

**CRIMINOLOGICAL EVALUATION OF GAY RIGHTS UNDER THE
ZAMBIAN CRIMINAL JUSTICE SYSTEM**

A Comparative Human Rights View

By

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**A dissertation submitted to the University of Zambia in partial fulfillment of
the requirements for the degree of Master of Laws.**

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DECLARATION

I, JEAN COUVARAS DO HEREBY DECLARE THAT This dissertation is my original work and has not been presented for a degree to the University of Zambia or any other University. All other sources of information cited herein have been duly acknowledged

Signature

Date

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CERTIFICATE OF APPROVAL

This dissertation authored by Jean Couvaras (Computer Number: 531001912) and entitled *Criminological Evaluation of Gay Rights under the Zambian Criminal Justice System: A Comparative Human Rights View* has been approved as fulfilling the requirements for the award of the Degree of Mater of Laws by the University of Zambia.

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ABSTRACT

This dissertation focuses on the topical issue of gay rights and homosexuality in Zambia. Homosexuality in Zambia is penalized under Sections 155 and 158 of the Penal Code and this dissertation gives different views that have been given for the criminalization. The First Chapter gives a brief analysis of the presence of homophobia in Zambia. The Chapter also outlines the social aspect and purpose of criminalization in society. The dissertation in Chapter Two analyzes the various reasons given for criminalization so as to test the justification and rationale for the existing structure and to suggest reform where necessary. This Chapter also gives an analysis of the reasons given for continued criminalization of homosexuality under the Zambian criminal justice system which include: religious views, morality, unnaturalness and the assumption that homosexuality is alien to African culture. The purpose of the research was to ascertain whether any of the reasons given for the criminalization of homosexuality are actually justifiable in a modern democratic society such as Zambia, especially in light of possible scientific evidence of persons who may actually have no choice over their sexual orientation. The dissertation also seeks to ascertain the constitutionality of the penal provisions that criminalize homosexuality. The third Chapter outlines the international position on homosexuality from various international law instruments and Committees some of which have been ratified by Zambia.

The research employed the socio-legal methodology so as to analyze the law in its socio context and also offer a comparative view. The results of the Research clearly indicate that there is no justifiable reason for criminalization of homosexuality in so far as satisfying the common principles and purpose of criminalization is concerned. The research also brings into question the constitutionality of the penal provisions on homosexuality and actually recommends the repeal of the said provisions in the final Chapter.

To my big family

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CHAPTER ONE

1.1 Introduction

Homosexuality is generally understood to be a long lasting pattern of or disposition to experience sexual, affectional or romantic attractions primarily to people who share the same sex as the person exhibiting such a pattern. It is a condition in which one is attracted to his/her own gender, which is evidenced by erotic and emotional involvement with members of his/her sex.¹ The term thus encompasses both the conditions of homosexuality and the act itself.

As will be seen later in the dissertation, homosexuality has long been a controversial issue in Zambia and the rest of the world. Under the Zambian Penal Code however,² the Legislators were clear in their intent to criminalize homosexual conduct, whether the same was done in private or public. Sections 155 and 158 of the Penal Code explicitly criminalize homosexuality and provide for imprisonment where convictions are secured. These two sections undoubtedly criminalize any sexual intercourse between persons of the same sex and have remained unchanged since the Penal Code was enacted in 1931. This is in spite of the many UN calls for decriminalization following the Yogyakarta principles,³ as well as the United Nations Declaration for the Global Decriminalization of Gay Lesbian Bisexual and Transgender persons

¹ K Gulia and H Mallick, "Homosexuality: a Dilemma in discourse," *Indian Journal Physiol pharmacol*, Vol. 54, No. 1 (2010): 5, <http://www.imsear.hellis.org/bitstream/123456789/145951/1/ijpp2010v54n1p5.pdf> (accessed on 13th October, 2012).

² The Penal Code Act of 1931, Chapter 87 of the Laws of Zambia, Volume 7.

³ International Commission of Jurists, *The Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*, Yogyakarta, 2007, http://www.yogyakartaprinciples.org/principles_en.pdf, (accessed on August 13, 2013).

activity.⁴ Another aspect of controversy concerning these provisions is their Constitutionality. The Constitution of Zambia⁵ under Articles 17 and 23 does provide for freedom of privacy of the home and non-discrimination respectively. This dissertation seeks to determine whether the penal provisions on homosexuality are violating these Constitutional freedoms named above. In as much as the section 23 of the Zambian Constitution does not mention 'sexual orientation' as a prohibited ground of non-discrimination, there is a plethora of authority that would seem to indicate that where there is enough evidence that 'sexual orientation' needs to be added as a prohibited ground of non-discrimination, the courts would indeed do so.⁶ There are also an unlimited number of international law instruments, decided cases as well as other literary works that can be quite persuasive for a court faced with such a case.

Various arguments in defense of the criminalization of gay rights under the Zambian Penal Code are given by the many conservatives that insist that the status quo be preserved. These arguments range from the status of Zambia as a Christian Nation, or that it was not permissible under the Zambian culture or; public morality or that homosexuality is unnatural. The same arguments are promulgated by policy makers. It is noteworthy that none of the individuals citing these arguments have shown any knowledge of having explored or researched the field of homosexuality. The biological argument in support of homosexuality which, in the author's opinion, is of paramount importance has never been investigated by any of the conservatives or policy makers arguing

⁴ The Declaration was passed in 2008 by the United Nations General Assembly and is non-binding. It currently has about 70 signatories.

⁵ The Constitution of Zambia Act of 1996, Chapter 1 of the Laws of Zambia, Volume 1.

⁶ See for example *Edith Nawakwi v The Attorney General*, ZR 112 (1990 – 1992) HC.

against decriminalization. The biological for homosexuality merely asserts that homosexuality could be as a result of genetic factors. Even though the argument is not scientifically conclusive, it is one which cannot be ignored as it has not been proven to be false.

The purpose of this dissertation is thus to dissect the primary arguments that have been made against homosexuality in order to get an understanding and assess whether the said arguments are actually sustainable in light of other material factors that have so far been ignored. These arguments are of utmost relevance because of the nature of criminal law and the need for the policy makers to be able to justify any conduct which is deemed criminal by statute. It is thus imperative that there is legitimate justification for the continuous calls to maintain the status quo in so far as the Penal provisions relating to homosexuality are concerned, especially in a country like ours ostensibly governed by democratic principles.

Chapter One will outline the history of the Penal code of Zambia with emphasis on the provisions relating to homosexuality. A discussion on the concept of criminalization will also follow to highlight the core features of criminal conduct and the purpose of criminalization. Finally, the Chapter will discuss evidence of homophobia in Zambia.

Chapter Two will discuss the most common arguments that have been raised against the decriminalization of homosexuality. These arguments include religion, the claim that it is alien to African culture, morality and that it is

unnatural among other arguments. The Chapter will focus on what the proponents as well as the opposition have to say on the particular reasons and any evidence put forward by the relevant advocates. The Chapter will also discuss the scientific argument for decriminalization.

Chapter Three will deal with gay rights in the socio-legal context and the International community. It will also discuss the stance taken by the United Nations on the subject and the relevant international instruments that have been introduced concerning the subject. This Chapter will further discuss the Constitutionality of the provisions of the Penal Code.

1.2 Statement of the Problem

Homosexuality has been the subjects of much discussion in both international and domestic fora. This discussion has been fuelled mostly by the fact that many countries still have legislation that criminalizes gay conduct, and Zambia is among these countries. There are very strong sentiments against homosexuality in Zambia as will be evidenced in Chapter two.

This dissertation therefore seeks to address whether or not, someone's sexual orientation, or indeed, preference, should be a subject that should be regulated by the law and whether this regulation can be justified in a modern society. Indeed, how far can the law go in regulating the private lives of individuals and is this sustainable in light of people's rights and invasion of their privacy. This dissertation will restrict itself to only consensual private sexual intercourse

between two adults of the same sex and whether its criminalization is tenable as a prevention of harm to society.

1.3 Purpose/Objectives of the Study

This dissertation is very important for purposes of understanding whether gay rights have any place in Zambia. Given the fact that the Zambian Penal Code explicitly criminalizes sexual intercourse between persons of the same sex, does the phenomenon of gay rights have any place under the Zambian criminal justice system? Notably, scientific studies have shown a distinct possibility of the existence of DNA carrying a homosexual 'gene'. Further, although the Penal Code criminalizes homosexuality, other immoral conducts such as fornication, adultery or masturbation have not been criminalized. This dissertation is therefore premised on the hypothesis that no government has the right to legislate private consensual sexual conduct between adults provided it does not cause any harm to the public and also that such conduct is protected by the right to privacy and non-discrimination as guaranteed under Articles 17 and 23 of the Zambian Constitution, as well as Articles 17 and 26 of the International Covenant on Civil and Political Rights to which Zambia is a state party. Therefore, provisions of the Penal Code criminalizing private consensual sex between adults of the same sex are unconstitutional on the grounds that they violate the right to privacy and non-discrimination as guaranteed under the Constitution and other international instruments. This dissertation is also premised on the hypothesis that none of the arguments given against homosexuality are actually sustainable in a democratic state to justify

criminalization. To test these hypotheses, this dissertation will seek to answer the following questions:

- (a) Is there any justification for the criminalization of consensual private sexual intercourse between consenting adults of the same sex on the basis of public morality or other grounds in light of other immoral conducts such as adultery and fornication that have not been criminalized?
- (b) Is the criminalization of homosexuality justifiable where there is scientific evidence of people who may be born naturally homosexual due to their physiological or genetic make-up?
- (c) Do the provisions of Sections 155 and 158 of the Penal Code violate the Constitutional freedoms of equality, privacy and non-discrimination as guaranteed under Articles 17 and 23 of the Zambian Constitution, as well as Zambia's obligations under Articles 17 and 26 of the International Covenant on Civil and Political Rights and other international instruments?

1.4 Significance of the Study

This dissertation helps to focus on not only the black letter law concerning homosexuality, but goes further to seek justification for such a law. This is important because, given the controversy surrounding this topic; one must have a legal basis to either advocate for the repeal of the relevant laws, or to defend the existing legal structure. If homosexuality has any place under Zambian law, it is imperative that the laws are harmonized to reflect this and this would call for not only Penal reform, but Constitutional reform as well to

reaffirm the rights and freedoms of such persons and guarantee protection against discrimination. This dissertation will therefore help not only the Legislators, but also advocates to call for the necessary judicial reforms.

1.5 Operational definition of terms

Sexual orientation: 'Sexual orientation is understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate sexual relations with individuals of a different gender or the same gender or more than one gender.'⁷

GLBT persons and activity: in this dissertation, the term GLBT shall mean Gay, Lesbians, Bisexual or Transgender individuals and GLBT conduct shall mean sexual intercourse by and between such persons in accordance with their orientation or preference.⁸

Gay Rights in this dissertation shall mean the rights of a person not to be discriminated against on the basis of their sexual orientation and the freedom to engage in gay conduct by GLBT persons without discrimination or criminalization.

⁷ International Commission of Jurists, *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity* (Geneva: March 2007), <http://www.unhcr.org/refworld/docid/48244e602.html> (accessed on 3rd October, 2012).

⁸ United Nations General Assembly Human Rights Council, *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity* (19th session, 2011), http://www2.ohchr.org/english/bodies/hrcouncil/.../A.HRC.19.41_English.pdf (accessed on 1st August, 2013).

Human rights are⁹ rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible.

Homophobia is the hatred or fear of homosexuals - that is, lesbians and gay men - sometimes leading to acts of violence and expressions of hostility against such individuals.

1.6 Limitations

During this Research, the author failed to find the Parliamentary debates relating to Sections 155 and 158. Information from the National Assembly was that the same had been archived as it was enacted during the colonial era. The author has also chosen to address gay rights which would include only homosexuality and thus leaves out bisexuality and transgender minorities.

