saying to me that I cannot stop him from smoking because he has a right to smoke in a public place, since it puts me under no duty not to interfere with his smoking. This once again shows the practical benefit of Hohfeld's elegant and clear analysis.

A problem may arise when two competing liberties arise in the arena of jurisprudence (MacKinnon, 1989). A good illustration of this is media law in the United Kingdom whereby freedom of expression and the right to privacy are often conflicting interests. The courts try to balance these interests, but the state traditionally is under no duty to provide for either interest. Therefore, it tends to be the consideration of moral and social norms and principles which governs the judiciary's favour of one interest over the other. Hohfeld points out that it is the mixing up of value-driven ideals that has confused the meaning of rights; instead, the clarification of rights should aid the judiciary to balance interests without letting a possible bias intrude (*Douglas and Others v. Hello! Ltd (No.1)* [2001] Q.B. 967).

Power

In short, a power is one's ability to alter legal (or moral) relations. For instance, I can have the power to enter into a contract with S whereby he agrees (for a consideration) to refrain from smoking in my presence. Thus, I have the power to change our legal relations in that I make S contractually bound (as well as myself). S, thus, has a liability, which is correlative to power, in that he is liable to having his legal relations altered by my exercise of power. Hohfeld's analysis clears the practical meaning of the term power; on myriad occasions, lawyers have created confusion by referring to a 'right' to do something when, in fact, they mean a Hohfeldian power to do something. Suppose X steals my car. Does he have a 'right' to sell it on to Y? If X sells it to Y, who is the bona-fide purchaser for value, he can pass good title on to him (MacKinnon, 1989).

Thus, X has a Hohfeldian power to perform the sale of my car. However, he is not at liberty (in Hohfeld's sense) to do so, because liberty is the absence of a duty not to do the act, whereas here, X's sale of the stolen car to Y is a legal wrong and he thus clearly breaches his legal duty by selling it.

Although he has effective power to transfer the title, he does not have a liberty to do so. How confusing would it be to say that X has a right to sell the car, but he does not have a right to sell the car in the absence of Hohfeld's precise vocabulary? Hohfeld's analysis indeed helps to clarify the legal position of the parties and is able to more accurately predict the effect of the alterations in their respective legal positions (Dworkin, 1977).

Immunity

If X has an immunity against Y, it means that Y has no power to change X's legal position with respect to any entitlements covered by the immunity. For instance, if the state has no power to place me under a duty to wear a hat when I go out, I have immunity in that respect, and the state a disability (a correlative to immunity). Simmonds notes that 'Constitutional Bills of Rights frequently confer extensive and very important immunities, in so far as; they disable the legislature from enacting certain types of law'. This shows that adopting Hohfeldian analysis of rights is very important given its clarity and precision to ensure that the state does not overpower the individual. I have shown so far how useful Hohfeld's analysis can be in getting a clear sight of the jural relations of the parties involved and their legal positions (Simmonds, 2001).

Indeed, as has been suggested, Hohfeld's work has become important, not only in the classification and clarification of rights elements themselves, but also in the relationship between the non-Hohfeldian uses of the term right, for instance when a privilege (a non-absolute right) can co-exist with another privilege. I will further illustrate how Hohfeld's analysis helps to clarify legal relationships and the meaning of 'rights' by using the case of *Quinn v Leathem* (1901) AC 495 in part II. One needs to note that the stipulative nature of Hohfeld's analysis of rights presents an analytically clear scheme which manages to steer clear of the confusion and complexities which are usually present in theories of rights which seek to justify rights, bringing into the equation various justificatory factors.

In contrast to Hohfeld, consider, for example, theorists such as Dworkin (1977), Kymlicka (1989), Kant (2003) and MacKinnon (1989) who seek to

justify rights, mainly in terms of the various values they serve. Arguably, this adds unnecessary complexity to the nature of rights.

3.2.2 The Substance of Rights: What Concerns Do Rights Protect?

Harel (2003) notes that there are two theories, the choice (or will) theory and the interest (or benefit) theory of rights, that address the question of what concerns rights protect. One important by-product of addressing this question is clarifying the gap within Hohfeld's theory, that is., explaining what it means for a right to be possessed by somebody (and for a duty to be owed to somebody). Moreover, both the choice and the benefit theories demonstrate the relation between conceptual analysis of rights and particular moral or political visions. The Choice Theory and the Interest Theory are competing conceptual frames that reflect more foundational moral disagreements.

The Choice Theory of rights regards rights as protecting the exercise of choice (Hart, 1982). Right holders are agents who are given control over another person's duty and can thus be analogised to a small-scale sovereign. Rights, under this view, can be identified as protected choices; protection which is conducive to the autonomy and self-realisation of right holders (Harel, 2003).

Choice theorists often focus their attention on private law. Private law is distinguished from criminal law in that, typically, the victim of a tort, or breach of contract, is granted many powers, which facilitate ample choice on the part of the right holder. The choices protected by private law consist of three elements:

- (i) the right holder may waive or extinguish the duty owed to him by others;
- (ii) the right holder can leave the duty unenforced, or alternatively, enforce it; and
- (iii) the right holder may waive or extinguish the obligation to pay compensation to which the breach gives rise (Hart, 1982).

The Choice Theory explains why rights are often regarded as fundamental to one's personhood, individuality, and self-determination. By

exercising choice one manifests one's individuality and personhood. Admittedly, conceptually one could argue that rights are protected choices and then deny the significance of autonomy and conclude based on this that people have no rights. Yet, choice theorists typically share a particular moral vision, a vision stressing the importance of self-determination and autonomy. (Sumner, 1987 and Kramer, 1998).

The Interest Theory of rights holds that the point of rights is to protect and promote (some of) the right holders' interests. The dominating picture here contrasts with the choice theory in that it characterises rights as protected choices and consequently emphasizes the status of right holders as the passive beneficiaries of protective and supportive duties imposed on others (Sumner, 1987 and Harel, 2003).

Facilitating individual choice can be classified as an interest, and rights can protect that interest; but it does not have the privileged status that it has within the choice theory of rights. Moreover, in contrast to the Choice Theory, the Interest Theory protects choices only because, and to the extent, that they promote the right holders' interests. Consequently, the interest theory is broader in the scope of concerns it protects and can acknowledge the existence of inalienable rights; it can also ascribe rights to entities that are not agents, as long as these entities have interests; as long as they can be made better or worse off (Harel, 2003).

The choice and the interest theory of rights address the question of which concerns are protected by rights. While doing so, they also fill a gap in Hohfeld's conceptual scheme. Most importantly, they clarify the concept of relational or directional duties; they explain what it means for a duty to be owed to somebody, or for a right to be possessed by somebody. In the course of doing so, one learns about the intimate relation between rights and more fundamental principles of moral and political theory. Yet, both the choice and the interest theory leave one important feature of rights unaccounted for: why are rights considered to be so important in practical reasoning?

3.2.3 The Strength of Rights: Why Should We Take Rights Seriously

The reason for the conviction that rights have special importance stems from the fact that there is a gap between the stringency or the weight attributed to a right and the degree to which this right promotes the right holder's interests. Even when rights clearly promote an interest, it often seems that their protection is much more stringent than that which would be justified simply by weighing the relevant interests (Raz, 1994). One influential theory states that when one has a right, the existence of the right provides the right holder with an argumentative threshold against objections, which could otherwise be addressed against her (Lyons, 1994). The mere fact that not protecting one's right has some (however slight) beneficial outcomes is not sufficient to override this right. Dworkin (1984) coined the term rights as trumps to describe this phenomenon. Rights, in his view, should be understood as trumps over some background justification for political decisions that states a goal for the community as a whole.

These background considerations are consequentialist in nature; they specify certain goals, which the political community should strive towards. Rights disrupt the (otherwise justified) uninhibited pursuit of these goals. Rights-based reasoning should, therefore, be contrasted with the unqualified process of balancing competing interests and goals; a balancing which is most characteristically exemplified in the economically oriented method of decision-making termed cost-benefit analysis, or utility maximisation (Harel, 2003).

Two clarifications are necessary to explain this position. First, although rights are understood as trumps over background justifications, they do not necessarily override the pursuit of every valuable social goal. If the gains in terms of the background justifications are large enough, rights can be overridden. Second, background justifications state goals that are not necessarily utilitarian. Equality could also function as a background justification. What characterises social goals in contrast to rights is the willingness to trade off burdens and benefits within a community in order to produce some overall benefit to the community as a whole (Dworkin, 1977).

Rights contrast with collective goals in that rights are individualistic, rather than collective and, consequently, rights-based reasoning does not allow a tradeoff of burdens and benefits between individuals and the society (Harel, 2003).

