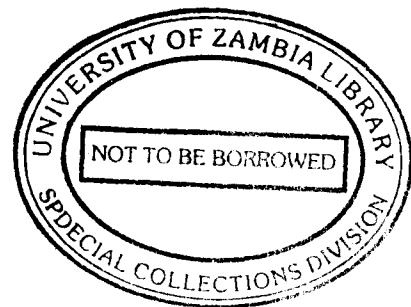


UNNATURAL SEXUAL OFFENCES: HIGHLIGHTING THE  
WEAKNESSES OF THE ZAMBIAN PENAL CODE

BY  
MWALE JOSEPHINE

University of Zambia  
Lusaka  
January 2007

**THE UNIVERSITY OF ZAMBIA**  
**SCHOOL OF LAW**



I recommend that the obligatory essay prepared under my supervision by **MWALE JOSEPHINE** titled:

**UNNATURAL SEXUAL OFFENCES: HIGHLIGHTING THE WEAKNESSES OF THE ZAMBIAN PENAL CODE**

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

A handwritten signature in black ink, appearing to be 'M. Malila', written over a horizontal dotted line. A long, thin horizontal line is drawn below the signature.

**M. MALILA (SC)**  
Supervisor

A handwritten date 'January 2007' in black ink, written over a horizontal dotted line.

**Date**

Obligatory Essay On

**UNNATURAL SEXUAL OFFENCES: HIGHLIGHTING THE WEAKNESSES  
OF THE ZAMBIAN PENAL CODE**

**By**

**MWALE JOSEPHINE**

**COMPUTER NUMBER 21081191**

Submitted to the University of Zambia in partial fulfilment of the requirements of the  
Bachelor of Laws (LLB) Degree Programme

School of Law  
University of Zambia,  
Lusaka

## DECLARATION

I Mwale Josephine do hereby declare that this dissertation is my authentic work and that to the best of my knowledge information and belief, no similar piece of work has previously been produced at the University of Zambia or any other institution for the award of a Bachelor of Laws Degree. All other works referred to in this dissertation have been duly acknowledged.

Made this 12<sup>th</sup> ..... Day of January 2007

By the said **MWALE JOSEPHINE**

At Lusaka

## **DEDICATION**

To the memory of my uncle Levy Mwale who would never have agreed with the idea that homosexuality be legalized in Zambia.

## PREFACE

This dissertation is divided into five chapters. The first chapter is an introductory chapter. It contains a statement of the problem that is that the law against homosexuality in Zambia is weak. It also contains an exposition of the fact that the opinion that some people in Zambia hold regarding homosexuality and its' being a taboo is slowly changing. The second chapter begins the analysis of the various weaknesses of section 155 of the Penal Code by showing that homosexuality really is a matter of private as opposed to public morality and the state consequently has no business passing legislation outlawing the same when it is done in private between consenting adults. The dissertation analyses more weaknesses of the law against homosexuality in the third chapter which is an in depth analysis of how the constitutional right to privacy is breached by the maintenance of the status quo of section 155 of the Penal Code. The fourth chapter shows the final weakness exposed in this dissertation whereas the fifth chapter focuses on recommendations that should be effected to remedy the weaknesses of section 155 of the Penal Code.

This research was embarked on because whereas several countries have legalized homosexuality, in Zambia, it remains an offence. In 2005 on the 28<sup>th</sup> of September, the President assented to an amendment to the Penal Code. In this amendment, the penalty for homosexuality was increased from an unspecified minimum and a maximum of fourteen years to a minimum of fifteen years imprisonment and a maximum of life imprisonment. This dissertation sets out to analyse whether the law against homosexuality conforms to the current Constitution. It is worth noting that the exposition does not necessarily reflect the opinion of the author on whether

homosexuality should be legalized in Zambia or not. The dissertation is simply an exposition of the law as it is.

**Lusaka, 2007**

**M.J.**

## ACKNOWLEDGEMENTS

I would like to express my heartfelt gratitude to the following people whose help and support has been very valuable as I wrote this dissertation.

Firstly, I would like to thank my God for giving me the strength to complete this dissertation and the guidance that I needed every step of the way through various people as I wrote this dissertation. I know that He does not support homosexuality but I know that He loves homosexuals the same way He does heterosexuals.

I would like to thank my supervisor, Mr Mumba Malila (SC) whose help, guidance, interest, criticism, optimism and thorough scrutiny of my work have helped me to conclude this dissertation successfully. He saw to it that I crossed all my 't's and dotted my 'i's.

I would like to say a special thank you to my entire family: dad, mum, my brother Stephen and my sisters Ngoza, Nancy and Tasila. Your love, care and support at all times are special to me and they have been of great help as I have been writing this dissertation.

Another special thank you is extended to my uncle Giddy Mwale who has shown a keen interest in every chapter I have written. Thank you for being available to advise and help with the printing of each chapter. Your thoughts on each chapter are greatly appreciated.

My gratitude is extended to Mr Brian Lubinda, the Division Prosecutions Officer at Lusaka Central Police Station for making himself and whatever information he had available to me. My gratitude is also extended to Mr Julius Kapembwa a lecturer at the University of Zambia in the Philosophy Department for lending me some of his textbooks. They were very helpful. My heartfelt gratitude is extended to Mubanga Kabwe whose advice has been invaluable. I would also like to thank my friends Nakasela Simwizye and Nsamba Kantumoya who really enjoyed the first chapter of my dissertation. I found that very encouraging.

Lastly but most certainly not the least, I am grateful to my roommates Kayabwe Mulenga, Thandiwe Makukula and Nachisitu Kakula for making the writing of this dissertation a most enjoyable experience. I appreciate your jokes, comments and taking the time to listen.

I wish to state that any errors and imperfections that may be found in this dissertation are entirely my own.

## TABLE OF CONTENTS

	<b>PAGE</b>
<b>PREFACE.....</b>	<b>vi</b>
<b>ACKNOWLEDGEMENTS.....</b>	<b>viii</b>
<b>CHAPTER 1 Introduction .....</b>	<b>1</b>
<b>Position of Law in Zambia on Homosexuality .....</b>	<b>2</b>
<b>Emerging Views on Homosexuality in Zambia.....</b>	<b>5</b>
<b>Society’s View and Reaction to Homosexuality.....</b>	<b>6</b>
<b>CHAPTER 2 Morality and the Right to Privacy .....</b>	<b>11</b>
<b>Definition of Morality.....</b>	<b>11</b>
<b>Homosexuality as an Offence Against Morals.....</b>	<b>13</b>
<b>Homosexuality: An Issue of Public or Private Morality?.....</b>	<b>16</b>
<b>Homosexuality: A Matter Involving Public Morality?.....</b>	<b>17</b>
<b>Homosexuality: An Offence Involving Private Morality?.....</b>	<b>19</b>
<b>CHAPTER 3 An In depth Analysis of the Constitutional Right to Privacy....</b>	<b>25</b>
<b>Privacy.....</b>	<b>25</b>
<b>Why is Privacy Important?.....</b>	<b>26</b>
<b>What is meant by the term Right to Privacy?.....</b>	<b>27</b>
<b>Is it Justifiable to Use Secular Penal Laws to Punish Moral Traditional or     Religious Beliefs?.....</b>	<b>35</b>
<b>Paternalism.....</b>	<b>36</b>
<b>Criminalizing of Homosexuality as a Form of Paternalistic Legislation .....</b>	<b>38</b>
<b>Criminalizing of Homosexuality as a Form of Pure Paternalistic.....</b>	<b>38</b>
<b>Legislation.....</b>	<b>38</b>
<b>Restrictions on Paternalistic Laws .....</b>	<b>39</b>
<b>CHAPTER 4 The Right to Freedom Discrimination .....</b>	<b>42</b>
<b>Discrimination .....</b>	<b>42</b>
<b>Freedom from Discrimination under the Zambian Constitution.....</b>	<b>44</b>
<b>Protection From Discrimination Under the African Charter on Human and     Peoples Rights .....</b>	<b>46</b>
<b>CHAPTER 5 Recommendations .....</b>	<b>49</b>
<b>BIBLIOGRAPHY.....</b>	<b>54</b>

## TABLE OF CASES

	<u>PAGE</u>
Griswold v Connecticut 381 US 479 (1965)	9
Hyde v Hyde (1866) LR1 P and D 130	14
Eisenstadt v Baird F. Supp. 1199 (1975)	21
Roe v Wade F. Supp. 1020 (1976)	21
Olmstead v United States 2-U.S 435 (1928) 475-476	25
Patel v Attorney General (1968) ZR 99	27
Edwards v Attorney General of Canada (1930) AC 124	28
James v Commonwealth of Australia (1936) AC 578	28
Kachasu v Attorney General (1967) ZR 145	29
Aitkin v Shaw (1933) S.L.T. (Sh.Ct) 21	29
Pierce v Society of Sisters (1965) 357 US 449, 462	32
Meyer v Nebraska 381 U.S. 479 (1965)	32
Legal Resource Foundation v Zambia Communication 211/98- 14 <sup>th</sup> Annual Activity Report 2000-2001 at 63	48
Toonen v Australia Communication No.488/1992 UN Doc. CCPR/C/50?D/488? 1992 (1994)	48
Young v Australia Communication No.941/2000: Australia. 18/09/2003 U.N Doc CCPR/C/78/D/941/ 2000 (2003) at 10.4	

## **TABLE OF STATUTES**

African Charter on Human and Peoples Rights

International Covenant on Civil and Political Rights

Medical and Allied Professions Act, Chapter 297 of the Laws of Zambia

Penal Code (Amendment) Act No. 15 of 2005

The Penal Code Act, Chapter 87 of the Laws of Zambia

The Zambian Constitution, Chapter 1 of the Laws of Zambia

## CHAPTER ONE

### INTRODUCTION

The word 'homosexual' refers to a person who is sexually attracted to a person of the same sex. If such a person is male, they are referred to as being gay and if they are female, they are referred to as being a lesbian. Homosexuality therefore, refers to either homosexual acts or a homosexual relationship.<sup>1</sup> Lesbianism is a sexual relationship between females. If they have sex in whatever form, they will be deemed to have had sex against the order of nature in Zambia.<sup>2</sup>

Several countries have legalized homosexuality and others continue to criminalize it. Among the African countries that have legalized it is South Africa. In 2003, a draft Sexual Offences Bill was introduced to replace the outdated Sexual Offences Act of 1957. After the law was passed, unnatural forms of sexual intercourse such as sodomy and bestiality are not offences in South Africa anymore. The age of consent for homosexual activities is nineteen years in South Africa whereas that for heterosexuals is sixteen years. South Africa's Constitutional Court has also adjudicated on matters of homosexuality and upheld the right of homosexual couples to marry.<sup>3</sup> Among the countries in Africa that continue to criminalize homosexuality is Botswana.