1.7 Methodology

This research will be done using the socio-legal approach as it best answers ‘the law in its context’ questions and how human rights and the law are affected by social factors other than the law. This method should best illustrate how the Law interacts with reality; and how facts that have been obtained in various

⁹ United Nations Office of the High Commissioner for Human Rights, *What are human rights?* <http://www.ohchr.org/En/Issues/Pages/WhatareHumanRights.aspx> (accessed on 13th August, 2013).

fields impact on the current provisions of the law and can form a proper basis for either reform or defense of the existing legal structures. The dissertation will involve desk research reviewing relevant legislation, judicial precedents as well as a comparative study with other jurisdictions and International Instruments.

1.8 History of the Penal Code Provisions on homosexuality

Zambia's Penal Code was adopted by Northern Rhodesia¹⁰ on 1 November, 1931 and this has remained in force ever since. Notably, the coming of Independence in 1964 has had little effect on Zambia's criminal law or indeed the Penal Code as there have been very few substantive changes, save mostly for purposes of increasing penal sentences.¹¹ The Penal Code owes its origins to moves in England during the nineteenth century to codify the English Criminal Law and is based on the Queensland Code¹² which was used by the colonial office in London as a model for Penal Codes for the British dominion overseas. The Code was first introduced in Northern Nigeria in 1904 and was subsequently introduced to other colonies and was adopted in Zambia in November, 1931, replacing the English Common Law which had been in force until then.¹³

¹⁰ As Zambia was known during the colonial era before independence in 1964 when it was under British colonial rule.

¹¹ S Kulusika, *Text, Cases and Materials on Criminal Law in Zambia* (Lusaka: UNZA Press, 2004).

¹² Criminal Code Act of 1899, Office of the Queensland Parliamentary Counsel.

¹³ J Hatchard, *Readings in Criminal Law and Criminology in Zambia* (Lusaka: Multimedia Publications, 1994).

It is noteworthy that this Code enacted in 1931 is still subsisting in our country today many years after Independence. The Constitution of Zambia¹⁴ immediately after Independence provided as follows under Section 2 (1):

Subject to the following provisions of this Act, on and after the appointed day all Laws which, whether being a rule of law or a provision of an Act of Parliament or any other enactment or instrument whatsoever, is in force on that day or has been passed or made before that day and comes into force thereafter, shall, unless and until provision to the contrary is made by Parliament or some other authority having power in that behalf, have the same operation in relation to Zambia, as it would have apart from this subsection if on the appointed day Northern Rhodesia has been renamed Zambia but there had been no change in its status.

Therefore, like the other laws obtaining in Northern Rhodesia before Independence, the Penal Code continued in force even after Independence. This has been the pattern in most other former British colonies and therefore the Penal Codes have similar provisions. For example, a review of the Penal Code of Kenya¹⁵ reveals that it has provisions relating to sexual intercourse between persons of the same sex which states:

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

It is noteworthy that these provisions are very similar to the ones under the Zambian Penal Code until the 2005 amendment which introduced a similar provision for females and increased the punishment to a 14 years maximum.

¹⁴ The Zambia Independence Act of 1964, Chapter 65.

¹⁵ Which is also based on the Queensland Code as it is a former colony of Britain as well.

The Sexual Offences Act¹⁶ of England also had a similar provision before its repeal in 1967. It provided as follows in part:

Any male person, who, in public or private, commits, or is a party to the commission of, or procures, or attempts to procure the commission by any male person, of any act of gross indecency shall be guilty of a misdemeanor and being convicted shall be liable at the discretion of the Court to be imprisoned for any term not exceeding two years with or without hard labour.

It can therefore be concluded that the penal laws pertaining to homosexuality where in effect introduced by the British Colonial masters through the penal code throughout the territories and in Britain as well.

As was noted by Coldham,

The Penal policies of Independent African governments show a remarkable continuity with those of their colonial predecessors. Penal policies continue to be characterized by their harshness, by their emphasis on retribution and general deterrence rather than on individualization and the rehabilitation of offenders.¹⁷

Coldham further argues that where these Codes have been amended, this has been usually done to increase penalties. Ironically, Britain, Zambia's colonial master and instrumental in the enactment of the said provisions, actually decriminalized homosexuality in 1967.¹⁸ To date the link between Zambia's Penal Code and the English legal system can still be evidenced under the provisions of Section 3 of the Penal Code which provides that: "This Code shall be interpreted in accordance with the principles of legal interpretation obtaining in England".

¹⁶ The Sexual Offences Act of 1956 (4 & 5 Eliz.2 c.69).

¹⁷ S Coldham, "Criminal Justice Policies in Commonwealth Africa: Trends and Prospects," *Journal of African Law*, Vol 44 (2000): 225.

¹⁸ through the Sexual Offences Act of 1967.

1.9 Criminalization of Conduct and its basis in a socio-legal context

In Zambia, like most other jurisdictions, the basis for criminalization of conduct is statutory. This entails that a person cannot be prosecuted for a conduct which was not previously made criminal and for which no penalty has been provided for by Law. Article 18 (8) of the Zambian Constitution provides as follows:

A person shall not be convicted of a criminal offence unless that offence is defined and the penalty is prescribed in a written law:

Provided that nothing in this clause shall prevent a court of record from punishing any person for contempt of itself notwithstanding that the act or omission constituting the contempt is not defined in a written law and the penalty therefore is not so prescribed.

As previously stated, the offences concerning same sex sexual intercourse are found under the Penal Code which is the primary source of penal legislation in Zambia.

It is noteworthy that what conduct is termed as criminal is based on sanctions that it attracts when one engages in it. However, the decision whether conduct is criminal or not is a deliberate decision that is based on certain factors to be determined by society through its policy makers. Criminal law is enacted in order to regulate conduct of individuals and to that extent, is seen as a constraint to individual freedoms. As stated by Cane

Just as time would have little or no value if human beings were immortal, so individual freedom would have little or no value in the absence of external constraints. In this light, it seems hard to justify

giving the individual's freedom of choice lexical priority over the interests in social cooperation and coordination.¹⁹

The importance of criminal law as outlined above cannot be overemphasized, however, the problem that arises is to what extent criminal law can constrain the private lives of individuals, and how far the state machinery can be invoked to compel obedience.

Criminal acts are actually offences against the public and invoke state machinery and for this reason, this invocation has to be justified on certain principles. As was noted by Schonscheck:

...The enforcing of criminal statutes is the most intrusive and coercive exercise of domestic power by a state. Forcibly preventing people from doing that which they wish to do, forcibly compelling people to do that which they do not wish to do – and wielding force in merely attempting to compel or prevent – these state activities have extraordinarily serious ramifications.²⁰

It was further argued by Ashworth that:

To criminalize a certain conduct is to declare that it should not be done, to institute a threat of punishment in order to supply a pragmatic reason for not doing it and to censure those who nevertheless do it. This use of state power calls for justification – justification by reference to democratic principles, and justification in terms of sufficient reasons for involving this coercive machinery against individual subjects.²¹

Criminal sanctions by their very nature restrict people's liberties and their freedoms. It follows therefore that where people's liberties are restricted, sufficient justification for the restriction must be given. There must be a proper

¹⁹ P Cane, "Taking Law seriously: starting points of the Hart/Devlin Debate," *The Journal of Ethics*, Vol 21 (2006): 10.

²⁰ J Schonscheck, *On Criminalization: An essay in the philosophy of the criminal law* (Dordrecht: Kluwen Academic Publishers, 1994), 1.

²¹ A Ashworth, *Principles of Criminal Law* (London: Oxford University Press, 2006), 22.

reason to warrant the sanctions and restriction on people's liberty. This is more so in light of other forms of correction that exist in our society apart from criminal sanctions that are actually engineered by the state. As a general rule, conduct is normally only regulated by the state through its criminal justice system where such conduct is harmful to the public.

Notably, criminal Law is mainly concerned with conduct that tends to be injurious to others or tramples on the rights or enjoyment of rights of others. With crimes such as murder, rape, theft, defilement and arson, this is easy because victims can easily be identified and the need for regulation is clear. In the words of John Mill:

The only purpose for which power can be rightfully exercised over any member of a civilized community against his will is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot be compelled to do or forbear because in the opinion of others to do so would be wise or even right.²²

Feinberg on the other hand put it as follows:

It is always a good reason in support of penal legislation that it would be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) and there is no other means that is equally effective at no greater cost to other values.²³

Much as the harm principle is founded in injury to others, it leaves a lot to be desired where the harm is towards the moral fabric of a society. Lord Devlin²⁴ argued that society's moral values are an indispensable part of its structure. He stated that allowing seriously immoral behavior could undermine the society's

²² J Mill, *On Liberty* (London: np, 1859), 23.

²³ J Feinberg, *Harm to Others* (London: Oxford University Press, 1984), 26.

²⁴ P Devlin, *The enforcement of Morals* (London: Oxford University Press, 1965).

social fabric and this would lead to social disintegration. This function of criminal law was aptly explained in the Wolfenden Report as follows:

The law's function is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others ... It is not, in our view, the function of the law to intervene in the private life of citizens, or to seek to enforce any particular pattern of behavior.²⁵

Applying these principles to the penal provisions outlined above, it is clear that justification for the existence of these penal provisions would become extremely difficult, especially where the acts in question involve consenting adults and are done in private. Justification based on the harm principle would be virtually impossible and one would tend to lean more on the morality principle which in any case is very subjective and would differ from society to society as well as from individual to individual. The question would thus be whether the government has the right to regulate private sexual intercourse between consenting adults. As was stated by Husak:

In order to justify a particular offence and the punishment of persons who transgress it, the governmental interest in enacting the Law must be substantial, and the offence must directly advance the government's purpose.²⁶

It remains to be seen the nature of the government's interest in individuals' private sexual acts and whether the same could be justified in any modern society. The arguments for criminalization in Zambia are usually based in morality and that homosexuality is alien to African culture. These arguments

²⁵ Department Committee on Homosexual Offences and Prostitution, *Report of the Committee on homosexual offences and prostitution*, Great Britain (London, 1957).

²⁶ D Husak, "The Criminal law as last resort," *Oxford Journal of Legal Studies*, Vol 24 (2004): 207.

will be dissected under Chapter Two to determine whether these arguments are actually sustainable in society today and whether the governmental interest in homosexuality is justified.

1.10 Homophobia in Zambia

Homophobia in Zambia, and indeed most parts of Africa, is a phenomenon that is very widespread and has so far remained widely unchanged over the years.²⁷ A survey conducted in 2012 revealed that only 2 percent of Zambians found homosexuality to be morally acceptable.²⁸ The move by Parliament in 2005 to further stiffen the laws relating to homosexuality in the Penal Code also further demonstrates that homophobia has been on the rise in the last decade. According to the *Zambian Human Rights Report for 1998*,²⁹ a Zambian man named Francis Chisambisa was ‘expelled from Chipembi Farm College, where he was pursuing a course in Agriculture’ after publicly acknowledging his homosexual status to a Zambian Newspaper, *The Post*.

It was also reported by Fabeni³⁰ that the said Francis Chisambisa, together with a colleague, Zulu, had attempted to form an association called Lesbian, Gays and Transgender Association (LEGATRA) in about 1998. The proposal for the registration of the said Organization was met with stiff resistance from the

²⁷ Embassy of Sweden, “SIDA Gender Country Profile,” (SIDA: Edita Communication, 2008).

²⁸ Xinhua, “Zambia: Ban’s comments on gay rights spark bitter debate,” *The Monitor*, February 28, 2012, <http://allafrica.com/stories/201202290027.html?page=2> (accessed on August 13, 2013).

²⁹ Immigration and Refugee Board of Canada, *Zambia: Government Treatment of Homosexuals in Zambia, and its attitudes towards gay organizations; protection or support available from human rights groups* (April, 2003), ZMB41458E, <http://www.unhcr.org/refworld/docid/3f/d4e3fs> (accessed on 13th August, 2013).

