

Oblig. Essay  
1999/2000

# THE UNIVERSITY OF ZAMBIA

## SCHOOL OF LAW

by

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entitled

Human Rights in Zambia: Freedom of Sexual Orientation - Homosexual Law Reform.

be accepted for examination. I have checked it carefully and I am satisfied that it fulfils the requirements relating to format as laid down in the regulations governing directed research essay.

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# **THE UNIVERSITY OF ZAMBIA**

## **SCHOOL OF LAW**

Human Rights in Zambia

Freedom of Sexual Orientation

Homosexual Law Reform

by

SYDNEY MALUPANDE

Directed Research Essay

Submitted in partial fulfilment of the requirements for the  
LLB degree of the University of Zambia.

**UNZA**

**APRIL, 2000**

## **DEDICATION**

To my wife, Mailess, and my children, Nelly, Kelly and Lauren, with lasting affection for their enduring warm and caring attitude.

## **ACKNOWLEDGMENTS.**

I would like to extend my heartfelt and sincere gratitude to Dr. A.W. Chanda, Senior Lecturer and Assistant Dean (Undergraduates) in the School of Law, University of Zambia, without whose guidance this work would not have been possible. As my supervisor he exhibited a high degree of patience and proffered valuable advice and guidance.

My indebtedness also extends to my family for their love, encouragement and moral support during my studies.

I would also like to thank Ms Precious Mweemba who kindly offered to type the script.

**SYDNEY MALUPANDE**  
**APRIL, 2000, UNZA**

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## CHAPTER 1

### INTRODUCTION

In Zambia, like in many parts of Africa, traditionally, sexual topics were avoided in polite conversation and young persons were carefully shielded from too early awareness of what was considered the more unpleasant side of life.<sup>1</sup> Ideas have changed, and works on hitherto taboo subjects, such as marital adjustments and birth control, now circulate freely. A number of factors have over the past three decades contributed to the liberalisation of attitudes to sex and sexual conduct. These have included the women's movement, which has asserted women's sexuality and very explicit discussion of it; the HIV epidemic, which has made it necessary for governments and public authorities to publicise materials about sexual practices which previously would have been unimaginable (today there are stickers you see in cars or public means of transport reading "I talk to my children about AIDS,"); and popular culture and entertainment since the Second World War, which have depicted sexual conduct increasingly openly.<sup>2</sup>

Despite that, lip service is paid to the ideal of an open attitude to sex; prudery and obscurantism linger on especially in relation to homosexuality.

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<sup>1</sup> See Reverend Levee Kadenge, "Gender, Sexuality and the Christian Church in Zimbabwe", Ecumenical Support Services (Second Seminar 8th May, 1998), p.7.

<sup>2</sup> E. Cameron "The Right To Equality Without Discrimination on The Ground Of Sexual Orientation", Seminar organised by Gays and Lesbians of Zimbabwe, 26th July 1996, p.8.



There is still embarrassment around homosexuality.<sup>3</sup> Attitudes of ignorance still abound, varying from almost superstitious dread, through abhorrence and contempt,<sup>4</sup> to an amused and prurient fascination.

In this study the term 'sexual orientation' refers only to heterosexuality, bisexuality and homosexuality. It includes only erotic predisposition which has as its object adults: in the case of heterosexuality, adults of the opposite sex; in the case of homosexuality adults of the same sex. 'Sexual orientation' as a term of constitutional protection does not include sexual behaviour which has as its object children or animals, and it is misleading and inaccurate to suggest that it does.

Homosexuality in women is sometimes called lesbianism,<sup>5</sup> the name deriving from Lesbos, an island in the Aegean, where the Greek poetess Sappho lived in the fifth century B.C. She gathered about her a circle of female admirers and wrote passionate verses of lovely maidens.

One of the concerns of this study is to show the varied and deep-seated ways in which homosexuals are oppressed. Gays and Lesbians face an additional

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<sup>3</sup> Ibid. p.8.

<sup>4</sup> President Robert Mugabe's speech on Heroes Day, 11th August, 1995. Here Mugabe stated, "It degrades human dignity. It's unnatural and there is no question of allowing these people to behave worse than dogs and pigs". Reuters News Agency published in the *Globe and Mail* (Toronto), August, 12, 1995 and The Herald (Harare) August, 12, 1995.

<sup>5</sup> Donald. J. West, *Homosexuality* (London: Gerald Duckworth co. Ltd, 1967), pp 12 - 13.

source of social blame in that it is often claimed, quite incorrectly, that sexual orientation is contagious, or subject to conversion, especially in adolescents.<sup>6</sup>

In all countries all over the world, individuals are being targeted for imprisonment, torture and even murder, simply on the grounds of their sexual orientation.<sup>7</sup> Abuses may take subtle forms such as everyday hostility, harassment or neglect.<sup>8</sup> In such cases antipathetic authorities may refuse to protect the basic rights of homosexuals, leaving them vulnerable to exploitation, sexual attack, public or domestic violence and even murder, all without recourse to law.<sup>9</sup>

Much of the impetus for the development of international human rights law as it exists today emerged in reaction to the atrocities committed during the Second World War.<sup>10</sup> Like Jews, Gypsies, and the disabled, lesbians and gay men were targeted for extermination - by the Nazis.<sup>11</sup>

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<sup>6</sup> E. Cameron, Supra note 2 at 8.

<sup>7</sup> Amnesty International, United Kingdom, *Breaking The Silence: Human Rights Violations Based On Sexual Orientation* (1997), p.7.

<sup>8</sup> Ibid.,p;9.

<sup>9</sup> Ibid., p;9, See also the *Lesbian and Gay Solidarity Newsletter*. April - May - June 1999,p.1. The bomb blast in a Soho, London pub, killing three people is a more recent example of violence and murder, but in the USA the numbers continue to rise as evidenced by the murder of Steven Goedereis by two young men because Goedereis had called out to one of them, "Hey, beautiful".

<sup>10</sup> Ibid., p.7

<sup>11</sup> Ibid.,p.7

Despite this clear indication of their particular vulnerability to human rights abuses, gay men and lesbians were not specifically included in the framework for international human rights protection when the United Nations drew up the Universal Declaration of Human Rights after the end of the Second World War. Systematic discrimination against some vulnerable groups has been addressed in subsequent documents such as the International Convention on the Elimination of All Forms of Racial Discrimination and the International Convention on the Elimination of all Forms of Discrimination Against Women. These documents have provided an important framework for combating violations against women and ethnic minorities, yet there has been little recognition in the international community that gay men and lesbians require - and deserve - similar protections.

It is true that the past ten years have seen significant steps taken in many parts of the world to recognise and protect the right to equal treatment of gays and lesbians.<sup>12</sup> In some countries<sup>13</sup> sexual minorities have won legal protection for their rights on the basis of existing laws. The European Convention for the Protection of Human Rights and Fundamental Freedoms has already provided a whole series of important decisions in favour of gay and lesbian rights.<sup>14</sup> In most Western European countries, discrimination against gays and lesbians has been

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<sup>12</sup> E. Cameron Supra note 2 at 3.

<sup>13</sup> *Norris v Republic of Ireland* (1988) 13 EHRR. See also *Modinos v Cyprus*, 1993 of the same court.

<sup>14</sup> *Dudgeon v United Kingdoms* (judgment of 22 October 1981); *Norris v Ireland* (judgment of 26 October 1988); *Modinos v Cyprus* (judgment of 22 April 1993).

abolished as far as the criminal law, job access and job security, and the age of consent for sexual conduct are concerned.<sup>15</sup> And in May of 1996 the Republic of South Africa became the first nation in the world to incorporate sexual orientation into the discrimination clauses provisions of the constitution.<sup>16</sup>

In Zambia homosexuality is proscribed by law.<sup>17</sup> The Zambian Constitution, unlike its South African counterpart, does not expressly provide for the freedom of sexual orientation. However, Article 23 offers protection from discrimination on the ground of sex.

It will be shown in this study that sections 155 - 158 of the Penal Code violate the constitutional guarantee of equality. The sections have the effect that different standards are made applicable to individuals and groups depending on their biological sex or sexual orientation.

The study has five chapters. In chapter two the study will discuss homosexuality from the classical times to the modern day. This will help us to understand how and why homosexuality was criminalised in Zambia.

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<sup>15</sup> E. Cameron Supra note 2 at 4.

<sup>16</sup> Ibid.,p.5.

<sup>17</sup> See sections 155 - 158 of the Penal Code, Chapter 87 of the Laws of Zambia.

In the third chapter the study will review the debate on freedom of sexual orientation in South Africa and Zambia. This will assist us to discern what individuals, government officials and the clergy think about the subject. Chapter three will also explore the burning issue of whether or not the campaign for gay men and lesbian rights is Eurocentric. Space will also be devoted to the voices of some chiefs in the country on the subject.

Chapter four will discuss international human rights. Examples of human rights violations targeting homosexuals will be given to show the extent of oppression the group suffers. This chapter will also discuss the steps taken in many countries to recognise and protect the right to equal treatment of gays and lesbians.