In Botswana, the Penal Code<sup>4</sup> has provisions that are similar to those of the Zambian Penal Code concerning unnatural sexual offences. The only difference is with regard to the penalty that offenders face after committing such offences. In Botswana offenders are liable to imprisonment for a term not exceeding seven years whereas in

---

<sup>1</sup> S. Wehmieier, Oxford Advanced Learners Dictionary. 575 (6<sup>th</sup> ed. 2002)

<sup>2</sup> J. Daka, Sexual Offences and How to Deal With Them. 97 (revised ed. 2005)

<sup>3</sup> <http://www.iglhrc.org>

<sup>4</sup> Chapter 08:01 of the Laws of Botswana

Zambia, with the passage of Act number 15 of 2005, the penalty for unnatural sexual offences has been divided into two. When the offence is committed with children, that is to say, persons below the age of sixteen, the minimum sentence has been increased to twenty-five years imprisonment and the maximum sentence has been placed at life imprisonment.<sup>5</sup> Where the offence involves consenting adults, the penalty ranges between a minimum of fifteen years imprisonment and life imprisonment.<sup>6</sup>

The International Gay and Lesbian Human Rights Commission website reports that Nigeria is in the process of introducing a new bill that will criminalize same sex marriage and impose a penalty of five years imprisonment for any one involved in such a union. The criminalizing will affect both advocacy and relationships.

In the Western countries that have embraced homosexual lifestyles as an ordinary part of their communities, organisations such as the International Gay and Lesbian Human Rights Commission, have been formed as advocacy groups. They state as their aim the securing of the enjoyment of the human rights of all people and communities subject to discrimination or abuse on the basis of sexual orientation or expression.

## **POSITION OF THE LAW IN ZAMBIA ON HOMOSEXUALITY**

In Zambia, homosexuality is a criminal offence under section 155 of the Zambian Penal Code<sup>7</sup>. The Penal Code<sup>8</sup> was recently amended with the passage of Act number 15 of 2005. The amendment in section 7 provides that

*“ Section 155 of the principal Act is amended by the deletion of the words ‘is guilty of a felony and is liable to imprisonment for fourteen years ‘ and the substitution*

---

<sup>5</sup> Section 7 of Penal Code (Amendment) [No. 15 of 2005]

<sup>6</sup> Ibid

<sup>7</sup> Cap 87 of the Laws of Zambia

<sup>8</sup> Ibid

*therefore of the words ‘ commits a felony and is liable, upon conviction, to imprisonment for a term not less than 15 years and may be liable to imprisonment for life.’*

The amendment to the principal Act further provides that if carnal knowledge is had of a child in an unnatural way or if a person causes a child to have carnal knowledge of an animal, the person found guilty of such an offence will be liable to imprisonment for a minimum of 25 years and a maximum sentence of life imprisonment.

The portion of section 155 of the Penal Code in issue in this essay therefore reads

*“Any person who*

*(a) Has carnal knowledge of any person against the order of nature or*

*(b) Has carnal knowledge of an animal or*

*(c) Permits a male person to have carnal knowledge of him or her against the order of nature*

*Commits a felony and is liable upon conviction to imprisonment for a term not less than fifteen years and may be liable to imprisonment for life.<sup>9</sup>*

The Penal Code Act does not use the word ‘homosexuality’. In fact, the term ‘unnatural act’ is not defined in section four of the Act, which is the interpretation section of the Act. What the courts consider as unnatural acts under this Act can be deciphered from the decisions that the courts have made in cases that concern the said unnatural acts. In October 2004 for instance, a man was sentenced to three years

---

<sup>9</sup> Ibid

imprisonment for sodomizing his nephew aged twenty. In passing judgment, the magistrate described the man as a danger to society. The man however pleaded for lenience and stated that he did not know what he was doing.<sup>10</sup>

In another case in the Magistrates Court reported by the *Post Newspaper* of Wednesday April 12 in 2004, a man aged 26 of Isoka Farmers Training Centre was sentenced to five years imprisonment with hard labour by an Isoka magistrate for having sex with a pig.<sup>11</sup>

It is interesting to note, that couples that are heterosexual can also commit 'unnatural sexual acts'. If a man for instance refuses to penetrate the vagina and instead chooses to penetrate a woman's anus, such a man commits an offence under section 155(a) and for the purposes of this offence, consent is irrelevant because in a case where she does consent to such a sexual act, she too will be just as guilty as he, under section 155(c) of the Penal Code.

It is difficult to find High Court and Supreme Court cases on unnatural sexual offences. Most cases end at Subordinate Court level for several reasons. Among these reasons is that many people in Zambia consider homosexuality a shameful practise and this could explain why parties choose to settle out of court in such matters, or why they shy away from appealing against convictions at Subordinate Court level. The parties, that is to say, the victim of an unnatural sexual act through rape for instance and the offender, usually try to avoid publicity being given to their case as it may result in stigma.

---

<sup>10</sup> J. Daka, *Sexual Offences and How to Deal With Them*. 99(2005). The Court refused to show lenience and maintained this three-year sentence in order to deter other would be offenders.

<sup>11</sup> The convict was on 7<sup>th</sup> October 2003 caught red handed having sex with the pig by its' owner after the pig produced a queer sound. The convict fled but was later arrested for bestiality after a veterinary officer examined the pig and passed an opinion that there was evidence of intercourse. The man did not deny having committed the offence and in passing judgment, the court sentenced him to 5 years imprisonment to deter other would be offenders.

Another reason why cases concerning unnatural sexual acts do not reach the High Court and Supreme Court level is because they are difficult to prove. A complainants' evidence is not conclusive because it has to be corroborated. Corroboration refers to independent evidence that implicates a person accused of a crime by connecting him with it. It refers to evidence that confirms some material particular not only that the crime was committed, but also that the accused committed it. It is difficult to find corroborative evidence in cases of sexual offences because by their very nature, they are usually done in private and so witnesses are not available to testify.

Medical tests may however, be carried out but these should be done within a short period after the sexual offence has been committed in order that the results should evidence sexual contact. Further, the law requires that the prosecution should prove beyond all reasonable doubt that the accused committed the offence. Therefore, most cases end at Subordinate Court level for want of sufficient evidence.

## **EMERGING VIEWS ON HOMOSEXUALITY IN ZAMBIA**

Recently radio programs and newspaper articles including other print media such as a magazine targeted at the youth referred to as the *Trendsetter*, have featured some articles that talk about homosexuality as something that the people in the nation of Zambia should cease to see as an evil or taboo.

The *Post Newspaper* of 3<sup>rd</sup> July 2005 features an article about Michael Mulenjekwa who is gay. In the article, he states that he is proud to be gay and that discrimination on the basis of sexual orientation in Zambia should come to an end. It may be argued that people are not being discriminated against on the basis of their sexual orientation but the very criminalizing of homosexuality is indicative of discrimination in our laws. People that are homosexuals may not be stigmatised because in the first place

they do not disclose their sexual preference. But because they are forced to hide their orientation for fear of stigmatisation and being criminalized, this can be said to amount to discrimination as well.

## **SOCIETY'S VIEW AND REACTION TO HOMOSEXUALITY**

The view of most Zambians with regard to homosexuality is that it is wrong and that the criminalizing of it is just. Kenneth Kangende in his book **Female Superstitions of Sex**, states how homosexuality is viewed in the eyes of traditional Zambia. He writes that

*“Men who indulge in such activities are regarded as sick people who need medical attention and that lesbianism is one of the gravest taboos, it can only be likened to incest”<sup>12</sup>*

Traditional belief can therefore, be cited as one of the reasons for the view held by most Zambians that homosexuality is wrong.<sup>13</sup>

Another basis for the view held by most Zambians is religious belief. Zambians are a very religious people though they do not affiliate themselves with only one religion. Christianity and Islam are the most prominent religions and they both teach that homosexuality is a sin in the eyes of God. Under Islamic law, the penalty for homosexuality is death by stoning and the Holy Bible states that

---

<sup>12</sup>K. Kangende, *Female Superstitions of Sex*. 19(2004)

<sup>13</sup> Despite this view, there have been few or no protests concerning the showing by the Zambia National Broadcasting Corporation (ZNBC), which is Zambia's national broadcaster, a popular South African television soap opera called 'Isidingo the Need'. This program depicts gay relationships as being a normal part of Society. Homosexuality in South Africa unlike Zambia has been legalised.

*“...Even their women exchanged the natural use for what is against nature...men leaving the natural use of woman, burned in lust for one another, men with men, committing what is shameful and receiving in themselves the penalty of their error which was due.”<sup>14</sup>*

Therefore, most people that affiliate themselves with these religions base their disapproval of homosexual practises on the basis of the teachings in their religions.

The laws that the legislative branch of the Government passes are expected to be indicative of what the Zambian population accept as laws by which they should be governed.

The passage of the amendment to the Zambian Penal Code reflects a stiffer punishment for persons found guilty of homosexuality and it appears that the majority of the Zambians are not prepared to accept the legalizing of homosexuality.

Before the amendment was made, the maximum sentence for homosexual acts was fourteen-years and there was no minimum sentence indicated.

The cases stated above indicate that a sentence could be as low as three years. In the amendment to the Penal Code, the penalty after conviction ranges between a minimum sentence of fifteen years and a maximum sentence of life imprisonment with regard to an adult person. In instances where a child is involved as a victim, the minimum sentence is twenty-five years whereas the maximum sentence is life imprisonment.

This research is very timely in that it seeks to critically analyse among other things, whether it is justifiable to take away a persons liberty based on traditional belief and religious belief that people are entitled to disbelieve. It is especially important that this

---

<sup>14</sup> Romans chapter 1 verse 26-27

research be done considering the magnitude of the penalty imposed on persons found guilty of homosexual practises.

The criminalizing of homosexuality also has a bearing on the Constitutional right to privacy enshrined in the Constitution<sup>15</sup>. This dissertation seeks to establish how it is that the maintenance of this law infringes on the peoples right to privacy.

This essay therefore analyses the weaknesses of section 155 of the Penal Code.<sup>16</sup> It seeks to establish what those weaknesses are, and what the continual maintenance of the status quo of the law against homosexuality entails when regard is had to the fundamental human rights enshrined in the Zambian Constitution. The essay also seeks to propose the way the law should be altered in order to address these weaknesses.

Chapter two of this essay, deals with the weakness of the law against homosexuality by showing how it is that homosexuality is a moral offence. The chapter will further discuss how it is not possible that such an offence can offend public morality when the Acts that constitute the crime involve private actions done between two consenting adults.

