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AN EVALUATION OF SEXUAL ORIENTATION AND GENDER IDENTITY RIGHTS AND THEIR PROPOSED APPLICATION IN ZAMBIA

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DECLARATION

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ABSTRACT

In Zambia, unnatural conduct is criminalised by section 155 of the penal code. The implication is that all sexual activity that is deemed unnatural such as homosexual, lesbian, bisexual and transgender conduct is prohibited and people of this sexual orientation and or gender identity live secret lives for fear of being arrested.

This work therefore evaluates sexual orientation and gender identity rights and their proposed application in Zambia. It begins by delving into the various arguments advanced for the continued intolerance of LGBT’S such as religious, moral, cultural and historical. It then shows that despite these arguments the world has seen a movement towards the recognition of LGBT rights.

The paper then shows how sexual orientation is a fundamental aspect of every individual and that the rights of sexual orientation and gender identity that are being asserted are already a part of international law. Further, the Yogyakarta principles are examined in light of the contribution that they have made to International law in as far as sexual orientation and gender identity rights are concerned.

The paper proceeds to evaluate sexual orientation and gender identity in Zambia, in doing this, the it uses South Africa to show how sexual orientation and gender identity rights have been incorporated in that country. The paper also proposes the application of some of the developments that have taken place in the realm of sexual orientation and gender identity on the international level in Zambia.

Finally, the paper concludes by giving some recommendations that are necessary in improving the situation of LGBT’S in Zambia so that they may enjoy their rights fully despite their sexual orientation. It does so by borrowing experiences from South Africa and New Zealand.
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<tr>
<td>HRC</td>
<td>Human Rights Committee</td>
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<td>HRCZ</td>
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<td>HRW</td>
<td>Human Rights Watch</td>
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<tr>
<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<td>ICC</td>
<td>International Criminal Court</td>
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<td>LGBT</td>
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STATUTES

South Africa


The Equality and Prevention of Unfair Discrimination Bill of 1999

Zambia

The Constitution of Zambia, Chapter 1 of the Laws of Zambia

The Criminal Procedure Code, Chapter 88 of the Laws of Zambia

The Marriage Act, Chapter 50 of the Laws of Zambia

The Penal Code, Chapter 87 of the Laws of Zambia
European Court of Human Rights

Informationsverein Lentia and others v. Austria Application No. 17207/1990 European Court of Human Rights

Human Rights Committee


Zambia

Christine Mulundika V. The People (1995) S.J

Sata v. Post news papers Ltd. And another (1995) (S.C) selected judgments
DEFINITIONS

Bisexual: Sexually attracted to both sexes.¹

Decriminalization: An official Act generally accomplished by legislation in which an act or omission formerly criminal is made non-criminal and without punitive sanctions.²

Gay: Homosexual.³

Gender Identity: A subjective, but continuous and persistent, sense of ourselves as masculine or feminine.⁴

Gender Stereotype: The socially determined model which contains the cultural beliefs about what gender roles should be. It differs from gender or sex role in that it tends to be the way that people feel others should behave.⁵

Homosexuality: Sexual preference for or sexual activity with people of ones own sex.⁶

Homosexual: One who is inclined towards or practices homosexuality.⁷

Lesbian: A female homosexual.⁸

LGBT: Refers to Lesbians, Gay, Bisexual and Transgender People.⁹

Sexual Identity: The objective categorization of a person’s physiological status as male or female.¹⁰

¹O. Brian (Editor), Longman Dictionary of the English Language. (Harlow: Longman 1991) Page 144.
⁶O. Brian (Editor), Longman Dictionary of the English Language. (Harlow: Longman 1991) Page 703.
⁷O. Brian (Editor), Longman Dictionary. Page 703.
Sexual Orientation: Refers to a person’s preference for the same or opposite sex partners.\textsuperscript{11}

Sex Role: The behaviors, attitudes, values, beliefs and so on that a particular cultural group considers appropriate for males and females on the basis of their biological sex.\textsuperscript{12}

Moral: Pertains to character, conduct, intention and social relations.\textsuperscript{13}

Transgender: A person whose personal idea of gender does not correlate with his or her assigned gender role.\textsuperscript{14}

\textsuperscript{10} J. Bland, About Gender Definitions. (2005) \url{http://www.gender.org.uk/about/00-defin.htm} (Accessed on the 11\textsuperscript{th} of September 2010).

\textsuperscript{11} J. Bland, About Gender Definitions. (2005). \url{http://www.gender.org.uk} (Accessed on the 11\textsuperscript{th} of September 2010)

\textsuperscript{12} J. Bland, About Gender Definitions.(2005) \url{http://www.gender.org.uk} (Accessed on the 11\textsuperscript{th} of September 2010)


\textsuperscript{14} T. Head (2010). \url{Civilliberty.about.com/od/gendersexuality/g/transgender.htm} (Accessed on 11\textsuperscript{th} September 2010)
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1.0 Introduction

Sexual orientation refers to the way in which a person’s sexual and emotional desires are directed. While gender identity refers to a person’s deeply felt, internal sense of belonging to a gender. These are profoundly rooted, fundamental aspects of the human personality and of human dignity.

Lesbian, Gay, Bisexual and Transgender (LGBT) people around the world face violence and inequality because of their sexual orientation and gender identity. For a long time, these people have been subject to intense forms of marginalization and social and political exclusion, not only in Zambia but also in many other societies such as Malawi, Uganda, South Africa, to mention but a few.

Not only have LGBT behaviors been and continue to be criminalized by various legal provisions but, in addition, in the daily life, people with lesbian, gender, bisexual and transgender sexual preferences have been excluded from multiple social benefits and have had to endure social stigmatization, which has amounted to, in the most extreme cases, campaigns of extermination against these populations.

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17 Commission on Human Rights, Sexual Orientation and Gender Identity. (March 10th 2005)
This situation of stigmatization against LGBT people has been justified through notions according to which these people, because they present or display a sexual orientation different from the majority of the population, is considered unusual, ill or morally wrong. However, these old conceptions against LGBT people contradict essential values of contemporary public law, based on pluralism and recognition of autonomy and equal dignity of people.

Almost one hundred countries still legally prohibit sexual relations between persons of the same sex. Persecution and discrimination based on sexual orientation and gender identity are widespread around the world. In other countries, vaguely worded laws against “public scandals” or “indecent behavior” are used to penalize people whose only crime is looking, dressing or behaving differently from rigidly enforced social norms.

Nevertheless, this paper will labor to show that all human beings are persons before the law regardless of their sexual orientation or gender identity, and are entitled to rights and freedoms deriving from the inherent dignity of the human person as well as to the equal protection of the law without discrimination.

It is with this view that the International Commission of Jurists (ICJ), jointly with the International Service for Human Rights, sponsored a meeting on issues relating to sexual orientation and gender identity in 2006. The result was the Yogyakarta Principles: a universal guide to human rights which affirm binding international legal standards with which all States must comply.

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21 Constitutional Court of Colombia Judgment No. C-481/98 from the Practitioners Guide (No. 4) Page 2
22 Constitutional Court of Colombia, Judgment No. C-481/98 from the practitioners Guide (No.4) Page 2
Other International bodies such as the HRC have also condemned unequal treatment based on sexual orientation. In its landmark 1994 decision in the case of Toonen v. Australia, the committee held that sexual orientation be understood to be a status protected against discrimination under articles 2 and 26 of the international covenant on civil and political rights.

Most recently the attempt by the Malawian government to convict two people whom the government accused of breaking laws against homosexual conduct after they underwent an engagement ceremony was viewed as violating basic freedoms on the grounds of sexual orientation and gender identity.

It is against this background that the paper seeks to evaluate sexual orientation and gender identity rights as developed by the international community. The paper also proposes the application of sexual orientation and gender identity rights and those principles expounded by the international community on the basis of these rights by policy makers in Zambia.