³⁰ S Fabeni: “The Violation of the Rights of Lesbian, Gay, Bisexual and Transgender Persons in Zambia,” Submitted to the Human Rights Committee (July, 2007).

government of the day, the media, the church and other bodies who threatened the members of the Organization with arrest. Chisambisa was actually forced to flee Zambia in the same year after a local newspaper printed articles exposing his sexuality in a highly inflammatory manner. The members of the organization were threatened with arrests by various government officials.³¹ Chisambisa went public about his sexual orientation and explained his decision to go public as follows:

Firstly I want to tell society that this gay thing has been there even before our generation. I want people to be aware that it is happening in Zambia and that there are people who want to be respected for their choice... the fact that am doing it shows that this practice is there and will continue to be there as long as man is there.³²

The then President, Frederick Chiluba also addressed the issue in a speech on the thirty-fourth anniversary of Zambia's Independence. He stated: "homosexuality is the deepest level of depravity. It is unbiblical and abnormal. How do you expect my government to accept something that is abnormal?"³³ Many more individuals including renowned church leaders and other dignitaries also expressed their horror at the proposed registration of LEGATRA. The Registrar of societies also stated that he would not allow the registration of such a society and if anyone attempted to push for such registration, he would call for the prosecution of such persons.³⁴

³¹ D Kaminda, "Gay promoters face arrest," Zambia Daily Mail, September 4, 1998.

³² G Machona, "I am 25, gay with 33 sex partners," The Post, July 14, 1998.

³³ Times Reporter, "Chiluba blasts gays," The Times of Zambia, October 19, 1998, <http://www.allafrica.com/stories/199810190041.html> (accessed on 9th August, 2013).

³⁴ Immigration and Refugee Board of Canada, *Zambia: Government treatment of homosexuals in Zambia; and its attitude towards gay organizations; protection or support available from human rights groups*, <http://unhchr.org/refworld/docid/3f7d4e3f5.html> (accessed on 5th October, 2013).

It was reported after the Chisambisa incident that a cross-section of the public interviewed during a random survey seemed to be in unison that such a move was unacceptable and should not be encouraged in any way as it would merely be perpetuating a vice. The outraged people noted that although homosexual organizations might be in existence elsewhere, it was totally alien in Zambian society and everything should be done to ensure it did not take off.³⁵ In 2012, a similar furore arose concerning gay rights which led to various Zambians to express their opinions on the subject. Notably, this topic raises controversy at every opportunity it has come to the fore in Zambia.³⁶

Zambia is currently in the process of deliberating the new draft Constitution which was prepared by the Technical Committee on Drafting the Zambian Constitution.³⁷ Under the said draft Constitution, Article 54 (2) provides that “A person who is eighteen years of age or older has the right to freely choose a spouse of the opposite sex and marry”. By necessary implication, this entails that persons of the same sex cannot be allowed to marry under the Zambian legal system. However, during the debates by the NCC³⁸ concerning the aforementioned clause, one delegate had insisted for a clause that stated: “Marriage between persons of the same sex is prohibited” arguing that they could not leave this to chance. Medical Association of Zambia Representative Dr. Antoinette Phiri insisted on this clause arguing:

³⁵ V Zulu and V Chitafu, "Homo Party? Not here!" Sunday Times of Zambia, September 6, 1998, <http://www.hrw.org/reports/2003/safrica/safriglhc0303-02.htm> (accessed on 9th August, 2013).

³⁶ M Besa, "Gays and Lesbians in Zambia," The Lusaka Times, March 1st, 2012, <http://www.lusakatimes.com/other-news/> (accessed on August 21st, 2013).

³⁷ Technical Committee on drafting the Zambian Constitution, "First Draft Constitution," April, 2012.

³⁸ National Constitution Conference Act No. 19 of 2007.

We do not want to leave this issue to interpretation somewhere else; we should adopt the clause as clearly as it is. We don't want a situation where we have a law that is unclear about such serious issue; it must come out categorically clear that same sex marriage is forbidden.³⁹

Remarkably, in April, 2013, an HIV rights activist named Paul Kasonkomona implored the government to respect gay rights and advocated for the recognition of gay people's rights. The engender Zambia project national coordinator, was speaking when he featured on the Muvi TV's *assignment* programme, contended that gay rights are like any other form of human rights, which should be respected at all costs. After his interview, police officers stormed MUVI television studios following the live programme and effected the arrest. Muvi TV reported that the plain clothed officers from Lusaka's Woodlands Police Station said their action followed a directive from the top command.⁴⁰ Mr Kasonkomona, 38 has since been charged with one count of idle and disorderly conduct, contrary to section 178 (g) of the Penal Code Chapter 87 of the Laws of Zambia. The recent case is closely monitored even by international media⁴¹ and will give chance to the courts hopefully to address this issue.

There have been mixed reactions from the Zambians after the arrest, even though several government officials have come out strongly to condemn

³⁹ M Chan, *Zambia: Rise of homophobia prompted by Christian fundamentalists* (February, 2010), <http://www.europe-solidaire.org/spip/.php?article16594> (accessed on 13th October, 2013).

⁴⁰ Editor, "Police Officers storm Muvi Television Studios arresting gay rights activist," Muvi Television, April 07, 2007), <http://www.muivitv.com/?p=8346> (accessed on 9th August, 2013).

⁴¹D Smith, "Zambian gay rights activist arrested," The Guardian, April 09, 2013, <http://theguardian.com/world/2013/apr/09/Zambian-gay-rights-activist-arrested> (accessed on August 13, 2013).

homosexuality. The Ministry of home affairs is actually believed to have threatened Non-governmental organizations that support gay rights with prosecution.⁴² Notably, Zambians still remain very conservative on such moral issues to the point where even advocating for such rights provokes the highest criticism. The case has currently been transferred to the High Court for determination of Constitutional issues raised by the accused's lawyers.

It has also been reported⁴³ that police in Kapiri Mposhi arrested two men for allegedly practicing homosexuality. The duo were actually released on bail but later rearrested because they were alleged to have been found committing sodomy after the release.⁴⁴ The two have since been charged under section 155 and trial has since commenced. Chapter two also refers to a 2012 incident where the United Nations Secretary General in his visit to Zambia urged the country to respect gay rights.

1.12 Conclusion

Having traced the development of the Zambian Penal Code to the British colonial period dating as far back as 1931, one would argue that some provisions such as the ones under discussion need to be revisited to justify their

⁴² C Chisha. "Gay activists get further warning," Zambia Daily Mail, May 12, 2013, <http://www.daily-mail.co.zm/breaking-news/7258> (accessed on June 1, 2013).

⁴³ "Police arrest Gay Couple in Kapiri Mposhi," May 07, 2013, <http://tumfweko.com/2013/05/07/police-arrest-gay-couple-in-kapiri-mposhi/comment-page-1/> and <http://www.times.co.zm/?p=9407> (accessed on 13th August, 2013).

⁴⁴ I Zulu, "Kapiri 'gay couple' trial starts today," The Post Newspaper June 10th, 2013, http://www.postzambia.com/post-print_articel.php?articleId=33939 (accessed on 20th July, 2013).

inclusion in today's modern Zambia. To do this, one has to look closely at the social aspects of criminalization and whether these provisions can meet the standard tests for criminalization, this is more so in light of the fact that Britain which imposed these laws on us has decriminalized private consensual sex between two adults of the same sex based on the Wolfenden Report. An analysis of gay rights and human rights has also been given so as to better understand the context of this dissertation. It is also evident from Chapter One that homophobia is a phenomenon that is quite rampant in Zambia. This has been demonstrated at every opportunity where the issue has come to the lime light.

Chapter Two will discuss the common arguments against decriminalization while Chapter Three will analyze the Constitutionality of homosexuality as well the international instruments and organizations view on the same.

CHAPTER TWO

2.1 Common Arguments against Decriminalization in Zambia

The debate over the recognition of gay rights is a controversial subject in Zambia and the rest of Africa. Of the 74 countries where homosexuality is criminalized in the world, 36 (representing almost 50%) are from Africa.⁴⁵ The ILGA survey further revealed that Africa is by far the continent with the worst laws when it comes to homosexuality and other sexual minorities, a phenomenon which is in part rooted in bad colonial era and political situations, religious autonomy, strong negative belief in cultural and family values and the evil of patriarchy. The Report also pointed out that there has been increased levels of homophobia in the past decade with more countries either criminalizing homosexuality, or for those with existing laws criminalizing homosexuality, actually increasing the punishments for convictions.

For instance, in 2009, Uganda had sought to introduce the commonly called *'kill the gays'* bill which was a legislative proposal that would broaden the criminalization of same-sex relations by dividing homosexual behavior into two categories: "aggravated homosexuality", in which an offender would receive the death penalty, or "the offense of homosexuality" in which an offender would receive life imprisonment.⁴⁶ Thanks mainly to concerted efforts from the International community, human rights activists and public outcry, the Bill was not debated in Parliament and thus never passed. Another renowned example

⁴⁵ L P Itaborahi, "State sponsored homophobia: A world survey of laws criminalizing same sex sexual acts between consenting adults," (ILGA, May, 2012).

⁴⁶B Malone, "Uganda's 'Kill the gays' bill shelved again," Reuters, May 13, 2011. <http://www.reuters.com/article/2011/05/13/ozatp-uganda-gaybill-idAFJJOE74C0HP20110513> (accessed on 20th July, 2013).

would be the situation in Malawi where a homosexual couple which celebrated a marriage ceremony was later convicted under the existing homosexuality laws, but later pardoned by the President in a move believed to have been as a result of serious pressure from the international community after a visit from UN Secretary General Ban Ki-moon.⁴⁷

Reactions to the Ban Ki Moon address in Zambia

In about February, 2012, during a visit by the Secretary General of the United Nations, Mr. Ban Ki Moon in his address to Parliament implored Zambians to respect gay rights: "I understand this is something that is not common here," said Ban. "I think they should be treated as human beings. The United Nations cares about those people," Mr Ban added. This sparked serious outrage in various quarters in Zambia. Zambians spoke out very strongly against Mr. Ki Moon's statement with various stakeholders actually calling for the government to make its position on the matter known to the public. Below are some of the sentiments issued through the public media in reaction to Mr. Ban's address.

Mr. Malekano Mwanza⁴⁸ said in a statement to the public media after Mr. Ki Moon's address to Parliament: "It is with utter displeasure that we the Zambia Rainbow Coalition note that the historic visit of the UN Secretary General was to be an ambassador of Colonialism and not development." Foundation for Democratic Process president stated that the sharp reaction from Zambians

⁴⁷ M Phiri, "Gay issues: Malawi and Zimbabwe have spoken, Where is Zambia," The Post Newspaper, June 3, 2012, pIII.

⁴⁸Xinhua, "Zambia: Ban's comments on Gay Rights spark bitter debate," The Monitor, February 28, 2012, <http://www.allafrica.com/storied/201202290027> (accessed on March 15, 2012).

against the introduction of homosexuality rights is a clear sign that Zambians will not be pushed to recognize things that are alien. He further stated that homosexuality is an abomination according to the Bible and urged Zambians to stand up and fight all attempts aimed at pushing for homosexual rights in Zambia.⁴⁹

Evangelical Fellowship of Zambia Executive Director, Pukuta Mwanza⁵⁰ is believed to have told the Zambia National Broadcasting Corporation that homosexuality is against Zambia's traditional customs and religious beliefs and that it should not be entertained. Member of Parliament Felix Mutati argued in the Lusaka Times that 'the country must be allowed to be guided by Biblical principles and the existing law against homosexuality... Zambia is a Christian nation and Christianity is against homosexuality.'⁵¹ Even Zambia's traditional and tribal leaders base their opposition to homosexuality on the Bible. A tribal counselor to Chieftainess Lesa named Danny Kakunka stated: "I know that homosexuality is not a taboo among the Westerners. But our traditions are opposed to it. Even the Bible does not allow it."⁵²

The Law Association of Zambia on the other hand, merely remarked that respecting gay rights in Zambia is impossible because homosexuality is a

⁴⁹ Ibid.

⁵⁰ ibid .

⁵¹ K Kaoma, "The Culture Wars come to Zambia: Intercepting the International Human Rights Agenda," Political Research Associates, August, 2012, <http://www.politica.research.org/the-culture-wars-come-to-zambia-intercepting-the-international-human-rights-agenda/> (accessed on 9th August, 2013).