Chapter three of this essay concerns itself with two things. The first issue addressed in this chapter, deals with the fact that the maintenance of this law constitutes a breach of the people's right to privacy. The right to privacy is briefly mentioned in chapter two, but chapter three will involve an in depth analysis of the right. The right to privacy is enshrined in Article 17 of the Constitution. It provides that

---

<sup>15</sup> Article 17 of the Laws of Zambia

<sup>16</sup> Ibid. , At page 1

*“Except with his own consent, a person shall not be subjected to the search of his person or his property, or the entry by others on his premises”<sup>17</sup>.*

The writer argues with the aid of decided cases that, though the wording of this Article appears to be narrow in its granting of the right to privacy, the interpretation of this Article should be construed to include several other implied rights that accrue to Zambian citizens by virtue of this fundamental right. Without these implied rights the enjoyment of the right to privacy cannot be had in full. In the case of **Griswold v Connecticut**<sup>18</sup> for instance, Mr Justice Douglas a judge in the United States Supreme Court, spoke of the specific guarantees in the American Bill of rights having penumbras emanating from those guarantees, that help give them life and substance.

This essay also seeks to establish the fact that the right to privacy is quite extensive and that it has wide meaning, such that there are certain areas of peoples lives in a society that the State has no business passing legislation and that one such area involves the details of an intimate relationship between two consenting adults.

The second of these, questions the justification of the law against homosexuality in Zambia, when regard is had to the fact that this law is a form of paternalistic legislation. It discusses whether this kind of paternalistic legislation should continue to be law in Zambia and whether secular penal laws should continue to be used to punish moral offences. The dissertation will discuss this in the light of the uniqueness of the Zambian society.

The fourth chapter of this essay will discuss the weakness of the law against homosexuality in Zambia in the light of how it violates the constitutional right to be

---

<sup>17</sup> Ibid. , Article 17(1)

<sup>18</sup> 381 US 479 (1965)

free from discrimination<sup>19</sup>. The essay will consider the provisions of the African Charter on Human and Peoples rights in the quest to give a comprehensive understanding of how section 155 of the Penal Code fosters discrimination against homosexuals and creates a situation whereby they are not given equal treatment with heterosexuals before the law.

The last chapter will contain recommendations on how the law should be altered in order to curb its weaknesses. The recommendations will be based on the findings in the first three chapters. This essay will not address the issue of bestiality, as there is no desire expressed in Zambia to alter the law as it stands.

The second chapter, therefore, will begin the highlighting of the weaknesses of section 155 of the Penal Code. It will be established that homosexual practises fall largely within the ambit of private morality as opposed to public morality. The chapter will show that since homosexuality is a matter of private morality, the State should not pass legislation that prohibits its' practise between consenting adults because this amounts to a violation of their right to privacy.

---

<sup>19</sup> Chapter 1 of the Laws of Zambia (Article 23)

## CHAPTER TWO

### MORALITY AND THE RIGHT TO PRIVACY

The chapter begins with a discussion on the fact that homosexuality is an offence against morals. This particular fact is significant in this chapter because it will enable us, to understand the nature of the offence as we analyse whether homosexuality is a matter of public morality or private morality. The chapter concludes with establishing that the criminalizing of homosexuality is unconstitutional.

#### **DEFINITION OF MORALITY**

In order to begin the discussion on how it is that homosexuality is a moral offence, it is important to first define the term 'morality'. The following will appear to be a somewhat lengthy definition, but it is necessary in our quest to appreciate fully what is termed as morality.

The Oxford Advanced Learners' Dictionary defines morality as "principles concerning right and wrong or good and bad behaviour."<sup>20</sup> Several writers use the term 'morality' and 'ethical' interchangeably. It appears that the choice is usually one of preference but some writers have attempted to outline the difference. The learned author P.F Strawson attempts to draw the distinction between ethics and morality. Concerning morality he states,

*"The sphere of morality denotes rules or principles governing human behaviour which apply universally within a community or class. A 'minimal' conception of*

---

<sup>20</sup> A, S. Hornby (ed) Oxford Advanced Learners Dictionary. 761(6<sup>th</sup> ed 2002)

*morality limits itself to those rules which are a condition of the existence of society, whereas a more 'comprehensive' conception of morality would embrace the entire body of rules governing a community or class.*"<sup>21</sup>

With regard to ethics he states that

*"The region of the ethical...is a diverse, certainly incompatible and possibly practically conflicting set of ideal images or pictures of human life.... Ethics is thus the sphere of ideal forms of life set by individuals for themselves...."*<sup>22</sup>

The definition of ethics and its distinction from morality is necessary in this discussion on morality because there really is no complete separation between morality and ethics. What this distinction between the two in P.F Strawsons' definition merely does is to clarify the relationship that exists between individual values and social values. This distinction consequently enables us to understand what bearing individual and social values have on the legal order.

In the above given definitions of morality and ethics respectively, we observe firstly that ethics are the values that individuals as conscientious and responsible human beings set for themselves. Secondly we see that the moral norms that govern a society reflect a balance and choice between conflicting individual values. Thirdly we see that the legal order must necessarily reflect a society's social morality.

The morality of a society will, therefore, be determined by a balance of the thousands and millions of individual ethical 'pictures of life' within it. The morality of a society will not, of course, be an arithmetical median, but it will be the relative impact of the

---

<sup>21</sup> P.F. Strawson, *Social Morality and Individual Ideal* IN W. Friedmann, *Legal Theory* 25 (5<sup>th</sup> ed 2003)

<sup>22</sup> *Ibid*

individual ethics upon that society. In turn the morality of that society will have an impact on the legal order. The end product of what will be termed law will greatly depend on the character of the particular society. A liberal society will more easily reflect a variety of ethical values than an authoritarian one.

The morality of a society at any given time will therefore, be the composite of a multitude of ethical values. As a consequence, it is reasonable to expect that the criminal law in any given society will be based upon a moral principle. In a number of crimes, the function of the law is simply to enforce a moral principle and nothing else.

### **HOMOSEXUALITY AS AN OFFENCE AGAINST MORALS**

In order to show how or why homosexuality is referred to as an offence against morals, it is necessary for us to answer the question ‘what are offences against morals?’

The first kind of answer that comes to mind in an attempt to answer the above question is a long list of sexual offences such as sodomy, prostitution, open lewdness and obscenity among others.

If, however, we paused to consider what it is that sets moral offences apart from offences against the person or offences against property, or even perhaps offences against public administration, it becomes apparent that sexual offences do not involve the violation of moral principles in any peculiar sense.

Following from what has been stated in the previous sub-heading; virtually the entire Penal Code expresses the society’s ideas of morality or what that particular society considers as immoralities. Offences such as stealing, killing or swearing falsely in legal proceedings among others are condemned by religious, moral and secular standards. Further, not all sexual behaviour condemned by Zambian penal laws at

present can be said to constitute universal moral principles in the Zambian society itself.

In Zambia bigamy for instance is a crime only in situations where the guilty party married their spouse under the Marriage Act.<sup>23</sup> However, if the party married under customary law, this particular law does not apply. Clearly a double standard is followed in the Zambian society because one standard derives from customary law and the other is found in the Marriage Act and its' provision on bigamy is derived from the law in England. Marriage was said by Lord Penzance in the case of **Hyde v Hyde**<sup>24</sup> to be, "*The voluntary union for life of one man and one woman to the exclusion of all others.*" It would therefore be incorrect to say that offences against morals constitute only sexual behaviour condemned by the Zambian penal laws. Clearly there are times when this sexual behaviour is not condemned as in the example of bigamy.

'Offences against morals' are therefore, no different from any other type of offence. They are offences merely because a majority of people in that society consider the behaviour to be offensive. According to Louis B Schwartz,

*"What truly distinguishes the offences commonly known as 'offences against morals' is not their relation to morality but the absence of ordinary justification for punishment by a non-theocratic state."*<sup>25</sup>

The ordinary justification for secular penal controls is the preservation of public order. Public security must be preserved and individuals must be able to go about their lawful pursuits without fear of being attacked or harmed in any way. This is an

---

<sup>23</sup> Section 38. Cap 50 of the Laws of Zambia

<sup>24</sup> (1866) LR 1 P&D 130

<sup>25</sup> L. B. Schwartz. Columbia Law Review, Vol. 63 at page 669 (1963)

interest that only organised law enforcement can effectively safeguard. If such organised law did not exist, and people were free to do as they saw fit, communities and the society at large would live in fear of being harmed in their person or having their property taken away without just cause.

People are not threatened in their person or property through the commission of offences such as those given as examples above commonly known as ‘offences against morals’<sup>26</sup>. Strictly speaking, if vices such as prostitution were allowed to flourish openly in a society, this would not impair personal security or the security of the property of the members of that community.<sup>27</sup> The same kind of reasoning will apply for homosexuality in which tangible interests of persons in a community are not affected by the sexual orientation of one member of that community.

Several other examples may be given of offences that are of a non-sexual nature, that do not affect tangible interests of the members of the society. An example of one such offence in the Penal Code<sup>28</sup> is the offence of insulting the National Anthem.<sup>29</sup> Evidently, legislation on a matter such as this is not aimed in any way towards the security of the members of the community or society but rather, it is directed at restraining conduct that may be regarded as offensive.

In Zambia at present, it may be considered offensive if a couple was allowed to live in a community where it was common knowledge that they were leading a homosexual lifestyle. People would probably see this as being a disgusting practise and much as it may be said that people who are bothered by such a thing are minding the business of

---

<sup>26</sup>Sexual offences, open lewdness, obscenity

<sup>27</sup> It may however, be argued that there is a way in which personal security may be impaired by allowing prostitution to flourish openly. Doing so may lead to an increase in sexually transmitted diseases such as HIV/AIDS. This arguably is true but would be the case only in situations where people allowed themselves to be lured by the prostitutes. In itself, prostitution does no harm to persons who do not engage themselves in it. Persons who do not allow themselves to be lured by the prostitutes will not suffer harm to their persons through the contraction of sexually transmitted diseases.

<sup>28</sup> Ibid

<sup>29</sup> Section 69 of the Penal Code (Chapter 87 of the Laws of Zambia)

other people, it would scarcely be considered as such in many Zambian communities. Several people hold the view that the morals of 'bad' people threaten the morals of 'good' people and, therefore, it is in every way their business what it is they allow into their communities.

It can, therefore, be seen from what has been stated above that homosexuality is considered an offence against morals. In Zambia to be specific, this is the case because homosexuality is regarded by a vast number of people to be offensive.