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30 Where not already provided for by existing legislative or other measures, each state party to the present covenant undertakes to take the necessary steps in accordance with its constitutive processes and with the provisions of the present covenant to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present covenant. Each State party to the present covenant undertakes to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy.
31 "All persons are equal before the law and are entitled without any discrimination to the equal protection of law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
2.0 Statement of the Problem

International human rights law imposes an absolute prohibition of discrimination with regard to the full enjoyment of all human rights, civil, cultural, economic, political and social. That respect for sexual rights, sexual orientation and gender identity is integral to the realisation of equality between men and women.

Therefore States must take measures to eliminate prejudices and customs based on the idea of the inferiority or the superiority of one sex or on stereotyped roles for men and women. In this regard, it is necessary to evaluate sexual orientation and gender identity rights in light of the developments advanced by the international community and to propose the application of these developments in Zambia.

This is because in both Zambia and other countries around the world such as Malawi, South Africa and Kenya, LGBT's suffer discrimination and inequality as a result of their sexual orientation and gender identity. LGBT behaviors are not only criminalised by various legal provisions including Zambia's but they also continue to be excluded from social benefits in their daily lives.

It is thus imperative that the problem of discrimination of LGBT's because of their sexual orientation and gender identity is addressed. This is because respect for sexual rights, sexual orientation and gender identity is integral to the realisation of equality between men and women [and also to the protection and promotion of these individuals rights]

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34 Experts' Meeting, 'The Yogyakarta Principles' Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity 6-9 (November 2006), Page 9
35 Experts' Meeting, 'The Yogyakarta Principles' Page 9
36 Experts' Meeting, 'The Yogyakarta Principles' Page 9
39 Experts’ Meeting, ‘The Yogyakarta Principles’ Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity 6-9 (November 2006), Page 9
3.0 OBJECTIVES

3.1 General Objective

This paper intends to show the advancement of international human rights law in the field of sexual orientation and gender identity by looking at some of the developments in the area of sexual orientation and gender identity rights. In this regard, the paper will consider the Yogyakarta principles and how the principles are an authoritative interpretation of international Human Rights Law on the subject of sexual orientation and gender identity. Further the paper intends to propose the application of these and other developments in the realm of sexual orientation and gender identity to policy makers in Zambia.

3.2 Specific Objectives

- To develop the legal argument that international human rights law does and should protect against abuses and discrimination based on sexual orientation and gender identity.
- To evaluate developments advanced by the international community in the field of sexual orientation and gender identity including the Yogyakarta principles.
- To evaluate the possible application of developments in the field of sexual orientation and gender identity rights in Zambia.
4.0 Significance of Study

There is a need for a legal argument affirming that human rights cannot be denied on the basis of sexual orientation and gender identity.40 Such a resolution is important not only to bring to light the many violations that are often shrouded in stigma and silence but also to uphold the principle that all human rights must be enjoyed equally by all people.41

The Human Rights Committee has condemned unequal treatment based on sexual orientation.42 On the domestic level, numerous countries have institutionalized protections against discrimination based on sexual orientation or gender identity including New Zealand and South Africa. In 1996, post apartheid South Africa became the first country to ban discrimination based on sexual orientations in its constitution.43

Although the Universal declaration of human rights does not explicitly mention sexual orientation and gender identity, evolving conceptions of international human rights law include a broad interpretation to include the rights and protection of the rights of LGBT people around the world.44

It is therefore necessary to look at the developments advanced by the international community in the realm of sexual orientation and gender identity with a view of proposing the application of the same to Zambian policy makers. This is important so that Zambia may reflect such protections against discrimination in their policies and laws.

5.0 Research Questions

- What is sexual orientation?
- What is gender identity?
- What are the conceptions held by people that contribute to the marginalization of LGBT people around the world?
- What are some of the human rights abuses suffered by LGBT’S as a result of their sexual orientation and gender identity?
- What developments has the international community advanced in the field of sexual orientation and gender identity?
- What are the Yogyakarta principles?
- Does decriminalization contribute to the continued stigmatization of LGBT people?
- Is respect for sexual orientation and gender rights essential to the full enjoyment of rights of LGBT people?
- How can Zambian policy makers apply developments advanced by the international community in the field of sexual orientation and gender identity?
6.0 Methodology

This research will be a qualitative one which will include collection of primary information by way of field investigations in the form of interviews with relevant officials from the Human Rights Commission and an underground LGBT organization. Secondary information in the form of books, journals, scholarly articles as well as related websites on the internet will also be consulted with a view to disseminating current information.
CHAPTER TWO

GENERAL CONSIDERATIONS

2.0 Introduction

As far as historians can trace back the past, [LGBT’s] have always been in existence with examples of LGBT’s such as Alexander the Great who is alleged to have been gay, Tracy Chapman, alleged lesbian and Angelina Jolie, alleged bisexual. History has also shown that [LGBT’s] have always been discriminated against.

A diversity of arguments including religion, morality, culture and history have been used in an attempt to justify repression of [LGBT’s] and degeneration of rights for persons of different sexual orientation or gender identity. This chapter thus intends to show the effect that religion, morality, culture and history have had on the discrimination of LGBT’s which has consequently slowed down the achievement of sexual orientation and gender identity rights.

The chapter will also underscore how despite these hindrances in the advancement of sexual orientation and gender identity rights, the world has gradually witnessed a movement towards recognition of these rights.

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2.1 Religious and Moral Discourses

On the one hand, religion can stir compassion and generosity, but it can also spark hatred and division.50 One area in which this divisive element becomes particularly ugly involves violations of the human rights of gay, lesbian, bisexual and transgender people.51 The International Commission of Jurists observes:

“Society’s values and notions of propriety have often been based on religious ideologies of morality. Religious and moral discourses have shaped attitudes and laws in respect of sex and gender. It is unsurprising therefore, that ideas and law making concerning sexual orientation and gender identity are strongly embedded within societal perceptions that reflect these beliefs among all the Abrahamic52 religions. There has been a variety of oppression and tolerance of same-sex eroticism at different times and among different branches of these religions.”53

These religious values are reflected for instance in the Bible for Christians and Jews and the Koran for Muslims. The books of instruction all seem to reiterate that sexual activity that is not strictly between a man and a woman goes against nature and is thus immoral. The Christian Bible for instance reflects these sentiments in Romans 1: 2754, Corinthians 9: 1055 and Leviticus 18: 22.56

52 This is a term used to describe religions with a historic-theological link with Abraham, mainly Judaism, Christianity and Islam. Definition is Available at http://www.religionintolerance.org/alt-mean1.htm (Accessed on the 13th of November 2011).
54 “Women no longer wanted to have sex with women and had strong desires for sex with other men. Men behaved in the same way, they stopped wanting to have sex with women and had strong desires for sex with other women. . .what has happened to them is punishment for their foolish deeds”
55 “Don’t you know that evil people will not have a share in the blessings of God’s kingdom? Don’t fool yourselves, No one who is immoral or worships idols or is unfaithful in marriage or is a pervert or behaves like a homosexual will enter the kingdom of God.”
56 “It is disgusting for a man to have sex with another man.”
Eusbius Mc Kaiser when commenting on religion and morality as forming a basis for discrimination against LGBT people noted:

"I do not take my bible as my source of moral authority, nor are our new public institutions founded on Christian Morality [...]. It does not follow that [LGBT’s] are immoral for all of us just because a particular religion states that that is the case [...]. Religious communities should be allowed to exist and even be allowed to regard [LGBT’s] as immoral, but this view of [LGBT’s] cannot determine public policies in a liberal society."

Religious and moral arguments against LGBT’s neglect the very essence of human rights which is their universality. All Human beings by their very nature are entitled to the enjoyment of human rights. This principle of Universality is reflected in the Universal Declaration of Human Rights, which proclaimed the entitlement of all human beings everywhere to all rights.

The Yogyakarta principles drawn by experts in Yogyakarta, Indonesia which are an authoritative interpretation of human rights law on the subject of sexual orientation and gender identity have captured this universality in their first principle. The principle is to the effect that:

"All human beings are born free and equal in dignity and rights. Human beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights."

The challenge for human rights defenders is to be firm in establishing the argument that religion and morality can not take a supreme role where the protection of human rights is concerned. Where as it is true that the two factors play their own major role for the survival of society, for as long as the society in question is one that has yielded to democratic ideals the protection of human rights is supposed to take precedence over any factors that might hinder the achievement of human rights.