⁵² Ibid.

criminal offence under the current laws. LAZ vice-president Martin Musaluke stated that it was unattainable to respect gay rights because homosexuality is prohibited in the country and that people convicted of the offence were liable to face stiff punishment.⁵³

From the discourse above: the common arguments against decriminalization in Zambia are: religious views and that Zambia is a Christian Nation, morality, unnatural and that it a Western concept and thus alien to our culture. It must be noted that these are the common arguments given in most parts of the world, especially Africa⁵⁴ for criminalization and also arguments concerning social aspects of homosexuality in domestic settings.

⁵³ B Matambo, "Zambia: Gay Rights impossible LAZ," Times of Zambia, February 28, 2012, <http://allafrica.com/stories/201202280767.html> (accessed on March 10, 2012).

⁵⁴⁵⁴Op cit L P Itaborahi, "State sponsored homophobia: A world survey of laws criminalizing same sex sexual acts between consenting adults,"

2.1.1 The Religious Argument:

Zambia is predominantly Christian. The Table below shows the distribution of the Zambian population by religion/faith.

Population by Sex and Religion in Zambia, 2012⁵⁵

Total Population	Religious population by percentage		
	Christian	Muslim and Hindu	Other religious beliefs
13.1 million	87%	1%	12%

The Zambian Constitution⁵⁶ in its Preamble states: We the People of Zambia “DECLARE the Republic a Christian nation while upholding the right of every person to enjoy that person's freedom of conscience or religion”. Based on this declaration, people have argued that Zambia should be governed according to Biblical principles. Various scriptures have been quoted to demonstrate that the Bible does not allow homosexuality such as The Apostle Paul, writing by inspiration of the Holy Spirit, declares concerning homosexuals that they ‘shall not inherit the kingdom of God.’⁵⁷ It is noteworthy that Paul does not single out the homosexual as a special offender. He includes fornicators, idolators, adulterers, thieves, covetous persons, drunkards, revilers and extortioners. Another commonly quoted scripture states: "If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they

⁵⁵ United States Department of State, “*International Religious Freedom Report for 2012*,” <http://www.state.gov/documents/organization/208422.pdf> (accessed on August 14, 2013).

⁵⁶ Constitution of Zambia Act of 1996, Chapter 1 of the Laws of Zambia, Volume 1.

⁵⁷ I Corinthians 6:9 - 10, (New King James Version).

shall surely be put to death; their blood shall be upon them."⁵⁸ It is thus to large extent not debatable whether Biblical principles allow gay conduct or whether it is indeed sin. The more appropriate question is whether it is right to criminalize homosexuality on the basis that it is against Biblical principles.

It is noteworthy that in as much as the Zambian Constitution in its Preamble declares Zambia a Christian Nation; it also reaffirms people's freedom of conscience or religion. It is therefore arguable whether by virtue of the Declaration; Zambia's laws are bound to be interpreted in accordance with Biblical principles. Suffice to note that this has been the subject of controversy in various Constitution-making commissions with various stakeholders calling for the removal of the Declaration on grounds that it conflicts with people's freedom of conscience.⁵⁹ Further, it is noteworthy that criminalization of conduct based on Biblical principles would entail that actions such as fornication, adultery, drunkenness and idolatry be equally criminalized based on the same reasoning.

Another controversy that would arise with the Constitutional provision is in a situation where other religious faiths actually tolerated or allowed homosexuality. According to Reports in 2009, The United Kingdom Hindu Council became one of the first major religious organizations to support LGBT

⁵⁸ Leviticus 20:13, (New King James Version).

⁵⁹"The Catholic Bishops oppose the inclusion of Christian nation clause in the draft constitution," Lusaka Times, August 22, 2012, <http://www.lusakatimes.com/2012/08/22/catholic-bishops-oppose-inclusion-christian-nation-clause-draft-constitution> (accessed on 13th August, 2013).

rights when they issued a statement '*Hinduism does not condemn homosexuality*.'⁶⁰ This would thus entail that if Hindus are allowed to practice their religion freely on account of freedom of conscience, they should in the same spirit be allowed to freely practice their beliefs which in this case would entail tolerating Hindu homosexuals. It has been argued that moral standards are derived from religion and claim validity from that religion. According to Devlin who wrote concerning religion and morality as follows:

It may or may not be right for the state to adopt one of these religions as the truth, to found itself upon its doctrines, and to obey and deny any of its citizens the liberty to practise any other. If it does not, then it is illogical that it should concern itself with morals as such. But if it leaves matters of religion to private judgment, it should logically leave matters of morality also. A state which refuses to enforce Christian beliefs has lost the rights to enforce Christian morals.⁶¹

Devlin in this discourse makes no firm stance on whether there should be a clear distinction between the Church and the state, but seems to argue that where a state adopts a particular religion, it would be justifiable to enforce the particular morals of such a religion. As earlier stated regarding Zambia, in as much as the Preamble of the Constitution makes a declaration that Zambia is a Christian nation, Article 19 also provides for freedom of conscience and religion with a derogation for purposes of protecting defence, public safety, public order, public morality or public health. In spite of this derogation, it is arguable whether the criminalization of homosexuality could actually be justified on religious grounds based on the declaration contained in the Constitution.

⁶⁰ J Boswell, *Hinduism does not condemn homosexuality* (Chicago: University of Chicago Press, 2005).

⁶¹ P Devlin, *The enforcement of Morals* (London: Oxford University Press, 1965), P5.

Further, there has been no judicial interpretation that would justify the interpretation of any law on Biblical principles, even though there has been emphasis on protection of the individual freedoms including freedom of religion as espoused in the *Feliya Kachasu* case.⁶² Devlin's argument therefore, would seem to suggest that by allowing freedom of other religions, Zambia cannot seek to impose Biblical principles through the agency of the law on society. Further, other 'sins' have not been criminalized which further weakens the application of the religious argument as espoused by Devlin.

In a case decided in Fiji,⁶³ where two gay men were charged with unlawful carnal knowledge, the Court while acknowledging that the Preamble to the Constitution emphasized the Christian heritage of Fiji rejected the contention that Fiji was based solely upon Christian values. The DPP in that case had tried to argue that homosexuality was abhorrent to a religious and conservative state like Fiji, but though the Court considered this argument relevant, it found that shock or offence to members of the public on its own could not validate unconstitutional law. The provisions relating to Sodomy in that case were thus struck down for unconstitutionality.

It is noteworthy that in spite of these religious and Biblical teachings on homosexuality, some churches have actually made pronouncements calling for the decriminalization of homosexuality. The Catholic Church for instance, while insisting that homosexuality is a sin and is unnatural stated: "The

⁶² *Feliya Kachasu v The Attorney-General*, ZR 145 (1967).

⁶³ *McCoskar and Nadan v State*, High court of Fiji 500 (2005).

Catholic church maintains that free sexual acts between adult persons must not be treated as crimes to be punished by civil authorities.”⁶⁴ The Church thus supports the call for decriminalization, while maintaining that homosexual acts are a sin.⁶⁵ It is thus noteworthy, that the religious beliefs though not in support of homosexuality, do not necessarily impose such beliefs on communities by insisting on criminalization. Recently, Pope Francis spoke openly about gay people and implored the public not to marginalize them. He is quoted to have said, ‘if someone is gay and he searches for the Lord and has goodwill, who am I to judge?’⁶⁶

2.1.2 The Morality Argument

Closely related to the religious argument is the morality argument. Morality is concerned with the distinction between right and wrong. According to Dworkin, it may be used simply to describe ‘the attitudes which a group displays about human conduct, qualities or goals’. It describes the standards which are generally acceptable within the group about what is right or wrong.⁶⁷ Sections 155 and 158 of the Penal Code which are the subject of this discussion are found under Chapter XV which deals with *Offences Against Morality*.

⁶⁴ Religion News Service, “Vatican calls for homosexuality to be decriminalized,” (National Catholic Reporter, December 31st, 2008), <http://www.ncronline.org/news/vatican/vatican-calls-homosexuality-be-decriminalied> (accessed on 9th August, 2013).

⁶⁵ F Kerrigan, “Getting to Rights. The Rights of Lesbian, Gay, Bisexual, Transgender and Intersex Persons in Africa,” (Danish Institute for Human Rights, 2013), 10.

⁶⁶ N Squires, “Pope Francis reaches out to gays,” The Telegraph, July 29, 2013, <http://www.telegraph.co.uk/religion/the-pope/10208802/Pope-Francis-reaches-out-to-gays.html> (accessed on August 15, 2013).

⁶⁷ N Bamforth, *Sexuality, Morals & Justice* (British Library Cataloguing, 1979).

The morality argument was one of the major factors addressed by the Wolfenden Report in its calls for decriminalization of homosexuality in England. While acknowledging that morality in most instances form the basis of Law, the Report also argued that:

Unless a deliberate attempt be made by society through the agency of the Law to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality, which is in brief and crude terms, not the Law's business.⁶⁸

The Wolfenden Report it must be stated contributed greatly to decriminalization in other Nations including the United States of America.

Lord Devlin⁶⁹ argued that society's moral values are an indispensable part of its structure. He stated that allowing seriously immoral behavior could undermine the society's social fabric and this would lead to social disintegration. Devlin⁷⁰ also stated that 'immoral private behavior ought to be tolerated unless it is injurious or causes public offense'. Hart⁷¹ on the other hand argued for the partial enforcement of morality based on a distinction he draws between immorality which affronts public decency and that which merely 'distresses' others based on the knowledge that immoral acts are taking place. In Hart's view, society may for example, outlaw the public expression of bigamy, or prostitution because such could be considered an affront to public decency as a nuisance, while it would not be justifiable to outlaw purely private manifestations of these types of behavior, or of consensual homosexual behavior in private, even though some might claim to be distressed by the

⁶⁸Op cit The Report of the Departmental Committee on Homosexual Offences and Prostitution.

⁶⁹ P Devlin, *The enforcement of Morals* (London: Oxford University Press, 1965).

⁷⁰ *ibid*

⁷¹ HLA Hart, *law, Liberty and Morality* (1963).

private behavior as well. In the author's opinion, the difference between Hart and Devlin is on the emphasis rather than being a substantial argument or difference. While Devlin was more emphatic on public and society good, Hart seemed to emphasize individual rights and freedoms. However, it is noteworthy that both seemed to agree that not all immoral behavior should be the subject of criminal sanctions, especially where the immorality comprises private immorality.

As was demonstrated in Chapter 1, criminalization of homosexuality is difficult to justify as one cannot point out what harm results in private consensual sex between adults of the same sex, and thus dilutes the morality argument which is at the fore of most debates. However, as clearly pointed out in the Wolfenden Report, it is not "... the function of the law to intervene in the private life of citizens, or to seek to enforce any particular pattern of behavior'. Such a law, as has been noted, seeks to restrict private sexual intercourse between consenting adults which, in the author's view, cannot be justified on grounds of morality. It is certainly hard for one to justify what harm the public would suffer as a result of private consensual sex between persons of the same sex.

The Wolfenden Report also revealed that people view homosexuality as 'unnatural, sinful or disgusting' but the Report counters: 'moral conviction or instinctive feeling, however strong, is not a valid basis for over-riding the individual's privacy and for bringing within the ambit of the criminal law

private sexual behavior of this kind.’⁷² By this statement, the Report showed a clear distinction between the effects of public morality and private morality which Devlin failed to appreciate in his discourse. The Court in the case of *McCoskar and Nadan v State*⁷³ also stated: “at the core of the appellants’ case is the principle that the state has no business in the field of private morality and no right to legislate in relation to the private sexual conduct of consenting adults”

It is thus argued that as much as morality is usually a strong basis for criminalization of conduct, one has to show that the morality in contention falls under the realm of public morality and can thus cause actual harm to the public, as opposed to private morality which merely causes distress and should not be ‘the law’s business’ as emphasized in the Wolfenden Report and Hart. Given the fact that what is advocated for by gay rights activists is decriminalization of private consensual sex between adults of the same sex, it falls within the realm of private morality as opposed to public morality and thus is ‘not any of the law’s business’. The Court in *Lawrence* reasoned that public morality when applied to behavior that is consensual and causes no harm, is a thin veil for prejudice. The issue in that case was ‘whether the majority may use the power of the state to enforce their views on the whole society through operation of the criminal law’. The Court in that case felt that their obligation was to define the liberty of all, and not to mandate their own moral code. And according to the Fiji case, the Christian heritage does not mean the nation is ruled solely on Biblical values.