### **HOMOSEXUALITY: AN ISSUE OF PUBLIC OR PRIVATE MORALITY?**

We have noted from the previous paragraphs that ethics is the sphere of ideal forms of life set by individuals for themselves. It was observed further that the average of individual ethics are reflected in what is termed as morality in any given society though this average is certainly not an arithmetic median. We have observed even further, that in matters to do with morality, even though the act may not harm any member of that society in their person or property, a vast majority of people considers it a threat to the maintenance of the morals of 'good' people to allow 'bad' people to continue with behaviour that is considered offensive.

Evidently it is not easy to dismiss the idea that homosexual practises are a matter to do with public morality but perhaps the most important question that requires an answer is whether homosexual acts done in private between consenting adults fall to a larger extent in the ambit of public morality as opposed to private morality.

Two kinds of arguments will be advanced below, the first will be one in favour of homosexuality falling within the ambit of private morality and the second will attempt to rebut the first argument by advancing an argument in favour of the fact that homosexuality falls to the larger extent within the ambit of private morality.

## **HOMOSEXUALITY: A MATTER INVOLVING PUBLIC MORALITY?**

The existence of a society is attributable to more than the fact that people live together. What makes a society of any sort is a community of ideas, not only political ideas but also ideas about the way its members should behave and govern themselves. The latter can be referred to as the morals of that particular society.

In his writing, Patrick Devlin<sup>30</sup> points out the need for fundamental agreement on several matters to precede the existence of any nation. He speaks of a common morality as being one of those invisible bonds of common thought that create and hold a nation together. He states that,

*“Each one of us has ideas about what is good and what is evil: they cannot be kept private from the society in which we live. If men and women try to create a society in which there is no fundamental agreement about good and evil, they will fail; if, having based it on common agreement, the agreement goes the society will disintegrate. Society is not something that is kept together physically, it is held together by the invisible bonds of common thought.... A common morality is part of that bondage”<sup>31</sup>*

Little wonder, therefore, that society considers it necessary to pass legislation on what kind of sexual activity it will permit. Agreement on this matter is just as necessary as agreement on what in law, will constitute the crime of theft in that society, for instance. It constitutes one of those ideas on good and evil that cannot be kept private from society.

---

<sup>30</sup> P. Devlin. *Morals and the Criminal Law*. 237(1965)

<sup>31</sup> *Ibid* at page 273

Evidently, there exists what can be termed public morality, and the average of the individual ethics of the people in that community or society, make up that public morality. This public morality in turn has a bearing on the nature of legislation that will exist in that community or society. It is therefore, easy to see why people cannot easily be denied the right to legislate on the basis of their beliefs especially if these beliefs are strongly held by a very large majority. This is the case simply because, the majority cannot be expected to abandon a belief and all the sensitivities associated with it, even though such a belief may be deemed irrational, in order to give way to the thoughts or beliefs of the minority. Consequently, in societies such as Zambia where the majority view homosexual practises as offensive, it is expected that such a view will be reflected in the penal laws. In Zambia therefore, homosexuality is to this extent considered a matter of public morality.

Secondly, it is legitimately expected in a society for penal laws to not only protect people in their persons and property but also in their psychological well being. No one challenges this when the penal laws take the form of penal laws guarding against crimes such as libel<sup>32</sup> or offences relating to religion.<sup>33</sup> A crime such as criminal libel is clearly designed to protect against psychic pain and so are offences such as trespassing on burial places<sup>34</sup> or uttering words with the intent to wound religious feelings.<sup>35</sup>

Since penal laws at times protect people from physical pain, or aggression, there exists a basis for the expectation that that the law will also protect people from psychic pain such as the blaspheming of their religion. If therefore, a vast majority of

---

<sup>32</sup> Chapter 87 of the Laws of Zambia. Section 191. “ Any person who, by print, effigy, or by any means otherwise than solely by gestures, spoken words, or other sounds, unlawfully publishes any defamatory matter concerning another person, with intent to defame that other person, is guilty of the misdemeanour termed libel.

<sup>33</sup> Sections 128 –131. Chapter 87 of the Laws of Zambia

<sup>34</sup> Ibid, Section 130

<sup>35</sup> Ibid, Section 131

people in a society or community for instance, hold the view that the practising of homosexuality stings their religious beliefs, it would be legitimate to expect it to be outlawed in the legislation of that particular community or society.<sup>36</sup> When matters such as religious belief in a society are taken into consideration, it seems justifiable to say that homosexuality falls largely within the ambit of public morality.

### **HOMOSEXUALITY: AN OFFENCE INVOLVING PRIVATE MORALITY**

It has been stated earlier that a society has the right to pass legislation on matters of morality and this generally depicts what can be termed as public morality. However, it is worth noting that an individual cannot be expected to surrender to the judgment of society, the whole conduct of his life. Admittedly, the state has a right to intrude upon certain matters but others remain within the domain of the privacy of an individuals' life.

A balance must, therefore, be established between the rights and interests of the society on the one hand and the rights and interests of the individual on the other.

Homosexual relations are a matter of privacy between two consenting individuals in the same way that heterosexual relations are a matter of privacy between consenting adult couples either married or unmarried. It is to this extent therefore, that homosexual relations fall largely within the ambit of private morality as opposed to public morality.

It may be argued that the issue of privacy in sexual relations exists only between married couples because that relationship is sanctioned under the Marriage Act<sup>37</sup> and by the customary laws in Zambia. These sexual relations are allowed to exist only

---

<sup>36</sup> It is entirely understandable for instance for cow slaughter to be considered criminal in a Hindu state or for the rearing of pigs to be outlawed in a Moslem state or for abortion to be considered a criminal offence in a state where 99% of the population affiliates themselves with the Catholic faith.

<sup>37</sup> Chapter 50 of the Laws of Zambia

between a man and a woman. However, in Zambia at present, there is no law that has been passed against sexual relations between two unmarried persons. Though the larger segment of the Zambian society may frown upon this, it is generally acknowledged that their relationship falls within their right to privacy as long as such a sexual relationship exists between two consenting adults that are male and female.

Bearing in mind the two sorts of relationships in which privacy is acknowledged either expressly (in the case of married couples) or impliedly (in cases where the couples are unmarried) by law, it is apparent that in Zambia it is generally acknowledged that every individual has a right to be free from unwarranted governmental intrusion. The right to privacy should also be said to apply to persons in homosexual relations.

A question that may arise at this point is, 'is it proper for us to begin to discuss the existence of the right to privacy of people in homosexual relationships because ideally, this right is meant to be recognized between individuals who are in relationships that are not expressly outlawed, that is to refer to, heterosexual relationships between consenting adults whether married or not?'

The answer to the question that has been raised above is yes. This is the case because it has, been stated above that homosexuality is an offence in Zambia, not because its practise harms any tangible interests of the people in the society, but because a vast majority of people considers it offensive. It has further been mentioned that the entire Penal Code expresses what the society terms as morality and therefore offences such as swearing falsely or murder are as much offences against morals as homosexuality is.

An issue of privacy is raised because the essay questions the very fact that the issue of privacy is not acknowledged with regard to homosexual relationships. The fact that in

the Zambian laws the right to privacy should be acknowledged in homosexual relationships will be dealt with in depth in the third chapter. This chapter concerns itself with showing that there is really no distinction between heterosexual and homosexual relations and that the right to privacy should necessarily be acknowledged in all relationships that involve sexual intimacies between consenting adults.

In the case of **Eisenstadt v Baird**<sup>38</sup> the Court stated that,

*“A married couple is not an independent entity with a mind and heart of its’ own, but an association of two individuals each with a separate intellectual and emotional make-up. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person....”*

It is also important to consider further, what the Court stated in the case of **Roe v Wade**<sup>39</sup>. In that case the Court held that

*“Every individual has a right to be free from unwarranted governmental intrusion in ones decisions on private matters of intimate concern. Private consensual sex acts between adults are matters, absent of evidence that they are harmful, in which the state has no legitimate interest”*

---

<sup>38</sup> 403 F. Supp. 1199 (1975)

<sup>39</sup> Cited in Doe v Commonwealths Attorney for City of Richmond. United States District Court (Virginia), 1976

In the case of **Eisenstadt v Baird**<sup>40</sup>, the court declined to restrict the right of privacy in sexual matters to married couples. This case was an appeal by two men that were involved in a homosexual relationship. They based their appeal on the premise that they had a right to privacy. The Court acknowledged the right to privacy as existing between unmarried couples and also between homosexual couples. The Court was of the view that the right to privacy involved the protection of intimate personal decisions on private matters such as those to do with sexuality. The right to select consenting adult sexual partners must be considered to fall within this category.

In **Roe v Wade**<sup>41</sup> the Court stated that the exercise of the right to privacy between adult persons whether homosexual or heterosexual, should be acknowledged. Since sexual relationships are a matter of privacy between consenting adults, the state cannot pass a law that forbids the expression of a particular sexual preference such as homosexuality for instance, without providing compelling justification for the enactment of such a law. Such a law would have the effect of discriminating against people on the basis of sexual orientation. Compelling justification would in this sense refer to harm being caused to any member of the society either in their person or their property.

By private morality therefore, we are making reference to private behaviour in matters of morals. It has already been stated that a society has the right to pass legislation based on what it generally considers to be moral or immoral as is the case with homosexuality in Zambia. However, an individual cannot be expected to surrender to the judgment of society the whole conduct of his life though he or she forms a part of it.

---

<sup>40</sup> Ibid

<sup>41</sup> Ibid

By its very nature homosexuality is not practised publicly. Unless it can be shown that these acts violate the rights of other members of society in their persons or property, it cannot rightly be said that homosexuality falls largely within the ambit of public morality as opposed to private morality. Any concern by members of the public with regard to the sexual activities between consenting adults would constitute an invasion of privacy. It is difficult to grasp why homosexuality if conducted in private would be considered a public matter especially because the acquiring of such knowledge with regard to the relationship and the subsequent conviction would involve an invasion of privacy of the homosexual couple.

The second matter raised in favour of the fact that homosexuality falls within the ambit of public morality is that if the majority of people in a society consider it to be a vice that stings their religious beliefs, it is a matter to do with the society as a whole and legislation against such a vice is legitimate.

The demand for protection against psychic pain is legitimate but it does not imply that there should be indiscriminate approval of laws intending to give such protection. Crimes such as libel<sup>42</sup>, or trespassing on burial places<sup>43</sup> that are aimed at protecting people from psychic pain involve the offender actively doing something against the offended. An offence like homosexuality involves the violation of the right to privacy of the offender by the offender. It is almost as if the offended party goes looking for trouble and when they find it the law protects their having meddled in matters that do not concern them.

The knowledge of homosexuality in a community that eventually is said to sting a religious belief is something that can be avoided if the privacy of the consenting adults was acknowledged and adhered to.