The study ends in chapter five with a summary, conclusion, recommendations or proposals on how the law can be amended to provide for the consideration of homosexuals in its clauses.

## CHAPTER 2

### HOMOSEXUALITY: A HISTORICAL DEVELOPMENT.

In this chapter the study will discuss homosexuality from the classical times to the modern day. This will help us to understand how and why homosexuality was criminalised in Zambia.

#### The Early Past:

Homosexuality is known to have existed in all civilisations and among all people of whom there is a record, but the laws of the different communities have varied considerably.<sup>18</sup> San ("Bushmen") rock paintings, for example, record men having group sex from at a least thousand years ago.<sup>19</sup> The culture and political ideas of Western Civilisation have largely been borrowed from the Greeks who are well known for harbouring liberal ideas on sex.<sup>20</sup> In classical Greece homosexuality was socially recognised as an acceptable and expected form of love between normal males.<sup>21</sup>

The Christian Church adopted the ancient Jewish sex codes and formalised them into the Ecclesiastical Laws that governed medieval Europe and later

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<sup>18</sup> J. West, *Homosexuality*, London 1965, p.21.

<sup>19</sup> Marc Epprecht, *Homosexual "Crime" in Early Colonial Zimbabwe (1892 - 1923)* History Department, University of Zimbabwe.

<sup>20</sup> J.Z. Eglinton, *Greek Love*. New York, Layton Press. 1964.

<sup>21</sup> J.Z. Eglinton, *Greek Love*. New York, Layton Press. 1964.

provided the basis for English Common Law.<sup>22</sup> The Jews were a small and struggling race who urgently needed to expand. The salient feature of ancient Jewish sex life was, therefore, the desire for offspring.<sup>23</sup> Polygamy was encouraged. One anecdote states that the Jews were proud of the fact that Solomon had a thousand wives.<sup>24</sup> Homosexuality was regarded with intense abhorrence and was punished by death.<sup>25</sup>

The Ecclesiastical courts of early English history decreed that sodomy was a crime for which the penalty was death.<sup>26</sup> In England homosexual crimes first became a matter for secular courts in 1533 when a statute was introduced (25 Henry VIII C. 6) making Sodomy punishable by death.<sup>27</sup>

### **Zambian Laws inherited from the English**

The Zambian laws on homosexuality were inherited from the English with the introduction of the Penal Code in the territory then known as Northern Rhodesia in 1930. Act No. 26 of 1933 brought into existence sections 155 - 158 as they appear on the statute books today.<sup>28</sup>

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<sup>22</sup> J. West Supra note 18 at 73

<sup>23</sup> Genesis XVIV 1 - 4, New International Version.

<sup>24</sup> Samuel XIV. 3, New Intentional Version.

<sup>25</sup> Leviticus XX v. 3, New International Version.

<sup>26</sup> Hirschfeld, M. *Sexual Anomalies and Perversions*. London, Francis Aldor 1944.

<sup>27</sup> J. West, Supra note 18 at 79

<sup>28</sup> See Act No. 42 of 1930 and Act No. 26 of 1933.

Thus, from the above it is discernible that in the Western countries, including England, Christianity has historically given the ideological leadership. The same is the case in the former colonies of black Africa (Zambia included) where both official ideology and public discussion on homosexuality (and indeed on any other topic) have to a large extent been shaped by the spread of Christianity through missionary activities. It is safe to state that a very large proportion of the political leaders in Africa today have received part or all of their formal schooling through mission-run schools.

Many countries maintain laws that prohibit or regulate sexual activity between consenting adults of the same sex.<sup>29</sup> Often called sodomy laws, some statutes regulate specific sexual acts (for example anal sex) regardless of gender or sexual orientation while others prohibit a range of same-sex sexual activities.<sup>30</sup> Many laws are quite broad in their scope, for example, prohibiting any "unnatural" or indecent sexual act.<sup>31</sup>

The Zambian government policy on homosexuality was propounded by the Republican Vice - President. Lieutenant-General Christon Tembo in Parliament on 22 September, 1998. This reaction was prompted by a point of order raised by the honourable member of Parliament for Solwezi Central Constituency, Dr.

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<sup>29</sup> IGLHRC fact sheet *A Global Overview: Criminalization and Decriminalization of Homosexual Acts*, November, 1998. p.1.

<sup>30</sup> Ibid., p.1.

<sup>31</sup> Ibid.,p.



Ludwig Sondashi on 15th September, 1998, in which he "wondered why some people had gone around declaring their homosexual status and wanted to know the government's position on the matter". In enunciating the government policy

Lt. - Gen Tembo said,<sup>32</sup>

*On Tuesday, 15th September, 1998, during the question and answer session, the hon. Member of Parliament for Solwezi Central raised a point of order in which he wondered why some people had gone around declaring their homosexual status and wanted to know what was government's position on the matter.*

*In Your ruling Mr. Speaker, Sir, you directed that since the matter hinged on the moral integrity of the nation, government should come up with a ministerial statement indicating its stand on the matter.*

*In response to your directive, I want to inform the house that government policy on homosexuality is clearly reflected by legislation and in particular the Penal Code, Cap. 87 of the Laws of Zambia.*

*Mr. Speaker, Sir, it is of public notoriety that homosexuality goes against the order of nature and morality as understood in the Zambian society. The Zambian people have through parliament criminalised acts that go against the order of nature.*

*Section 155, paragraphs (a) and (c) of the Penal Code, cap. 87 of the Laws of Zambia provide that any person who has carnal knowledge of any person against the order of nature or (c) permits a male person to have carnal knowledge of him or her against the order of nature is guilty of a felony. Similarly, section 158 of the code provides, that:-*

*"Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony and is liable to imprisonment for five years".*

*Mr. Speaker sir, hon. members may equally wish to note that it is an offence, under section 394 of the Penal Code, for any person to conspire with another, to commit any of the above mentioned felonies.*

*Therefore, Sir, anybody who agitates for homosexual practices in Zambia is at risk of being arrested for the criminal acts or for conspiracy to commit criminal acts.*

*Mr. Speaker, Sir, the Zambian government is fully committed to the protection of fundamental rights and freedoms of the individual as evidenced by the numerous International Human Rights instruments ratified or acceded to by the state. The*

<sup>32</sup> Lt. Gen. Tembo, *Government Policy statement on Homosexuals in Zambia*. Speechh delivered in Parliament.

*provisions of the Penal Code that have been cited are in no way inconsistent with or in contravention of articles 11 and 21 of the Zambian Constitution, article 22 of the International Covenant on Civil and Political Rights (ICCPR) to which Zambia is a state party and Article 20 of the Universal Declaration of Human Rights (as read together with article 29(2) of the same Declaration).*

*Mr. Speaker, Sir, all the above articles while guaranteeing the freedom of assembly and association, have limitation clauses for purposes of protecting certain public interests such as public morality. This confirms that human rights do not operate in a vacuum but within social norms, which are a summation of numerous interests and certain generally accepted international legal principles.*

*Mr. Speaker, Sir, the registration of associations in Zambia is governed by the Societies Act, Chapter 119 of the Laws of Zambia. This Act of Parliament empowers the Registrar of Societies to register any organisation or association established for legal purposes. Under section 9(a) of the Act, the Registrar is under an obligation to refuse registration of any society if it appears that the terms of the constitution or rules of such society are in any respect repugnant to or inconsistent with the provisions of any law for the time being in force in Zambia.*

*Mr. Speaker, Sir, it follows, therefore that an association formed to further the interests of homosexuals can never be registered in Zambia. In the circumstances, Mr. Speaker, those who will persist in championing the cause for homosexuals activities in Zambia, risk being arrested for the felonies of committing criminal acts or for conspiracy to commit the criminal acts. This, Mr. Speaker, is government's position.*

*Mr. Speaker, Sir, allow me to appeal to all Zambians particularly our young boys and girls, that it is not to be modern to champion new, ugly causes such as homosexuality as this is against African, nay Zambian norms and values. Please remain straight and aspire to grow up to be responsible fathers and mothers like your parents.*

*To parents, allow me Sir, to caution them that, while they enjoy the newly introduced freedom of watching M-Net, satellite T.V. etc. they should maintain our African ideals and remain in the know of who their children are befriending and what indeed they are watching and reading for only then, shall we be able to guide them to be good citizens and indeed leaders of tomorrow.*

*Mr. Speaker, Sir, I thank you.*

From the above it is clear that homophobia is highly entrenched in the Zambian government.

Having given the position of the government in Zambia on homosexuals, it is essential to have a brief discussion on how the right of sexual orientation is

viewed by the United Nations and other inter-governmental organisations, international conferences and non-governmental organisations working in the context of international human rights protections.

## **UNITED NATIONS<sup>33</sup> INITIATIVES**

### **United Nations Commission on Human Rights**

The UN Commission on Human Rights (CHR), comprised of government representatives, investigates and addresses a wide range of human rights issues, in regard to both specific countries and general themes. The Commission has addressed sexual orientation in a number of forums and mechanisms.