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59 Universal Declaration of Human Rights adopted by the United General Assembly on 10th December 1948.
of this fundamental goal.\textsuperscript{61} This is so because the rule of law and respect for human rights are the driving force of any democratic society.\textsuperscript{62}

Eusbius Mc Kaiser further argues that even if people are of a different sexual orientation there is no basis on which to treat it as immoral. According to him, viewing something as unnatural is not sufficient to declare it as immoral. He gives an example of something being unnatural if it is unusual in the sense of being a statistical minority [as is the case with LGBT’s]. He explains that just because [LGBT’s] are a minority of people on the planet does not make them immoral. He points out that by analogy, Geniuses are a minority but that does not make them immoral.\textsuperscript{63}

The essence of the above argument which this paper absolutely agrees with is that extra justification is needed for the conclusion that something is immoral. Morality itself is a concept that may be termed as subjective and so what one society or individual views as immoral may not be so for another.\textsuperscript{64} In the same regard, while heterosexuals judge LGBT’s as immoral, LGBT’s themselves view what they do as perfectly moral.\textsuperscript{65}

Thus to deprive LGBT’s of the human rights which they are born with based on the argument that what they do is religiously unacceptable or immoral goes against the very principle on which international human rights law is based: that all persons are entitled to the full enjoyment of all human rights.\textsuperscript{66}

\textsuperscript{64} E. Mc Kaiser, Homosexuality: Unnatural, Immoral? (2007).(Accessed on the 16\textsuperscript{th} of November)
\textsuperscript{65} E. Mc Kaiser, Homosexuality: Unnatural, Immoral? (2007).(Accessed on the 16\textsuperscript{th} of November)
\textsuperscript{66} Experts’ Meeting, ‘The Yogyakarta Principles’ Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity 6-9 (November 2006),Page 10
2.2 Culture and History

In Uganda, the law makers recently passed a draft law that if put to effect would seriously discriminate against LGBT’s as anyone having gay sex would meet grave consequences.\(^{67}\) According to this law, if the accused is HIV positive or a person of authority or if the victim is under 18, a conviction will result in the death penalty.\(^{68}\) One of the reasons given for passing such a draconian law is that support for LGBT’s would lead to the abolishment of traditional marriage.\(^{69}\)

The above brings in issues of culture\(^{70}\) and history\(^{71}\) as every country on earth [strives] for its own survival and to achieve it, each establishes social norms that will regulate how to live with one another, develop practices that will foster bonds and behaviors that will ensure its survival through future generations.\(^{72}\) In this regard, every country has its own culture and history. The problem however is that most of these cultures which are often entwined with the country’s history tend to be discriminatory towards LGBT’s lifestyles.

The paper however refers to the African culture in general with particular focus on Zambia. African culture considers LGBT conduct as generally against God’s will and an evil act performed by sexual perverts.\(^{73}\) The aversion to LGBT’s historically has more to do with the fact that the practice is anti nature since it is non-productive; that is to say, same sex conduct can not lead to the production of human life.\(^{74}\) Further, that LGBT conduct historically has led to rapid

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\(^{70}\) The Oxford Advanced Learners Dictionary defines culture as art, literature, music and the intellectual expressions of a particular society or time.

\(^{71}\) Defined by the Oxford Advanced Learners Dictionary as the study of past events, especially the political, social and economic development of a country or nation.


spread of diseases; thus the reason why in many places in Africa the reaction to gay rights is becoming more aggressive and volatile.  

In Malawi for instance, Gay rights organizations work clandestinely and just recently two gay men were arrested for holding an engagement party in December, 2009.  

The situation in Zambia is not any different with the Home Affairs Minister being quoted as saying that homosexuality is un-african and according to Zambian law is a crime that carries a minimum sentence of 14 years. These are only are few examples that reflect the situation of LGBT’s in Africa.

Where the African culture has always been mildly intolerant to LGBT’s, colonialism brought with it westernization which worsened the negative attitudes of Africans towards LGBT’s already fostered by African culture. Western colonialism brought a Christian missionary zeal for rooting out savage, native behaviors like homosexuality and more generally the western paradigm of sexuality promoted a dualistic way of thinking that sharply delineated between homosexual and heterosexual identities.

It is true to assert therefore that both cultural and historical factors such as the advent of Christianity have contributed to the discrimination of LGBT’s that exists in Africa today. Governments have [to this effect] failed to provide protections for LGBT people through laws, policies and practices that are consistent with international human rights law. Many State officials have never even discussed let alone considered sexual orientation and gender identity as

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78 Regis Zoula. Globalizing Social, religious and human rights issues: Hypocrisy and Danger.(2010)  


a human rights issue arguing that non-sexual orientation and gender identity is anti-religious and counter cultural.\textsuperscript{81}

Zambia can be given as an example where church leaders and those in the public eye openly condemn LGBT's using the argument that the same goes against the Zambian culture and is traditionally unacceptable.\textsuperscript{82} In a Times of Zambia article for instance, Northmead Assemblies of God Bishop Joshua Banda and Bishop Joe Imakando of Bread of life International are reported to have said that support for LGBT's is unacceptable as it goes against traditional values.\textsuperscript{83}

In another article by the Lusaka Times, Kapijimpanga Franco the president of the Institute of Human Rights and Democratic governance is reported to have warned Patriotic Front President Michael Sata against legalising gay rights.\textsuperscript{84}

The above are just a few examples of the anti gay movement that is directed towards LGBT people in Zambia and across Africa. The argument advanced among others is that LGBT's go against culture and traditional values. History has also had an impact in as far as the advent of Christianity which came with colonialism is concerned. Regis Zoula noted:

"The problem is that homosexuality is not any more un-African, than polygamy is un-American, or murder is typically European. Homosexuality, like polygamy or murder is an act, a choice into a certain lifestyle characterized by a particular sexual preference."\textsuperscript{85}

Having established the above, the paper contends that discriminating against a group of people because of their sexual preference and denying them rights which are entitled to them just as they are entitled to any other heterosexual human being\textsuperscript{86} should be regarded as unacceptable.

\textsuperscript{81} C. Ukwimi. Constitutional Reform in Zambia: managing the impact.(28\textsuperscript{th}-29\textsuperscript{th} October 2010) http://www.iglhrc.wordpress.com/(Accessed on the 19\textsuperscript{th} of November 2010).
\textsuperscript{82} Times Reporter, ‘Channel funds to projects not gay rights,’ donors urged. Times of Zambia, 7\textsuperscript{th} May, 2010. Available at www.times.co.zm/news/viewnews.cgi (Accessed on the 13\textsuperscript{th} of November 2011)
\textsuperscript{83} Times Reporter, ‘Channel funds to projects not gay rights,’ donors urged Times of Zambia, 7\textsuperscript{th} May, 2010. Available at www.times.co.zm/news/viewnews.cgi (Accessed on the 13\textsuperscript{th} of November 2011)
\textsuperscript{84} Managing Editor, Sata warned over gay rights. Lusaka Times, 3\textsuperscript{rd} November, 2010. Available at www.lusakatimes.com/2010/11/03/sata (Accessed on the 13\textsuperscript{th} of November 2011)
2.3 Movement towards recognition

“In 1948 the world’s nations set forth the promise of human rights, but six decades later, the promise is unfulfilled for many,” said Linda Burman of Namma, a board member of pan Africa ILGA, a coalition of over 60 African LGBT groups. The unprecedented African support for this statement sends a message that abuses against LGBT people are unacceptable anywhere in the world today. 

There has indeed been considerable progress in the LGBT movement from 1948 when the Universal declaration on Human Rights was passed which is the most universal declaration of Human Rights in the world. In order to appreciate fully the movement towards recognition of LGBT’s it is necessary to understand some significant happenings over the years which have brought this movement to where it is today.