---

<sup>42</sup> Ibid

<sup>43</sup> Ibid

It has been established so far that homosexual practises fall to the larger extent within the ambit of private morality as opposed to public morality and consequently, homosexuality really is a matter that concerns private morality. Private morality has been said to involve private behaviour in matters of morals. It has been established that by the very nature of the crime, it concerns private acts between consenting adults and has little to do with the society as a whole. It is for this reason that it can be said that society's intervention in the sexual intimacies of its people constitutes a violation of their right to privacy.

In a bid to further analyse the weaknesses of section 155 of the Penal Code<sup>44</sup>, the third chapter of this essay sets out to question the validity of section 155 of the Penal Code on two bases. The first issue that will be considered in the chapter that follows will be an in depth analysis of the weaknesses of Section 155 of the Penal Code in the light of how the criminalizing of homosexuality can be said to violate the Constitutional right to Privacy<sup>45</sup> even though the Constitution does not expressly provide for the right to privacy in matters involving sexual intimacies. The second issue that the third chapter will consider is why it is not justifiable to use secular penal laws to punish certain moral, traditional or religious beliefs that people in a society are entitled to disbelieve. The writer will show that there is need for reasons other than those of morality, religion or tradition, to justify the use of penal laws to punish offences such as homosexuality.

---

<sup>44</sup> Chapter 87 of the Laws of Zambia

<sup>45</sup> Chapter 1 of the Laws of Zambia (Article 17)

## CHAPTER THREE

### AN INDEPTH ANALYSIS OF THE CONSTITUTIONAL RIGHT TO PRIVACY

#### **PRIVACY**

The learned author of the article **Privacy Morality and the Law**, defined privacy as;

*“The condition of not having undocumented personal knowledge about one possessed by others.”<sup>46</sup>*

Personal information would in this case refer to facts about a person that most individuals in a given society at a given time do not want widely known about themselves. A person’s privacy is diminished exactly to the degree that others possess this kind of knowledge about him. In the Zambian society today, facts about a person’s sexual preference, drinking habits, income or state of the marriage among other things, belong to the class of personal information. Clearly therefore, personal information consists of facts which most people in a given society choose not to reveal about themselves. They may however, choose to disclose such personal information to persons closest to them, such as members of their family.

The United States Supreme Court has adjudicated on what is meant by the term privacy. According to the decision of the Court passed in the case of **Olmstead v U.S**<sup>47</sup>, privacy consists of being ‘let alone’. In that case, the appellant appealed against the view of the lower Court that telephone wire-tapping did not constitute a search

---

<sup>46</sup> W. A. Parent, Philosophy and Public Affairs. Vol. 12, number 4 (1983)

<sup>47</sup> 2- U.S 438 (1928) 475-476

and seizure. The appellant stated that every citizen had the right to be 'let alone' and he referred to this as the people's most cherished entitlement. The Court held in favour of the appellant and endorsed this conception of privacy.

It has also been held by the United States Supreme Court, that the right to privacy consists of a form of autonomy or control over significant personal matters. In the case of **Eisenstadt v Baird**<sup>48</sup>, Mr Justice Brennan stated that;

*"If the right to privacy means anything, it is the right of an individual married or single, to be free from unwarranted government invasion into matters so fundamental affecting a person as the decision to bear or beget a child"*

When it is stated above that the right to privacy includes the right to be left alone, it is worth noting that privacy should not be confused with autonomy. While an offence to privacy may be an offence to autonomy, not every curtailment of autonomy is a compromise of privacy.

## **WHY IS PRIVACY IMPORTANT?**

Privacy in the lives of the Zambian people is considered to be very important. Most people desire it for perfectly good reasons; they do not seek to hurt anyone or disadvantage anyone by exercising it. Some people may desire it for fraudulent purposes, for example to keep certain information hidden about themselves from future employers. However, privacy is a very valuable thing if it is not intended to defraud anyone.

---

<sup>48</sup> 403 (1979) F. Supp. 1199

People need to keep some information about their lives private because, that information may be sensitive such that if other persons obtained this knowledge, they would by that fact be able to exercise power over the person about whom the information has been known. This power could then be used to their advantage, that is to say, the advantage of the person who has acquired the sensitive information. This power can be manifested in the form of exploitation such as blackmail for instance. Harm can therefore, come to the person who has lost their privacy.

Another reason why privacy is very valuable in our society is that, undeniably, where some people are generally intolerant of certain lifestyles, habits, ways of thinking that are very different from their own; the persons that differ from them may become objects of scorn or ridicule.<sup>49</sup> People do not want to be mocked, scorned or laughed at and made to feel ashamed just because they are different.

A third reason why people desire privacy is that they are convinced that there are certain facts or pieces of information about them that other people, and strangers and casual acquaintances in particular are not entitled to know. Information about a spouse suffering from incontinence, for instance, is not the sort of information most people would want publicised.

## **WHAT IS MEANT BY THE TERM ‘RIGHT TO PRIVACY?’**

The legal right to privacy is recognised by many jurisdictions the world over and Zambia is one of those jurisdictions where the right to privacy is enshrined in the Constitution. In Zambia, the case of **Patel v The Attorney General**<sup>50</sup>, the High Court

---

<sup>49</sup> This is the case with people that are known to be HIV positive. Though stigma against infected persons is widely condemned in Zambia, once people know about the HIV status of another person, they tend to shun them or discriminate against them in one way or the other.

<sup>50</sup> (1968) ZLR 99

adjudicated on the Constitutional Right to privacy as enshrined in the Bill of Rights.<sup>51</sup> In this case, the applicant Mr Jashbhai Umedhbai Patel was charged with doing an act preparatory to the making of a payment outside Zambia, contrary to regulation 9 of the Exchange Control Regulations, 1965 and section 9 of the Exchange Control Act (Cap 276). In the alternative, he was charged with attempting to export currency contrary to regulation 17 of the aforementioned Regulations and section 6 of the aforementioned Act and section 352 of the Penal Code Act (Cap 6). A Mr Hilditch, a Customs Officer in Ndola testified that when he went to the General Post office in Ndola to examine out-going mail, he found and opened four envelopes each containing eight ten kwacha notes sent by Mr Patel addressed to one destination in England. He stated that he had no search warrant but that in opening the mail he had been acting in his capacity as Customs Officer under the authority of the regulation 53 of the Exchange Control Regulations. One of the questions that were put before the High Court was whether the opening, examination and seizure of the postal article constituted a contravention of the applicant's right to privacy of property as guaranteed by section 19 of the Constitution. In dismissing this application, the Court enunciated several points of law.

Firstly the Court adopted the view expressed in several decided cases such as **Edwards v Attorney General of Canada**<sup>52</sup> and **James v Commonwealth of Australia**<sup>53</sup> that the provisions of the Bill of Rights are to be broadly construed and this was the case so that they may be protected against gradual encroachments that seek to deprive them of their effectiveness. The learned High Court Judge stated that when regard was had to the wording of the Constitution, limitations on the fundamental rights enshrined in the Constitution could be effected for two purposes,

---

<sup>51</sup> Ibid

<sup>52</sup> (1930) AC 124

<sup>53</sup> (1936) AC 578

the first of these was to preserve the fundamental rights and freedoms of others and, secondly, to preserve the public interest. A Bill of Rights should, however, be construed in favour of the individual rather than in favour of the state. The reason for this is simply that the purpose of the Bill of Rights is to secure fundamental rights and freedoms of the individual. The limitations placed on these rights were not the principal object of the legislation, but a restriction on that object namely 'limitations to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest. The Court looked closely at the wording of the Constitution in its granting of the right to privacy. The Constitution provided that the derogations were permitted to the extent that the law in question made provisions that that were 'reasonably required' in the specified interests. The Court stated that this was a condition precedent to the validity of the derogation. In the view of the Court, 'a reasonable requirement 'was an objective test and the facts upon such a test would be based, were particularly within the knowledge of the state. Therefore, the Court was of the view that the onus was on the state to satisfy the Court that the law concerned was reasonably required.

The Court went further to adjudicate on what could amount to a 'reasonable requirement'. The learned Judge cited the case of **Kachasu v The Attorney General**<sup>54</sup> where the learned Chief pointed out that 'reasonably required' did not mean the same as 'necessarily required' or even 'urgently required'. The term 'reasonably' required imported some degree of need and was therefore stronger than 'expedient' although not as strong as 'necessary'. In the case of **Aitkin v Shaw**<sup>55</sup>, 'reasonably required' was interpreted to mean a genuine present need, something more than desire although something less than absolute necessity.

---

<sup>54</sup> (1967) ZR145

<sup>55</sup> (1933) S.L.T. (Sh. Ct.) 21

Case law in Zambia, therefore, expresses the position of the law on the Constitutional right to privacy in Zambia. The onus is on the state to prove that section 155 of the Penal Code is reasonably required in the interest of public morality because it has been established that homosexuality is a morality issue.

In the United States the right to privacy has been adjudicated upon numerous times. In the United States it was first dealt with in the Supreme Court in the case of **Griswold v Connecticut**.<sup>56</sup>

In that case, the appellants Griswold and Buxton gave information and instruction and medical advice to married persons as to the means of preventing conception. They examined the wife and prescribed the best contraceptive device or material for her use. The statutes whose constitutionality was involved in this appeal were sections 53-32 and 54-196 of the general statutes of Connecticut. The statutes criminalized the use of any drug, medicinal article or instrument for the purpose of preventing conception. The statute further stated that any person who assisted, abetted, counselled another to commit such an offence would be prosecuted as if he or she were the principal offender.

The appellants were found guilty as accessories in the lower Courts. In their appeal to the Supreme Court, they raised an issue concerning the constitutional right to privacy of the couple with whom they had had a professional relationship. They had standing to do so because they were found guilty as accessories and according to the general statutes of Connecticut, the sentence that would be imposed on the couple they counselled would also be imposed on the appellants. In the view of the Court therefore, they were entitled to question the constitutionality of the offence with which they were charged with assisting, by questioning whether or not the offence

---

<sup>56</sup> 381 US 479(1965)

could constitutionally be a crime. The Court held in favour of the appellants and enunciated several principles in relation to the right to privacy. This case is relevant in this argument against the criminalizing of homosexuality because an analogy can be made between the reasoning of the Court in its judgment, with the reasoning in the argument against the criminalizing of homosexuality. Below, the essay will explain the reasoning of the Court in its judgment in the case of **Griswold v Connecticut**<sup>57</sup> and will go further to show how this reasoning is applicable in relation to the fact that the criminalizing of homosexuality is a breach of the Constitutional right to privacy in Zambia. In our analysis, it is important to note firstly that at the time the case was decided, there was no express right to privacy mentioned in the American bill of rights and it wasn't mentioned in any other part of the Constitution. This is unlike the case in Zambia at present because Article 17 of the Bill of Rights provides for the right to privacy as a fundamental right. It states that,

*“Except with his own consent, a person shall not be subjected to the search of his person or property, or the entry by others on his premises.”*<sup>58</sup>

The wording of the right to privacy as enshrined in the Constitution, however, appears to be constructed rather narrowly. It does not seem to expressly provide for matters of privacy in relation to sexual intimacies between married couples, unmarried couples in a heterosexual relationship or persons pursuing a homosexual lifestyle.