3.5 Summary

Rights can be characterised based on their form, substance and strength (Harel, 2003). Their role within moral theory is controversial and some even regard the discourse of rights as promoting a formal legalistic or sectarian moral agenda (Lyons, 1994). In a world with no rights, an intangible human sensitivity would be lost; sensitivity which highlights the right holder and her perspective as central components of moral theory (Harel, 2003). People may be well protected in such a world but depriving them of the status of right holders means that they are not protected for the rights reasons; reasons which highlight their central role in justifying that protection (Harel, 2003). However, even if one rejects this explanation as too metaphysical, it seems that analogous conceptual tools (Harel, 2003) would in such a world, replace some of the function's rights serve. Currently, rights are too entrenched in our moral and legal culture for us to comprehend how such a world would look (Harel, 2003).

CHAPTER FOUR: METHOD AND METHODOLOGY

4.1 Overview

This chapter presents the detailed account of the study design and the reasons for its' adoption.

4.2 Research Design

According to Kirshenblatt-Gimblett (2016), the function of a research design is to ensure that the evidence obtained enables you to effectively address the research problem as unambiguously as possible. In other words, the development of a paradigm. A paradigm is the patterning of the thinking of a person; an exemplar or model to follow according to which design actions are taken. Differently stated, a paradigm is an action of submitting to a view (Stanage, 1987). Denzin and Lincoln (2000), supported this view when they defined a research paradigm as a basic set of beliefs that guide action, dealing with first principles, 'ultimates' or the researcher's worldviews. In social sciences research, obtaining evidence relevant to the research problem generally entails specifying the type of evidence needed to test a theory, to evaluate a programme, or to accurately describe a phenomenon Kirshenblatt-Gimblett (2016). In this study, the research topic needed evidence from lived experiences of health personnel, LGBTI persons, parliamentarians, judicial officials, civil society, the church and defence lawyers, because of this the researcher engaged with the participants in collecting the data.

In collecting evidence for accurate description of lived phenomenon the researcher adopted transcendental phenomenology as developed Edmund Husserl in 1913. Husserl rejected the belief that objects in the external world exist independently and that the information about objects is reliable (Fouche, 1993). He argued that people can be certain about how things appear in, or present themselves to their consciousness (Eagleton, 1983). To arrive at certainty, anything outside immediate experience must be ignored, and in this way the external world is reduced to the contents of personal consciousness ((Moustakas, 1994). Realities are thus treated as pure 'phenomena' and the

only absolute data from where to begin (Kruger, 1988). Husserl named his philosophical method 'phenomenology', the science of pure 'phenomena' (Eagleton, 1983). The aim of phenomenology is the return to the concrete, captured by the slogan 'back to the things themselves!' (Eagleton, 1983).

The epistemological position regarding the study that the researcher undertook can be formulated as follows: (a) data are contained within the perspectives of people that are involved with LGBTI health programmes, either in advocating for their health rights or as programme participant (LGBTI persons themselves); and b) because of this the researcher engaged with the participants in collecting the data. Based on Davidson (2000) and Jones (2001), the researcher identified a phenomenological methodology as the best means for this type of study.

Phenomenologists, in contrast to positivists, believe that the researcher cannot be detached from his or her own presuppositions and that the researcher should not pretend otherwise (Hammersley, 2000). In this regard, Mouton and Marais (1990) state that individual researchers hold explicit beliefs. The intention of this research, at the outset, was to gather data regarding the perspectives of research participants about the phenomenon; the legal proscription of homosexuality on public health in Zambia.

4.3 Study Site

According to Hycner (1999), the phenomenon dictates the study site (not vice-versa) including even the type of participants. The researcher made use of Internet searches, telephonic enquiries and personal inquiry to the identified offices; constituency offices, civil society, public and private hospitals. Interviews were arranged with the key informants or their representatives. These interviewees were the primary unit of analysis (Bless and Higson-Smith, 2000), with their 'informed consent' (Bailey, 1996, Arksey and Knight, 1999).

4.4 Sample

The researcher selected the sample based on my judgement and the purpose of the research (Babbie, 1995), looking for those who have had experiences relating to the phenomenon to be researched (Kruger, 1988).

4.5 Sampling Method

According to Hycner (1999) the phenomenon dictates the method. The researcher chose purposive sampling, considered by Welman and Kruger (1999) as the most important kind of non-probability sampling, to identify the primary participants. The researcher selected the sample based on his own judgement and the purpose of the research (Greig and Taylor, 1999; Schwandt, 1997), looking for those who have had experiences relating to the phenomenon to be researched (Kruger, 1988). In order to trace additional participants or informants, the researcher used snowball sampling. Snowballing is a method of expanding the sample by asking one informant or participant to recommend others for interviewing (Babbie, 1995), Bailey (1996), Holloway (1997), and Greig and Taylor (1999) call those through whom entry is gained gatekeepers and those persons who volunteer assistance key actors or key insiders.

Neuman (2000), qualifies a gatekeeper as someone with the formal or informal authority to control access to a site a person from whom permission is required. Key insiders often adopt the researcher. Bailey (1996), cautions that such adoption may isolate the researcher from some potential informants or subjects. The researcher requested the purposive sample interviewees to give, at their discretion, the names and contact details of persons involved in key population health campaigns, civil society and/or government who a) were responsible for the advocacy programmes; and b) who had participated or played an active role in the theme presented. Regardless of these strategies, the most accommodating gatekeepers did, as Neuman (2000) cautions, to some extent influence the course of the research unfolding by steering the researcher to look into documented health policies.

4.6 Sample Size

Boyd (2001), regards two to ten participants or research subjects or participants as sufficient to reach saturation and Creswell (1998) suggests long interviews with up to ten people for a phenomenological study, a sample size of ten; one parliamentarian, one judge, one magistrate, one lawyer, one representative from civil society, two health workers (public and private), one clergy, two LGBTI persons, were selected. The participants were grouped into four categories: health professionals, legal minds, civil society, and LGBTI community. The purpose of collecting data from four different kinds of informants is a form of triangulation; in Sociology this general idea translates into what Denzin (1970) identifies as five types:

(A) Methodological Triangulation; (1) Two or more researchers using same research technique (2) One researcher using two or more research techniques (3) Two or more researchers using two or more research techniques,

(B) Researcher triangulation; in studies that rely heavily on researcher interpretations to generate data, reliability and validity control is attained through the use different researchers

(C) Data Triangulation: This involves gathering data through differing sampling strategies such as collecting data: (1) at different times (2) in different contexts (3) from different people,

(D) Theoretical triangulation, sometimes called methodological pluralism, this type involves a researcher combining different research methodologies, such as interpretivism and feminism methods, in an attempt to improve research reliability and validity,

(E) Environmental Triangulation This type uses a range of environmental factors - different locations, times of day, and seasons to check. data validity.

In this study, the researcher adopted the 'data triangulation' to contrast the data and 'validate' the data if it yields similar findings (Arksey and Knight, 1999; Holloway, 1997), that is, gathering data from different people; the four identified categories of the participants, at different times and in different contexts (Denzin, 1970).

4.7 Sources of Data

Interviews were the main source of primary data (Holloway, 1997). Interviews for collecting data continued until the topic was exhausted or saturated. That is when interviewees (subjects or informants) introduced no new perspectives on the topic (Bloor, 1997). However, Bentz and Shapiro (1998) and Kensit (2000) caution that the researcher must allow the data to emerge: Doing phenomenology means capturing rich descriptions of phenomena and their settings.

4.8 Ethical Protection of the Participants

In order to ensure ethical research, the researcher made use of informed consent (Holloway, 1997; Kvale, 1996). Bailey (1996), cautions that deception may be counterproductive. The specific ‘phenomena’ (from the Greek word phenomenon, meaning appearance) that the researcher focused on was the legal proscription of homosexuality on public health in Zambia. However, not asking the leading central research question is not regarded as deception (Kvale, 1996). Based on Bailey’s (1996) recommended items, the researcher developed a specific informed consent agreement, in order to gain the informed consent from participants, namely:

- (i) You are participating in a research study (Arksey and Knight, 1999),
- (ii) The purpose of the research is to generate data to be used for analysing the legal proscription of homosexuality (Arksey and Knight, 1999),
- (iii) The procedure of the research is to purposive conduct in-depth open interviews with a purposively selected sample (Kvale, 1996),
- (iv) The risk and benefits of the research are that it is contributing to a real matter (Bless and Higson-Smith, 2000),
- (v) The voluntary nature of research participation: You are free to withdraw your participation at any stage you feel uncomfortable (Street, 1998),

Bailey (1996), further observes that deception might prevent insights, whereas honesty coupled with confidentiality reduces suspicion and promotes sincere responses. The informed consent agreement was explained to subjects at the

beginning of each interview session. It was important to keep in mind that the findings may, or may not, illustrate that any of the practice of the respondents induce or propagate the legal proscription of homosexuality on public health in Zambia. In this regard, Jon KabatZinn states that inquiry does not mean looking for answers (cited in Bentz and Shapiro, 1998).