⁷² This is the same argument that was used by the Court in the *Fiji* case quoted above

⁷³ *McCoskar and Nadan v State*, High Court of Fiji 500 (2005).

There is considerable consensus therefore, that private morality is an area which should not be criminalized as it directly relates to individuals' private lives. It is thus not expected that the government would regulate this sphere of a person's life.

2.1.3 Homosexuality as Western concept alien to African culture

This argument is one that has been advanced by many Africans. As one renowned African Jurist stated when the International Commission of Jurists wished to add on to its Agenda the rights of sexual minorities in 1980:

I will concede everything else. But please do not add the topic of sexuality. We do not have homosexuals in our country. It is completely alien to our culture. It is contrary to our spiritual beliefs. The topic is regarded with disgust. Please do not damage the ICJ by adding such an issue to its agenda.⁷⁴

This statement reflects the views that have been expressed (albeit in different language) by many Zambians whenever the issue of homosexuality has come to the fore. It is actually, a reason given by many against gay rights as will be seen later in this Chapter. The Political Research Associates (PRA) also noted in its publication,⁷⁵ that this view is widespread in Africa with most Africans seeing homosexuality as a Western import. One conservative African Church leader

⁷⁴ International Commission of Jurists, *Sexual Orientation, Gender Identity and Justice*. A Comparative Law Casebook (2011), <http://www.refworld.org/pdfid/4ad5b5ab2.pdf> (accessed on 5th October, 2012).

⁷⁵ K Kaoma, "Colonizing African Values. How the US Christian Rights is transforming Sexual Politics in Africa," A Publication of Political Research Associates, (2012).

explained to the PRA: ‘from a cultural perspective, Africans do not condone homosexuality. It is not a practice that takes place, whether privately or in the open...’

Documented evidence, however, seems to suggest that homosexuality is a practice that has been common in African societies even before colonization. According to historian Marc Epprecht,⁷⁶ the traditional African culture was de facto more tolerant of sexual diversity than modern literalists recognize. Epprecht also alleges that the early European colonialists were ‘scandalized by African willingness to bend the supposed natural laws of sexuality’ and that the Europeans imported the homophobia now reflected as African culture. Epprecht states: “dogmatic revulsion against same sex behavior, acts, relationships, and thoughts was introduced into the region by European colonialists and preachers” who he alleges characterized such acts as signs of backwardness. This argument by Marc Epprecht is actually supported by the fact that the criminalization of homosexuality was actually introduced during the colonial era in Northern Rhodesia. As Cantrell correctly points out:

Epprecht, through marshaling voluminous evidence that included pre-historic cave paintings, court forensics, literary deconstruction and oral interview demonstrates that Southern Africa peoples have, from the earliest of times to the present, engaged in an active accommodation with all manners of sexual expression.⁷⁷

⁷⁶ M Epprecht: *Hungochan, The history of dissident sexuality in Southern Africa* (Montreal: McGill-Queen’s University Press, 2004), 317.

⁷⁷ P Cantrell, “Review of Marc Epprecht, *Hungochani*,” *Journal of Men, Masculinities and Spirituality*, Vol. 2, No. 1 (2008): 56-57.

Similarly, Anthropologists Stephen Murray and Will Roscoe⁷⁸ reported that women in Lesotho engaged in socially sanctioned "long term, erotic relationships," named *motsoalle*. E. E. Evans-Pritchard⁷⁹ also recorded that male Azande warriors (in the northern Congo) routinely took on boy-wives between the ages of twelve and twenty, who helped with household tasks and participated in intercrural sex with their older husbands. The practice had died out by the early 20th century, after Europeans had gained control of African countries, but was recounted to Evans-Pritchard by the elders he spoke to.

Renowned authors Wieringa and Morgan conclude that, far from being a colonial import, same-sex practices existed in Africa long before the onset of colonialism, and that it is homophobia rather than homosexuality that has been imported from the west. The authors further argue that colonial policies and the missionary imposition of Victorian social mores led to a ban of these homosexual practices.⁸⁰ In their book, they document same sexuality in East and South Africa.

As noted in Chapter 1, the offences concerning unlawful carnal knowledge as well as sexual intercourse between persons of the same sex as provided for under the Penal Code are actually relics of the Penal Code as adopted by Northern Rhodesia during the colonial period which have to date not been

⁷⁸ S Murray and W Roscoe, *Boy Wives and Female Husbands: Studies of African Homosexualities* (New York: St. Martin's Press, 1998).

⁷⁹ E Evans-Pritchard, *Sexual Invasion among the Azande*. *American Anthropologist* (1970).

⁸⁰ R Morgan and S Wierenga, *Tommy Boys, Lesbian Men and Ancestral wives* (Gauteng: Jacana Media, 2005).

modified. This fact would seem to corroborate the allegation made by Epprecht when he says homophobia was actually a Western concept as opposed to an African concept, and that the traditional African cultures were in fact more tolerant of such sexual practices. Christianity and homophobia are well documented Western concepts that were introduced to Africa by the Western World during the colonial era and through missionaries that came to Africa.

2.1.4 The Unnatural Argument

Another common argument that has been advanced by most people against homosexuality is that it is unnatural. It is noteworthy that one of the provisions under which a person can be prosecuted for homosexuality under the Zambian Penal Code is termed as 'unnatural offences' or offences against the order of nature. The argument has been advanced that homosexuality is against the order of nature and, by virtue of this fact, should be outlawed. The term 'against the order of nature' has not been defined in the Penal Code. This term was however, defined in the Nigerian case of *Magaji v the Nigerian Army*⁸¹ wherein Justice Niki Tobo, then of the Supreme Court stated:

While carnal knowledge is an old legal euphemism for sexual intercourse with a woman, it acquires a different meaning in section 81. The section 81 meaning comes to light when taken along with the proximate words "against the order of nature". The order of nature is carnal knowledge with the female sex. Carnal knowledge with the male sex is against the order of nature and here, nature should mean God and not just the generic universe that exists independently of mankind or people.

⁸¹ *Magaji v the Nigerian Army* 2 – 3 SC 32 (2008).

This case actually involved carnal knowledge between two male persons in Nigeria who were convicted for an offence of having ‘carnal knowledge of any person against the order of nature’ similar to section 155 of the Zambian Penal Code. They tried unsuccessfully to appeal against their conviction by the lower courts to the Supreme Court. According to this case, sexual intercourse between two persons of the same sex is ‘against the order of nature’ and is thus illegal.

According to Austin:

Sometimes the argument that homosexual relationships and homosexuality are “unnatural” might be meant in the sense that it doesn’t really flow from “human nature” in its raw state, untainted by civilization. Presumably this is supposed to mean that if it weren’t for the society around us, no one would be gay — we’d only ever want to mate with or have intimate relationships with members of the opposite sex.⁸²

Austin further states that “Very often the argument that homosexual relationships are “unnatural” is meant to describe the fact that they do not and cannot lead to the creation of children, which is supposed to be the “natural” consequence of such intimate relationships”. The first argument concerning nature might be considered inaccurate based on documentary evidence that suggests that homosexuality has been part of most cultures in the World, including Africa.

⁸² A Cline, *Arguments Against Gay Marriage: Gay couples are unnatural*. About Agnosticism/Atheism, <http://atheism.about.com/od/gaymarriage/a/GaysUnnatural.htm> (accessed on August 15, 2013).

It has been observed that possibly the oldest evidence of homosexuality is in Africa. In Egypt stands the 4390-year-old Saqqara tomb (near Giza) of Niankhkhnum and Khnumhotep, two men buried together for the afterlife. On the walls are several depictions of them in intimate embrace and nose-kissing (the form of kissing favoured by heterosexuals too in ancient Egypt).⁸³ Ancient Greece and Rome (due to the Greek influence) are also renowned for their rich history on homosexuality.⁸⁴ The most widespread and socially significant form of same-sex sexual relations in ancient Greece was between adult men and pubescent or adolescent boys, known as pederasty. These were widely accepted and documented by Greek philosophers in ancient Greece and formed part of the country's rich culture. These documentary records, including the ones concerning Africa do indicate to a wide extent that homosexuality has been part of various cultures since time immemorial and is, by virtue of that fact, not an invention or creation of modern society.

Marmor,⁸⁵ a psychiatrist states that homosexuality is far from being "unnatural" in the statistical sense. He further alleges that homosexuality occurs in all higher species, even when members of the opposite sex are present and presumably available for mating. In Baghemils' book,⁸⁶ which he described as "the book that definitely crushes the argument that homosexuality is not natural", he states that homosexuality is widespread in nature. He further states

⁸³B Meersman, *Homosexuality is African* (Thought Leader, 2012), <http://www.thoughtleader.co.za/brentmeersman/2012/03/26/homosexuality-is-african> (accessed on August 5, 2013).

⁸⁴ A Calimach, *Lovers' Legends: The Gay Greek Myths* (New Rochelle, Haiduk Press, 2002).

⁸⁵ J Marmor, *Homosexual Behaviour: A Modern Reappraisal* (Virginia: Basic Books, 1980).

⁸⁶ B Bagemihl, *Biological Exuberance: Animal homosexuality and Natural Diversity* (Stonewall Inn editions: 1999).

that 'To say that it is "unnatural" is to say that the stars don't shine!' He gives various examples of animals that have exhibited homosexual behavior on numerous occasions from studies conducted in zoos and wildlife parks.

Up until 1973, the APA⁸⁷ had listed homosexuality in its Diagnostic and Statistical Manual of Psychological Disorders and in 1975, it then released a public statement that homosexuality was not a mental disorder. The removal of homosexuality from this list was prompted by scientific research that seemed to indicate that there was no correlation between homosexuality, psychological development and illness. In 1994, two decades later, the APA finally stated, "...homosexuality is neither a mental illness nor a moral depravity. It is the way a portion of the population expresses human love and sexuality"

Inconclusive though the unnatural argument may be, one would tend to lean more towards the naturalness of homosexuality on the basis that it has been in existence in nature as evidenced by many oral and documentary records. If various cultures, including cultures in southern Africa⁸⁸ have lived with this phenomenon since time immemorial, it would suggest that the behavior is not one that is learned, but most likely occurs naturally in the world.

⁸⁷ The American Psychology Association established in the United States of America which actually has done scientific studies on homosexuality.

⁸⁸ Op cit M Epprecht, *Hungochani*.

2.1.5 Conclusion on Arguments against Decriminalization

The arguments against gay rights that are most commonly articulated as discussed above include religion, morality, alien to African culture and unnatural. It is however, evident from the discourse above, that none of the arguments offered above would justify criminalization of homosexuality either individually or indeed, when the arguments are combined, especially not in a democratic society like Zambia. In Zambia, for instance, it is feasible that a combination of various if not all the arguments have been given as grounds not to support gay rights, and sometimes in support of criminalization. The Christian argument seems to be the most popular in Zambia, and this is not tenable on account of the fact that though Zambia was declared a Christian Nation, it still maintains its respect for fundamental rights and freedoms including the freedom of conscience and religion. This would therefore require that, Zambia has to remain tolerant of the religious morals of other beliefs, for instance, Hinduism which is documented to have accepted homosexuality. Further, the Christian argument, would entail that all conduct that has been declared as 'sin' in the Bible be criminalized such as adultery, fornication or indeed idolatry in order to ensure justice.