When Article 17 of the Constitution states that no person shall be subjected to ‘the search of their person’, the wording appears to suggest an actual physical search of a person perhaps in the quest to find an illegal substance that they may be carrying on

---

<sup>57</sup> Ibid

<sup>58</sup> Ibid

their body or in the clothes they are wearing. In relation to sexual intimacies, even between married couples, the Constitution does not appear to provide for their right to privacy.

Article 17 of the Constitution also makes mention of a person's right to privacy in that they have a right to not be searched in their property nor is entry upon their premises allowed. Again the wording of the Constitution does not expressly suggest that sexual intimacies are a private matter between adult, consenting individuals.

In the same way, there was no general right in the United States that granted the citizens the right to privacy. In **Griswold v Connecticut**<sup>59</sup>, Mr Justice Goldberg delivered a dissenting judgment. He stated that since he could find no part of the Constitution or any case that the Supreme Court had decided that spoke of the right to privacy as a right that existed in the United States he said he would require a more explicit guarantee than the one the Court had derived from the several Constitutional amendments. The Court, however, held that the American bill of rights did not only protect those rights that the Constitution specifically mentioned by name but that it also protected peripheral rights. The Court stated that, though the freedom of association for instance, was not mentioned in their Bill of Rights, the First amendment had been construed to include this right in several decided cases. In these cases, the First Amendment was construed to also include the right to educate children in the school of their parents' choice<sup>60</sup> and the right to teach and study a foreign language.<sup>61</sup> According to the Court, a right such as the right of freedom of speech and press included not only, the right to utter or to print, but it also included several other rights such as, the right to distribute, the right to receive, the right to read and the right

---

<sup>59</sup> Ibid

<sup>60</sup> *Pierce v Society of Sisters* (1965) 357 U.S 449, 462

<sup>61</sup> *Meyer v Nebraska* 381 US 479 (1965) In this case the Court upheld the right to study the German language in a private school.

to freedom of inquiry. Without these peripheral rights, the specific right would be less secure.

Mr Justice Douglas in delivering of the judgment in **Griswold v Connecticut**<sup>62</sup> stated that, the First Amendment had a penumbra where privacy was protected from governmental intrusion. He further stated that the full meaning of each of the rights enshrined in the bill of rights could not be realised if other rights that were not expressly stated in the bill of rights were not deemed to accrue to the American citizens. Specific guarantees in the bill of rights therefore have penumbras, formed by emanations from those guarantees. It is these emanations that give the guaranteed rights life and substance.

The Court finally held that the case concerned a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. It was the view of the Court that the law against the use of contraceptives, could not stand in the light of the principle that, a government purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which swept unnecessarily broadly and thereby invaded the area of protected freedoms.

The Court stated that it would not allow the police to search the sacred precincts of marital bedrooms for tell tale signs of the use of contraceptives because the very idea was repulsive to the notions of privacy that surround the marriage relationship. It was therefore, of the opinion that the right to privacy could be said to refer to the right that people had, to make fundamentally important decisions or choices free from governmental intrusion.

The reasoning of the Court in the above case can be applied in relation to the right to privacy being violated by the criminalizing of homosexuality in Zambia. It can be said

---

<sup>62</sup> Ibid

that though the right to privacy with regard to sexual intimacies between adult couples is not expressly mentioned in the Constitution, one can still justifiably infer its existence.

The right to privacy would not be fully enjoyed based on the wording of the Zambian Constitution if certain peripheral rights were not presumed to form part of it. The right a person has under Article 17 to ‘ not be subjected to the entry by others on his land’ means that neither the Police nor any other individual should be allowed to enter a persons’ home to look for evidence to prove that a person is leading a homosexual lifestyle.

The argument of the police entering on a persons premises to conduct such a search being in the interest of public morality cannot stand, because it has already been stated that, homosexuality falls within the ambit of private morality as opposed to that of public morality.

The fact that a person has the right to privacy of their home means that they have the right to allow any person they wish to come on to their premises and the right to exclude persons that have not been invited. The person also retains the right to associate with people on his premises. This right not to be subjected to the entry by others on the premises of a person should, therefore, necessarily include the right for a person to not have people enter onto his land to pry into matters such as who he or she has sexual relations with.

The above stated rights therefore, constitute some of the peripheral rights that give life and substance to Article 17 of the Constitution. The right to not have people enter on ones premises without permission should be construed to protect this right that consenting adults have to sexual intimacies.

The nature of the sexual intimacies however is irrelevant. The private precincts of one's bedroom would have to be searched out in order to prove what the nature of these intimacies is at any point. The Court in the above stated case said that it would not allow the Police to do this especially regarding a relationship such as marriage. Undoubtedly, the law in Zambia should cease to suggest that such an action by the Police or any other 'concerned' member of the public would be right. The maintenance of the status quo of the law against homosexuality suggests that such an action would be right because, the only way that evidence on the nature of sexual intimacies a person is engaged in is going to be obtained is by allowing such searches on suspected persons.

If the Zambian society can recognize privacy as existing between persons that are not married with regard to sexual intimacies between them, it is hard to appreciate why the law cannot do the same regarding private homosexual relations between consenting adults. The criminalizing of homosexuality in Zambia, therefore, violates the Constitutional right to privacy.

### **IS IT JUSTIFIABLE TO USE SECULAR PENAL LAWS TO PUNISH MORAL, TRADITIONAL OR RELIGIOUS BELIEFS?**

The question whether it is justifiable to use secular penal laws to punish moral, traditional or religious beliefs is aimed at those actions that may be condemned by religious as well as traditional beliefs, but in themselves do not harm any member of the society in their property or person. The emphasis will be on the law against homosexuality in Zambia.

Whether or not it is justifiable to use secular penal laws to punish certain moral, traditional or religious offences cannot be answered with an unequivocal yes or no.

This is the case because the continued existence of most of these moral, traditional and religious beliefs that currently exist as penal laws in Zambia can be defended on paternalistic grounds.

### **PATERNALISM.**

Most pieces of legislation are made for the purpose of ensuring that in the exercise of their rights and liberties, people do not cause harm to other members of their society. This is understandable because one of the functions of the State is to use its coercive power to ensure law and order in society. But the state has not stopped at simply ensuring that harm is not caused to people by other people, it has gone further to pass several pieces of legislation that are aimed at keeping people from causing harm to themselves.

The problem with legislation that interferes with a person's liberty solely for their own good or happiness is that it prescribes for the individual what it is that they should consider good. The freedom to do as one pleases is, therefore, curtailed to some extent because the state considers it to be in their best interest.

The learned author Gerald Dworkin has written extensively on the subject of paternalism. In his writing he stated that,

*“By paternalism I shall understand roughly the interference with a person's liberty of action justified by reasons referring exclusively to the welfare, good, happiness, needs, interests or values of the person being coerced”<sup>63</sup>*

---

<sup>63</sup> G. Dworkin, *Morality and the Law*. 258 (1971)

The *Zambian Penal Code*<sup>64</sup> has examples of laws that interfere in peoples' lives for the purpose of protecting them. Examples include laws regulating certain kinds of sexual conduct, for example homosexuality among consenting adults in private.<sup>65</sup> Other examples of paternalistic legislation are found in the laws that prohibit various forms of gambling.<sup>66</sup> Another example of paternalistic legislation though not found in the *Penal Code* refers to the requirement for licensing in order to conduct certain professional practises.<sup>67</sup>

In addition to laws that attach criminal or civil penalties to certain kinds of actions, there are laws that make it either difficult or impossible for people to carry out their plans and they too are justifiable on paternalistic grounds. An example of these is that the consent of a victim to murder or assault cannot be advanced as a defence to the criminal charge.

Most of the examples mentioned, show the placement of restrictions on the liberty of individuals for the good of the person whose liberty is interfered with. A clear example already given is the law that prohibits gambling.<sup>68</sup> The existence of this law has the effect of protecting people from spending their money or 'investing' it in something where profit is determined by nothing other than chance. This kind of paternalistic legislation is referred to as 'pure paternalism'. But as some of the examples show, the class of persons whose good is involved is not always identical with the class of persons whose freedom is restricted. In the case of professional licensing, it is the practitioner who is directly interfered with, but it is the would-be

---

<sup>64</sup> *Ibid*

<sup>65</sup> Chapter 87 sections 155(a) and (c)

<sup>66</sup> Chapter 87 section 175 The *Penal Code* does not actually use the word gambling but it refers to it as betting and prohibits the use of any house, room or place for the purposes of betting.

<sup>67</sup> Chapter 297 of the *Laws of Zambia (Medical and Allied Professions Act)*. Section 39(1) (a) any person not being a registered dental surgeon who for gain practises as a dental surgeon or performs or undertakes to perform any act specially pertaining to the practise of dental surgery, shall be guilty of an offence and liable on conviction, to a fine not exceeding three thousand penalty units.

<sup>68</sup> *Ibid*

client whose interests are presumably being served. This kind of legislation is an impure form of paternalistic legislation.

### **CRIMINALIZING OF HOMOSEXUALITY AS A FORM OF PATERNALISTIC LEGISLATION**

The criminalizing of homosexuality in Zambia appears in part to be a form of ‘impure’ paternalism. It was discussed in the second chapter that homosexuality is a moral offence not because it violates any moral principles in any peculiar sense but simply because it is generally considered to be a practise that is unacceptable and offensive in the Zambian society.

The criminalizing of homosexuality is, therefore, a form of ‘impure’ paternalism to the extent that the freedom of homosexuals to express their sexual orientation, whether in public or in private is something that shocks the conscience of most of the people that make up the Zambian society. The freedom of homosexuals then is curtailed in the interest of the ‘general public’.

In chapter two, mention was made of how it is that people in a society can legitimately expect the law to, not only protect them in their persons and in their property, but also to protect them from psychic pain. The very fact that for many people in Zambia, the practising of homosexuality stings their religious beliefs and traditional beliefs appears to be the harm that the law seeks to protect the majority of the Zambians against, by making homosexuality a criminal offence.