#### Programme on HIV/AIDS

In 1996 the **CHR** included for the first time reference to homosexuals as a protected class in a resolution on the human rights of persons living with HIV/AIDS. This decision was influenced by two communications delivered by the **Joint United Nations Programme on HIV/Aids (UNAIDS)** to the CHR's Sub-Commission on Prevention of Discrimination and Protection of Minorities. The resolution issued by the CHR addresses the forms of discrimination suffered by people living with HIV and AIDS, and it calls for U.N. agencies and member states to counter discrimination and ensure the full human rights and freedoms of

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<sup>33</sup> Material mostly reproduced IGLHRC fact sheet *International Jurisprudence and Policy Precedents Regarding Sexual Orientation*.

people affected by HIV/AIDS. The resolution states in part that "persons suffering from disadvantaged socioeconomic or legal status" are especially "vulnerable to the risk of HIV infection... and that they suffer disproportionately from the economic and social consequences of the HIV/AIDS epidemic". The resolution twice mentions "men who are homosexual" among those who are disproportionately affected by the epidemic. The same resolution reconfirms "that the term 'other status' in non-discrimination provisions in international human rights texts should be interpreted to cover health status, including HIV/AIDS."<sup>34</sup>

### Special Rapporteurs

The **CHR** can also appoint Special Rapporteurs to investigate particular human rights problems or abuses. In 1987 the Commission's Sub-Commission on Prevention of Discrimination and Protection of Minorities initiated such a special report on the legal and social problems of sexual minorities, including male prostitutes. While this report signaled the interest of the CHR in these important issues, the report itself was poorly researched and was criticized by the Sub-Commission for being superficial and arriving at dubious conclusions.<sup>35</sup> More recently, the human rights of sexual minorities have been mentioned by Special Rapporteurs investigating abuses in Iran, Romania, and Colombia. In 1994 and 1995 two reports described the action of death squads who target sexual

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<sup>34</sup> United Nations Organisation, E/CN.4/Sub.2/1996/L.31.

<sup>35</sup> United Nations Organisation, E/CN.4/1995/50/Add.1 and E/CN.4/1995/111.

minorities for "social cleaning" in Colombia<sup>36</sup>. Also in 1995, a report described the situation of a prisoner in Romania who was arrested and beaten for being gay.<sup>37</sup> In 1996 a report listed sodomy among the crimes punishable by death in Iran, and noted that this law is enforced.<sup>38</sup>

### Filing petitions

Organisations and individuals outside the United Nations can bring rights abuses to the attention of the **CHR** by filing petitions called "Resolution 1503 communications". The Commission has received a number of such petitions regarding the human rights of gay men and lesbians.<sup>39</sup>

### **United Nations Human Rights Committee**

UN Human Rights Committee (**HRC**), comprised of independent experts, is the body charged with monitoring the steps taken by state parties to carry out their obligations to protect human rights as guaranteed by the *International Covenant on Civil and Political Rights* (ICCPR). As part of its responsibility, the HRC can hear and issue opinions on cases filed by individuals alleging violations of their rights.

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<sup>36</sup> United Nations Organisation, E/CN.4/1995/34.

<sup>37</sup> United Nations Organisation, E/CN.4/1996/59.

<sup>38</sup> United Nations Organisation, G.A. Res. 2200A. [XXI], U.N. GAOR, Supp. No. 16, at 52, Doc. A/6316 [1966], 999 U.N.T.S. 171.

<sup>39</sup> IGLHRC fact sheet, *International Jurisprudence and Policy Precedents Regarding Sexual Orientation*.

## **International Covenant on Civil and Political Rights (ICCPR)**

With 101 signatories, the ICCPR is one of the most important international human rights treaties. Article 17 of the ICCPR guarantees the right to privacy. Article 2(1) of the ICCPR provides that the rights and freedoms guaranteed in the ICCPR must be protected for all persons, without discrimination. Article 2 (1) states, in part, "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". Article 26 also prohibits discrimination - based on the same language as Article 2 - and takes the matter of discrimination a step further by declaring a right to equality *independent* of guarantees made in the ICCPR. Article 26 reads, in part, "All persons are equal before the law and are entitled without any discrimination to the equal protection of law."<sup>40</sup>

## **United Nations High Commissioner for Refugees**

Since April 1993 The United Nations High Commissioner for Refugees (UNHCR) has recognized in several Advisory Opinions that gays and lesbians qualify as members of a "particular social group" for the purposes of the 1951 Convention

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<sup>40</sup> United Nations Organisation, UNHCR/p.1/QIA - UK1. PM5/Feb. 1996

and the 1967 Protocol Relating to the Status of Refugees. In its publication, "Protecting Refugees," the UNHCR states: "Homosexuals may be eligible for refugee status on the basis of persecution because of their membership of a particular social group. It is the policy of the UNHCR that persons facing attack, inhumane treatment, or serious discrimination because of their homosexuality, and whose governments are unable or unwilling to protect them, should be recognized as refugees."<sup>41</sup>

## **UNITED NATIONS PROGRAMMES**

### **International Labour Organization (ILO)**

In 1996, the ILO conducted a Special Survey on the application of the ILO's Discrimination (Employment and Occupation) Convention, 1958 (No. 111) in which it examined issues of discrimination in employment based on sexual orientation. The ILO's Committee of Experts on the Application of Conventions and Recommendations recommended that sexual orientation be included in a new protocol that would extend application of the 1958 Convention to this and other grounds.<sup>42</sup>

### **U.N. Educational, Scientific and Cultural Organisation (UNESCO)**

In 1991, UNESCO accepted a petition to review a case of human rights violations against the editor of a lesbian periodical published in Greece.

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<sup>41</sup> International Labour Organisation. III 4B/281 - 11G. E95/v.3.

<sup>42</sup> United Nations Organisations, A/CONF 177/20.

Decision 104/EX (1978) of the UNESCO Executive Board calls upon UNESCO to examine human rights violations in the areas of education, culture, science, information, and communication. UNESCO ended its investigation of the case of Irene Petropolous, who had been charged by the Greek government with publishing "indecent" material, when Ms. Petropolous was acquitted by a Greek court.<sup>43</sup>

### **UN Development Programme (UNDP)**

In 1991, the UNDP introduced a Human Freedom Index in its Human Development Report. This Index ranked 88 countries by 40 indicators of democracy such as press freedom, rule of law, the right to travel and the personal right to conduct homosexual relations between consenting adults. Because many developing countries objected to the inclusion of human rights in a UNDP index, the Human Freedom Index was replaced by the Political Freedom Index, and the UNDP stopped publishing the ratings of individual states.<sup>44</sup>

### **World Health Organisation (WHO)**

In May 1991, the who voted to delete homosexuality from its International Classification of Diseases; this change became effective in January, 1993. (Chapter V, code 302).

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<sup>43</sup> IGLHRC fact sheet, *International Jurisprudence and Policy Precedents Regarding Sexual Orientation*.

<sup>44</sup> IGLHRC fact sheet, *International Jurisprudence and Policy Precedents Regarding Sexual Orientation*.



## United Nations Conferences

At the *Fourth World Conference on Women* (Beijing, 1995) there was substantive and sustained discussion about including references to "sexual orientation" in the *Platform for Action*. The draft version of the Platform included four references, including one calling on governments to eliminate discrimination in employment, and one calling on governments to provide legal protections against discrimination. The Conference did not reach consensus on inclusion of sexual orientation language, but the final Platform for Action does include recognition that women and men must be able to decide freely on all matters relating to their sexuality free from coercion, discrimination or violence. Israel, South Africa, and the United States have indicated that they interpret language in the Platform for Action to advocate human rights protections for all women no matter their sexual orientation.<sup>45</sup> In addition, the *Economic Council of Europe Regional Platform for Action* for the Beijing Conference includes as one of its basic principles that the promotion, protection, and realization of the human rights of women must "reflect the full diversity of women, recognizing that many women face additional barriers because of such factors as their race, language, ethnicity, culture, religion, sexual orientation, disability, socio-economic class or status as indigenous people," and directs governments to include lesbian

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<sup>45</sup> United Nations Organisation, E/ECE/RE/HLM 8.

organizations in developing and implementing strategies for the advancement of women.<sup>46</sup>

### **Non-Government Organizations**

The decisions and actions taken by the following organisations exemplify the sort of human rights advocacy in which many non-governmental organisations are currently involved.

In 1991 *Amnesty International* decided to include in its definition of prisoners of conscience those individuals who have been incarcerated for their actual or presumed homosexuality.

At the 1997 Cape Town International Council Meeting (ICM), Amnesty agreed to increase the visibility of its work on human-rights violations based on sexual orientation. However, a motion to add "sexual orientation" to its mission statement was abandoned by its supporters, who feared it would be defeated.<sup>47</sup>

Since 1993, the *International Human Rights Law Group* has been working to promote the application of international human rights standards to persons

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<sup>46</sup> Chris Dunton and Mai Palmberg, *Human Rights and Homosexuality in Southern Africa*: current African Issues 19, June 1996, Foreword.