Much as the Christianity argument is compelling therefore, its justification in a modern democratic society is not feasible. The morality argument, in the same vein, does not meet the basic principles of criminalization as there is no harm to public morality. The 'alien to African culture' argument is as tempting as it is misleading and inaccurate. Various authors have documented the existence of homosexuality in Africa prior to colonialism and the advent of Christianity

based on oral and literary works. Contrary to popular belief, there is proof that homophobia, rather than homosexuality, is a Western concept. The 'unnatural' argument also seems to be based on personal beliefs rather than actual evidence. The prevalence of homosexual conduct in species other than humans as well as the fact that homosexuality has occurred in humans since time immemorial, would seem to suggest that homosexuality occurs naturally in nature and can thus not be considered unnatural.

It is important to note here that most of these arguments are given in strong opposition to recognition of gay rights, and not specifically in support of criminalization of gay conduct.

2.2 A scientific argument for decriminalization

Having studied the arguments that have been put forth against gay rights, it is also imperative that apart from giving reasons why criminalization cannot be justified in a modern democratic society, reasons should also be given for decriminalization.

It would appear from much of the debate surrounding the topic of homosexuality that people seem to concentrate more on the societal view of the condition as opposed to a critical study the condition itself. Even when one looks at the reaction to Ban Ki-moon's statement, the public was more concerned with its views on the subject, and little mention was made on the reasoning behind the calls. It has been argued by most conservatives that gay

people actually choose to be gay and thus the term 'sexual preference' as opposed to 'sexual orientation'. Not much evidence, if any, has actually been offered for this argument. Considering the stigma surrounding homosexuality in most societies, it is quite difficult to imagine how one would consciously choose to be homosexual and invite societal homophobia on oneself.

In recent decades, homosexuality has come under the scrutiny of sociobiologists, trying to determine its causation and origins. The current debate is whether or not homosexuality is a result of nature: a person's environment and surroundings, or of his biology and genetics. The debate endures because both sides have the ability to create a scientific environment to support their cause. The biological or genetics argument insists that one has little choice over homosexuality as it is determined physiologically and has nothing to do with the environment.

Karen Hooker⁸⁹ executed the first psychological test done to test for biological determinism in 1957, on a grant from the National Institute of Mental Health. The study was meant to explore the relationship between homosexuality and psychological development and illness. Hooker studied both homosexuals and heterosexuals. Both groups were matched for age, intelligence quotient (IQ) and education level, and were then subjected to three psychological tests which were then analyzed by psychologists, and the results tabulated. The results of Hooker's experiment yielded no significant differences in answers on any of the

⁸⁹ R D Johnson, "Homosexuality: Nature or Nurture," (The Virtual Psychology Classroom, April 2003), <http://www.allpsych.com/journal/homosexuality.html> (accessed on August 13, 2013).

three tests. Because both groups' answers scored very similarly, she concluded a zero correlation between social determinism of sexuality.⁹⁰

D.F. Swaab conducted the next noteworthy experiment in 1990.⁹¹ This experiment became the first to document a physiological difference in the anatomical structure of a gay man's brain. Swaab found in his post-mortem examination of homosexual males' brains that a portion of the hypothalamus of the brain was structurally different than a heterosexual brain. The hypothalamus is the portion of the human brain directly related to sexual drive and function. In the homosexual brains examined, a small portion of the hypothalamus, termed the suprachiasmatic nucleus (SCN), was found to be twice the size of its heterosexual counterpart.⁹²

Swaab's experiment was later corroborated by another scientist, Laura S. Allen who made a similar discovery in the hypothalamus as well. She found that the anterior commissure (AC) of the hypothalamus was also significantly larger in the homosexual subjects than that of the heterosexuals.⁹³ Another influential study on the genetics of homosexuality was done by Dean Hamer and his co-workers at the National Cancer Institute in Washington DC (1993). Hamer's research involved studying thirty-two pairs of brothers who were either "exclusively or mostly" homosexual. None of the sets of brothers were related. Of the thirty-two pairs, Hamer and his colleagues found that two-thirds of

⁹⁰ As a result of Hooker's finding, the APA removed homosexuality from its Diagnostic and Statistical Manual of Psychological Disorders in 1973.

⁹¹ J Foreman, "Biological Basis for Homosexuality," (boston.com News, 2003), http://www.boston.com/news/science/articles/2003/12/02/the_biological_basis_of_homosexuality/?page=full (accessed on August 13, 2013).

⁹² *ibid*

⁹³ *ibid*

them (twenty-two of the sets of brothers) shared the same type of genetic material. This strongly supports the hypothesis that there is an existing gene that influences homosexuality.⁹⁴

It should be stated here that this genetic argument has actually been recognized in certain decided cases. In Ecuador, the Court adopted a medical theory that describes homosexuality as a dysfunction of the endocrine system and on these grounds considered it appropriate to treat homosexuality medically, rather than by penal sanction.⁹⁵ Social or psychoanalytic theories, however, stress the role of parental and family dynamics, not the society as a whole. Behaviorists believe that some sexual and gender identification differences result from roles imposed by family and friends upon children, such as the masculine and the feminine stereotypes.⁹⁶

Another theory propagated by psychoanalytic theorists is abusive childhood experiences. A study of 13,000 New Zealand adults (age 16 years and above) examined sexual orientation as a function of childhood history. The study found a 3-fold higher prevalence of childhood abuse for those who subsequently engaged in same sex sexual activity. However, childhood abuse was not a *major factor* in homosexuality, since only 15% of homosexuals had experienced abuse as children (compared with 5% among heterosexuals). So, it

⁹⁴ Op cit R D Johnson, "Homosexuality: Nature or Nurture"

⁹⁵ Case No. 111-97-TC. Constitutional Tribunal of Ecuador (Nov. 1997). This case has however been criticized for terming homosexuality as an illness or abnormality. Critics while appreciating the scientific argument, have termed the judgment as being conservative.

⁹⁶ Op cit F Kerrigan, *Getting to Rights: The rights of lesbian, gay, bisexual, transgender and intersex persons in Africa* (2009).

would appear from this population that only a small percentage of homosexuality (~10%) might be explained by early childhood abusive experiences.⁹⁷

A 5-year study of lesbians found that over a quarter of these women relinquished their lesbian/bisexual identities during this period: half reclaimed heterosexual identities and half gave up all identity labels. In a survey of young minority women (16-23 years of age), half of the participants changed their sexual identities more than once during the two-year survey period.⁹⁸ Other studies have confirmed that sexual orientation is not fixed in all individuals, but can change over time, especially in women.⁹⁹

It ought to be noted however, that these genetic studies, have not been academically conclusive because there has been no specific identification of the gay gene. It has been argued by other scientists for instance after Levay's¹⁰⁰ experiment which was conducted on persons who had died from HIV, that the results could have been affected by the HIV condition of the subjects. It would

⁹⁷ J E Wells, A M McGee and A L Beautrais, "Multiple Aspects of Sexual Orientation: Prevalence and Sociodemographic Correlates in a New Zealand National Survey" Department of Public Health and General Practise, (University of Chicago, 2011), <http://www.ncbi.nlm.gov/pubmed/20567892> (accessed on August 5th, 2013).

⁹⁸ L M Diamond, "Sexual identity, attractions, and behavior among young sexual-minority women over a 2-year period." *Dev. Psychol.* 36 (2000): 241-50.

⁹⁹ KK Kinnish, DS Strassberg, CW Turner, "Sex differences in the flexibility of sexual orientation: a multidimensional retrospective assessment," *Archives of Sexual Behavior Vol. 34* (2005): 173-183.

¹⁰⁰ Op cit R D Johnson, "Homosexuality: Nature or Nurture."

also appear that the genetic theories could not be very convincing for lesbians on account of Diamond's study.

2.3 Conclusion

In as much as the genetic and social behavioral theories may not be conclusive, there remains a distinct and real possibility that homosexuality could actually be influenced by physiological factors over which one has no choice. These studies seem to lend credence to the argument for 'sexual orientation' as opposed to 'sexual preference'. Given this sort of evidence, it would put homosexuality in the same category as other immutable stereotypes such as race, tribe, creed and other status. As will be seen in Chapter 3, this could have a very big influence on whether or not such conduct or indeed status could be the subject of criminalization.

The scientific argument it must be noted is one which has so far not been addressed by the policy makers in Zambia. In all the statements issued by the Policy makers when called upon to address the issue of homosexuality, not one policy maker has raised the scientific argument. Surprisingly, even a statement issued by a renowned doctor in the country did not address this argument.

CHAPTER THREE

3.1 A comparative Human Rights View:

As stated earlier, the subject of homosexuality is closely interlinked with human rights. This link is mostly as a result of the perceived violation of the human rights of homosexuals on account of their sexual orientation, more so in countries such as Zambia where engaging in homosexual conduct is actually criminalized. When talking of human rights and homosexuality, the core principles of equality before the law and non-discrimination are the core tenets to be discussed as well as freedoms such as expression, association and privacy. This is in line with the new global trend towards decriminalization as well as repeated pleas by various international agencies seeking decriminalization.

3.1.2 The Concepts of Non-discrimination, Equality and Privacy

The general principle of equality and non-discrimination is a fundamental element of international human rights law. The Inter-American court held that it “considers that the principle of equality before the law, equal protection before the law and non-discrimination belong to jus cogens, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws.”¹⁰¹ Generally, these two principles provide the foundation for the enjoyment of all human rights. The African Commission on Human and Peoples’ Rights has observed: “together with equality before the law and equal protection of the law, the principle of non-discrimination provided under Article 2 of the Charter provides the

¹⁰¹ Inter-American Court of Human Rights, Advisory Opinion OC-18/03 of 17 September, 2003.

foundation for the enjoyment of all human rights.”¹⁰²It was also stated in the
Zambian case of *Roy Clarke v Attorney General* as follows:

The concept of equality before the law and equal protection of the law, non-discrimination and guarantee of the dignity and worth of the human person seem to have gone beyond providing the fundamental basis for effective actualization of the rule of law to become part of it.¹⁰³

It is thus not in dispute just how important the said rights are to human beings. While the right to non-discrimination protects against discrimination in the enjoyment of other human rights, the right to equal protection of the laws is an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authority.¹⁰⁴ Equality before the law, however, entails that all persons are equal in the eyes of the law, regardless of any status that might attach to their names. The principle ‘All human beings are born free and equal in dignity and rights’¹⁰⁵ is an apt way to describe equality before the law.

The principle of non-discrimination is a basic and general principle in the protection of human rights and fundamental to the interpretation and application of the Convention. However, different legal systems invoke divergent justification – whether at policy level or in terms of basic constitutional principle – when deciding which activities count as examples of

¹⁰² *Zimbabwe NGO Human Rights Forum v Zimbabwe*, African Commission on Human and Peoples Rights, Decision of 15 May, 2006. Communication No. 245 (2002) para 169.

¹⁰³ *Roy Clarke v Attorney General*, HP 003 (April, 2004).

¹⁰⁴ United Nations General Assembly, *Human Rights Committee General Comment No. 18*, Nov. 89

¹⁰⁵ Article 1 of the United Nations Universal Declaration of Human Rights.

the type of impermissible discrimination that the law should prohibit.¹⁰⁶ The scope of these protections – even down to the issue of whether particular questions count as ‘discrimination’ questions at all – is uncontroversial: in all the jurisdictions concerned, there has been legislative and/or juridical debate about the ambit of protections against discrimination, particularly where those protections touch on areas which involve cultural sensitivity.¹⁰⁷ This will be discussed further when dealing with the Constitutionality of sections 155 and 158 of the Penal Code.

The principle of non-discrimination is premised on certain factors that help determine what grounds can be included in this principle. Most international instruments and indeed, national Constitutions tend to prohibit discrimination based on similar grounds. As was stated in a decided case:

What these grounds have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to the personal identity..... to put it another way, s. 15 targets the denial of equal treatment on grounds that actually immutable like race, or constructively immutable, like religion.¹⁰⁸

This principle therefore, is aimed at protecting individuals regardless of what characteristics are applicable to them provided such characteristics form part of the prohibited grounds of discrimination. This entails that the state is actually obligated to protect the persons falling under all these grounds and cannot target them using the public authorities or criminal law sanction. The state is

¹⁰⁶ N Bamforth, Malik and O’Cinneide, *Discriminatory Law: Theory and Context* (London: Sweet & Maxwell, 2008).