Basically, the [LGBT] movement is defined as the demand of [LGBT’S] to be treated as equal citizens with the same rights, privileges and treatment as heterosexuals do. The year 1961 saw the creation of the Mattachine Society of Washington in the United States of America in Washington. Their work was to equalize the status and position of the homosexual. Similar organizations grew rapidly elsewhere around the world, re-characterising the effort to repeal anti-sodomy laws as a part of a broader human rights struggle.

The gay and lesbian movement was not merely focused on repealing anti-sodomy laws; it included other human rights issues, such as non-discrimination and recognition. Over the past decade the adoption of the Yogyakarta principles was a significant milestone in that realm. The

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principles, launched on the 26th March 2007 are intended as a coherent and comprehensive identification of the obligation of States to respect, protect and fulfill the human rights of all persons regardless of their sexual orientation and gender identity.\(^{96}\)

Since their launch the principles have attracted considerable attention on the part of States, United Nations actions and the civil society.\(^{97}\) The United Nations declaration on sexual orientation and gender identity may be given as an example of how the principles are drawing the attention of world leaders to the need for a stronger voice in the recognition of the protection of sexual orientation and gender identity rights.

The declaration includes a condemnation of violence, harassment, discrimination, exclusion, stigmatization and prejudice based on sexual orientation and gender identity.\(^{98}\) It also includes condemnation of killings and executions, torture and arbitrary arrest and deprivation of economic, social and cultural rights on those grounds.\(^{99}\)

The movement towards recognition though slow can be said to have been a productive one in so far as it has produced some commendable results as those discussed above. It is safe to say that there is indeed light at the end of the tunnel. An example of the achievements may be given of the six countries which to date have enacted legislation allowing same sex marriages.\(^{100}\) These countries include the Netherlands, Belgium, Spain, Canada, Norway and South Africa.\(^{101}\)


\(^{101}\) International Commission of Jurists (2009). Page 18
2.4 Conclusion

While religious, moral, cultural, and historical arguments may be convincing in so far as establishing that LGBT’s should not be tolerated for various reasons. It is important to emphasise that these individuals are human too and whatever the arguments may be, nothing justifies the taking away of their rights.

These are human rights, entitled to them from birth and not to be taken away lightly by anyone for any reason the basis of which finds no place in a liberal democratic society. This is why the movement towards the recognition of LGBT rights is vital and much appreciated by those that strive to ensure that all human beings: born equal in dignity and rights continue to enjoy this status.
CHAPTER THREE

Sexual orientation and Gender Identity: The Universal Declaration of Human Rights and the Yogyakarta Principles

3.0 Introduction

We all have the same human rights whatever our sexual orientation, gender identity; nationality, place of residence, sex, national or ethnic origin; colour, religion, language, or any other status, and we are thus equally entitled to our human rights without discrimination.102

The UDHR103 signaled the beginning of the modern concept and application of human rights.104 It gave expression to those fundamental rights that should be protected and to which everyone everywhere could rightfully hope to attain.105 These rights, interrelated, interdependent and universal are shared by each one of us.106

The Yogyakarta principles being a set of principles that deal with international Human Rights Law as it applies to people of different sexual orientations and gender identity address a broad scope of standards and their application to issues of sexual orientation and gender identity.107 The principles also affirm the primary obligations of States to implement human rights in their countries.108

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This chapter will highlight that the rights to sexual orientation and gender identity that this paper is reiterating reflect the position of the law today as it is stated through such documents as the UDHR and related instruments. In this spirit the paper will draw attention to the Yogyakarta principles as it sets out what countries are legally bound to do in order to ensure that LGBT people enjoy the same rights and dignity as everyone else.

3.1 International Human Rights Law

It is important to state some of the rights that are enshrined in international human rights law that are meant to be enjoyed by all human beings regardless of their sexual orientation. The paper has identified a few and will now examine them in relation to sexual orientation and gender identity.

1. Non-Discrimination and the right to be equal before the law

Article 2(1) and Article 26 of the ICCPR\textsuperscript{109} sets out the non-discrimination standards to which signatories will be held. Under 2(1), State parties “undertake 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.”\textsuperscript{110}

Article 26 recognises that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. It also prohibits any discrimination and guarantees to all persons equal and affective protection against discrimination on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.\textsuperscript{111}

The HRC has considered that, although the rights to non-discrimination and to be equal before the law have not been listed among the non-derogable provisions of the ICCPR\textsuperscript{112}, “there are

\textsuperscript{109} (1966) entered into force on 23\textsuperscript{rd} March 1976.
\textsuperscript{110} (1966) entered into force on 23\textsuperscript{rd} March 1976.
\textsuperscript{111} (1966) entered into force on 23\textsuperscript{rd} March 1976.
\textsuperscript{112} Article 4(2) which are to the effect that no derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under article 4.
elements or dimensions of the right to non-discrimination that cannot be derogated from in any circumstances.\textsuperscript{113} Examples of such dimensions may be given of situations where a person’s life is endangered due to discrimination. This may happen where an individual is subjected to violence or torture as a result of their sexual orientation and gender identity. Nowadays, no legal act that is in conflict with the fundamental principle of non discrimination and the right to be equal before the law is acceptable.\textsuperscript{114}

Thus in order to ensure protection it is an emerging trend in new human rights instruments and standards to incorporate “sexual orientation” or “gender identity” in the prohibited grounds of discrimination.\textsuperscript{115} This emphasises the view that non-discrimination and equality before the law are core principles that capture the very essence of human rights.

It is therefore iniquitous to deny any human being any rights that are rightly theirs on the basis of grounds such as sexual orientation and gender identity. In view of this, every State including Zambia should strive for the full attainment of these cardinal principles.

\section*{2. The Right to Life}

The HRC has pointed out that the right to life “... is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation.”\textsuperscript{116} Under international Human Rights Law, the obligation of protection in relation to the right to life is absolute and is included among the obligations from which a State cannot derogate under any circumstances.\textsuperscript{117}

\textsuperscript{113} Human Rights Committee, General Comment No. 29, States of Emergency, (Article 4), para.8.
\textsuperscript{115}International Commission of Jurists. Practitioners Guide (No. 4) Page 27
\textsuperscript{116} Human Rights Committee, General Comment No. 6: The right to life (Article 6) Para. 1
\textsuperscript{117} Article 4 of the ICCPR (entered into force in 1966); Article 15 of the European Convention on Human Rights.
This right requires that States take reasonable measures to protect their citizens from being arbitrarily deprived of life.\textsuperscript{118} Thus extrajudicial killings based on the victims of sexual orientation by either State or Non-State actors violate Article 6\textsuperscript{119} of the ICCPR.\textsuperscript{120} In Honduras for instance, the UN special rapporteur on extra judicial, summary, or arbitrary executions reported upon her visit there that approximately 200 LGBT people were murdered between 1991 and 2001.\textsuperscript{121}

Clearly the right to life has been given great value by the various international instruments referred to and a situation such as the one in Honduras should be avoided as it is unfortunate for people to lose their lives solely on the basis of their sexual orientation and gender identity.

3. The Right to private Life and Arbitrary Deprivation of Property

The right to private life under the law means that people can make their own decisions about their bodies, including how they want to express their gender; it means that they are free to reject the gender roles imposed by society and to choose their own gender identities.\textsuperscript{122} It also means that disclosure of their gender identities is at their own discretion and that documents have to reflect the persons preferred gender identity.\textsuperscript{123}

Any deprivation of property must meet the following criteria to avoid being arbitrary: procedural and substantive legality, legitimacy of purpose, necessary, proportional and human rights

\textsuperscript{119} Article 6 protects the right to life.
\textsuperscript{123} S. Quinn (editor), an activist's guide. (2010)http://www.asiapacificforum.net.
guaranteed. These rights are meant to be enjoyed equally by both LGBT and heterosexual people as they are recognized and protected by international Human Rights Law.

4. Torture and Ill Treatment

The UDHR states that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”. In a 2001 report, the UN Special rapporteur on the question of torture and other Cruel, Inhuman or Degrading treatment or punishment addressed in part the issue of LGBT individuals.

The UN Convention against Torture describes “torture as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted [...] for any reason based on discrimination of any kind [...]”.