<sup>47</sup> IGLHRC fact sheet, *International Jurisprudence and Policy Precedents Regarding Sexual Orientation*.

facing violence or discrimination because of their sexual identity or sexual orientation.<sup>48</sup>

In 1994 *Human Rights Watch* declared that it opposes "state-sponsored and state-tolerated violence, detention and prosecution of individuals because of their sexual identity, sexual orientation or private practices."<sup>49</sup>

In 1995 the *International Planned Parenthood Federation* approved its "Charter on Sexual and Reproductive Rights" which recognizes, among other rights, the rights of women to privacy, to equality and to freedom from all forms of discrimination. In this document the IPPC includes sexual orientation among the grounds it advocates should be protected from discrimination in the provision of information, health care, and reproductive health services.<sup>50</sup>

At the 1995 Zimbabwe International Bookfair one of the exhibitors, the organisation of Gays and Lesbians in Zimbabwe (GALZ), was prevented from taking part on the orders of the Zimbabwean government.<sup>51</sup> This opened up an unprecedented debate in Southern Africa, including Zambia. In Zambia the attempt by *LEGATRA*, the Lesbians, Gays and Transgender Association, to register<sup>52</sup> in August 1998 and the revelation by Francis Yabe Chisambisha that

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<sup>48</sup> IGLHRC fact sheet, *International Jurisprudence and Policy Precedents Regarding Sexual Orientation*.

<sup>49</sup> IGLHRC fact sheet, *International Jurisprudence and Policy Precedents Regarding Sexual Orientation*.

<sup>50</sup> IGLHRC fact sheet, *International Jurisprudence and Policy Precedents Regarding Sexual Orientation*.

<sup>51</sup> Gays Form NGO", Post, 31 August 1998, p.1.

<sup>52</sup> Gays Form NGO", Post, 31 August 1998, p.1.

he was a homosexual raised so much controversy, provoked so much public condemnation and met so much opposition from individuals, churches, the Muslim community, political parties and government ministers. The next chapter (chapter 3) will look at the arguments for and against homosexuality in the wake of the revelation by Chisambisha that he was a homosexual. This will set the tone for the discussion of homosexuality in the successive chapters.

## CHAPTER 3

### THE DEBATE ON SEXUAL ORIENTATION IN ZAMBIA AND ARGUMENTS ON THE DEBATE IN SOUTH AFRICA

#### Introduction

This chapter will look at some of the views which were propagated for and against the homosexual debate in Zambia. The chapter will also briefly look at the debate in South Africa over the inclusion of the sexual orientation clause in the South African Constitution. The chapter will close by explaining away the deep-rooted sexual prejudices raised in the above debates.

Until recently, as earlier seen, in Africa, public comments on homosexuality have been fairly infrequent. In the press, generally, commentary has largely been based on a couple of basic contentions. First, that homosexuality is an offence that can readily be conflated with other offences, such as bestiality, child abuse and the marketing of pornography.<sup>53</sup> Second that - in the words of a 1987 Lagos publication - "homosexuality is still largely a Euro - American perversion which has not yet any foothold in Africa".<sup>54</sup>

When Francis Yabe Chisambisha made his homosexual orientation a public issue in an article published in *The Post* in July 1998, the gay-lesbian debate

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<sup>53</sup> Times of Zambia, 8 October 1998, p.3:.. 'Madondo speaks out on gays,'

<sup>54</sup> Monthly Life, vol. 4, No. 5, May 1987, p.8.

was ignited. In August 1998, with the help of the Zambia Independent Monitoring Team (ZIMT), LEGATRA, the Lesbians, Gays and Transgender Association, sought to be registered, but this raised a storm of determined protests from individuals, churches, the Muslim community, political parties and government ministers.

### **Debate on homosexuality in Zambia**

The revelation by Chisambisa that he was a practising homosexual raised emotions of many people. Living in a society that did not publicly acknowledge this type of sexual orientation the language between those opposed to homosexual activities, especially government officials, and those supporting and promoting the interests of rights of gay people was very acrimonious. The highly emotive issue pit Legal Affairs Minister Vincent Malambo, former Information and Broadcasting Services Minister David Mpamba and Home Affairs Minister Peter Machungwa on the one hand and Zambia Independent Monitoring Team (ZIMT) president and human rights activist Alfred Zulu and ZIMT board secretary, Gershom Musonda, on the other. Mr. Malambo denounced those calling for the registration of LEGATRA, saying homosexuality was not African and that government would not allow registration of the Association.<sup>55</sup> He also added that homosexuality was a felony which carried a custodial sentence of 14 years' imprisonment. Mr. Mpamba, reiterating Mr. Malambo's sentiments, said

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<sup>55</sup> The Post, 7 September 1998, p.11.

homosexuality was unAfrican, and an abomination to society which could cause social decay.<sup>56</sup> The two ministers found an ally in Vice-President Lt. Gen Christon Tembo who observed that it was of public notoriety that homosexuality went against the order of nature and morality as understood in the Zambian society.<sup>57</sup> This was in response to points of order raised by Solwezi Central Member of Parliament, Dr. Ludwig Sondashi and Itezhi tezhi Member of Parliament Mr. Bates Namuyamba in which they wondered why some people had gone around declaring their homosexual status. The former Republican President, Dr. Kenneth David Kaunda lending credence to the debate said, "gayism is a disease, but instead of discriminating against people who practice it let us do something to help them lead normal lives".<sup>58</sup> Commenting on the debate the Republican President Mr. F.J.T. Chiluba said, "... Homosexuality is the deepest level of depravity. It is unbiblical and abnormal. How do you expect my government to accept something that is abnormal", in apparent reference to the call for the registration of LEGATRA.<sup>59</sup> Samuel Ngoma writing in the Times of Zambia<sup>60</sup> wrote,

*Ignoring the loquacious ZIMT's Alfred Mthakati Zulu's attempts to form a gay movement on [the] Zambian soil is injustice to justice. Why is there such a determined silence even from government. Please stop Zambia going down the drain. The best way to do it is to curb the rising tally of gay voices in our nation. Where is our culture? Where are all the moral values? Where is government? Where is the church (except for Jesus Worship Centre's Pastor, Ernest Chelelwa)?*

<sup>56</sup> Ibid; at.11.

<sup>57</sup> Times of Zambia, 23 September 1998.

<sup>58</sup> Legatra News, vol.1, No. 1, April/May 1999, p.18.

<sup>59</sup> Times of Zambia, 19 October 1998 'Chiluba blasts gays'.

<sup>60</sup> Times of Zambia, 19 September 1998, p.8. "Gays: State must brook no nonsense".

And a writer, Allan, writing to the editor<sup>61</sup> noted that,

*There are scientific findings that show brain scans of murderers. The studies show that most of them have brain activity that is different from 'normal' humans. Since the origin of these murders is probably biological, should these murderers form an association to defend "their right to kill others".*

Permanent Human Rights Commission (PHRC) Chairperson, Justice Chibesakunda, joined the chorus of the people against the registration of LEGATRA. She was categorical in her comments, stating that under the current Republican Constitution her Commission was not ready to help gays! According to her:

*These people have a problem because the law does not permit them to practice this (homosexuality). As the law is, we cannot do much to help them even if they came to us with a complaint. Really even civil and political rights have conditions to be followed and here every society has its conditions and values because morality and public opinion have to be observed. For the time being, I think these guys have a problem because of the law and until such a time when this changes I don't see any future for gays. What they are doing is a perverse act in Africa.<sup>62</sup>*

## **The Church**

Joining the debate the Zambia Episcopal Conference (ZEC), the Christian Council of Zambia (CCZ) and the Evangelical Fellowship of Zambia (EFZ) on 17th September 1998, urged the Zambian government not to register gays and lesbians.<sup>63</sup> A member of the *Third World Mufulira Church* also known as *End of*

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<sup>61</sup>Legatra News, Supra note 58 at 16: "Social deviants have different brain activity".

<sup>62</sup>The Post, 7 October 1998, p.6.

<sup>63</sup>Times of Zambia, 21 September 1998, p.1.



*Time Believers*, David Mwango, believed that gay persons were a product of the devil's evil work.<sup>64</sup> Mwango appealed to activists calling for humane treatment of gays, lesbians, bisexuals and transgendered persons to stop since such people did not have human rights like other normal persons (heterosexuals). In Livingstone, pastors from Pentecostal churches (Pastor Jannet Hart from Abundant Life Ministries and Pastors Lumbiya and Kazaka from Vineyard Church) converged at Calvary Pentecostal Church and prayed for the deaths of all gay and lesbian persons in the country.<sup>65</sup> "Lord Jesus come quickly... This LEGATRA thing and those advocating for (sic) non-discrimination of gays and lesbian persons are satanic, let them all die".