### **THE CRIMINALIZING OF HOMOSEXUALITY AS A FORM OF ‘PURE’ PATERNALISTIC LEGISLATION**

The criminalizing of homosexuality in Zambia may also narrowly be seen as a ‘pure’ form of paternalistic legislation. Most people hold the view that homosexuality is an

unacceptable practise. By curtailing the freedom of homosexuals to express their sexual orientation, the law can be said to protect these people from being stigmatised and shunned in their communities.<sup>69</sup>To this extent therefore, it can be said that the group of persons whose liberty is curtailed is identical to the group of persons for whom the benefit is intended.

## **RESTRICTIONS ON PATERNALISTIC LAWS**

It is important that restrictions be placed on the paternalistic laws we allow to continue as law in Zambia. Just cause must be shown before restrictions are placed on the liberty of the Zambian citizens to act as they please. People should not be obligated to obey laws whose basis is religion or tradition, especially if they are entitled to disbelieve the teaching of either the religion or tradition. Just cause would in this sense refer to the burden of proof that the state or authorities need to discharge, by demonstrating the exact nature of the harmful effects (or beneficial consequences) that the paternalistic legislation that has been enacted is intending to avoid (or achieve). The state should also show what the probability of the occurrence of the harmful effects or beneficial consequences will be so that it may be clear whether there is need for such paternalistic legislation or not.

When regard is had to the crime of homosexuality as a form of paternalistic legislation, the need for just cause is extremely important. The harmful effects of its not being criminalized have already been envisaged and they are that, firstly, the law continues to criminalize homosexuality in order to protect the general public from

---

<sup>69</sup> This remedy against stigmatisation seems to defeat a more fundamental purpose for which the law is intended. The law is intended to protect people in their persons, property and to protect them from psychic pain. It does not make sense for the state to seek to protect the welfare of homosexuals by allowing laws that discriminate against them. It necessarily entails that the law only fully seeks after the welfare of the majority but has no regard for the impact this may have on people that make up the minority.

psychic pain. Secondly, the law continues to criminalize homosexuality in order to protect homosexuals from the pain of stigma. But when regard is had to the probability of the harmful effects of legalizing homosexuality and the beneficial effects of maintaining the status quo of the law, it becomes apparent that the probability of either of the two mentioned situations occurring is very small.

Homosexual practises are by their nature practised in private. Therefore, the people that the law seeks to protect from psychic pain will not need such protection because they will rarely, if ever, get to know about the relationship that will cause them the psychic pain that the law intends to protect them from. Further, the persons that the law seeks to protect from discrimination will not need the protection the law seeks to confer because if they practise their homosexuality in private, people in general will not get to know about it and they will not be stigmatised as a consequence.

The law against homosexuality is, therefore, the kind of paternalistic legislation that should cease to exist in Zambia.

This chapter has discussed two other bases upon which Section 155 of the Penal Code with specific regard to the provision against homosexuality is weak. It has been established that the criminalizing of homosexuality violates the right to privacy. The judgment of the Court in **Griswold v Connecticut**<sup>70</sup> has been used to establish what the right to privacy is. It has also been established that homosexuality and other matters involving sexual intimacies fall within the zone of privacy that the state should not interfere with either directly or indirectly. It is not justifiable to punish certain offences using secular penal laws. These offences are those such as homosexuality. Homosexual acts do no tangible harm, to persons not involved in it either in their person or their property. Homosexuality has been discussed as a form of

---

<sup>70</sup> 381 US 479 (1965)

paternalistic legislation and it has been stated that it is not the kind of paternalistic legislation that can justifiably continue to be criminalized.

Chapter four will analyse another weakness of section 155 of the Penal Code<sup>71</sup> by showing how the criminalizing of homosexuality in Zambia is unconstitutional because it violates the right to protection from discrimination. The chapter will analyse Article 23 of the Constitution<sup>72</sup> that provides for the right to protection from discrimination. In order to get a comprehensive understanding of how the right to protection against discrimination is violated through the maintenance of legislation that outlaws homosexuality in Zambia, this chapter will also analyse some provisions of international instruments that Zambia has ratified such as the African Charter on Human and Peoples Rights including some cases that have dealt with the issue of discrimination.

---

<sup>71</sup> Chapter 87 of the Laws of Zambia

<sup>72</sup> Chapter 1 of the Laws of Zambia

## CHAPTER FOUR

### THE RIGHT TO FREEDOM FROM DISCRIMINATION

#### **DISCRIMINATION**

There are certain things that are relevant to the way people should be treated and certain things that are not. The size of ones body is relevant to the size of skirt or trousers they will wear, but this has nothing to do with the colour of clothes they will like the best. If it is known that a particular person has a large appetite for food, this should be considered when they are being served a portion of food at a dinner to which they have been invited, however, this has nothing to do with the colour of napkin they should be given.

People should be treated on the basis of their attributes and merits that are relevant to the circumstances. When they are, those who are similar are treated similarly and those who are dissimilar are treated differently. Although these distinctions do involve treating people differently, (that is to say, those who are larger will get larger clothes sizes than those who are smaller and those with a large appetite will be served more food than those that do not have a large one), it does not involve what can be called discrimination.

According to Louis Katzner<sup>73</sup>, discrimination means treating people differently when they are similar in the relevant respects or treating them similarly when they are different in the relevant respects. This means that if for instance, a black man and a white man both commit the crime of theft as individuals, both men should be charged and sentenced if found guilty without regard being had to their race or colour. The

---

<sup>73</sup> L. Katzner. Discrimination and Reverse Discrimination: Is the Favouing of Women and blacks in Employment and Educational Opportunities Justified? In Philosophy of Law by Joel Fienberg and Hyman Gross. Page 450 (1968)

sentence that one will serve should be the same sentence the other will serve, this is because what is relevant at the time and similar to both men is that they have committed a crime. Their difference of race and colour is irrelevant in determining what their sentence will be.

In relation to the law against homosexuality in Zambia, it is a bit difficult to understand how it can be said that such a law is discriminatory. There are no reported cases in Zambia about people that have been denied a job opportunity for instance, on the basis of their sexual orientation. In what ways, therefore, can it be said that section 155 of the Penal Code is a law that is discriminatory?

The International Gay and Lesbian Human Rights Commission (IGLHRC), a United States based non-governmental organization prepared a report on the rights of lesbian, gay, bisexual, and transgender people in the Republic of Uganda under the African Charter on Human and Peoples Rights. This report was prepared in response to the periodic report of the Republic of Uganda that was presented at the 40<sup>th</sup> Ordinary session of the Commission in November of 2006.

The report of the IGLHRC stated that homosexuals in Uganda were discriminated against and reference was made to what was called 'legal discrimination'. The report cited various instances in Uganda that were indicative of the existence of discrimination in the Republic. However, what is relevant to this chapter is what the report said concerning how it can be said that laws that outlaw homosexuality are discriminatory laws.

According to the report, in International human rights law, the right to equality before the law and the equal protection before the law is broader and more expansive than its non-discrimination counterpart. Article 3 of the African Charter on human and Peoples Rights states firstly that every individual shall be equal before the law and

secondly that every individual shall be entitled to equal protection of the law. This Article should be interpreted to be a very comprehensive one, covering all forms of discrimination including those that are not expressly mentioned in the Charter. The IGHLC report cites a quotation from the work of Manfred Nowak an eminent legal theorist. Nowak stated that, *“the prohibition of discrimination for personal characteristics is merely one aspect of the substantive structuring of the principle of equality”*<sup>74</sup> It can therefore be said that discrimination or denying people equality before the law on the basis of sexual orientation is covered under International human rights law.<sup>75</sup> Therefore, as long as homosexuality continues to be criminalized in Zambia, homosexuals and heterosexuals are not accorded equal treatment under the law. The African Commission stated in **Legal Resource Foundation v Zambia**<sup>76</sup>, that equality before the law is very important. Citizens should expect to be treated fairly and justly within the legal system and be assured of equal treatment before the law and equal enjoyment of the rights available to all citizens.

## **FREEDOM FROM DISCRIMINATION UNDER THE ZAMBIAN CONSTITUTION**

The Constitution in Article 23 enshrines the right to be free from discrimination. The Constitution defines discrimination in clause 3. It provides that,

*“In this Article, the expression “discrimination” means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, sex, place of origin, marital status, political opinions, colour or creed whereby*

---

<sup>74</sup> Manfred Nowak, “UN Covenant on Civil and Political Rights: CCPR Commentary”, Kehl am Rhein: Strasbourg, 1993, p 459

<sup>75</sup> And in this case, specifically under the African Charter for Human and Peoples Rights.

<sup>76</sup> Communication 211/98 – 14<sup>th</sup> Annual Activity Report: 2000-2001 at 63

*persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.”*

The Constitution does not have an express provision that outlaws discrimination on the basis of sexual orientation. In Article 23(3), mention is made of how people should not be discriminated against on the basis of sex. Though this is mentioned, it seems to refer to the fact that males and females in Zambia should be treated equally before the law and should be accorded equal opportunities to better their lives.

It was mentioned in **Griswold v Connecticut**<sup>77</sup> that the full meaning of the rights enshrined in the American bill of rights could not be realised if other rights that were not expressly stated in it were not deemed to accrue to the American citizens. Each right stated in the bill of rights had a penumbra made up of certain peripheral rights that ensured that the substantive right was securely protected. Similarly, the rights enshrined in the Zambian Constitution should be interpreted to have wide meaning in order that the rights that they confer on the people may be enjoyed fully.

It has been stated that the Constitution does not expressly state that people should not be discriminated against on the basis of their sexual orientation. However, Zambia is a party to several international instruments and among these is the African Charter on Human and Peoples Rights.<sup>78</sup> The African Charter on Human and Peoples Rights has not been domesticated in Zambia because the Zambian Parliament has not ratified it yet. However the fact that Zambia is a party to the Charter indicates that, in principle, Zambia agrees with the provisions of the Charter. Steps should therefore be taken to

---

<sup>77</sup> 381 US 479 (1965)

<sup>78</sup> The Charter was adopted in 1984 and Zambia ratified it in 1984

ensure that all of the legislation in Zambia that affects human rights conforms to the provisions of the Charter.