This aspect of the definition is relevant for sexual orientation and gender identity issues. In this regard, the UN Committee against torture notes that a draft of discrimination grounds which include sexual orientation and gender identity is possible. States are thus obligated to ensure that they are enabled to do so and critically, that they do not experience any particular impediment due to discrimination.

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128 Committee against Torture, General Comment No. 2, doc. Cit. para.22.
5. Freedom of Expression and the Rights to assembly and association

Freedom of expression and [assembly] is a cornerstone of a democratic society.\textsuperscript{130} The protection of freedom of expression must encompass not only the flow of "information" or "ideas" that are received favorably or without offence, but also expressions that "offend", shock or disturb"; such are the demands of pluralism, tolerance and broad mindedness without which there is no "democratic society".\textsuperscript{131}

The rights of peaceful assembly and association are closely linked with the right to freedom of expression.\textsuperscript{132} Freedom of assembly focuses on the process of forming, expressing and implementing political opinions in a democratic society, while freedom of association entails the right to choose, join and form associations as well as form and express thoughts and opinions.\textsuperscript{133}

The Zambian Supreme Court decided in the distinguished case of \textbf{Christine Mulundika v. The People}\textsuperscript{134} that freedom of expression [and assembly] one of the most precious of all guaranteed freedoms has four broad special purposes to serve: (i) it helps an individual to obtain self fulfillment, (ii) it assists in the discovery of truth (iii) it strengthens the capacity of an individual to participate in decision making and (iv) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change.

In light of the above, the paper contends that denying an individual this precious right on the basis of their sexual orientation and gender identity stands in the way of progress for both the individual and society at large and is an iniquity that should not be tolerated.

Furthermore the rights of freedom of expression, assembly and association being asserted have been reaffirmed by the UN. This can be seen from the sentiments of the special rapporteur on the right to freedom of opinion and expression who when considering States obligations under the


\textsuperscript{131} European Court of Human Rights, Judgment of 24 November, Case of informationsverein Lentia and Others v. Austria, Application No. 13914/88; 15717/89;17207/90,para.38.


\textsuperscript{134} (1995) S.J.
ICCPR\textsuperscript{135}, said, “in accordance with the nature and the spirit of his mandate, [he] considers that all citizens, regardless of, inter alia, their sexual orientation, have the right to express themselves [. . .]”\textsuperscript{136}

3.2 The Yogyakarta Principles

3.2.1 History and Relevance

In November of 2006 a group of international human rights law experts met in Yogyakarta, Indonesia, to draft the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity.\textsuperscript{137} In 29 principles the document purports to reflect the existing state of international human rights law in relation to sexual orientation and gender identity.\textsuperscript{138}

While the principles seek to restate existing International human rights law, they also seek to codify developing elements of the law that are helpful to victims of discrimination but have not achieved binding status.\textsuperscript{139} In this regard the principles are relevant as a useful statement of International Human Rights law: they are used as a means for monitoring state performance in relation to the rights of sexual and gender minorities and accordingly act as a tool of advocacy for the promotion and protection of the human rights of these minorities.\textsuperscript{140}

\begin{itemize}
\item \textsuperscript{135} (1966) entered into force on 23\textsuperscript{th} March 1976.
\item \textsuperscript{137} Experts’ Meeting, ‘The Yogyakarta Principles’ Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity6-9 (November2006).
\item \textsuperscript{138} Experts’ Meeting, “The Yogyakarta Principles”. (November2006).
\item \textsuperscript{140} Human Rights Commission, Statement on the application of principles of existing international law. (August 2010). \url{http://www.hrc.co.nz/hrc/-/new/hrc/cms/files/documents/24-Aug-2010-11-53-34-HRinrelationtosexualorientation-genderhtml} Page 22 (Accessed on the 25\textsuperscript{th} of November 2010)
\end{itemize}
3.2.2 The Principles

The principles highlight legal developments that their drafters felt held the most promise to create tangible improvements in the lives of the people who suffer from discrimination and prosecution on the grounds of sexual orientation and gender identity.\textsuperscript{141} In other words, as much as the principles seek to restate existing international human rights law they also seek to codify developing elements of the law that are helpful to victims of discrimination, but have not yet achieved binding status.\textsuperscript{142}

The principles recommend that national human rights institutions "promote respect for them by State and non-State actors and integrating into their work the promotion and protection of the human rights of persons of diverse sexual orientations or gender identities.\textsuperscript{143}

The document contains 29 principles, each of which states a right protected under international law as applied to sexual orientation and gender identity.\textsuperscript{144} Each principle is followed by a detailed description of States obligations necessary to guarantee and protect the right.

The principles are mainly based on the major human rights conventions, notably the International Covenant on Civil and Political Rights (ICCPR)\textsuperscript{145} and the International Covenant on Economic, Social, and Cultural Rights (ICESCR)\textsuperscript{146}.

Among the most prominent are Edwin Cameron, judge of the Constitutional Court of South Africa; Maina Kiai, former Chairperson of the Kenya National Commission of Human and People’s Rights; Sanji Monageng, Judge of the ICC; and Mary Robinson, former president of Ireland and former Commissioner for human rights.\footnote{153}

The principles have already had success as a standard setting document.\footnote{154} The council of European Human Rights Commissioners office is now using them for “country and thematic” monitoring related to discrimination and human rights violations based on sexual orientation and gender identity.\footnote{155}

Another example can be given of the general comment on non-discrimination passed by the committee on economic, social and cultural rights.\footnote{156} The committee has in pursuance to this general comment adopted the Yogyakarta principles definitions of sexual orientation and gender identity.\footnote{157} Further success is the use of the principles as terms of reference by the HRC of States reports under the ICCPR.\footnote{158}

However in a country such as Zambia, due to the dual legal system employed by the country, the principles can only be of persuasive value unless domesticated into the laws.\footnote{159} This is as held in Sata v. Post News s Ltd. and another (1995) (S.C) selected judgments were the court noted:

“I make reference to the international instruments because am aware of a growing movement towards acceptance of the domestic application of international human rights norms not only to assist resolve any doubtful issues in the interpretation of domestic litigation but also because the


\footnote{156}{General Comment No. 20: Non-discrimination in Economic, social and cultural rights. Page 10}

\footnote{157}{General Comment No. 20. Page 10}

\footnote{158}{(1966) entered into force on 23rd March 1976.}

\footnote{159}{Sata v. Post News s Ltd. And another (1995) (S.C) selected judgments.}
opinions of other senior courts in the various jurisdictions dealing with a similar problem tend to
have a persuasive value. At the very least the, consideration of such decisions may help us to
formulate our own laws maybe to a greater or lesser extent.”

The persuasive nature is indeed of some help in as far as the protection and fulfillment of
LGBT’S rights is concerned because as already stated, the principles do remind States of their
obligations under international human rights law in relation to LGBT rights.

It can be said on application and efficacy that the Yogyakarta principles are a work in progress
since not all countries are applying them in their jurisdictions, an example can be given of
Zambia which continues to criminalise LGBT conduct.\textsuperscript{160} However, this paper asserts on the
premise of the foregoing that they have so far made commendable progress. Nevertheless, more
can be done in so as far as reminding States of their obligations is concerned.

\textbf{3.3 Conclusion}

Sexual Orientation is a fundamental aspect of every individual’s identity, an immutable and part
of self.\textsuperscript{161} It is therefore contrary to human dignity to force an individual to change their sexual
orientation or discriminate against them on this basis.\textsuperscript{162}

This paper asserts in this chapter that the rights of sexual orientation being asserted are already a
part of international law and have their basis on the Universal Declaration of Human Rights\textsuperscript{163}
from which other instruments referred to in this chapter initiate from.

In this regard it is right to conclude that Sexual orientation and gender identity rights have a
concrete basis from which they are derived and this is discernible from the existing international
law that backs them up.