4.9 Data Collection Methods

4.9.1 Primary Data

Primary data can be collected in a number of ways (Kvale, 1996). However, the most common techniques are self-administered surveys, interviews, field observation, and experiments (Kvale, 1996). The researcher conducted unstructured in-depth phenomenological interviews with all the four categories of the participants. The researcher's questions were directed to the participant's experiences, feelings, beliefs and convictions about the theme in question (Welman and Kruger, 1999). Husserl called it bracketing when the inquiry is performed from the perspective of the researcher. According to (Caelli, 2001), Bracketing in this study entailed asking the participants/informants to set aside their experiences about the phenomena; legal proscription of homosexuality on public health, and to share their reflection on its value (King, 1994).

Data was obtained about how the participants think and feel in the most direct ways (Bentz and Shapiro, 1998). I focused on what goes on within the participants and got the participants to describe the lived experience in a language as free from the constructs of the intellect and society as possible. This is one form of bracketing (Davidson, 2000). There is also a second form of bracketing, which, according to Miller and Crabtree (1992) is about the researcher that must 'bracket' her or his own preconceptions and enter into the individual's lifeworld and use the self as an experiencing interpreter. Moustakas (1994), points out that Husserl called the freedom from suppositions the 'epoche'(sic), a Greek word meaning to stay away from or abstain. According to Bailey (1996), the informal interview is a conscious attempt by the researcher to find out more information about the setting of the person. The interview is reciprocal: both researcher and research subject are

engaged in the dialogue. The researcher experienced that the duration of interviews and the number of questions varied from one participant to the other.

Kvale (1996), remarks with regard to data capturing during the qualitative interview that it is literally an interview, an interchange of views between two persons conversing about a theme of mutual interest, where researcher attempts to understand the world from the subjects' point of view, to unfold meaning of peoples' experiences. At the root of phenomenology, the intent is to understand the phenomena in their own terms; to provide a description of human experience as it is experienced by the person herself (Bentz and Shapiro, 1998) and allowing the essence to emerge (Cameron, et.al, 2001). The maxim of Edmund Husserl was back to things themselves! (Kruger, 1988).

Observations recorded in the form of 'Memoing' (Miles and Huberman, 1984) is another important data source in qualitative research that the researcher used in this study. It is the researcher's field notes recording what the researcher hears, sees, experiences and thinks in the course of collecting and reflecting on the process.

Researchers are easily absorbed in the data-collection process and may fail to reflect on what is happening. However, it is important that the researcher maintains a balance between descriptive notes and reflective notes, such as hunches, impressions, feelings, and so on. Miles and Huberman emphasize that memos must be dated so that the researcher can later correlate them with the data (Miles and Huberman, 1984).

4.9.1.1 Data Storage

Each interview was assigned a code, for example Participant, 21 May 2002. Where more than one interview took place on a specific date, the different interviews were identified by an alphabet character, for example (Participant-B, 18 June 2002). The researcher recorded each interview on a separate sheet of paper. None of the participants gave the researcher permission to audio tape them.

Field notes in most studies are considered a secondary data storage method in qualitative research but in this study they were the primary data

storage. Because the human mind tends to forget quickly, field notes by the researcher are crucial in qualitative research to retain data gathered (Lofland and Lofland, 1999).

This implies that the researcher must be disciplined to record, subsequent to each interview, as comprehensively as possible, but without judgmental evaluation, for example: What happened and what was involved? Who was involved? Where did the activities occur? Why did an incident take place and how did it actually happen? Furthermore, Lofland and Lofland (1999) emphasises that field notes should be written no later than the morning after. Besides discipline, field notes also involve luck, feelings, timing, whimsy and art (Bailey, 1996).

The method followed in this study is based on a model or scheme developed by Leonard Schatzman and Anselm Strauss supplemented by Robert Burgess. Four types of field notes were made:

1. Observational notes (ON); 'what happened notes deemed important enough to the researcher to make. Bailey (1996) emphasizes the use of all the senses in making observation.
2. Theoretical notes (TN) - 'attempts to derive meaning' as the researcher thinks or reflects on experiences.
3. Methodological notes (MN) - 'reminders, instructions or critique' to oneself on the process.
4. Analytical memos (AM) - end-of-a-field-day summary or progress reviews.

At this point, it is important to note that field notes are already a step towards data analysis. Morgan (1997), remarks that because field notes involve interpretation, they are, properly speaking, part of the analysis rather than the data collection. Bearing in mind that the basic datum of phenomenology is the conscious human being, or the lived experiences of the participants in the research (Bentz and Shapiro, 1998; Heron, 1996), it is very important that the researcher must, to the greatest degree possible, prevent the data from being prematurely categorised or 'pushed' into the researcher's bias about the legal proscription of homosexuality on public health in Zambia. The writing of field

notes during the research process compels the researcher to further clarify each interview setting (Caelli, 2001; Miles and Huberman, 1984).

4.9.2 Secondary Data

Secondary data means data that is already available; it refers to the data which have already been collected and analysed by someone else (Bailey, 1996). When the researcher utilises secondary data, then he has to look into various sources from where he can obtain them (Bailey, 1996). Secondary data was collected from newspapers, published documents and books.

4.10 Explication of the Data Versus Data Analysis

Hycner (1999), cautions that ‘analysis’ has dangerous connotations for phenomenology.

The ‘term’ [analysis] usually means a ‘breaking into parts’ and therefore often means a loss of the whole phenomenon. Whereas ‘explication’ implies an investigation of the constituents of a phenomenon while keeping the context of the whole (Hycner, 1999). Coffey and Atkinson (1996), regard analysis as the systematic procedures to identify essential features and relationships. It is a way of transforming the data through interpretation. In this study, the researcher used the simplified version of Hycner’s (1999) explication process. This explication process has five ‘steps’ or phases, which are:

- I. Bracketing and phenomenological reduction.
- II. Delineating units of meaning.
- III. Clustering of units of meaning to form themes.
- IV. Summarising each interview, validating it and where necessary modifying it.
- V. Extracting general and unique themes from all the interviews and making a composite summary.

I. Bracketing and phenomenological reduction: Phenomenological reduction to pure subjectivity is a deliberate and purposeful opening by the researcher to

the phenomenon in its own right with its own meaning (Fouche, 1993; Hycner, 1999). It further points to a suspension or 'bracketing out' (or *epoche*), in the sense that in its regard no position is taken either for or against (Lauer, 1958), the researcher's own presuppositions and not allowing the researcher's meanings and interpretations or theoretical concepts to enter the unique world of the informant/participant (Creswell, 1998; Moustakas, 1994; Sadala and Adorno, 2001). This is a different conception of the term bracketing used when interviewing to bracket the phenomenon researched for the interviewee. Here it refers to the bracketing of the researcher's personal views or preconceptions (Miller and Crabtree, 1992).

Zinker (1978), explains that the term phenomenological implies a process, which emphasises the own unique experiences of research participants. The here and now dimensions of those personal experiences gives phenomena existential immediacy.

II. Delineating units of meaning: This is a critical phase of explicating the data, in that those statements that are seen to illuminate the researched phenomenon are extracted or „isolated“ (Creswell, 1998; Holloway, 1997; Hycner, 1999). The researcher is required to make a substantial amount of judgement calls while consciously bracketing her or his own presuppositions in order to avoid inappropriate subjective judgements.

The list of units of relevant meaning extracted from each interview is carefully scrutinised. To do, this the researcher considers the literal content, the number (the significance) of times a meaning was mentioned and also how (non-verbal or paralinguistic cues) it was stated. the researcher had to also keep note of new units that were apparently standing independently. The actual meaning of two seemingly similar units of meaning might be different in terms of weight or chronology of events (Moustakas, 1994).

III. Clustering of units of meaning to form themes: By rigorously examining the list of units of meaning, the researcher tries to elicit the essence of meaning of units within the holistic context. Hycner (1999) remarks that this calls for even more judgement and skill on the part of the researcher. Colaizzi, makes the following remark about the researcher's 'artistic' judgement here: Particularly in this step is the phenomenological researcher engaged in

something which cannot be precisely delineated, for here he is involved in that ineffable thing known as creative insight (Hycner, 1999).

Clusters of themes are formed typically by grouping units of meaning together (Creswell, 1998, King, 1994 and Moustakas, 1994) and the researcher identifies significant topics, also called units of significance (Sadala and Adorno, 2001). Both Holloway (1997) and Hycner (1999) emphasise the importance of the researcher going back and forth to the interview notes to the list of non-redundant units of meaning to derive clusters of appropriate meaning. Often there is overlap in the clusters, which can be expected, considering the nature of human phenomena. By interrogating the meaning of the various clusters, central themes are determined, which expresses the essence of these clusters (Holloway, 1997 and Hycner, 1999).

IV. Summarising each interview, validating it and where necessary modifying it: A summary that incorporates all the themes elicited from the data gives a holistic context. Ellenberger captures it as follows:

Whatever the method used for a phenomenological analysis, the aim of the investigator is the reconstruction of the inner world of experience of the subject. Each individual has his own way of experiencing temporality, spatiality, materiality, but each of these coordinates must be understood in relation to the others and to the total inner 'world' (Hycner, 1999).