## **Chiefs**

And apparently making reference to calls by some academicians (Prof. Kashoki and Prof. Hansungule) that the issue of homosexuality be debated within the Zambian cultural norms, senior Chieftainess Chiyawa said, 'gayism' was a taboo and that it had no meaning in Zambian society.<sup>66</sup> "What is the purpose of being a homosexual when you can't have children through it?". She did not even want the issue of gays and lesbians to be discussed in public because, according to her, "it was a shame to the African values".

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<sup>64</sup> Legatra News, p.25: 'God should spit fire on Gay Community-Church Member'.

<sup>65</sup> Ibid., p.7 Pentecostal Churches call for elimination of gays, lesbians',

<sup>66</sup> The Post, 7 October 1998, p.6.

Two fundamentally different views stand against each other in the Zambian debate on gay and lesbian persons. On one side government officials and some citizens describe homosexuality as a danger threatening the existence of a socially ordered society. On the other side are those who see the recognition of gay and lesbian rights as a logical extension of those human rights needed to defend the existence of a well ordered society.

### **Voices in support of Gays**

Elaborating the view of those who recognise the rights of gays and lesbians Zambia Independent Media Association Chairman, David Simpson said:

*Discrimination against homosexuals diminishes culture. I have observed that most of those who are gays or lesbians are very creative, for example, in music and the arts.<sup>67</sup>*

Speaking in support of gays and lesbians, former minister of Agriculture, and current Chairperson of the Minorities Rights Committee of the Permanent Human Rights Commission, Mr. Simon Zukas, said homosexuals, lesbians and gays and other minorities in Zambia had the right to be organised and advocate change in the law. According to Mr. Zukas, "As chairman of the minorities and communal rights committee, I would be failing in my duty if I did not bring to the attention of the conference that those Zambian citizens, now coming out of the closet, the gays and lesbians, qualify for social concerns as minorities".<sup>68</sup> Mr. Zukas also

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<sup>67</sup> Legatra News, Supra note 64 at 18

<sup>68</sup> The Post, 7 October, Supra note 66 at 18

said that organisations that campaigned for a change in the current law within the democratic process deserved the protection of the PHRC to enable them to do so freely and without hindrance by state organs irrespective of the current state of Zambian public opinion on the issue of gays and lesbians rights.

ZIMT president, Alfred Zulu, commenting on the debate observed that the real problem was that political leaders did not understand basic human rights issues, thus failing to guide their people with a fair and objective hand. According to Mr. Zulu:

*The President (Chiluba) and all his ministers need to be educated on human rights so that they make a proper analysis of issues and guide a transition properly... we need a gay-friendly Republican President because homosexuality is not a disease but an alternative form of sexuality.*<sup>69</sup>

A trader in Chipata district of Eastern Province of Zambia, contributing to the debate said viewing homosexuality as madness was being unfair to persons of this sexual orientation. He advised that gay people were born that way and that it was, therefore, unfair to treat them as outcasts.<sup>70</sup>

From the above debate it is clearly discernible that the general outcry against gays and lesbians is premised on the arguments that:

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<sup>69</sup> Ibid., p.1.

<sup>70</sup> Legatira News, Supra note 67 at p.15, 'Please don't mind Gays'.

- (1) Homosexuality is alien to the Zambian culture and way of life. To sanction homosexuality is culturally, morally and spiritually unacceptable.
- (2) Homosexuals are mentally sick people who need either christian exorcism or confinement in a mental sanatorium
- (3) Homosexual practice is unchristian and inconsistent with the values that underpin the Republican Constitution.
- (4) Homosexuality is on the same footing of immorality as incest, bestiality, drug abuse, prostitution and witchcraft. Practitioners of these vices would come out in the open to seek registration if LEGATRA were registered.

#### **South Africa - the Sexual Orientation Clause Debate.**

On May 8, 1996, South Africa became the first country in the world to include a reference in the constitution to "Sexual orientation" as one of the basic human rights to be protected against discrimination.<sup>71</sup>

The inclusion of a clause on sexual orientation in the South Africa Constitution received broad official political party support. During the Bill of Rights debate the African National Congress (ANC), National Party (NP) and the Democratic Party (DP) proposed that all legislation that made discrimination on the ground of

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<sup>71</sup> South African Constitution, chapter Two (as adopted by the Constitutional Assembly on May 7 and the Parliament on May 8, 1996.

sexual orientation be unlawful.<sup>72</sup> Although the Inkatha Freedom Party did not take part in the work of the Constitutional Assembly after its walk-out in February 1995, it had in its proposal for the Provincial Constitution for Kwazulu/Natal, a sexual orientation clause.<sup>73</sup>

### **Voices of the public on the Debate**

Like in Zambia, the submissions against the sexual orientation clause in South Africa, almost invariably, began and ended with a moral condemnation of homosexuality as perverse, unnatural, and against God. The language against the sexual orientation clause followed a familiar pattern like that in Zambia. Petitions with the following or very similar wording were common.

*I hereby strongly object to the legalisation of immoral and unnatural sexual lifestyles under chapter 3 paragraph 8.2 of our interim Constitution. The phrase "SEXUAL ORIENTATION" must be deleted from our present Constitution and must NOT be included in the final Constitution that is being drafted. Homosexuality, lesbianism, sodomy and bestiality are unnatural, abnormal and immoral and do not deserve any constitutional protection under clauses like "sexual orientation".<sup>74</sup>*

### **Submission for inclusion Of Sexual Orientation clause**

Some Lawyers, some priests, individuals and the Democratic Party, as earlier seen, argued for the inclusion of the sexual orientation clause. Then Anglican

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<sup>72</sup> Gevisser, Mark and Edwina Cameron eds., *Defiant desire. Gay and lesbian lives in South Africa*, Ravan Press, Johannesburg, 1994, p.94 - 95.

<sup>73</sup> KwaZulu Legislative Assembly Resolution: Constitution of the State of KwaZulu/Natal, 1 December 1992, quoted by Gevisser and Cameron, p.96.

<sup>74</sup> Chris Dunton and Mai Palmberg, *Human Rights and Homosexuality in Southern Africa*, Current African issues, 19 June 1996, p.30.

Archbishop of Cape Town, Desmond Tutu, on June 2 1995, made a statement on the issue of homosexuality. He said,"... it would be a sad day for South Africa if any individual or group of law-abiding citizens in South Africa were to find that the final Constitution did not guarantee their fundamental human right to a sexual life, whether heterosexual or homosexual."<sup>75</sup>

### **Homosexuality not Eurocentric**

The notion that homosexuality is a Western phenomenon has been shown to be fallacious by some studies.<sup>76</sup> In response to the claim that homosexual relations are entirely accepted within western societies and western culture we have seen in chapters one and two that this assertion is not quite correct. Thousands of homosexuals were killed together with Jews, Gypsies, trade unionists and social democrats in German concentration camps during the reign of Nazism.<sup>77</sup> It was seen in chapter two that homosexuals existed in every community for which there is a record. We also saw that Western societies far from being permissive had a history of violent oppression of people who were 'different'.

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<sup>75</sup> Ibid., p.31.

<sup>76</sup> See Rev. Leeve Kadenge, "Sexuality in the African Context", Ecumenical Support Services, paper presented at the second seminar at Quality International Hotel, Harare, 8 May 1998. See also "Sister roars back on gay right", *The Namibian*, 10 October 1995, quoted in the current African issues by Chris Dunton and Mai Palmberg, Ibid; p.24. Both researchers, that is Rev. Kadenge, a Zimbabwean, and Kurt Falk, who lived in Namibia for 10 years, discovered that homosexuality was prevalent but latent in nearly all cultural groups in their respective times.

<sup>77</sup> Amnesty International, United Kingdom, Op.cit. p.7.

In Sudan Evans - Prichard published an account of same-sex activity in the pre-colonial Zande Kingdoms of Sudan.<sup>78</sup> He gave accounts of sexual relationships which bachelor male warriors and senior pages in the royal households had with in their "boy-wives", as well as sexual relationships among female members of large polygamous households.

In Uganda East Africa, it has been documented that King Munga II of Buganda used to consort with his christian pages.<sup>79</sup>

King Shaka of the Zulu (1788 - 1828) was identified by Max Gluckman as a "latent homosexual".<sup>80</sup>

The discussion on the background of the debate on homosexuals in Zambia has shown the varied views, some albeit wrong, of how the subject is perceived by various sections of the Zambian society. Chapter four will discuss sexual orientation and international human rights vis - a - vis the Zambian law.

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<sup>78</sup> A.J.G.M. Sanders, "Homosexuality and the Law in South Africa", *Journal of African Law*, Vol.41, No1, p.102.

<sup>79</sup> *Ibid.*, p.102.

<sup>80</sup> *Ibid.*, p.103. For fuller stories and examples on the existence of homosexuality in Africa see above article by Professor Sanders.