\textsuperscript{160} Section 155 of the Penal code.
\textsuperscript{161} \url{http://www.hrc.co.nz/hrc-new/hrc/cms/files/documents/24-Aug-2010-11-53-34-HR-inrelationto}
\textsuperscript{162} \textsuperscript{162} sexualorientation.gender.html Page 18 (Accessed on the 25\textsuperscript{th} of November 2010)
\textsuperscript{163} \url{http://www.hrc.co.nz/hrc-new/hrc/cms/files/documents/24-Aug-2010-11-53-34-HR-inrelationto}
\textsuperscript{163} sexualorientation.gender.html Page 18. (Accessed on the 25\textsuperscript{th} of November 2010).
\textsuperscript{164} Universal Declaration of Human Rights adopted by United Nations General Assembly on 10\textsuperscript{th} December 1948.
The Yogyakarta principles are therefore illustrative in showing how international law protects sexual orientation and gender identity and they also set a standard for the protection of these rights. The principles have had considerable success with regards application and efficacy but this paper contends that more can be done especially when it comes to reminding State parties of their obligations with reference to sexual orientation and gender identity.
CHAPTER FOUR

Sexual Orientation and Gender Identity: Zambia

4.0 Introduction

In Zambian law, sexual orientation and gender identity with regards LGBT persons is currently termed as ‘unnatural acts’ and governed by sodomy laws which do not recognize consensual sex between adults of the same sex.\textsuperscript{164}

The justification for reinforcing [LGBT] as a crime and depriving LGBT people of their rights is that it is an anathema to the country’s Christian beliefs, values and its culture.\textsuperscript{165} However, this paper established in chapter two that no justification that has its basis on any thing other than the values of a liberal democratic society can suffice as grounds for taking away the human rights of another human being.

The aim of this chapter is to give the position of the law with regards sexual orientation and gender identity in Zambia. It will also discuss the effects of criminalisation and the better prospects that decriminalisation of LGBT conduct would have on those affected. In doing this, the paper will give a comparative view of the situation of LGBT’s in South Africa which as was mentioned in Chapter 1 has decriminalised LGBT conduct in their constitution.

The chapter will further draw emphasis on the international developments that have taken place in the realm of sexual orientation and gender identity with particular reference to the Yogyakarta

\textsuperscript{164} Section 155 of the Penal code, Chapter 87 of the laws of Zambia is to the effect that any person who has carnal knowledge of any person against the order of nature commits an offence.

principles. It also seeks to consider these principles in the context of their possible application to Zambia. Finally, a conclusion will be rendered based on the discourse.

4.1 Sexual Orientation and Gender Identity in Zambia

The institution that has been mandated to safeguard the human rights and fundamental freedoms of individuals in Zambia is the HRCZ. Section 125 of the constitution of Zambia provides for the establishment of the commission and goes on to list its functions. Among the functions enlisted to the commission are the investigation of human rights violations and the proposal of effective measures to prevent human rights abuse.

This paper contends that sexual orientation and gender identity rights being human rights as established in the preceding chapters fall under the mandate of the HRCZ to safeguard. It is for this reason that interviews were conducted with various officials at the commission including the director so as to get the position of the commission with regards sexual orientation and gender identity in Zambia.

Kasanka Samuel, the Chief Information, Education and Training officer provided the general position of the commission with regards the rights in question. The HRCZ states that the law is supreme and having express provisions in the law that prohibit against LGBT conduct means that the commission has to respect the same and cannot do much to defend the rights in question.

He added that although human rights are universal, certain rights are controversial having regard to culture, religion and related factors. Furthermore, that Zambia is struggling to accept

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166 As discussed in Chapter 3 of this paper.
167 Chapter 1 of the Laws of Zambia, section 125.
168 Chapter 1 of the laws of Zambia, section 126.
169 Section 155 of Chapter 87 of the laws of Zambia
children’s and women’s rights and gay rights would be even worse.\textsuperscript{172} He concluded by underscoring the fact that the sensitivity of society is an issue to keep in mind and public order is a priority so it is important to consider the implications of decriminalizing LGBT laws in Zambia before doing so.\textsuperscript{173}

The director of the commission Mr. Enoch Mulembe had some very useful insight on the implications of defending LGBT persons and decriminalizing of the same in Zambia. He argued that at present the commission’s hands are tied because they simply cannot defend something which is illegal.\textsuperscript{174}

According to Mr. Mulembe, the question to be asked is whether or not any of the rights provided in the Zambian constitution cover sexual orientation and gender identity. To this he argued that it is a matter of interpretation by the courts and since to date no such interpretation has been given then sexual orientation and gender identity rights remain to be rights which cannot be recognized in Zambia.\textsuperscript{175} He emphasised that the purpose of the law is to advance societies values and the laws are reflective of the values of the Zambian society, in this regard it would be correct to conclude that decriminalisation of LGBT laws would not be reflective of societies values.\textsuperscript{176}

This paper acknowledges the views of the officers at the HRCZ but seeks to remind them that in the premises the task that they have been charged with is a great one; one that involves the protection of human rights. Therefore to turn a blind eye simply because the law does not permit them amounts to abandoning those minority groups (LGBT’S) that remain without a voice to speak for them.

History has shown countless times how certain laws have been in conflict with human rights.\textsuperscript{177} In light of this a balance must be struck between the interests of society and the individual rights of those affected by the legislation in question (LGBT’S). The paper observes however that the

\begin{footnotesize}
\item[172] Interview: S. Kasankha, Chief Information, Education and Training Officer, Human Rights Commission, 27\textsuperscript{th} January 2011. Lusaka.
\item[173] Interview: S. Kasankha, Chief Information, Education and Training Officer, Human Rights Commission, 27\textsuperscript{th} January 2011. Lusaka.
\item[174] Interview: E. Mulembe Director, Human Rights Commission, 27\textsuperscript{th} January 2011. Lusaka.
\item[175] Interview: E. Mulembe Director, Human Rights Commission, 27\textsuperscript{th} January 2011. Lusaka.
\item[176] Interview: E. Mulembe Director, Human Rights Commission, 27\textsuperscript{th} January 2011. Lusaka.
\item[177] Women’s failure to own land and women’s failure to vote amongst other things.
\end{footnotesize}
problem in Zambia seems to be that retrogressive steps are being taken where the fight for sexual orientation and gender identity rights is concerned.

This becomes evident when one looks at the draft constitution produced by the NCC which not only decriminalises homosexuality but has explicitly deprived LGBT persons of their rights.\textsuperscript{178} The draft constitution expressly states that any culture, custom or tradition that undermines the dignity, welfare, interest or status of women or men is prohibited.\textsuperscript{179}

However the legislation that follows regarding same sex relations is inconsistent with this principle.\textsuperscript{180} In Article 52 (3) the right to choose a spouse is only available to a choice of the opposite sexes. It goes on to prohibit marriage between same sex persons.\textsuperscript{181} It appears from this that Article 49(4) was not intended to apply to LGBT persons.

The NCC has been a long political and highly contested process which attempts to merge the varying interests of a diverse society.\textsuperscript{182} It is with great emphasis therefore that the paper adds that this historical occurrence should have been the ideal opportunity to revisit LGBT laws in the country.

The situation in Zambia with regards LGBT persons seems bleak with the main obstacle been the criminalisation of these sexual orientations. This has shown however, that LGBT persons live in a secretive manner with a high chance of being blackmailed or having their lives ruined if anyone finds out and [in the extremes, this may even endanger the lives of these persons].\textsuperscript{183}

\begin{flushright}
\begin{itemize}
\item \textsuperscript{178} Draft Constitution of the Republic of Zambia. Secretariat, CRC Lusaka, 29\textsuperscript{th} June 2005.
\item \textsuperscript{179} Article 49 (4) of the draft constitution of Zambia.
\item \textsuperscript{180} M.Agatha, Sexual Equality and the NCC draft Zambian Constitution. (2010) 
\item \textsuperscript{181} Section 52 (5).
\item \textsuperscript{182} M. Agatha, Sexual Equality and the NCC draft Zambian Constitution. (2010). 
http://timeszambiapost.com/pambizuka_sexualequalityandthenccdraftconstitution18502 (Accessed on the 8th of January 2011)
\item \textsuperscript{183} Charlotte Cooper, 40 years after Decriminalisation. (2007).
\end{itemize}
\end{flushright}
Chanda Mubanga the executive director of an underground LGBT organisation in Zambia is of the view that Human Rights are just that; human rights. In this respect LGBT’S in Zambia are not asking for any special rights but simply the basic rights entitled to any other individual.