## **PROTECTION FROM DISCRIMINATION UNDER THE AFRICAN CHARTER ON HUMAN AND PEOPLES RIGHTS**

The African Charter on Human and Peoples Rights has Articles that prohibit all forms of discrimination. When we consider these provisions of the Charter, it becomes clearer how the wording of the Constitution that provides for discrimination against ‘sex’ in Article 23(3) should be interpreted in order that it may confer upon the Zambian people, the full benefit of the right it enshrines. Article 2 of the Charter provides that

*“Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.”*

Article 28 of the Charter also makes provision for the outlawing of discrimination. It provides that,

*“Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.”*

Despite the fact that there are Articles in the Charter that outlaw discrimination, the African Commission does not have extensive jurisprudence that can give a clear interpretation of Articles 2 and 28. However, Article 60 of the Charter helps to remedy this problem by encouraging the consideration of international law and decisions from comparable human rights bodies in understanding the rights contained in the Charter. Because of Article 60 of the African Charter, a better understanding of what discrimination on the basis of sexual orientation is, can be had by considering what the Human Rights Committee concluded when trying to determine the meanings of the non discrimination protections under the International Covenant on Civil and Political Rights (ICCPR)<sup>79</sup>. Discrimination is not defined under the ICCPR therefore, the Human Rights Committee elucidated its' meaning by drawing from the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and from the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).

The Commission has stated that “discrimination” under the ICCPR

*“Should be understood to imply any distinction, exclusion, restriction of preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion...or other status...which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms”<sup>80</sup>*

---

<sup>79</sup> Adopted by the UN General Assembly as Resolution 2200 (21) of December 1966. It entered into force on 23<sup>rd</sup> May 1976. Zambia ratified the ICCPR in 1984

<sup>80</sup> Report prepared by the IGLHRC presented at the 39<sup>th</sup> Ordinary Session of the Commission in May 2006

In the case of **Toonen v Australia**<sup>81</sup> ‘sex’ in Articles 2(1) and 26 of the ICCPR was interpreted to include sexual orientation. It was held that any domestic law criminalizing private, same-sex sexual behaviour between consenting adults violates the principles of non-discrimination. It was further established that states could not abridge the human rights of their citizens based on sexual orientation.

In another case, **Young v Australia**<sup>82</sup>, the Human Rights Committee held that Australia had violated Article 26 of the ICCPR- the analogous equal protection clause under the ICCPR- by denying Edward Young a pension on the basis of sex or sexual orientation. In so doing, the Committee decided that a distinction made on the basis of sexual orientation, was a denial of the right to equality before the law.

Article 23(3) of the Constitution<sup>83</sup> should as a consequence be interpreted to outlaw discrimination on the basis of sexual orientation even though it simply states that people shall have the right to be protected from discrimination on the basis of sex. Sections 155(a) and(c) of the Penal Code<sup>84</sup> are therefore unconstitutional to the extent that they discriminate against people on the basis of their sexual orientation and more importantly have the effect of not treating people as equal before the law.

This chapter has shown that the law in Zambia that outlaws homosexuality is unconstitutional because it violates Article 23 of the Constitution that guarantees the right to be free from discrimination. It has further been established that freedom from discrimination on the ground of ‘sex’ should be interpreted to refer to sexual orientation as well. The Constitutional provision in Article 23(3) should therefore be interpreted widely so that the right that the Constitution intends to confer can be enjoyed to the full. The right to equality before the law is a broader, more expansive

---

<sup>81</sup> Communication number 488/1992, UN Doc CCPR/C/50? D/488? 1992 (1994)

<sup>82</sup> Communication No. 941/2000: Australia. 18/09/2003. U.N Doc. CCPR/C/78/D/941/2000 (2003) at 10.4

<sup>83</sup> Ibid

<sup>84</sup> Chapter 87 of the Laws of Zambia

protection than the right to be free from discrimination. By allowing the existence of laws that outlaw homosexuality, the state denies homosexuals the right to equality before the law. Having established the various weaknesses of section 155 of the Penal Code, the question that remains to be answered is simply, what changes should be made in the law in order to rid it of its weaknesses? Chapter five will address this matter in its recommendations.

## CHAPTER FIVE

### RECOMMENDATIONS

Perhaps the most important change that needs to be made with regard to the law against homosexuality is that it should be done away with altogether. This change is necessary because the weakness that stands out the most regarding this law is that it is unconstitutional. The Constitution in Article 1 sub Article 3 provides that the Constitution is the Supreme law of Zambia. It further provides that if any other law is inconsistent with the Constitution, that other law shall to the extent of its inconsistency be void.

In establishing the weaknesses of section 155 of the Penal Code, this essay has shown that homosexuality is a matter of private morality as opposed to public morality therefore, the state has no right to pass legislation prohibiting homosexual relationships. It may be argued that homosexuality is an issue that concerns public morality because what people think concerning what is right or wrong cannot be kept private from society. This is the case because the morality of a society is made up of a median (though not an arithmetic median) of the individual ethics of each member of that society. These individual ethics represent the thousands and millions of individual thoughts of what people consider right or wrong, therefore, those that are homosexual will corrupt the morals of people that are not homosexual. However, it should be said that looking at the issue of homosexuality in this way encourages discrimination against people on the basis of sexual orientation.

The sexual orientation of a person is a matter of privacy especially when consenting adults are involved. Admittedly, there should be sanctions against persons that have

carnal knowledge of children but this should not be the case between persons that are adults and engage in private consensual sexual acts. People should be treated equally before the law. To draw a distinction between persons on the basis of their sexual orientation amounts to discrimination because their sexual orientation is not a matter that is relevant in determining how they should be treated. This is especially important in Zambia because homosexuality attracts a criminal sanction and the penalty for it is quite severe. It ranges from a minimum of fifteen years to a maximum of life imprisonment.

The crime of homosexuality should not exist in Zambia at all when regard is had to the wording of the Constitution and the international instruments that Zambia has ratified such as the International Covenant on Civil and Political Rights (ICCPR) and the African Charter of Human and Peoples Rights. The Penal Code should cease to make reference to 'crimes against the order of nature'. The language of the law in section 155 of the Penal Code is gender neutral and as such it is potentially applicable to heterosexual relationships. It however, appears that this legislation is directed at same sex practising individuals. Consequently, the existence of the law against homosexuality in Zambia can be said to be discriminatory to this extent. All sexual offences should be categorized under the 'ordinary' categories of sexual offences such as rape or defilement for instance. It should not be provided in the law that a certain kind of carnal knowledge is worse than the other or different in any way.

The law against homosexuality has been said to represent a form of paternalistic legislation, that is to say it reflects a kind of law that the state passes that imposes a restriction on an individual's actions because in the view of the state it is good for them. This essay expresses the view that when such legislation affects a sane adult, the state should explain the reasons for such prohibition or restriction. The reason that

would probably be advanced in favour of criminalizing homosexuality is that such law serves the interests of public morality. However, this essay has laboured to show that homosexuality really is a matter affecting private morality as opposed to private morality. It should also be noted that there is yet no demonstrative harm that can be shown to have been experienced in any society where homosexuality has been legalized.

Despite the fact that the law against homosexuality contravenes the Constitution it would not be right to hurry to change it and legalize homosexuality. To do so would mean having to ignore what the larger majority of the public think about homosexuality. In Zambia the majority of people still consider homosexuality a taboo and would not want it legalized. It would therefore, be unwise to change the law without educating the people on why the law needs to change. The reason for this is that it should be borne in mind that the morality of a society is reflected in its laws. Though people may differ in what they think about a matter, the general will of the majority will make the law, therefore, the law on homosexuality in Zambia is as it is because the majority of the Zambian people agree with it. However, one of the greatest dangers a society faces when making laws is 'tyranny by the majority'. Just because the majority hold a certain view on a particular matter does not cause them to be right just by that fact. The minority may also be right. A society may also experience 'tyranny by the minority'. This can exist in situations where the legislation in a society does not adequately reflect the convictions of the citizenry on a particular matter. A balance must therefore be struck between the interests of the majority that cannot be ignored and the rights of the minority that are just as important.

Rapid steps should therefore be taken in order to educate the Zambian people on the position of our law in Zambia concerning homosexuality and the necessary steps that

should be taken in order that it may conform to the Constitution and other international instruments. In situations such as these, that is to say, the passing of legislation on homosexuality in Zambia, other ways of arriving at what the law should be need to be established other than making law through Parliament. Admittedly, legislation made by Parliament is intended to be reflective of what people want the law to be, but undoubtedly, this is not the case in Zambia. Other ways of passing legislation on matters to do with morality, such as homosexuality, will enable the laws to more effectively reflect the diverse thoughts of the members of the Zambian society.

It is easy to say that Zambia should domesticate the African Charter on Human and Peoples Rights so that all of Zambian laws that deal with human rights can be brought into conformity with the provisions of the Charter. This would be a good step to take but perhaps before such an instrument is domesticated, a sizeable population of the Zambian people should be able to understand the implications that will follow the domestication of the Charter. If this were the case, it would give the Zambian citizens a chance to make an informed decision concerning matters such as whether they want homosexuality legalized.

This essay should not be understood to be one that advocates for the legalizing of homosexuality. The intention of the essay was merely to critically analyse the weaknesses of law against homosexuality as it is. This analysis has revealed that the law against homosexuality is weak and it has recommended what changes should be effected.

## **BIBLIOGRAPHY**

Bone. S (ed). 2001. **Osborne's Concise Law Dictionary**. London: Sweet and Maxwell

Daka. J. 2003. **Sexual Offences in Zambia and How to Deal With Them**. Lusaka: Comfort Publishers

Devlin. P. 1965. **The Enforcement of Morals**. Oxford. Oxford University Press

Dworkin. G. 1971. **Paternalism from Morality and the Law** edited by Richard A. Wasserstrom. Wadsworth Publishing Company Inc. Belmont, California 94002

<http://www.iglhrc.org>

Feinberg. J and H. Gross(ed). 1986. **Philosophy of Law**. Belmont, California: Wadsworth Publishing Company. (3<sup>rd</sup> Ed.)

Friedmann. W. 2003. **Legal Theory**. New Delhi: Universal Law Publishing Company. (5<sup>th</sup> edition)

Kangende. K. 2004. **Female Superstitions About Sex**. Lusaka. University Printing Press

Katzner. L. (1986) **Is the Favouring of Women and Blacks in Employment and Education Opportunities Justified?** J. Feinberg and H. Gross (Ed). Belmont California: Wadsworth Publishing Co.

Parent. W. A. 1983. **Philosophy and Public Affairs.** Princeton University Press Vol. 12 No. 4 pages 269-288

Report on the Rights of Lesbian, Gay, Bisexual and Transgender People in the Republic of Uganda under the African Charter on Human and Peoples Rights in Response to the Periodic Report of Uganda. Presented at the 39<sup>th</sup> Ordinary Session of the Commission in May 2006.

Schwartz. L. B. 1963. **Morals Offence and the Model Penal Code.** Columbia Law Review. Vol. 63 page 669

Wehmeier. S (ed). 2004. **Oxford Advanced Learners Dictionary of Current English.** Oxford: Oxford University Press