## CHAPTER 4

### GLOBAL OVERVIEW OF HOMOSEXUALITY AND LAW

This chapter is going to look at examples of human rights violations targeting gay men and lesbians. It will also discuss international law vis-a-vis the Zambian law on homosexuality.

#### Examples of Human Rights violations targeting Gays and Lesbians

Governments violate human rights of their citizens. But what are human rights?

Justice C.M. Musumali, in *Sara. H. Longwe .v. Intercontinental Hotel* 1992.

*H./HP/765* defined 'human rights' as:

*...Claims which every individual has or should have upon the society in which she or he lives. To call them human rights suggests that they are universal, they are due to every human being in every human society. They do not differ with geography or history, culture or ideology or political development. They do not depend on gender or race, class or status.*

Lesbians and gay men around the world face violations of their human rights in common with other citizens, but they also suffer specific abuses geared to their real or perceived homosexuality. Discrimination occurs when governments, institutions, or individuals treat people differently based on their characteristics- such as (but hardly limited to) sex, age, racial or ethnic identity or health. Discrimination can be *direct* - an explicit policy or law which generates unequal



treatment; or it can be *indirect* - an implicit side - effect of another policy or decision. Crimes, including murder, which turn out to be gay and lesbian hate-crimes continue around the world. Some examples of violations faced by gaymen and lesbians are given below.

## **Mexico**

In Mexico, between 1991 and 1994, twelve gay men were killed in the city of Tuxtla Gutierrez in the state of Chiapas. Nine were shot, one was stabbed to death and two were beaten to death, as part of a pattern of violence directed against the gay community in this area. There was evidence that the actual perpetrators of the crimes acted with the tolerance and complicity of the Mexican authorities.<sup>81</sup>

## **Columbia**

In Colombia, according to the now-disbanded Colombian gay organisation *Grupo De Ambiente*, between 1986 and 1990 328 gay men were murdered in the city of Medellin.<sup>82</sup>

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<sup>81</sup> Amnesty International Index: AMR 41/07/94.

<sup>82</sup> Amnesty International Index: A M R 23/46/93, 'Homophobia Homicide' Aiuk Leaflet on Columbia, 1994.

## Zambia

In a letter to *Legatra News* entitled, "*How my Gay neighbour was bashed*" a concerned neighbour gave an account of how his neighbour was violently assaulted by a group of four people when they learnt that he was a gay man.<sup>83</sup> They took him to Chilimbulu road where they severely beat him up and later dumped him near a private school.

On August 24, 1999 Emmanuel Sikombe was convicted and sent to jail for five years by the Subordinate court of the first class at Kabwe for 'indecent practices between males' contrary to section 158 of the Penal Code. It was alleged in the particulars that Sikombe had on May 16, 1998 at Kabwe in the Kabwe district of the Central Province of the Republic of Zambia done an act of gross indecency with another male by putting his penis in Mukamba Mokoma's mouth.

## Peru

In Peru in 1994, the gay rights organisation, *Movimiento Homosexual de Lima*, which works against police abuses of lesbians and gay men, reported that gays were being assassinated by the Tupac Amaro Revolutionary Movement (MRTA), an armed insurgency group.<sup>84</sup>

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<sup>83</sup> Legatra News Vol. 1 No. 1 April/May 1999, p.29.

<sup>84</sup> Amnesty International Index: A M R 46/19/94.

## **Saudi Arabia**

In Saudi Arabia, in October 1996, twenty-four Filipino migrant workers were arrested for homosexual behaviour and were sentenced to two hundred lashes.<sup>85</sup>

## **Other Countries**

In England, the bomb blast in a Soho, London pub, killing three people is a more recent example of homophobia or hate crimes.<sup>86</sup> In the USA the *Sydney Star Observer* reported in its 17 June 1999 edition that Steven Goederes was murdered by two young men because Goederes had called out to one of them, "Hey, beautiful".

## **What is the position of International Law on Homosexuality?**

More than any group, gays and lesbians are regarded, and often treated, with distaste and rejection. Traditionally disadvantaged groups such as women and children both constitute a majority of the Zambian population. Gays and lesbians, by contrast, are a minority and given the persecution they have faced/continue to face, they constitute a minority which needs legal protection against discrimination. This is the premise upon which the reasoning behind the increasing and fairly recent tendency to view homosexuality as a human rights issue is based.

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<sup>85</sup> Amnesty International Index: MDE 23/11/96.

<sup>86</sup> Lesbian and Gay Solidarity Newsletter, Issue 2 April - May - June 1999, p.1.

In the 1970s the view of homosexuality as a disorder began to be replaced by an acceptance of the fact that same - sex attraction was normal to a minority of people in most, if not all, societies. In 1973 the US Psychiatry Association deleted homosexuality from its books on mental disorders.<sup>87</sup> In Sweden homosexuality was taken off the official list of diseases in 1979.<sup>88</sup> Homosexuality was taken off the list of diseases by the World Health Organisation (WHO) as late as 1993.

The past ten years have seen significant steps taken in many parts of the world to recognise and protect the right to equal treatment of gays and lesbians.\*

The Council of Europe encourages respect for human rights among member states through a treaty - the *European Convention for the Protection of Human Rights and Fundamental Freedoms* - and through resolutions of the Parliamentary Assembly. The European Convention establishes a right to privacy (Article 8), and the *European Court of Human Rights* has ruled that state signatories to the European Convention cannot criminalise same-sex sexual relations because such laws violate the personal right to privacy. The European Court articulated this decision in relation to sodomy laws in Northern Ireland (*Dudgeon v. United Kingdom*, 4 Eur. H.R. Rep 149 [1981], Ireland (*Norris .v.*

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<sup>87</sup> American Psychological Association, *Diagnostic and Statistical Manual* (3 ed, 1980, reflecting resolutions adopted in 1973).

<sup>88</sup> The list is produced by the National Board of Social Services (Social styrelsen).

*Ireland*, 13 Eur. H.R. Rep. 186 [1991], and *Cyprus (Modinos v. Cyprus)*, 16 Eur. H.R. Rep. 485 [1993]).

In *Dudgeon v. UK* the court had the opportunity to elaborate on the right to respect for private life in relation to the sexual activity of individuals. The applicant was a homosexual and complained of prohibitive provisions of the criminal law of Northern Ireland as regards homosexual activities even between consenting adults in private life. The court held that the maintenance of the provisions constituted interference with the right of private life of the applicant 'which included his sexual life', even though no criminal proceedings were brought against him on the basis of such provisions. The mere existence of the relevant legislation was considered to constitute 'a continuous and direct interference' with the right in question. The Court in its decision acknowledged 'the legitimate necessity in a democratic society for some degree of control over homosexual conduct notably in order to provide safeguards against the exploitation and corruption of those who are especially vulnerable by reason, for example, of their youth'.

Internationally, there have also been significant developments. As earlier seen, in an important recent decision,<sup>89</sup> on 4 April 1995, the Human Rights Committee of the United Nations held that the right to privacy contained in the International

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<sup>89</sup> *Toonen v. Australia* (1994) (Concerning Tasmania's Sodomy laws).

Covenant on Civil and Political Rights (1966) covered adult - consenting same - sex activity in private: therefore, a nation - state's law criminalising sodomy violated the right to privacy. The Committee, therefore, called for the repeal of the law. More specifically, the Committee was called upon to rule on the application of Articles 2(1) and 26 of the Covenant.<sup>90</sup>

The question in the case before the Committee was whether the term 'other status' in these provisions included sexual orientation. The Committee ruled that the reference to 'sex' in articles 2(1) and 26 should be taken as including sexual orientation.<sup>91</sup> The importance of the *Toonen* decision for the cause of the recognition of sexual orientation as a fundamental ground for protection of human rights<sup>92</sup> extends far beyond Tasmania, Australia, the occasion of the complaint. The significance of the decision is that it speaks to the whole world. It represents an important ruling by a high body of the United Nations on a fundamental question of human rights. It draws on the earlier jurisprudence of the *European Court of Human Rights*.<sup>93</sup> This decision has profound implications for the international obligations of States subscribing to the Covenant. It

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<sup>90</sup> Article 2(1) provides that 'Each State Party... undertakes to respect and to ensure to all individuals.. the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political and other opinion, national and social origin, property, birth or other status' Article 26 provides that 'All persons are equal before the law and are entitled without any discrimination to the equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal effective protection against any ground such as race, colour, sex ... or other Status'.

<sup>91</sup> Para 87 of the Committee's ruling.

<sup>92</sup> E. Heinze, *Sexual Orientation: A Human Right - An Essay on International Human Rights Law*, Martinus Nijhoff, Dordrecht, 1995.

<sup>93</sup> See, for example, *Dudgeon v. United Kingdom* (1981) 4 EHRR 149 - *Norris V. Republic of Ireland* (1988) 13 EHRR.

suggests that States cannot discriminate against individuals on the basis of their sexual orientation in granting citizens all the rights enshrined in the Covenant, and further that States must ensure the equal protection of the law to all their citizens, regardless of their sexuality.<sup>94</sup>

In Zambia, as seen in chapter two, the law prohibits same - sex relations. The proscription is found in sections 155 - 158 of the Penal Code, cap. 87. The Zambian Constitution in Article 23, however, prohibits discrimination based on sex. Article 17 offers the right to privacy.