The situation in Zambia can however be contrasted with South Africa; in 1996 post apartheid South Africa became the first country to ban discrimination based on sexual orientation in its constitution. Section 9 of the constitution of the republic adopted in 1996 prohibits discrimination and disadvantage on the basis of: race, gender, sex, religion, and many other criteria including sexual orientation. The constitution requires that national legislation be enacted to support these concepts. In pursuant to this, the bill of promotion of equality and prevention of unfair discrimination bill was introduced by the South African government in 1999, November.

4.2 Effects of continued criminalisation and decriminalisation of LGBT’S

The criminalisation of people based on their sexual orientation contravenes international and regional human rights treaties. The institutionalisation of this form of discrimination reinforces the disadvantages experienced by LGBT persons and can be used as justification for violence against them whether on the street, at home, or in prison.

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184 Interview: Director, Friends of Rainka, LGBT organization that champions the rights of sexual minorities in Zambia through advocacy, information dissemination, research among other things, 3rd February, 2011. Lusaka.
185 She gives an example of such a right as being the right to secure access of health.
More than eighty countries around the world [including Zambia] still have laws prohibiting consensual sexual relations between same sex adults, essentially giving government and law enforcement the ability to regulate a person’s private and intimate decisions.  

Decriminalisation is a key step towards respecting, protecting and fulfilling the human rights of LGBT’S. President of Botswana Festus Mogae has said on the subject that there is no need to discriminate and stigmatise [LGBT’S] . . . because they too are a part of society. This paper could not agree more and in light of this wishes to reiterate the sentiments of the HRW on the subject.

In a letter addressed to Zambian leaders, the New York based rights watchdog states that Zambia’s anti gay law which dates back to the British Colonial era violates the country’s constitution in as far as it guarantees the right to privacy and prohibits discrimination. The HRW has called on the government of president Rupiah Banda to condemn statements that could discourage [LBT’S] from using health care facilities [. . .] and erode their fundamental human rights. The letter also calls on Zambian law makers to decriminalise consenting homosexual conduct. This paper agrees with the HRW and emphasises that decriminalisation is a key step towards respecting, protecting and fulfilling the human rights of LGBT people.

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4.3 Proposal of the application of developments in the field of sexual orientation and gender identity rights in Zambia

The Universal declaration in its preamble recognises that the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.\textsuperscript{201}

In this regard, all human beings are persons before the law regardless of their sexual orientation and gender identity, and are entitled to rights and freedoms deriving from the inherent dignity of the human person as well as to the equal protection of the law without discrimination.\textsuperscript{202} This is why this paper proposes that all individuals in Zambia must be able to enjoy their human rights regardless of their sexual orientation.

One of the most significant developments in the field of sexual orientation and gender identity to date may possibly be said of the Yogyakarta principles. They are significant in that this is the first time that both the rights covered by law and also the actual lived experiences of LGBT’s are brought together in one document.\textsuperscript{203}

As a self styled restatement of existing international law, the principles are based on customary law, treaties, or general principles, including authoritative interpretations of these sources of law by domestic and international courts.\textsuperscript{204}

Primarily the principles are targeted towards States, since it is mainly governments that have responsibilities under international human rights law.\textsuperscript{205} The question is whether or not these

\textsuperscript{201} Preamble, UDHR, adopted on 10\textsuperscript{th} December 1948.
principles have any relevance in Zambia since it does as a State have responsibilities under international human rights law.

Zambia adheres to what is referred to in international law as the “dualist” doctrine. According to this doctrine, domestic and international law belong to different regimes. This means that decisions taken will be based on a domestic legal principle even if it is in conflict with international law.

It may be argued however that the Yogyakarta principles in as far as they restate rules of jus cogens are binding on Zambia. This is because under this source of law, State parties have an obligation to observe whether or not the particular law is domesticated in their country as it is legally binding on them regardless. An example can be given of principle 2 of the Yogyakarta principles on the right to equality and non discrimination which has entered the realm of jus cogens.

The paper wishes to propose to Zambia as a State with obligations under international law, to apply these very useful principles in its policy making. The principles speak to all functions of the State. They draw attention to how in accessing State services or in trying to live, work and participate in society, LGBT people have experienced or are likely to experience unequal treatment relative to others.

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209 These are substantive rules recognised to be of a higher status as such.

210 Experts’ Meeting, ‘The Yogyakarta Principles’ Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity 6-9 (November 2006), Page 10


In this regard a proposal is made to all facets of the official machinery and personnel of the State so as to ensure equal treatment of all individuals in society regardless of their sexual orientation. So that for example, under principle 6, the right to Privacy reminds States of their obligation to repeal laws that criminalise same sex sexual activity to ensure people have the right to choose how, when and to whom they reveal information relating to their sexual orientation and gender identity.\textsuperscript{214}

Another example may be given of principle 9 which is the right to Treatment with Humanity while in detention and it addresses the obligation to adopt measures that will protect prisoners at risk of violence because of their sexual orientation or gender identity.\textsuperscript{215}

It is enough to know that the principles are an articulation of international law and that it sets out the obligations that governments face in order to ensure that LGBT people live their lives freely and enjoy the same rights and dignity as everyone else.\textsuperscript{216} In this spirit Zambia is advised to give effect to them so as to protect those vulnerable individuals in society (LGBT’s) that could use the intervention.

\textsuperscript{214}Experts’ Meeting, ‘The Yogyakarta Principles’ Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity 6-9 (November 2006).

\textsuperscript{215}Experts’ Meeting, ‘The Yogyakarta Principles’ Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity 6-9 (November 2006).

4.4 Conclusion

Article 11 of the Zambian Constitution217 states that every person has been and shall continue to be entitled to the fundamental rights and freedoms of the individual [. . .] however, despite this provision which ought to apply to all individuals, LGBT’s continue to face human rights violations on the basis of their sexual orientation and gender identity.

The rationale given for excluding LGBT’s from the enjoyment of their rights is that the law currently does not recognise LGBT conduct and nothing can be done until the law is changed. This however, does not seem likely considering the arguments advanced towards the criminalisation of such “unnatural” conduct.

In the premises, this paper seeks to reiterate the sentiments expressed in chapter two which are that Zambia is in theory a democratic country and thus no arguments which do not find their place in a democratic society can be used to take away the inherent human rights of others (LGBT’S).

To this effect, Zambia is reminded of its obligations to LGBT’S under international law. It is thus proposed that the only effective way that these individuals will enjoy their rights like any other person is if Zambian laws decriminalise same sex conduct in their laws and begin to apply such international developments as the Yogyakarta principles in their policy making.

CHAPTER FIVE
CONCLUSIONS AND RECOMMENDATIONS

5.0 Introduction

The aim of this chapter is to draw conclusions from the findings of the research undertaken in order to make relevant recommendations towards the subject of sexual orientation and gender identity in Zambia. This will be done with the aim of changing the prevailing situation of LGBT’s.

The paper will begin by giving some observations with regards the subject matter based on the foregoing chapters. It will proceed to give recommendations deemed constructive in assisting the plight of LGBT’s. In giving these recommendations, the paper will make use of the developments that have taken place in South Africa and New Zealand in the realm of sexual orientation and gender identity. Finally a conclusion will be rendered based on the discourse.

5.1 Conclusions

From the foregoing chapters, it is clear that the recognition of sexual orientation and gender identity rights is necessary in the realisation of equality amongst all persons. It is through such equality that the true essence of human rights; which is their universality may truly be realised.

In Chapter one, it was observed that the aspirations expressed in the preamble to the Universal Declaration of Human Rights (UDHR)\textsuperscript{218} meant to capture this universality are far from realised where the fight for sexual orientation and gender identity rights is concerned.\textsuperscript{219}

\textsuperscript{218} UDHR, adopted on 10\textsuperscript{th} December, 1948. Preamble recognizes that the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.
This may be said of Zambia and many other countries\textsuperscript{220} that to date continue to criminalise same sex conduct in their laws. The basis for such discriminatory laws as discussed in Chapter two of this paper seem to draw from such factors as religion, morality, culture and history.