¹⁰⁷ Ibid at p4.

¹⁰⁸ *Corbiere v Canada* 203 2SCR 13 (1999).

under an obligation to ensure that there is equal treatment of all persons regardless of what class they fall in. Therefore:

The state cannot single out one identifiable class of citizens for punishment that does not apply to everyone else, with moral disapproval as the only asserted interest for the Law..... a legislative classification that threatens the creation of an underclass.... cannot be reconciled with the equal protection clause.¹⁰⁹

It is also noteworthy that the principle of non-discrimination and the grounds thereunder have usually been devised to protect minorities. For instance, 'sex' was included in the Zambian Constitution of 1995 after repeated calls for gender equality. This was necessitated by the fact that women had for a long time, both domestically and internationally, been treated as being inferior to men. Another such ground is 'race' whose inclusion as a prohibited ground of non-discrimination was prompted by experiences such as the slave trade, the Nazi experience of Germany and even apartheid in South Africa. It is as such, the aim of the principle of non-discrimination to prevent abuse of minority classes and to ensure they are treated in the same way as other individuals. Sexual orientation is now one such ground that requires universal recognition as a prohibited ground of non-discrimination.

It is not in dispute that the majority of the world population is made up of heterosexuals thus making homosexuals a minority. It can also not be disputed that homophobia is quite rampant among the heterosexual majority. Being a minority, the persons that belong to the class of homosexuals thus need to be

¹⁰⁹ *Lawrence v Texas*, 539 US Supreme Court 558 (2003).

protected by law to prevent repeated abuse by the majority and repeated instances of actions such as the 'kill the gay' bill that was presented in Uganda. This argument is especially compelling in light of the scientific evidence that has been presented in support of decriminalization. According to scientific evidence¹¹⁰, certain persons' sexual orientation may be determined physiologically due to genetics and they have no choice over their preferred sexual partners. This would put this minority class of homosexual persons in the same class as grounds like race and sex. Desmond Tutu likened criminalization of homosexuality to the apartheid era of South Africa. He remarked as follows at the World Social conference held in Nairobi:

To penalize someone because of their sexual orientation is like what used to us: to be penalized for something which we could do nothing about; our ethnicity, our race..... I could find it quite unacceptable to condemn, persecute a minority that has already been persecuted.¹¹¹

The protection of minorities is therefore an important responsibility that is placed on individual nations as well as the international community. This is more important where they are subject to persecution by the majority. Homosexuals are one such minority that needs special protection from the government. As has also been remarked in a certain case:

Denying persons of a minority class the right to sexual expression in the only way available to them, even if that way is denied to all, remains discriminatory when persons of a majority class are permitted the right

¹¹⁰ As documented in Chapter 2.

¹¹¹ Archbishop Desmond Tutu, Nobel Peace prize Laureate and Anglican Bishop. World Social Forum in Nairobi, Kenya, (19th March, 2007).

to sexual expression in a way that is natural to them... it is disguised discrimination founded on a single base: sexual orientation.¹¹²

The right to non-discrimination is normally not limited to enumerated grounds. Every international and regional instrument that protects against discrimination includes 'other status' or language equivalent thereof. The Term 'other status' was explained by The UN Committee on Economic, Social and Cultural Rights as follows:

The nature of discrimination varies according to context and evolves over time. A flexible approach to the ground 'other status' is thus needed to capture other forms of differential treatment that cannot be reasonably and objectively justified and are of comparable nature to the expressly recognized grounds in Article 2 (2). These additional grounds are commonly recognized when they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalization.¹¹³

It is therefore indisputable that homosexuals are a minority in society and thus need protection. At international level, this has not created much of a problem due to the liberal interpretation of 'other status' by agencies such as the Human Rights Council. However, domestically, this has continued to present a challenge as most Constitutions do not expressly prohibit discrimination based on sexual orientation and some have not been willing to include 'sexual orientation' under 'other status' thus perpetrating the discrimination of homosexuals in such countries.

¹¹² *Leung v Secretary for Justice of the Hong Kong Special Administrative Region*, Court of Appeal (2006).

¹¹³ United Nations General Assembly Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para 2 of the International Covenant on Economic, Social and Cultural Rights*, (July, 2009) para 27.

3.2 The Constitutionality of Sections 155 and 158 of the Penal Code

Zambia's Constitutional provision on discrimination is expressed as follows:
23(1) Subject to clauses (4), (5) and (7), a law shall not make any provision that is discriminatory either of itself or in its effect.

(3) In this Article the expression "discriminatory" means affording different treatment to different persons attributable, wholly or mainly to their respective descriptions by race, tribe, sex, place of origin, marital status, political opinions, colour or creed whereby 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 provision on privacy is couched in the following words: 17. (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.

It is noteworthy that the discriminatory provision does not include 'sexual orientation' as one of the grounds on which discrimination is prohibited. This would make the penal provisions therefore unconstitutional on the face of it, if the Constitution were to be interpreted strictly. However, as was referred to earlier, the principle of discrimination is founded mostly on the basis of immutable grounds i.e. facts over which one has little or no control over. Such grounds normally include sex, tribe, creed and other factors which one is naturally born with. These grounds also include factors which are so essential

to a person's identity that a change is something not easily done such as marital status, political opinions or religion. What all these factors have in common is that they help in determining who we are as individuals and form an integral part of our very existence. They form part of our identity as a human person. The law on non-discrimination is therefore meant to protect this identity and to ensure the dignity of individuals is preserved.

If the biological argument for sexual orientation were to be considered, it would seem to indicate that sexual orientation is a phenomenon which is genetic and thus, one has no conscious choice over it: thus one can actually be born gay. This would place sexual orientation on the same basis as sex or race. Logically speaking, it would thus become an absurdity if the law were to discriminate over persons who do not actually consciously choose to be born the way they are. Using the purposive rule of interpretation and considering the scientific evidence for homosexuality, it would seem to appear that a judge would be more inclined to hold that sexual orientation should be a prohibited ground of non-discrimination to avoid absurdity. In as much as the Constitution does not expressly list 'sexual orientation' as such a ground, the purposive rule of interpretation would require that the Constitution be interpreted in such a way that it is included to avoid ambiguity. As was stated by Lord Denning in a decided case

Whenever strict interpretation of a statute gives rise to an absurdity and unjust situation, the judges can and should use their good sense to remedy it – by reading words in, if necessary – so as to do what Parliament would have done, had they had the situation in mind.¹¹⁴

¹¹⁴ *Seaford Court Estate Ltd v Asher*, 2 KB 431 (1949).

Maxwell also stated:

It is a corollary to the general rule of literal construction that nothing to be added to or taken from a statute unless there are adequate grounds to justify the inference that the legislative intended something which it omitted to express.¹¹⁵

It is noteworthy that the Zambian Judiciary has invoked this 'good sense' in a number of decided cases in Zambia. For instance, in the case of *Edith Nawakwi v Attorney General*,¹¹⁶ the court was interpreting Article 25 clause 3 which defined the term 'discriminatory'. The definition then did not include 'sex' or 'gender' as one of the prohibited grounds of discrimination but the Court stated: 'Be that as it may be, it is my considered view that the intentions of the framers could never have been to discriminate between males and females...' The Court in that case therefore added 'sex' as a prohibited ground of discrimination even though the then Constitution did not include it in the prohibited grounds.

Bweupe ACJ¹¹⁷ also had the opportunity to invoke the purposive interpretation in his interpretation of Article 71 (2) c of the Constitution. The said Article provided that an MP who resigned joined another party would lose his seat, but did not provide for loss of seat where an MP left a party and did not join any other party. The Court in its interpretation using the purposive rule of interpretation held that the spirit of the Article was to prevent '*floor crossing*' in

¹¹⁵ Langan, *Maxwell on Interpretation of Statutes*, 12th Edition, page 33.

¹¹⁶ *Edith Nawakwi v Attorney General* ZR 112 (1990 – 1992).

¹¹⁷ *Zambia National Holdings Limited & United Nation Independence Party v Attorney General* SJ 22 (1994).

Parliament. The court thus added in the words 'and vice versa' to the original reading of the Constitution to prevent ambiguity and unjust situations.

These instances would seem to find favor with Lord Denning who remarked: In all cases now the interpretation of statutes we adopt such a construction as will 'promote the general legislative purpose'¹¹⁸ underlying the provision. It is no longer necessary for the judges to wring their hands and say: 'There is nothing we can do about it.' It is therefore arguable that, using the purposive rule of interpretation, another ground not specifically enumerated under Article 23 could be added, as was done in the *Nawakwi* case. Any court would be obliged to avoid the ambiguity that would result in allowing discrimination based on sexual orientation where there is compelling medical evidence suggesting that there could be a genetic influence for homosexuality.

Much as it is agreed that judicial interpretation should not lead to a situation where the judiciary is seen to be making law, the importance of the purposive rule of interpretation cannot be overemphasized. As Lord Denning stated: 'A judge must not alter that of which it (a Statute) is woven, but he can and should iron out the creases.'¹¹⁹ For instance as regards discrimination, a difference in treatment could be said to amount to 'discrimination on an unspecified ground if it is based on attributes or characteristics which have the potential to impair

¹¹⁸ Op cit *Seaford Court Estate Ltd v Asher*.

¹¹⁹ Ibid.

the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner.¹²⁰

It ought to be noted however that for issues such as homosexuality, cultural values do play a big role in the interpretation of the Statutes. This is more so in African societies where the communities tend to be more conservative in sexual matters. For instance, in the case of *Kanane v State*,¹²¹ the Court found that the decision whether to decriminalize or not based on sexual orientation lay in point on whether the circumstances in Botswana 'demand the decriminalization of homosexual practices'. The Court in that case stated:

No evidence that the approach and attitude of society in Botswana to the question of homosexuality and to homosexual practices by gay men and women requires decriminalization of those practices, even to the extent of consensual act by adults.

The case of *Banana v State*¹²² which was actually followed in the *Kanane* case had taken a similar approach. In that case, the Court had stated:

I do not believe that this Court lacking the democratic credentials of a properly elected Parliament should strain to place a sexually liberal interpretation on the Constitution of a Country whose social norms and values in such matters tend to be conservative.

It ought to be noted however that in these two cases cited above, the scientific evidence was never discussed nor was it introduced by any of the parties. With such a guide and using the purposive rule of interpretation, it is plausible that

¹²⁰ *Harken v Lane*, ZACC 12 (1997).

¹²¹ *Kanane v State*, Court of Appeal, Botswana (July, 2003).

¹²² *Banana v State*, Supreme court of Zimbabwe (May, 2000).

the Courts would include sexual orientation as a prohibited ground of discrimination. The scientific argument is a dimension that needs to be used more especially in societies such as the African societies where the societal attitude is so strong that an equally strong argument needs to be introduced if the Courts were to be persuaded.

However, this would all depend on the attitude of the judiciary itself to the questions raised and what view they would take on the question of sexual orientation. Given Zambia's conservative society and the public opinion on homosexuality, it would be a serious challenge to the judiciary if such an issue were to be presented before the judiciary. It would remain to be seen whether the courts would choose to be guided by public opinion and morality as in the *Banana* and *Kanane* cases, or actually apply the principles of non-discrimination equality before the law to the case. The author is however of the view that if the scientific evidence were to be added on to the traditional arguments used such as the Wolfenden Report and the Wolfenden Report, the Courts would be left with little choice but to decriminalize.

As Professor Anyangwe¹²³ puts it:

How well human rights are protected in any particular country depends in the first place on the laws, and the administrative and other practices, of the country concerned and the government that has authority there.

¹²³ C Anyangwe, *Introduction to Human Rights and International Humanitarian Law* (Lusaka: UNZA Press, 2004).

Therefore, human rights are, in the first instance, a matter of domestic law and practice. International human rights law sets the global standards against which their conformity can be assessed. It also supplies procedures for making such assessments and also for remedying any established deficiencies.