Of significance to Zambia is that the constitutional provisions quoted above are, *mutatis mutandis*, similar to those in the International Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms. Lt. Gen. Tembo in his address to Parliament maintained that the provisions of the Penal Code cited above were not "inconsistent with or in contravention of Articles 11 and 21 of the Zambian Constitution, Articles 22 of the ICCPR to which Zambia is a State Party and Article 20 of the Universal Declaration of Human Rights (as read together with Article 29(2) of the same declaration)". Lt. Gen. Tembo's assertion that the provisions in the Penal Code are not inconsistent with the Zambian Constitution,

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<sup>94</sup> Brenda Sue Thornton, 'New International Jurisprudence on the Right to Privacy: A Head - on Collision with *Bowers v. Hardwick*', Albany Law Review, Vol 58, No. 3 (1995), p.725 at 7765. See also Dr. Chanda ,ZLJ, Vol. 30, 1998 pp. 125 - 128.

the ICCPR and the Universal Declaration of Human Rights are not quite correct. The provisions he quoted (Article 22 of the ICCPR and 20 of the UDHR) were cited out of context. The principal provisions relating to non-discrimination in the ICCPR are found in Articles 2, 17 and 26, while under the UDHR they are found in Articles 2 and 7.

The United Nations Human Rights Committee's decision in the case of *Toonen Vs. Australia* and the various decisions of the European Court of Human Rights, contrary to Lt. Gen. Tembo's claims, show clearly that the provisions in the Penal Code are discriminatory and, thus, inconsistent with the above international instruments.

As regards the claim that sections 155 - 158 do not violate the provisions of the Zambian Constitution, it is contended that the laws and the provisions in question violate the constitutional guarantee of equality. They have the effect that different standards are made applicable to individuals and groups depending on their biological sex or sexual orientation.

As to sodomy, recognition of this act as a crime necessarily involves differentiation on grounds of sexual orientation. Anal intercourse is the homosexual man's form of sexual expression equivalent to heterosexual



intercourse *per vaginam*. In an article, entitled, "Sexual Orientation and the Constitution: A Test Case for Human Rights,"<sup>95</sup> Professor Cameron wrote:

*The only plausible argument which adequately recognises sexual orientation as an impermissible ground of discrimination is based on a claim to equal protection of the law. This argument asserts unequivocally that discrimination on the ground of homosexuality is untenable, because sexual orientation is - or should be - a matter of indifference morally and constitutionally. There is thus, no basis which can be countenanced before the law for treating homosexual men and women differently. This implies acceptance of three critical premises. They are (a) that sexual orientation, and consensual conduct expressing it, do not in themselves justifiably evoke social censure (whatever divergent moral views one may hold about it); (b) that homosexual orientation is not itself evidence of illness or depravity; and (c) sexual orientation (homosexual or heterosexual) is or should be an indifferent factor in the distribution of social goods and services and the award of social opportunities.*

Professor Cameron's passage above correctly interprets the Constitutional provision on equality before the law. The Zambian Constitution enjoins equal treatment before the law of persons entitled to its protection. Human rights are protected in Part 3 of the Constitution. However, only civil and political rights are protected and these include rights to: life;<sup>96</sup> personal liberty;<sup>97</sup> protection from slavery and forced labour;<sup>98</sup> protection from torture and inhuman treatment;<sup>99</sup> property;<sup>100</sup> protection of the law;<sup>101</sup> privacy of home and other property;<sup>102</sup> freedom of expression;<sup>103</sup> freedom of conscience;<sup>104</sup> freedom of association and

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<sup>95</sup> 110 (1993) SALJ 450 - 472.

<sup>96</sup> Article 12. Constitution of Zambia.

<sup>97</sup> Article 13. Constitution of Zambia.

<sup>98</sup> Article 14 Constitution of Zambia

<sup>99</sup> Article 15 Constitution of Zambia

<sup>100</sup> Article 16 Constitution of Zambia.

<sup>101</sup> Article 18 Constitution of Zambia.

<sup>102</sup> Article 17 Constitution of Zambia.

<sup>103</sup> Article 20 Constitution of Zambia.

<sup>104</sup> Article 19 Constitution of Zambia.

assembly;<sup>105</sup> freedom of movement;<sup>106</sup> *protection from discrimination on various grounds*;<sup>107</sup> and protection of young persons from exploitation.<sup>108</sup>

To penalise a homosexual person for the expression of his or her sexuality can only be defended from a standpoint which depends on religious intolerance, ignorance, superstition, bigotry, fear of what is different from, or alien to everyday experience and the millstone of history.<sup>109</sup>

Government officials have relied on the derogation clauses in the Bill of Rights to justify their refusal to recognise the right to sexual orientation. The Bill of Rights contains wide derogation clauses which have the effect of negating the essential content of the rights protected. In fact, it was to these derogation clauses that Lt Gen. Tembo alluded in his address to Parliament when he referred to Article 29 of the UDHR.

Reliance on the derogation clauses can easily be challenged by referring to Dr. A.W. Chanda's article<sup>110</sup> in the *Zambia Law Journal* when he was discussing "freedom of expression and the law in Zambia".

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<sup>105</sup> Article 21 Constitution of Zambia.

<sup>106</sup> Article 21 Constitution of Zambia.

<sup>107</sup> Article 23 Constitution of Zambia.

<sup>108</sup> Article 24 Constitution of Zambia.

<sup>109</sup> See Chapter 3

<sup>110</sup> A.W. Chanda, *Freedom of Expression and The Law In Zambia*, *Zambia Law Journal* Vol. 30, 1998, p.125 - 128. Also see *Handbook of Media Laws in Zambia* by Dr. A.W. Chanda and Mufalo Liswaniso, Zambia Independent Media Association, Lusaka, 1999, especially article on derogations permitted under the Zambian Constitution.

Although he was discussing the "freedom of expression" his observations are true about the other fundamental rights and freedoms recognised by the Constitution. Dr. Chanda noted that the derogation clauses were very wide, and that if they were broadly construed they would completely emasculate the protection of the various freedoms contained in Articles and clauses of the Constitution.<sup>111</sup>

Article 21 (2) of the Constitution, for example, provides:

*Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that it is shown that the law in question makes provision-*

- (a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health;
- (b) that is reasonably required for the purpose of protecting the rights and freedoms of other persons;
- (c) that imposes restrictions upon public officers; or
- (d) for the registration of political parties or trade unions in a register established by or under a law and for imposing reasonable conditions relating to the procedure for entry on such a register including conditions as to the minimum

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<sup>111</sup>A.W. Chanda, *Freedom of Expression and The Law In Zambia*, Ibid., p.127.

number of persons necessary to constitute a trade union  
qualified for registration;

*and except so far as that provision or, the thing done under the authority thereof as the case may be, is shown not to be reasonably justifiable in a democratic society.*

According to Article 21(2), in order for a restriction on freedom of assembly and association to be valid, it must meet the following criteria. First, it must be provided for by law. Second, it must reasonably be required in any of the interests enumerated in clauses (a) to (d). These 'interests', especially those in clause (a), Dr. Chanda observed,<sup>112</sup> and the writer totally agrees with him, are expressed in *very broad and vague* terms. 'Public safety', 'public order', 'public morality' or 'public health' are not defined. Dr. Chanda correctly observes that any restriction can be justified on any of the above grounds. He gave examples<sup>113</sup> of where timid judges in Zambia have upheld all restrictions imposed by the state by giving broad interpretations to derogation clauses. Dr. Chanda further observed that:

....the restriction need only be 'reasonably required' to protect the listed interests as opposed to being 'necessary' as under Article 10 of the European Convention, Article 19 of the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights.

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<sup>112</sup> Ibid., p.127.

<sup>113</sup> Ibid., 127. See also *Kachasu v. Attorney-General* (1967) ZR 145; *Patel v. Attorney-General* (1968) ZR 99; *The People v. M'member and Bright Mwape*, HP/36/94 as quoted by Dr. Chanda in ZLJ Vol. 30.

The Zambian standard is less stringent than in international instruments as all that has to be shown is that the restriction is 'reasonable' or 'desirable'. It is not necessary to demonstrate a 'pressing social need' or to give relevant and sufficient reasons for the restriction.

Third, the restriction must be reasonably justifiable in a democratic society. What constitutes a democratic society is not defined by the Constitution. This will depend on the social philosophy of the judge hearing the case and the scale of value he places on public interests. The European Court of Human Rights has laid down standards for evaluating what constitutes a democratic society. It was stated that tolerance, pluralism and open-mindedness are intrinsic to democratic society.