Most religions\textsuperscript{221} and indeed cultures\textsuperscript{222} do not condone any sexual relations other than those between a man and a woman or women for certain cultures.\textsuperscript{223} The morality school of thought on the other hand deems it unnatural for same sex persons to engage in sexual relations.\textsuperscript{224} Following from this, history has evolved in such a way that such relations have being frowned upon.\textsuperscript{225}

The above factors have been used as justification for the criminalisation of LGBT conduct in many countries including Zambia,\textsuperscript{226} this, as the paper labored to show in Chapter three defies the very essence of human rights and goes against established principles of international law.

It was further illustrated in Chapter three that the principles of international law such as the Yogyakarta principles have incorporated within them the rights of sexual orientation and gender identity which are being asserted by this paper. This can be seen from documents such as the UDHR\textsuperscript{227} and ICCPR\textsuperscript{228}.

\textsuperscript{221}Uganda, Malawi amongst others.
\textsuperscript{222}Christianity, Muslim Religions.
\textsuperscript{223}Example given of the African Culture.
\textsuperscript{225}International Commission of Jurists. Practitioners Guide (No. 4) Page 5
\textsuperscript{226}H. Cox, A globalization of the Culture Wars. (3rd February 2010).
\textsuperscript{227}http://www.globalpost.com/dispatch/Africa/100201/gays-and-the globalization-the-culture -wars (Accessed on the 16th of November 2010)
\textsuperscript{228}As observed from the Interview conducted with Mr S. Kasankha, Information, Education and Training officer of the Human Rights Commission on the 27th of January in Lusaka.
\textsuperscript{229}UDHR, adopted on 10th December, 1948 can be seeing in its Preamble which recognizes the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.
\textsuperscript{230}(1966) entered into force on 23rd March, 1976. Can be seeing in art 2 and 26
\textsuperscript{231}Art. 2: Where not already provided for by existing legislative or other measures, each state party to the present covenant undertakes to take the necessary steps in accordance with its constitutive processes and with the provisions of the present covenant to adopt such legislative or other measures as may be necessary to give effect to the rights
In this regard it was observed in Chapter three that the Yogyakarta principles referred to in all the above chapters are also useful as they restate existing international law with regards sexual orientation and gender identity.

Despite the above, it was shown in Chapter Four that most countries including Zambia continue to have laws that criminalise LGBT conduct thus making it impossible for LGBT individuals to enjoy their rights.

In Zambia for instance, the reasons given are that same sex conduct is criminalised at present and so it is complicated to effect developments in international law in the country as the domestic law stands supreme to any other law.\textsuperscript{229}

However the reality is that for as long as LGBT conduct continues to be criminalised it is unlikely that LGBT's will enjoy their rights in full as they should. In light of this, the paper will proceed to give some relevant recommendations necessary for the realisation of LGBT rights in Zambia.

5.2 Recommendations

The ultimate goal is for LGBT people to enjoy their rights just as any other human being and not to be deprived of their rights on the basis of sexual orientation and gender identity.

1. Decriminalisation of LGBT conduct

Observably, the main problem in Zambia seems to be the criminalisation of LGBT conduct.\textsuperscript{230} This is because in a country such as Zambia were there is criminalisation of LGBT conduct it is


\textsuperscript{230} Section 155 of Chapter 87 of the laws of Zambia.
very easy for these individuals to be denied their rights as whoever may be doing so has legal justification for their actions. That is to say they may merely report the individual to the relevant authorities where the individual tries to speak up for their rights. Further LGBT’S cannot freely express themselves or demand for their rights for fear of being imprisoned or even killed as such laws tend to foster hatred and violence towards such persons.\textsuperscript{231}

Decriminalisation of LGBT conduct thus seems to be the best way to ensure that these individuals are afforded equal treatment by those clothed with the responsibility of protecting their rights as guaranteed in the Constitution of Zambia.\textsuperscript{232}

In this regard law makers are advised to take a leaf from countries such as South Africa and decriminalise same sex conduct altogether. As was mentioned in Chapter one, South Africa has entrenched in its constitution sexual orientation and gender identity as prohibited grounds of discrimination.\textsuperscript{233} Zambia is also recommended therefore, to include in Article 23(3) of the Constitution of Zambia\textsuperscript{234}, sexual orientation and gender identity as grounds of discrimination.

2. The LGBT Community in Zambia is encouraged to take action

The paper also proposes to the LGBT community to be bold enough to challenge the constitutionality of those laws that decriminalise same sex conduct because the constitution is the supreme law of the land and all laws must therefore be consistent with its provisions.\textsuperscript{235} In this respect Mr. Enoch Mulembe the director of HRCZ was right when he observed that the lack of interpretation of the rights enshrined in the constitution viš a viš LGBT’S leave a lacuna in the law that can only be filled when the law is revised or when those affected take the initiative to bring the issues before the courts so that an interpretation can be rendered.

\textsuperscript{232} Part 3 of Cap.1 of the laws of Zambia.
\textsuperscript{233} Section 9 of the Constitution of South Africa, No. 108 of 1996.
\textsuperscript{234} Part III of Cap. 1 of the Laws of Zambia.
\textsuperscript{235} Article 1(3) of Cap. 1 of the laws of Zambia.
3. The Zambian government to give effect to international human rights law

With regards existing international law that recognises LGBT rights, the paper proposes to Zambia to use such principles such as the Yogyakarta principles as a guide to policy making. In this way when policies are made regard is had to those individuals that are disadvantaged as a result of sexual orientation and/or gender identity. The principles shown in Chapter three and four of the paper are an affirmation of the rights entitled to these individuals and they restate existing principles of international law. It may also be argued that they are binding on state parties including Zambia in so far as they restate existing principles of jus cogens. 236

For instance, the government can give effect to the right to equality, equal protection of the law and freedom from all forms of discrimination based on sex, sexuality or gender which is principle 2 of the Yogyakarta principles 237 by reflecting the same in such Zambian laws as the Penal Code 238, The Marriage Act 239 and the Criminal Procedure Code 240.

4. Having regard to sexual orientation and gender identity in policy making

Sexual orientation and gender identity has been included in the policy making of New Zealand as was mentioned in Chapter one of this paper. New Zealand’s domestic laws have progressed from decriminalisation of LGBT’s based on a conscience vote in parliament. 241 The following are some of the measures employed by the government of New Zealand;

i) The Right to Family

This includes the law being amended to give same-sex and defacto heterosexual couples the same property rights and obligations as married couples on the breakdown of a relationship. It also includes the law providing for marriage between same-sex couples.

236 Universally binding by nature.
238 Cap. 87 of the Laws of Zambia.
239 Cap. 50 of the Laws of Zambia.
240 Cap. 88 of the Laws of Zambia.
ii) The law to entitle same-sex partners access to the same rights and entitlements as married partners in relation to the estate of a deceased partner who has not left a will.

iii) Same-Sex relationships to be accorded the same legal protections as heterosexual partners when it comes to domestic violence.

iv) The law to be reviewed generally so as to remove provisions that discriminate on the grounds of sexual orientation.

The paper recommends to the Zambian government to adopt the position taken by New Zealand by way of the above measures so as to give effective protection to the LGBT community in Zambia and to ensure that they too enjoy their rights.

This is important because the promotion and protection of human rights ensures that the government puts in place efforts to protect the population against anything that challenges people’s life, health, economic well-being, social stability, political stability and participation.\textsuperscript{242} In this regard LGBT’S like any other people are entitled to such protection and promotion as they are human beings rightly entitled to the rights that are being asserted.

This paper concludes that the above recommendations are imperative if Zambia is to ensure the protection of the human rights of all individuals as it has undertaken to do in its constitution.\textsuperscript{243} Most importantly they are necessary if LGBT’S are to be afforded equal protection of their human rights like they are entitled to.


\textsuperscript{243} Part III of Cap.1 of the laws of Zambia.
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