At this point, the researcher conducts a 'validity check' by returning to the informant to determine if the essence of the interview has been correctly 'captured'. Any modification necessary is done because of this 'validity check' (Holloway, 1997 and Hycner, 1999).

V. Extracting general and unique themes from all the interviews and making a composite summary: The researcher looks for the themes common to most or all of the interviews as well as the individual variations. Care must be taken not to cluster common themes if significant differences exist. The unique or minority voices are important counterpoints to bring out regarding the phenomenon researched (Holloway, 1997 and Hycner, 1999).

The researcher writes the explication summary, which must reflect the 'horizon' from which the themes emerged (Hycner, 1999 and Moustakas, 1994). According to Sadala and Adorno (2001), the researcher, at this point

‘transforms participants’ expressions into expressions appropriate to the scientific discourse supporting the research. However, Coffey and Atkinson (1996) emphasise that good research is not generated by rigorous data alone [but] ‘going beyond’ the data to develop ideas. Initial theorising, however small, is derived from the qualitative data.

4. 11 Summary

This chapter described the phenomenological study design. This study design was selected because it investigates peoples’ lived meanings. Key practices that are associated with transcendental phenomenology include ‘bracketing’ and ‘epoche’. In bracketing, a researcher sets aside his/her experiences, biases, and preconceived notions in order to understand how the phenomenon appears to participants. In this research design, a researcher conducts in-depth interviews with up to ten participants. These interviews are conducted until saturation point: when the participant can no longer bring up new topics of discussion. Data analysis is done through horizonarisation: significant statements are taken from the transcripts to describe elements of experiencing the phenomenon organizing them into clusters of meaning, and using these to write textual and structural descriptions and using those to write the essence of the phenomenon.

CHAPTER FIVE: FINDINGS, DISCUSSION AND ANALYSIS

5.1 Overview

This chapter presents the findings according to the themes stated in the objectives; inter linkages between homosexuality and public health, barriers against provision of prevention of prevention, treatment and care goods and services, and the impact of legal proscription of homosexuality on homosexuals' access to life saving HIV/AIDS prevention, treatment and care.

5.2 Inter Linkages between Homosexuality and Public Health

The structural barrier created by law is twofold in effect: firstly, it has created limited assumptions that all patients are heterosexual (SANTE, 2017). Which made Richardson (1996) to comment that the public sphere is overwhelmingly heterosexual; it erases the existence of LGBTI persons (Fish, 2006). This reality is very offensive to LGBTI persons in fact, it has resulted in LGBTI patients avoiding healthcare services altogether (ACON, 2017). These experiences and treatment, observably, has led to individual, Institutional, not to mention societal stigma (ACON, 2017).

The legal proscription does not promote health access and provision to these people. These people are termed as marginalised. They do not feel comfortable to come to the clinic, and when fellow patients know that they are gay, people will start staring which is rude. People speak behind their backs (interview: health professional, 2017).

Structural stigma involves state policies, institutional practices (Hatzenbuehler and Link, 2014), that prevent the health provider or institution from providing the necessary services to the legally proscribed community. CAP 87 of the laws of Zambia, under sub section 155 to 158, there is a clear close that says anyone with information on the whereabouts of homosexuals and does not provide such information to the state is guilty of a felony. That means, under civic duties, the medical practitioner who knows about a homosexual, even

though it is client, medical practitioner privilege, he or she should provide such information to the state.

However, “the prevalence rate for HIV is high amongst men having sex with fellow men” (Interview: Civil Society, 2017). We “have identified men having sex with fellow men as a key driver in the spread of HIV because the men having sex with fellow men want to show that they are straight, so they marry and have children, too. This makes homosexuals prone to HIV infection and they are likely to infect their wives” (Interview: Civil Society, 2017).

The illegality and stigma attached to sexual diversity or identities may give victims good reason to value non-disclosure, and to go to great lengths to prevent disclosure from taking place (Panos, 2013). This is affecting public health. “Some of them indulge in bisexual activities” (Interview: Health professional, 2017). Panos (2013), observed that in low-income countries (Zambia inclusive), on average, 20 per cent of men who have sex with men report having sex with women at the same time; 16 per cent of men who have sex with men also report having sex with women in the last year; and 16 per cent of men who have sex with men also report being married. However, “there are no official statistics regarding anything to do with the LGBTI community because the census that is done country wide does not include them” (interview: civil society).

Panos (2013), further noted that in Zambia, as in many other countries in the region, HIV infection is highly driven by the prevalence of multiple and potentially concurrent sexual partnerships and yet, the report by Panos (2013) further indicated that sexual identity has been largely ignored in HIV prevention efforts. In one of the study interviews, one of the health professionals expressed that “when LGBTI persons remain untreated, their diseases will transfer into the general public. Reinfections will increase” (Interview: health professional, 2017). The different sexual identities and behaviour require different HIV prevention approaches because of the different risk exposures (Panos, 2013). However, perceptions of sexual diversity in Zambia are that it is foreign and un-Zambian. As a result, most of the current HIV / AIDS and sexual reproductive health interventions are developed and rolled out with the assumption of a heterosexual population (Panos, 2013).

The foregoing notwithstanding: In the [National AIDS strategic framework 2017-2021] NASF, there is a concept of not leaving anyone behind. To reduce new infections, if we leave behind key people (sic), we will not reach that goal. We will be lost. The 90, 90, 90 will not be reached. Currently, 67 per cent of those that are HIV positive know their HIV status. 85 per cent of those are on HIV treatment and 89 per cent of those have their viral load suppressed. “How will we know that the unknown percentage are gay? Offer services to everyone” (Interview: health professional, 2017).

Panos (2013), observed that sexual identity has been largely ignored in HIV prevention efforts, yet it can provide important clues for public health prevention efforts. Panos (2013), further noted that the inclusion of targeted programming for sexual minorities in HIV prevention interventions has potential to address some of these unaddressed dynamics in the HIV response thereby contributing to the reduction in the spread of the virus within and outside the population.

5.3 Effects of legal proscription of homosexuality on homosexuals’ access to life saving HIV/AIDS prevention, treatment and care goods and services

There is a legal system in Zambia. This refers to a functioning system of rules that has an effect on social control. These rules are intelligible and available to citizens. The legal system in Zambia proscribes homosexuality. In simple terms, legal proscription means to denounce, prohibit or condemn an act by passing legislation that criminalises the said act, (Merriam-Webster, 2020). In commenting on the anti-gay laws, a respondent said “that the law is what it is and not what it ought to be” (interview: magistrate, 2017). The term ‘law’ in the foregoing quoted phrase might mean either ‘legal system’ or ‘legal rule’. The researcher shall consider both possibilities. Summer (1963), observes that to many it may seem very odd that anyone should deny that ‘the law as it is’ can always be distinguished from ‘the law as it ought to be’.

Most would agree that The Zambian legal system consists in part of rules for controlling human behaviour. Thus, if someone were to say there is a legal system in Zambia, we would normally understand him to be referring to a

functioning system of rules, and we would expect to find in Zambia rules of social control of prospective operation that are intelligible and either known to the citizenry or available to them. We would also normally expect to find a scheme of sanctions for non-compliance. CAP 87 and sub section 155 proscribes and spells out all the sanctions for non-compliance.

What the respondent meant when he asserted that Zambia has a legal system, he implied that what he has called the legal system of Zambia is what it ought to be at least in the sense that it is to some extent serving its purpose, that is, controlling human behaviour. But this is only to take note of a tautology, for to say that a system of rules for controlling behaviour exists is to say, in part, that this system is functioning to some extent as it ought to function if it is to serve its purpose, that is, social control (Nagel, 1959).

Moreover, it still remains possible to separate what, for lack of a more concise expression, might be called 'is and ought' components of the judgment that there is a legal system in Zambia.

Thus, we may distinguish between: (1) the judgment that in Zambia there is a body of rules functioning in various ways, and (2) the judgment that in view of the purposes for which these rules exist, they are functioning as they ought to function. It may be, however, that we cannot readily specify precisely when we should say: This system of rules is functioning so ineffectively that it should not be called a legal system instead of, simply, this legal system is not functioning effectively (Fuller, 1963).

The foregoing would be explicitly true in the event that the Zambian system was absolutely constitutional. It would mean that a said legal system cannot exist unless the constitutional rules for identifying the rules of the legal system are accepted by the vast majority of the citizenry (Weeks, 1981). In an interview with an LGBTI activist, she had this to say about acceptance of the anti-gay law:

Zambia is a very political country to start with, all the news you getting out of Zambia is either politically motivated or such that it relates to sports. There is very little news on developmental agendas. The impact in terms of the national politics is that, there are two impacts; there are

two things that unite Zambian people: Zambian country, Zambian politicians:

1. When there is a big soccer match and Zambia is playing in the same tournament, Zambians rally behind the Zambian team. There is that spirit.
2. The other thing is the anti-gay debate. When specific individuals are targeted and they are within communities and they are arrested, there seems to be an outpouring of support for the state's decisions, even in the midst of whatever social or economic problems that are ongoing at the time. Government is always commended for doing a fantastic job. It is always politically motivated to try and draw support and sympathy from the nation and to actually have a sort of public opinion as opposed to going through the competent courts of law (interview: LGBT rights activist, 2017).