The above exposition by Dr. Chanda clearly shows that the derogation clauses in Zambia are not interpreted in accordance with international standards. In the book, *'Handbook of Media Laws in Zambia'*, Dr. Chanda explained the relevance of decisions of the European Court of Human Rights.<sup>114</sup> According to him cases decided by the European Court of Human Rights are relevant to Zambia, even if Zambia is not party to the *European Convention*. This is because, this is the oldest human rights court in the world with vast experience in deciding human rights issues. Dr. Chanda explains that the Court has acquired an immeasurable amount of prestige and for this reason its decisions are referred to by national courts and international tribunals throughout the world. The Zambian Bill of Rights, he adds, closely parallels that of the *European Convention*. It is necessary that Zambian courts should draw inspiration from decisions of the European court of Human Rights.

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<sup>114</sup> A.W. Chanda and M. Liswaniso, *Handbook of Media Laws in Zambia* Supra note 110, at 5

From the above discussion it is clear that the Zambian government's position on derogation clauses is quite way out of tune of what is the contemporary and correct interpretation of such clauses.

Arguments for the justification of the proscription of homosexual activities by government officials are, almost invariably, based on historical antipathy, personal revulsion, religious conviction, the prevailing opinion in society, and the protection of the morals of the people. However, the first three bases must yield before the tenets of the Constitution which recognises, protects and guarantees fundamental rights and freedoms. As to the protection of *morals*, while this is a factor that can properly be taken into account, (the European court recognized this in *Toonen*) it does not carry great weight where the law provides adequate protection for those vulnerable to sexual exploitation as it does, for example, by means of applying criminal sanctions to indecent assault,<sup>115</sup> public indecency,<sup>116</sup> and contraventions of section 257<sup>117</sup> of the Penal Code. As regards popular opinion, this cannot constitute a justification for proscription in the face of an explicit constitutional guarantee. Nor can the existence of prejudice, even though pervasive, have any role to play in constitutional adjudication. While the constitution cannot control such prejudice, it is not expected to tolerate it. What is required instead is a search for possible justification grounds within the criteria

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<sup>115</sup> Section 157 Penal Code, Cap. 87 of the Laws of Zambia

<sup>116</sup> Section 158 Penal Code, Cap. 87.

<sup>117</sup> Section 257 Penal Code, Cap. 87 of the Laws of Zambia.

contained in the limitation clauses. Whether a limitation is justifiable has to be assessed objectively. Where no rational basis can be found for the retention of the challenged crime, it would have to be struck down.

The above discussion on limitations is closely related to what has come to be known as 'margin of appreciation' in determining the necessity of a restriction or limitation. The States parties to the *European Convention* have a certain "margin of appreciation" in determining the necessity of a restriction.<sup>118</sup> Zambian courts would do well to make use of this principle of *margin of appreciation*.

### **Margin of Appreciation**

As observed by Dr. Chanda and Liswaniso,<sup>119</sup> the scope of the margin of appreciation varies according to the aim at issue. Protection of morals is accorded a wide margin because national authorities are considered to be in a better position than the *European Convention* bodies to assess the need for the interference.<sup>120</sup>

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<sup>118</sup> A.W. Chanda and M. Liswaniso, *Handbook of Media Laws in Zambia* Supra note 110 at 5

<sup>119</sup> Ibid., p.5.

<sup>120</sup> Ibid., p.5.

## Decriminalisation

Homosexual acts are today, as seen below, decriminalised in most European countries, with the exception of Romania, coined as "the most homophobic country in Europe".<sup>121</sup>

In Southern Africa, Botswana, Swaziland and Lesotho do not have any laws against homosexuality.<sup>122</sup>

A list of some of the nations/states which offer protection against discrimination based on sexual orientation includes Australia, Brazil, Canada, Columbia, Costa Rica, Denmark, Ecuador, Finland, France, Iceland, Ireland, Israel, Luxembourg, The Netherlands, New Zealand, Norway, Slovenia, South Africa, Spain, Sweden and United States of America.<sup>123</sup> The list is not exhaustive.

This chapter gave examples of human rights violations targeting gay men and lesbians. It also dealt with legal aspects. The discussion has attempted to show the complex relationship between the law and society's norms. It was shown in the discussion that social acceptance of homosexuality depends on many factors

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<sup>121</sup> Chris Dunton and Mai Palmberg, *Human Rights and Homosexuality in Southern Africa*. Current African Issue 19, June 1996, p.34.

<sup>122</sup> Ibid., p.34.

<sup>123</sup> IGLHRC fact sheet, *Anti discrimination Legislation*, November 1998.



such as the general atmosphere of tolerance, views on sexuality, the tone set by leaders and opinion-makers, and the visibility of gays and lesbians themselves.

Finally the chapter has shown that there have been many profound changes in general views on homosexuality and the scope of "gay rights" in recent years in many parts of the world.

## CHAPTER 5

### CONCLUSION

#### Summary

The study has shown that sexual orientation is one of the four components of sexuality and is distinguished by an enduring emotional, romantic, sexual or affectionate attraction of a particular gender. The three other components of sexuality are biological sex, gender identity (the psychological sense of being male or female) and social sex role (adherence to cultural norms for feminine and masculine behaviour).

Three sexual orientations are commonly recognised: homosexual attraction to individuals of one's own gender; heterosexual, attraction to individuals of the other gender; or bisexual, attractions to members of either gender.<sup>124</sup>

Sexual orientation is different from sexual behaviour because it refers to feelings and self-concept.<sup>125</sup>

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<sup>124</sup> See study done in the USA and considered in *Equality Foundation of Greater Cincinnati Inc et al v The City of Cincinnati*, 850F supp 417 (1994) (US D et). For a Summary of factual findings on which the court founded its findings you may refer to an article by Justice Michael Kirby entitled, *Homosexual Law Reform - The Road of Enlightenment*, Commonwealth Law Bulletin, Vol. 23, Nos. 1 and 2, January and April 1997, p.570.

<sup>125</sup> Ibid.

How a particular sexual orientation develops in any individual is not well understood by scientists. Various theories have proposed differing sources for sexual orientation, including genetic or inborn hormonal factors and life experiences during early childhood. However, many scientists share the view that sexual orientation is shaped for most people at an early age through complex interactions of biological, psychological and social factors. Psychologists, psychiatrists and other mental health professionals agree that homosexuality is not an illness, mental disorder or emotional problem.<sup>126</sup>

It has been shown in the study that homosexuals are frequently the targets of discrimination and violence. This threat of violence and discrimination is an obstacle to lesbian and gay peoples' development.

In concluding the study it is proper to quote the wise words of Peter Nobel, the first ombudsman against discrimination in Sweden. He said:

*.The way one is prepared to treat sexual minorities is a test of how much one means when talking about the equal rights of all humans or the respect for human beings including the universality of human rights.....*<sup>127</sup>

In testing the government's commitment to human freedom and dignity, it has to examine not the easy cases, not the cases of discrimination rejected by conventional opinion and widespread consensus. The test of the government's

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<sup>126</sup> Ibid.

<sup>127</sup> Chris Dunton and Mai Palmberg, *Human Rights and Homosexuality in Southern Africa*, Current African issues, 19 June, 1996, preface.

commitment to human rights is the hard cases. It is easy to speak in glowing terms of an end to race and gender rhetoric. The true test comes when a nation faces those stigmas which are not yet unfashionable, those hatreds which are still permitted, those prejudices which are still fostered by those in authority, and those discriminations which are still widely licenced.

Constitutional protection is not only socially necessary. It is a mark of civilisation. Economic aid to Zambia is linked to good governance. "Good governance" is defined in international instruments including the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights. To avoid the Zambian nation being sidelined by the listed international instruments including the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights. To avoid the Zambian nation being sidelined by the civilised international community the recommendations made below must be considered and implemented.

### **Recommendations for the protection of lesbians and gay men.**

The writer recommends that the government reviews all legislation and practices including sodomy laws (and revise or repeal where necessary) which result in the detention of persons because of their homosexual identity or homosexual acts in private between consenting adults. This review should also include any laws which result in imprisonment of advocates of homosexual rights.

The government must promote human rights education which emphasises the need to protect the human rights of all people, including lesbians and gay men. Educating all people about sexual orientation and homosexuality is likely to diminish anti-gay prejudice. Accurate information about homosexuality is especially important to young people struggling with their own sexual identity. Fears that access to such information will affect one's sexual orientation are not valid.

To the religious, it is recommended that they should love every person equally. They must have in their contemplation that all are precious in the eyes of God. The love which one person can have for, and receive from another is a gift from God. Nonetheless, God expects homosexual people as indeed he does heterosexual people, to keep his law and to work towards achieving a difficult ideal, even if this will only be achieved gradually. God has a love for every person which is greater than any love which one human being could have for another. In all the circumstances and situations of life, God calls each person, whatever his or her sexual orientation, to fulfil that part of his created design which only that person can fulfil.<sup>128</sup>

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<sup>128</sup> Cardinal Basil Hume, *A note on the teaching of the Catholic Church concerning homosexual people*, Archbishop's House, Westminster, London.

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