It can be argued that homosexuality is constitutionally protected under Article 23 of the 1996 Constitution: 23. [Protection from discrimination on the ground of race, sex, and culture]. However, the combination of article 23(4)(d), non-ratification of international human rights treaties and deeply held Christian views have led to the LGBT community deliberately not being acknowledged in Zambia, a situation referred to as a jungle by a practicing gay man. "It is a jungle out there, for people in my position. We are always hunted" (interview: gay practitioner, 2017). "If I had a choice, why would I choose such a hostile life?" (Interview: gay practitioner, 2017). The hostility exhibited by society and authorities has led to homosexuals living in fear and preferring being closeted.

However, the Law Association of Zambia (LAZ), made an independent observation when the society commented that it is not possible to respect LGBTI rights under the current legislation that criminalises same-sex acts, and that people who engage in protecting LGBTI rights either face penal sanctions or are discriminated against (Sida, 2014). Zambia's laws concerning homosexuality not only violate international conventions that Zambia has

committed to, but reinforce negative social stigma and homophobia against sexual and gender non normative behaviour Sida, 2014).

Simply put, the law creates a social set-up. “Right now it is illegal to provide health care to LGBTI persons in Zambia. Even for persons that would portray themselves as transgender, they would also not be provided with health services” (interview: health professional, 2017). Health products that are peculiar to the LGBTI community are also not on the market. This came out in interview when a respondent “observed that lubricants are not readily available in the country for people who engage in the homosexual activity. In other words, health services peculiar to LGBTI people are hardly available in Zambia because of the illegality of the practice” (Interview: health practitioner, 2017). This situation is compounded by a lack of knowledge on the part of Healthcare Professionals (HCPs) around LGBTI specific health issues (SANTE,2017); “despite the fact that [medical] training is based on the human body” (interview: health professional, 2017), healthcare systems are ill-equipped to deal with the complexities of gender identity; laws and policies restricting access to healthcare and preventing trans people in particular from accessing appropriate medical services (SANTE, 2017).

5.4 non-legal proscription barriers to provision of prevention, treatment and care services to homosexuals

Health professional express discomfort when it comes to treating LGBTI persons. Most of them indicate that they are not free to interact with LGBTI persons. “You would want to offer medical treatment to an LGBTI person but you are soon associated with the LGBTI community and you are stigmatised by fellow medical practitioners within the health facility” (interview: health professional, 2017). Societal stigma; at whose center are interpersonal relationships, culminates in societal-level conditions, cultural norms, and institutional policies and practices that constrain the opportunities, resources, and wellbeing of the stigmatised. These conditions are abusive; they lead to rejection, and or discrimination. “When LGBTI person come to the health

facility, they feel very uncomfortable because it is not user friendly” (Interview: health professional, 2017). At the individual level, stigma always leads to concealment (Hatzenbuehler and Link, 2014) not to mention the mirror image.

These experiences coupled with systemic barriers such as the role of medical professionals as gate keepers to accessing medication, hormones and surgeries; association of the health care system with the criminal justice system (ACON, 2017), “threatens health professional from providing health care to LGBTI persons because the government calls on anyone with information on LGBTI activities to report to the nearest police station” (interview: health professional, 2017). This predicament is worsened with the lack of general comprehensive sex education; funding cuts to essential services; and lack of routine data collection using gender and sexuality indicators (ACON, 2017) “clearly indicates that there are structural barriers created by the law” (interview: LGBTI rights activist, 2017). Structural barriers prevent patients’ from experiencing good healthcare, because for good health care to prevail, patients must be able to be open with their HCPs, (SANTE, 2017).

5.5 Analysis of Zambian Laws on Homosexuality

Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) persons in Zambia face legal challenges not faced by non-LGBTI citizens (Numwa, 2008). This is because the penal code CAP 87 of the laws of Zambia section 155, 156 and 158 criminalises homosexuality and classifies it under unnatural offences. The legal status does not promote health access and provision of health services to these people (Interview: health professional, 2017). However, the law does not provide a definition as to what amounts to unnatural offences. In the Black’s law dictionary (2010), unnatural offences have been referred to ‘Buggery’ and other unnatural forms of intercourse. Thus, by implication of the Zambian anti-gay law, homosexuality is an unnatural form of intercourse.

There is an unstated assumption in the Zambian anti-gay law, namely that everything that is unnatural is morally wrong. The argument would no longer support the conclusion that homosexuality is morally wrong because the

stated premise claims simply that homosexuality is unnatural. It does not say in what way it is unnatural. To make the argument work, it would have to be claimed that homosexuality is unnatural in that specific way that makes unnatural things wrong or morally wrong (Meyers, 2015).

It would be easier and clearer instead, to simply formulate the hidden premise because claiming that everything that is unnatural is wrong and then give a more specific, narrower definition of unnatural. This leads to the other weakness of the Zambian anti-gay law. It is unclear in what sense homosexuality is thought to be unnatural. The terms natural and unnatural are highly ambiguous. They have several distinct meanings. One cannot assess the truth or falsity of the claim that homosexuality is unnatural until one knows exactly what it means to be natural or unnatural. Homosexuality might be unnatural in some sense or other but might be quite natural in another sense.

Here are some of the terms that are related to and or could mean unnatural; aberrant, aberrational, abnormal, anomalous, atypical, deviant, deviate, devious, irregular, untypical (Merriam-Webster, 2020). In a sense that is more practical, here are some of the various things that might be meant by the term unnatural. When one says an activity is unnatural, we might mean that it is unhealthy, abnormal, awkward or uncomfortable; as in he has a very unnatural walk, unfamiliar; as in Chinese music sounds very unnatural to me, contrary to instinct, not innate, artificial, that is, being the product of human invention, or contrived (Meyers, 2015). Some of these senses of unnatural overlap, but many of them do not. The argument against homosexuality fails to prove that homosexuality is neither unnatural nor that being unnatural does necessarily make something wrong. The argument also fails to especially show both that homosexuality is unnatural and also that being unnatural; in that particular way, does make something morally wrong.

Thus far, the Zambian anti-gay law claims that homosexuality is unnatural and also makes the assumption that any behaviour or practice that is unnatural is thereby morally wrong are unfounded. Even in the event that homosexuality was unnatural, being unnatural does not automatically make something wrong or bad. Many things that are unnatural; in whatever way, are morally neutral or even morally good (Meyers, 2015).

By virtue of the anti-gay law being on the Zambia law books, it deprives homosexuals of all the rights, liberties, and privileges that we grant to heterosexuals.

For example, all patients are entitled to privacy but LGBTI persons' privacy is not guaranteed at clinic level as politicians call on everyone with information on LGBTI persons to report the nearest police station (African Men for Sexual Health and Rights (AMSHeR) / Friends of Rainka (FoR), 2017). Further, when it comes to ailment treatment, there is discrimination. Others are considered normal and the other abnormal. Now the abnormality is based on sexual orientation. This prevents LGBTI people from accessing health care based on this discrimination (Interview: health professional, 2017). AMSHeR/ FoR, (2017), attributes this behaviour of HCPs to a lack of education on the full range of human sexuality, and the particular health needs of LGBTI persons.

Changing the curriculum on health training would mean including information on sexual and reproductive health (SRH) for LGBTI persons and MSMs. Including information about, for example, ano-rectal intercourse would, according to the current law, amount to promoting immoral acts and spreading or distributing seditious materials. Therefore, even well-meaning health service providers cannot produce Information and Education Communication (IEC) materials with this information AMSHeR/ FoR, (2017). This discriminatory situation creates a very compromised situation for the public health agenda because government is trying to put everyone on health care when health care for LGBTI is not mandatory (Interview: health professional, 2017). The anti-gay law has created a society where there is differential treatment in favour of heterosexuals.

In general, health inequalities occur due to the consequences of a complex interaction of social, cultural and political factors. For LGBTI people, the root causes that are likely to contribute to the experience of health inequalities are; (i) cultural and social norms (Pennant, 2018) that prefer and prioritises heterosexuality (Marques, 2018); (ii) minority stress associated with sexual orientation, gender identity and sex characteristics (Branstrom and van der Star, 2018); (iii) victimisation (Katz-Wise and Hyde, 2018); (iv)

discrimination (individual and institutional)(Meads,*et al.*, 2018) and (v) stigma (Whitehead, *et al.*, 2018).

Health inequalities occur in a context where heterosexuality prevails as the norm (Utamsingh, *et al.*, 2018). LGBTI people access treatment and care in healthcare settings where it is often assumed that people are heterosexual, cisgender (not trans) and not intersex by default. These forms of heteronormativity and gender normativity can be understood as beliefs and practices where sex (male and female) and gender (masculinity and femininity) are absolute and unquestionable binaries. In heteronormativity, opposite sex attraction or heterosexuality is the only conceivable way of being 'normal'. As LGBTI people deviate from these norms, insofar as their sexual orientation (LGB people), or gender identity (trans people), or sex characteristics (intersex people) they may experience discriminatory attitudes, prejudice or demeaning behaviour (Marques, *et al.*, 2018 (Pennant, 2018 and Utamsingh, *et al.*, 2018).

Discrimination and prejudice sanction the behaviour of those who deviate from commonly accepted norms. The impact of discrimination is described in minority stress theory, the leading narrative explaining the health inequalities of LGBTI people (Goldbach, *et al.*, 2018). In brief, the minority stress model suggests that because of stigma, prejudice and discrimination, LGBTI people may experience more stress than non-LGBTI people, and that it is this disproportionate experience of stress that can lead to increased incidence of physical and mental health problems. Minority stress occurs where marginalised groups display specific risk factors. Whilst the entire population may display a particular risk factor, the incidence and effects of these risk factors may be more pronounced in smaller subsections of the larger population (Blosnich, *et al.*, 2018 and Goldbach, *et al.*, 2018).

Due to their minority status; LGB people only account for up to 6 per cent of the UK population. LGB people were among the social groups most likely to experience higher levels of unpredictable, episodic and day-to-day social or minority stress because of discrimination and stigmatisation, which creates a hostile environment where LGBTI people face stressful social exchange (Goldbach, *et al.*, 2018 and Meads, *et al.*, 2018).

A meta-analysis of 386 research studies with LGB people undertaken across nineteen countries, reported up to 55 per cent of people experienced verbal harassment, 45 per cent experienced sexual harassment and 41 per cent experienced discrimination at higher levels than the general population (Katz-Wise and Hyde, 2018). For some LGBT people, experiences of individual discrimination included hostility, personal rejection, harassment, bullying and violence (Haas, *et al.*, 2018), whilst for others institutional discrimination occurred where laws and policies in the public domain sustained inequalities such as the prohibition of same-sex marriage, or where laws did not protect against discrimination based on gender identity, sexual orientation or sex characteristics (Haas, *et al.*, 2018).

Globally, the degree to which anti-discrimination law and the level of legal and social recognition legally protects LGBTI people varies significantly. Where LGBTI people did not have legal protection, they were more apprehensive when accessing healthcare due to anticipated stigma; or LGBT people internalised stigma where they devalued themselves because of their gender identity or sexual orientation leading to significant barriers in accessing healthcare (Elliott, *et al.*, 2018).

In Zambia, a report submitted to the United Nations Human Rights Committee by Global Rights and the International Gay and Lesbian Human Rights Commission, stated that the criminalisation of consensual homosexual sex in Zambia has had a devastating impact on same-sex practicing people in Zambia. The report asserts that LGBT people are subject to arbitrary arrest and detention, discrimination in education, employment, housing, and access to health services, and extortion; often with the knowledge or participation of law enforcement authorities (Fabeni, *et al.*, 2007).

According to a report by Behind the Mask, a non-profit organisation dedicated to LGBT affairs in Africa, most LGBT people in Zambia are closeted due to fear of targeting and victimisation (Journal of House of Commons, 1968). Lesbians are especially vulnerable, according to the report (*Op. Cite*). The situation was obtaining due to the patriarchal structure of Zambian society (Weeks, 1981).

The United States Department of State's 2010 Human Rights Report found that the government enforced the law that criminalises homosexual conduct and did not respond to societal discrimination and that societal violence against homosexual persons occurred, as did societal discrimination in employment, housing, and access to education or health care (Human Rights report, 2011).

5.5 Sexually Transmitted Diseases and HIV/AIDS

Sexual relationships between members of the same sex expose gays, lesbians and bisexuals to extreme risks of Sexually Transmitted Diseases (STDs) and physical injuries. In terms of HIV, sex between men is significant because it can involve anal sex, which when unprotected carries a very high risk. The original spread of AIDS is generally attributed to the promiscuity of homosexual men. Originally, the syndrome was called the gay disease because the overwhelming majority of patients were homosexual men (United States Centre's for Disease Control and Prevention (CDC), 2006).

In September of 2010, Reuters reported: Nearly one in five gay and bisexual men in twenty-one major United States cities are infected with HIV, and nearly half of them do not know it(A September 2010 report of the Centers for Disease Control and Prevention (CDC) reported : Gay, bisexual, and other Men who have Sex with Men (MSM) represent approximately 2 per cent of the United States(US) population, yet they are the population most severely affected by HIV and are the only risk group in which new HIV infections have been increasing steadily since the early 1990s (CDC, 2011).

In 2006, MSM accounted for more than half (53%) of all new HIV infections in the United States. Of newly diagnosed HIV infections in the United States during the year 2003, the Centres for Disease Control (CDC) estimated that about 63 per cent were among men who were infected through sexual contact with other men (CDC, 2006).

There is considerable controversy around the modes of AIDS transmission in Africa. In Malawi, the official statistics show that AIDS prevalence rate among homosexuals is twice the countries seroprevalence rate. It currently stands at 21 per cent while the countries prevalence rate is at 10 per

cent (Malawi Voice, 2012). Zambia, in southern Africa, has one of the world's most devastating HIV and AIDS epidemics. More than one in every seven adults in the country is living with HIV and life expectancy at birth has fallen to just 49 years. In 2009, nearly 76,000 adults were newly infected with HIV that is about 200 new infections each day (CDC, 2006 and Avert, 2012).

There are no official statistics of HIV/AIDS seroprevalence rate among Homosexuals in Zambia. This because as of July 2007, no public or private programmes provide HIV-related counseling to homosexual men in Zambia, where the HIV seroprevalence rate among adults is approximately higher than among heterosexuals. However, the government has opened a wing in the University Teaching Hospital, a medical school operated by grant from the Government Republic of Zambia under the University of Zambia as at July 2018. The impact of this newly opened wing was yet to be seen.

Although men involved in same-sex sexual relationships have a higher risk of HIV transmission, the government-operated National AIDS Control Program does not address same-sex relationships. In June 2007, the Zambian Ministry of Health agreed to conduct, together with the Centers for Disease Control and Prevention and Society for Family Health under Population Services International, an assessment to evaluate HIV and AIDS prevalence and transmission among gay men. It is not known what happened to the report, because the findings were not made public (Fabeni *et al*, 2007).

5.6 Summary

This chapter presented findings on the stated in the objectives of the study; inter linkages between homosexuality and public health, barriers against provision of prevention of prevention, treatment and care goods and services, and the impact of legal proscription of homosexuality on homosexuals' access to life saving HIV/AIDS prevention, treatment and care. The anti-gay law is based on the understanding of what might be meant by 'natural' and 'unnatural'. The inclusion of the term 'unnatural in the law defies all logical reasoning of what is meant by the 'term 'unnatural'. Notwithstanding the illogical inclusion of the term unnatural in the anti-gay law, the law has created a heterosexual society by assuming the gender binary (male/female) with no

exceptions, a situation that has erased the existence of gender non-normative persons.

The creation of a heterosexual society has had an adverse effect on health seeking habits for gender non-normative persons. The law has exposed them to violence, discrimination and being denied health care services. At present, it is illegal to provide health services to gender non-normative persons. This situation leads the gender non-normative persons to remain closeted because their experiences in the health facilities, let alone in the public at large, exposes them to violence, stigma and discrimination.

The current legal status of homosexuality in Zambia provides no platform for the development of palliative care for homosexuals. This is clearly demonstrated by the lack of any programmes for gays, lesbians and bisexuals by the government controlled National AIDS control programme. Further, there are no public or private programmes providing HIV-related counselling to homosexual men in Zambia beyond the lone center at UTH in Lusaka.

CHAPTER SIX: ETHICAL ASSESSMENT

6.0 Overview

This chapter presents the moral assessment using the Rights Theory according Hohfeld, of the legal proscription of homosexuality on public health in Zambia.

6.1 Application of nature of rights to the findings according to the Hohfeldian conception

6.1.1 A. The Logic of Rights: Hohfeld's Analytical Framework

Right (claim)

To say that X has a legal claim-right means that he is legally protected from interference by Y or against Y's withholding of assistance with respect to X's project Z. Conversely, Y, who is to abstain from interference, or is required to provide assistance in connection with X's project Z, is under a correlative duty to do so (*Lake Shore and MSR Co v Kurtz* (1894) (correlation of duty and right)).

There are two parts to this conception; that is, the protected and the protector (who is also the provider of a service or assistance). According to this study, the protected were citizens regardless of their sexual orientation under state paternalistic behaviour. Every citizen has a right to be protected by the state against all forms of discrimination and have a right to access every service and assistance they need from the state agents as and when need arises.

But the situation as shown in the findings indicates that as opposed to being protected, homosexuals are "hunted like wild animals" (interview: gay practicing man). Only heterosexuals have free access to protection from discrimination based on sexual orientation. Homosexuals can not access health services at will. They are stigmatised in hospitals by both fellow patients and health personal. Health services are oriented towards a heterosexual society. The records only recognize the gender binary, to the total exclusion of gender variant persons. All major policy guidelines on health services do not include health services to homosexuals.

Health personnel are mandated by law to provide information to security wings that would lead to the arrest of anyone that is practicing homosexuality. Homosexuals' health seeking habits have been curtailed. Further, those health personnel that seek to help and provide health services to homosexuals are equally stigmatised. "We are associated with homosexuality and the stigma is real making it impossible to provide health services freely" (interview: nursing officer). This has made Semlyen *et al.* (2018) conclude that it leads LGBTI people to be frequently marginalised and experience significant health inequalities.

Liberty

In short, liberty is merely an absence of a duty to abstain from the action. The correlativity of this jural relationship shows that the person against whom the liberty is held has a no-right concerning the activity to which the liberty relates. This, however, does not mean that he himself does not have a liberty to interfere in the activity. Suppose that I am irritated by people who smoke in my vicinity. I meet S (smoker) in a public place, who starts to smoke in my presence. I ask him to stop, but S tells me he has a 'right' to smoke here (given the absence of any legal prohibitions). S is confusing his entitlement. He does not have a right (in the Hohfeldian sense) to smoke, but merely a liberty (a weaker right) (Halpin, 1985).

The findings indicate that homosexuals in Zambia have no entitlement as far as publicly identifying themselves as being LGBTI. Homosexuals suffer from arbitrary arrests and lead a life of being closeted. In this regard, as opposed for the state invoking article 23 (1), (2) and (3) which protects against discrimination, the state uses article 23(4)(d) which literally allows some form of discrimination.

Power

In short, a power is one's ability to alter legal (or moral) relations. For instance, I can have the power to enter into a contract with S whereby he agrees (for a consideration) to refrain from smoking in my presence. Thus, I have the power to change our legal relations in that I make S contractually bound (as well as

myself). S, thus, has a liability, which is correlative to power, in that he is liable to having his legal relations altered by my exercise of power.

The findings indicate that those that are practicing homosexuality are Zambians, and they are domiciled in Zambia. Further, homosexuals practice their love affairs in the privacy of their homes. The constitution protects the privacy of the citizens. Further, the Zambian constitution exercises power when it comes to describing the age of consent, which currently stands at 18 years.

However, for homosexuals there no such privileges extended to them. Any person found in the act or practice of homosexuality, whether at the age of consent or not is liable to imprisonment not less 14 years with hard labour. As far conducting romantic love affairs is concerned, it is a private matter, if the state would want to use the power right in that sense, it would be rightly placed because anyone conducting their romantic love affairs in public would be a public nuisance.

For the LGBTI community such privileges do not exist. From the evidence produced in the related literature as well in the findings, it was clear that even in the privacy of their homes, homosexuals are not safe and have no privacy at all. A situation that has led some to practice bisexuality as a means of hiding from public specter. under All those that were arrested and prosecuted, were arrested from the privacy of their homes. The application the power right is violated right from the implementation of CAP 87 of the laws of Zambia.

Immunity

If X has an immunity against Y, it means that Y has no power to change X's legal position with respect to any entitlements covered by the immunity. For instance, if the state has no power to place me under a duty to wear a hat when I go out, I have immunity in that respect, and the state a disability (a correlative to immunity). Simmonds (2001) notes that 'Constitutional Bills of Rights frequently confer extensive and very important immunities, in so far as; they disable the legislature from enacting certain types of law'.

Article 23 (1), (2), and (3) of the constitution protects homosexuals against discrimination and confers on them an immunity that makes the state

not harass or arrest them on any charges that makes their sexual orientation an illegality. However, article 23(4)(d) literally allows some form of discrimination. A number of international treaties that confer legal protection to homosexuals have not been domesticated in Zambia. Compromising the legal protection of homosexuals in Zambia.

All the legal instruments that offer legal protect that can be termed as immunity against state homophobia have been ignored in Zambia. Therefore, homosexuals have no immunity against the state due to the deliberate ignoring of instrument that confers immunity to sections of society regardless of their sexual orientation.

In Hohfeld's conception of the nature of human rights, the Zambian government through states agents violates all the rights of homosexuals. The CAP 87 of the laws of Zambia, is therefore morally unfounded, because it seeks to create a heterosexual society. This attempt has far more reaching effects in the health seeking behaviour of gender variant persons. They predominantly remain closeted by shunning services that would be more telling of their sexual orientation for fear of victimisation and or possible prosecution.

6.2 Applying Hybrid Theory of Rights to the Findings

O'Flynn and Weale (2012), suggest that the term 'human rights', though natural in nature, does not meant to suggest that rights occur naturally in the world about us, as leaves grow on trees, but merely that there are certain ways in which we ought to treat or not to treat other human beings just as human beings. Hence, natural rights are 'natural' in that they apply to human beings universally or without distinction and hence are not merely artificial or man-made.

Since human rights are rights that are held simply by virtue of being human, they may be said to exist in advance of government and hence must be upheld by government, therefore, 'governments are instituted' to secure rights. According to liberalism, a society is first and foremost a collection of individuals. The purpose of the state is primarily to serve the good of the individuals that constitute society. Moreover, those interests consist of happiness and autonomy (Meyers, 1968 and O'Flynn and Weale, 2012).

There may be some social goods over and above the good of the individuals, such as solidarity, tolerance, civic involvement, and harmony. But these are only instrumental goods; they are good only because, and only insofar as, they tend to promote individual well-being and autonomy. The state should not promote any values that are not universally accepted or give preference to any particular way of life over others. Public policies are not to be justified by appeal to controversial beliefs or value systems. Mill(yop) defending individual liberties, was especially concerned with what political theorists refer to as the *tyranny of the majority*. This form of injustice occurs in democratically governed societies when the majority imposes unjust restrictions of freedom on a hated minority or unfairly promotes the interests of the majority at the expense of the interests of the minority.

Clearly, the principle of liberty supports the right of homosexuals to live as they see fit, without interference from the state and without harassment from meddling homophobes or religious puritans. Weale (2012), however, contends that there are two competing logics at work. The first is deontological and stresses what each person is owed simply by virtue of his or her standing as a human being; the second is teleological and seeks to advance our common ends as members of shared way of life. To demonstrate this, Weale argues that this strategy can only take us so far. There may be a human right to basic healthcare (Meyers, 1968 and O’Flynn and Weale, 2012).

But questions about the highest attainable levels of healthcare inevitably bring larger collective goals and purposes into play: in the light of its own way of life, each society will need to decide what resources it is willing to make available, how different priorities are to be assessed, how healthcare is to be balanced against other social goods. Thus, how and whether these competing logics can be melded has important implications for our thinking about the value and limits of rights.

Weales’ arguments are very valid, much more so the teleological argument. It is correct to think of ‘common ends’ as members of the ‘shared way of life’. The deontological arguments give value to the mere existence as ‘human that value carrying potencies; equal before the law regardless of sexual orientation or expression, whereas teleological arguments gives no special

privileges to any preferred or assumed sexual expression in planning social services as opposed to the prevailing situation in Zambia where homosexuality is legally proscribed, hence excluded from social services, especially their right to health. All services are assumed and planned based on a heterosexual society.

The quality of service notwithstanding, liberty rights as a purely negative principle, it might not be of much use in supporting the legal recognition of gay rights or same-sex marriage. The principle of liberty, however, could be interpreted not merely as a negative duty not to interfere with others but also as a positive duty to protect the liberty of others, especially those who are vulnerable or belong to persecuted minorities. Threats to liberty come not just from state coercion but also from domination by other people or by nongovernmental institutions, including businesses, banks, landlords, and religious organisations (O'Flynn and Weale, 2012).

6.3 Summary

The legal proscription of homosexuality in Zambia is based on the misconception of 'natural sex' and 'unnatural sex'. According to the penal code, 'unnatural sex' is supposed to be sex that does not end in procreation. All logical arguments in support of this type of thinking fall short of all credible contribution to substantiate the support for the anti-gay law. The logical analysis of all justifications in support of the term 'unnatural' and its inclusion in the Penal Code CAP 87 of the Laws of Zambia sub section 155 to 157 is problematic not to mention unfounded. This piece of legislation has led many that practice homosexuality to be socially, medically and economically isolated. The application of the Hohfeldian (1919) moral rights theory has indicated that this piece of law is unfounded and find the government of Zambia wanting in promoting homophobia. The maximum moral rights programme, by contrast, holds on to the thesis that, in making rights central to a political morality, we have also to commit ourselves to a set of priorities in relation to individuals, groups and the state and their place in political authority: the right is prior to the good; neutrality is prior to the pursuit of even

widely shared social values; constitutional adjudication is prior to majoritarian politics; and individual rights are prior to collectively established purposes.

CHAPTER SEVEN: SUMMARY, CONCLUSION AND RECOMMENDATIONS

7.0 Overview

This chapter presents a summary of what this study has done and accomplished. It shall present recommendations based on the ethical assessment.

7.1 Summary

The background information on the subject of homosexuality brings out a number of definitions. The consensus, however, is that it is a sexual act between persons of the same gender. The aim of this study was to ethically assess the legal proscription of homosexuality on public health in Zambia with specific objectives being: (i) to establish the inter linkages between homosexual behavior and public health, (ii) to investigate the effects of the legal proscription of homosexuality on homosexuals' access to lifesaving HIV/AIDS prevention, treatment and care (iii) to investigate barriers to provision of prevention, treatment and care goods and services to homosexuals and key populations, (iv) to assess the morality of the legal proscription of homosexuality in Zambia. The significance of the study, statement of the problem, methodology and methods, were also presented. The organisational structure of the dissertation was carefully presented.

Related literature on the subject of legal proscription of homosexuality highlighted a number of issues. From a global perspective, it showed that the legal proscription is responsible for inequalities in health and other social services. Persons that practice, as well as those that identify themselves as homosexuals, are mostly marginalised or classified as such. Particular attention was drawn on the Moral Rights Theory. Statements ascribing rights are threefold: a subject, an object and content, indicating an analytical structure that is purely conceptual and definitional. There should be a rights holder; a subject, a duty bearer; object, and the nature of a right; content.

Rights emphasise individualism. This means that individuals exist before a community or society. Therefore, governments are established in order to secure rights as opposed to procure rights. The nature of the Zambian society is opposed to what is supposed to be obtaining. The Government in Zambia has become at the center of society and dictates the type of rights to be enjoyed by the society as suggested by the theoretical framework of the study that guided the data collection.

Research methodology and methods were covered from a specific view of qualitative study needs. Following the research methodology and methods were the findings, discussions and analysis of the study. The findings were then ethically assessed to indicate whether the legal proscription of homosexuality in Zambia had any effect on public health or not. The conclusion of that matter was, the legal proscription of homosexuality in Zambia has had a negative effect on the public health agenda by marginalising persons that identified themselves as homosexuals and those that are gender variants. This legal proscription was declared unjust according to the application of the ethical analysis and requires agent revision in order to save lives from further ruin and a possible redress in the public health agenda of the Zambia public.

7.2 Conclusion

Homosexuality is the condition of sexual desire or behaviour directed toward a person or persons of one's own sex. It is also defined in terms of an attraction, preference, orientation, or identity. The term orientation is particularly favoured by those who are promoting public acceptance of homosexuality (Boswell, 1980 and Ottosson, 2008).

The origins of homosexuality have been argued about without end. The causes of homosexuality are attributable to man's sinful nature, nurture and environment, and personal choice. Those from the most liberal school usually assume a philosophy of determinism, treating homosexuality as an identity or orientation which one has no choice over, and which cannot be changed. The contrasting and warranted position is that homosexuality is a choice, that of yielding to ultimately harmful desires, and which choice is partly affected by nurture and environment (Thorson-Smith, 1998).

With these three positions, it is very difficult to treat homosexuality from a singular position. What is obvious is that homosexuality's link to sexually transmitted diseases has been overlooked especially in countries that still legally proscribe it.

According to the findings, the Zambian penal code CAP 87 of the laws of Zambia, under Section 155, 156 and 158 legally proscribes homosexuality on grounds of unknown definition for 'unnatural' act. This is despite the fact that Article 23 of the 1996 Constitution protects homosexuals and gender variants persons from any form of discrimination. The Hohfeldian moral rights theory clearly puts individual rights at the center of any consideration for treatment. The Zambian society has dictated the type of rights to be enjoyed by the individuals domiciled in Zambia through legally proscribing such acts and practices as homosexuality. The proscription of homosexuality has led to homosexuals and all those that identify themselves as gender variant persons to be closeted. This closeting has resulted in homosexuals being denied health rights. The consequence of health rights being denied to homosexuals and other gender variant persons has had a negative effect on the public health agenda of the Zambian society. The collective understanding of the imperatives of public health and human rights leads to one conclusion: classifying sexual orientation as a crime is entirely wrong-headed. Decriminalisation is of the greatest urgency; without it there can be no end to the AIDS epidemic (Boswell, 1980 and Ottosson, 2008).

The prevalence rate of HIV/AIDS amongst Men who have Sex with Men (MSM) greatly exceeds that of the general population. There's nothing mysterious about this as anal tissue is highly susceptible to HIV (*Op. Cite*). But more, in an atmosphere of homophobia, the homosexual population is denied health rights, and are driven underground where sex is furtive and the thought of testing, prevention, and treatment is a scary anathema (McNeil, 2009).

Many argue that decriminalisation of same-sex relations will solve the HIV crisis among gay men. But others disagree; cogently pointing out that decriminalisation doesn't automatically lead to a decline in prevalence. They cite France and the United States, where, even in the absence of criminalization, rates among MSM continue to increase.

Naturally, the prejudice and stigma that malign the homosexual world will not disappear with the stroke of a legislative pen. But abolishing homophobic law lifts the Damoclean sword of hate. It is essential, but it is only a first step in reducing HIV infections (Rathus *et al.*, 1993).

It is impossible to speak of criminalisation without invoking human rights and questioning how so many governments, Zambia inclusive, that claim to uphold human rights get away with it. The argument of cultural relativism to justify homophobia, advanced by religious zealots, egocentric academics, and unprincipled politicians is rubbish. Human rights are inviolable, not negotiable (Ottosson, 2008, UN, Boswell, 2005 and 2011)

The legal proscription of homosexuality in Zambia is in violation of all logical conclusion on the matter as well as the very core of who a human being is; the right to self-govern. This violation affects health-seeking habits of all persons who are sexually oriented differently, a situation that degenerates in the compromise of public health efforts to curb sexually transferable diseases, chief among which is HIV/AIDS. This health risk compromises and unfortunately, affects the entire Zambian community through individuals that might be practicing bisexuality. Therefore, it is understood that the legal proscription of homosexuality accentuates homophobic tendencies and is thus unjust, according to moral rights theory.

7.3 Recommendations

The recommendation in this study bare threefold: human rights lobbying legal, and public health.

7.3.1 Human rights Lobbying Recommendations

1. Governments were established to secure rights of the constituents. Every society was established because of its constituents and not the opposed. The establishment of government was based on protection of the poor, the weak and the vulnerable in society.
2. The legal proscription of homosexuality has created a heteronormative society, making every gender variant person vulnerable and marginalized.

3. All human rights groups need to demand the rights of the vulnerable and marginalized in society by concerted and organized efforts.

7.3.2 Legal Recommendations

1. According to the penal code, CAP 87 of the laws of Zambia, homosexuality is legally proscribed in Zambia. However, this legal proscription is against the highest law of the land as indicated in Article 23 of the 1996 constitution.
2. The basis of this legal proscription of homosexuality is logically and legally unfounded.
3. The penal code as it stands is illegitimate and has no sound grounds on which it is based. Hence, the need to either outlaw it or revise it.

7.3.3 Public Health Recommendations

1. This study has clearly indicated that it is currently illegal to provide health services to LGBTI persons in Zambia. Unless homosexuality is decriminalised, the envisaged changes or gains that can be attained in the public health agenda for the country will always remain a speculative potential.
2. There is need for further research in the area of stigma in order to establish a better understanding of stigma and the mechanisms through which it affects the health of homosexuals. The study on stigma can help the field better predict future HIV epidemic trends among homosexuals' and maximise the impact of biomedical and psychosocial interventions for the entire population.

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Appendix 1: Interview Guide

The University of Zambia

Directorate of Research and Graduate Studies School of Humanities and
Social Sciences

Department of Philosophy and Applied Ethics

Interview Schedule for Civil society, Health Professionals, Judges, Lawyers,
and Magistrates.

Introduction

This Interview by John Shawa is conducted in partial fulfilling of his postgraduate studies at the University of Zambia in the Department of Philosophy and Applied Ethics. He seeks information and opinion on an Ethical Assessment of the Legal Proscription of Homosexuality on Public Health in Zambia. He has purposively selected your organisation to take part in the research study. The purpose of the study is purely academic and it shall be used for the stated purpose.

Questions:

- What is the value of the legal proscription of homosexuality on the Zambia society? (clergy, civil society, parliamentarians, judges, magistrates, lawyers)
- What effect does this legal proscription have on the key populations' health seeking habits? (clergy, civil society, parliamentarians, judges, magistrates, lawyers)
- Are you free to provide health services to homosexuals? (health care providers)

NOTE: Lastly, would you mind having your name mentioned in the dissertation? Take note of the answer, as consent is paramount in mentioning names of people in the report.

Thank you very much for taking part in the survey.

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Questions:

- What has been your experience of living under a legally proscribed practice? (LGBTI persons)?
- How has this legal proscription of homosexuality affected your health seeking habits? (LGBTI persons)?
- Do you have access to HIV/AIDS treatment?

NOTE: Lastly, would you mind having your name mentioned in the dissertation? Take note of the answer, as consent is paramount in mentioning names of people in the report.

Thank you very much for taking part in the survey.