This discourse points out the fact that international human rights law cannot be ignored in the interpretation of statutes. The traditional view has always been that although not binding, international law has a persuasive effect on interpretation of domestic law. In the case of *Zambia Sugar Plc v Fellow Nanzaluka*,¹²⁴ the Supreme Court held that international instruments that are ratified and assented to by the state cannot be applied unless they are domesticated. In that case, the respondent had sought to rely on provisions of an International Labor Convention No. 158 of 1982, to which Zambia was a party but which had not been domesticated into the national legal system.

The recent trend however has seen much reference to international as well as regional instruments in the interpretation of Statutes. This was done even in cases such as the *Roy Clarke* case cited above. As was remarked by CJ Ngulube in an unreported case:

I make reference to International instruments because I am aware of a growing movement towards the acceptance of the domestic application of International human rights norms, not only to assist the interpretation of domestic law in domestic litigation, but also because the opinion of

¹²⁴ *Zambia Sugar Plc v Fellow Nanzaluka*, Appeal No. 82 SC (2001).

other senior courts in various jurisdictions clearly with a similar problem tend to have a persuasive value.¹²⁵

An excellent example of such a persuasive case would be the case of *McCoskar and Nadan v State*¹²⁶ where the two appellants were charged with having or permitting carnal knowledge of the other against the order of nature, in violation of Section 175 (a) and (c) of the Fijian Penal Code. They were also charged with gross indecency between males. The specific provisions under which they were charged stated as follows in part:

Sec. 175: Any person who (a) has carnal knowledge of any person against the order of nature... (b) permits a male person to have carnal knowledge of him or her against the order of nature...

Section 177: Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him.....

The Court in its holding accepted the appellants' argument that S 175 was 'selectively enforced primarily against homosexuals' and thus discriminatory in its application. The Court also held that S. 177 was also discriminatory as it applied to conduct only exclusively between males while leaving unaffected by criminal law conduct that was not exclusively between males. The Court also made reference to the fact that the Fijian Penal Code was reminiscent of the British colonial days.

¹²⁵ *Sata v Post Newspaper Limited*, HP 1399 (1992) Unreported.

¹²⁶ *McCoskar and Nadan v State*, High Court of Fiji (2005).

It is noteworthy that the provisions under which the two appellants were charged in the Fiji case are very similar to the provisions under Zambia's Penal Code. This is not surprising given that fact that Fiji, like Zambia is a former British colony. Based on the reasoning by CJ Ngulube in the *Sata* case, this case would be of persuasive value under similar circumstances in the domestic courts.

These instances all go to show what a court would have to deal when presented with such a case. The international arguments are sound and compelling, and very persuasive, but in a society like Zambia, the public opinion and morality would present a strong challenge to any court. This was very evident after the Ban Ki-moon statements on homosexuality and the public reaction to it. It must be stated however, the international law arguments augmented by the scientific argument would be a very compelling argument for any judicial review case challenging the constitutionality

Another aspect that arises in matters of homosexuality is a person's right to privacy. The right to privacy is one that has not been subject of much judicial inquiry in the domestic courts. It is however, one avenue that could be pursued to challenge the constitutionality of sections 155 and 158 of the Penal Code. As was remarked in a case in Nepal:¹²⁷

The right to privacy is a fundamental right of an individual. The issue of sexual activity falls under the definition of privacy. No one has the right

¹²⁷ *Sunil Babu Pant and Others v Nepal Government & Others*. Supreme Court of Nepal (Dec. 2007).

to question how two adults perform sexual intercourse and whether this intercourse is natural or unnatural.

The case of *Toonen v Australia*¹²⁸ also found that 'adult consensual sexual activity in private is covered by the concept of 'privacy.' The South African Constitutional Court had this to say on the right to privacy:

Privacy recognizes that we all have a right to a sphere of private intimacy and that autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy.¹²⁹

The cases cited above just indicate how courts from other jurisdictions have ruled when faced with such challenging constitutional issues. The right to privacy is a right that is highly valued and has formed a basis in other jurisdictions upon laws such as the penal provisions against homosexuality have been struck down.

Given the fact that sections 155 and 158 criminalize sexual intercourse between individuals done in a certain way, even when done in private, it is arguably unconstitutional in so far as it purports to regulate private consensual sex. Article 11 (d) also provides for 'protection for the privacy of his home and other property and from deprivation of property without compensation.' It would therefore amount to invasion of this privacy if the Courts were to convict based on sexual intercourse performed in private between consenting adults.

¹²⁸ *Toonen v Australia*. CCPR/C/50/D/488/1992, United Nations Human Rights Committee, (April 4, 1994).

¹²⁹ *National Coalition for Gay and Lesbian Equality v Minister of Justice*. Constitutional Court of South Africa (1998).

There is thus a strong and compelling Constitutional argument against homosexuality as indicated in the above discourse. The topic thus remains a very inviting area for judicial review based on the grounds cited above.

3.3 The United Nations Response

Historically, sexual orientation and homosexuality were not topics that were generally covered by the United Nations. The advent of the 21st century saw this topic being gradually introduced in the United Nations discussions. In 2008, the General Assembly passed the Declaration for the Global Decriminalization of GLBT activity¹³⁰ which Resolution was sponsored by France and backed by a number of countries from the European Union. This Resolution was passed by a bare majority: It passed with support from 66 countries; however, 57 were opposed and 69 abstained including 3 of the World Powers being China, Russia and the United States. The opposition was mostly from predominantly Muslim countries as well as a substantial number of African countries.¹³¹ It is now generally agreed that the UN supports the protection of homosexuals and has gone as far as calling for decriminalization of homosexual conduct based on the right to 'sexual orientation'.

The Secretary General of the United Nations remarked as follows:

As men and women of conscience, we reject discrimination in general, and in particular discrimination based on sexual orientation and gender

¹³⁰ December 18, 2008.

¹³¹ Vatican Calls for Homosexuality to be Decriminalized," National Catholic Reporter, January 9, 2009, <http://www.ncronline.org/news/vatican/vatican-calls-homosexuality-be-decriminalized> (accessed on August 22nd, 2013)

identity.... But let there be no confusion: where there is tension between cultural values and universal human rights, rights must carry the day. Together, we seek the repeal of laws that criminalize homosexuality, that permit discrimination on the basis of sexual orientation or gender identity, that encourage violence. Personal disapproval, even society's disapproval, is no excuse to arrest, detain, imprison, harass or torture anyone, ever.¹³²

And Helen Clarke stated:

One of the founding principles of the United Nations is the faith in the dignity and worth of every person, without distinction on the basis of race, color, sex, language, religion, property, birth or other status. Discrimination in all its forms continues to undermine this principle.¹³³

Similarly, in Zimbabwe, the United Nations High Commissioner for Human Rights, Navanethem Pillay during her visit also spoke about the need for decriminalization. She reiterated that decisive leadership was needed to 'craft fair laws and policies on property rights for widows, early marriages, sexual violence, marital rape, **homosexuality** and commercial sex work.¹³⁴

The protection of human rights can be said to be the bedrock of the United Nation. As is stated in the Preamble to the ICCPR: 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of the freedom, justice and peace in the world.'¹³⁵ These

¹³² UN News Centre, *Universal decriminalization of homosexuality a human rights imperative – Ban* (December, 2010), <http://www.un.org/apps/news/story.asp?NewsID=37026#.UgTsFuR4PIU> (accessed 9th August, 2013).

¹³³ The United Nations Speaks Out, "Tackling discrimination on grounds of sexual orientation and gender identity," United Nations Development Programs Administrator, Helen Clark, 10 Dec. 2009, http://www.ohrchr.org/index.php/Helen_Clark (accessed on 14th August, 2013).

¹³⁴ M Phiri, "Gay Issues: Malawi & Zimbabwe have spoken; Where is Zambia?" The Post Newspaper. June 3rd, 2012.

¹³⁵Op cit ICCPR.

are but some of the renowned United Nations officials that have spoken out strongly on the issue of homosexuality.

The United Nations entities have also integrated issues of sexual orientation and gender identity into their work. For instance, entities such as the Office of the United Nations High Commission for Human Rights (OHCHR), the Office of the High Commission for Refugees (UNHCR), the International Labor Organization (ILO) and the World Health Organization (WHO) have all incorporated issues of sexual orientation and gender identity into their programs of action.

The Human Rights Council has held that states are obligated to protect individuals from discrimination on the basis of their sexual orientation.¹³⁶ In its General Comment No. 20, the Committee on Economic, Social and Cultural Rights observed that ‘other status’ included sexual orientation.¹³⁷ The UN Committee of the Elimination of Discrimination Against Women has also expressed concern about laws that classify sexual orientation as a sexual offence and has recommended that such penalties be repealed.¹³⁸ The Committee Against Torture has also considered that sexual orientation is one of the

¹³⁶ *Toonen v Australia*. CCPR/C/50/D/488/1992, United Nations Human Rights Committee, April 4, 1994.

¹³⁷ United Nations General Assembly Committee on Economic, Social and Cultural Rights, *General Comment No. 20 on Non-discrimination in economic, social and cultural rights*. (Geneva, 2009).

¹³⁸ United Nations General Assembly Committee on the Elimination Discrimination Against Women, *Report of the Committee on the Elimination of Discrimination against Women*, (New York: 20th January – 5th February, 1999) para 128.

prohibited grounds included in the principle of non-discrimination.¹³⁹ The Committee on the Rights of the Child has also listed sexual orientation among the prohibited grounds of discrimination in its General Comment regarding adolescent health, HIV/AIDS and the rights of the Child.¹⁴⁰

In a decision concerning 11 persons detained for their sexual orientation and prosecuted under an anti-sodomy law in Cameroun, the Working Group on Arbitrary Detention stated as follows:

Ever since the Human Rights Committee adopted its view in *Toonen v Australia* and itself adopted its opinion 7/2000 (Egypt), the Working Group has followed the line taken in those cases. That means the existence of laws criminalizing homosexual behavior between consenting adults in private and the application of criminal penalties against persons accused of such behavior violates the right to privacy and freedom from discrimination set forth in the International Covenant on Civil and Political Rights. Consequently, the Working Group considers..... the criminalization of homosexuality in Cameroun law incompatible with Articles 17 and 26 of the International Covenant on Civil and Political Rights, which Cameroun has ratified.¹⁴¹

From the references cited above, it is clear what position the United Nations has taken on homosexuality. Similar calls have been made by various representatives of the United Nations as well as other interested stakeholders such as the International Commission of Jurists in various parts of the World

¹³⁹ United Nations General Assembly Committee Against Torture, *Implementation of Article 2 by States Parties*, General Comment No. 2, (January 24, 2008) paras 21 and 22.

¹⁴⁰ United Nations General Assembly Committee on the Rights of the Child, *Adolescent Health*, General comment No. 4: para 6 and *HIV/AIDS and the Rights of the Child*, General Comment No. 3, (CRC/GC/2003/4).

¹⁴¹ United Nations General Assembly Working Group on Arbitrary Detentions, A/HRC/4/40/Add.1, (Opinion No. 22 of 2006).

calling for the decriminalization of homosexuality as well as an end to the victimization and torture of such persons.¹⁴² The message from the United Nations is thus unequivocal and clear: decriminalize homosexuality.

3.4 Comparative International Law Arguments and the Global Trend towards Decriminalization

It is noteworthy, that even before discussions on homosexuality were tabled before the United Nations, sexual orientation had been a subject of heated debates in domestic as well as regional organizations around the world. The modern decriminalization movement began in the mid-twentieth century with Denmark being the first nation in the 20th century to repeal its sodomy laws in 1933. Switzerland and Sweden followed soon thereafter to decriminalize in 1941 and 1944 respectively.¹⁴³ The States in the United States of America also experienced this decriminalization of homosexuality. By 1983, half of the states had followed the lead of Illinois to decriminalize homosexuality.¹⁴⁴

In the same period that the states in the United States were decriminalizing homosexuality, most of Europe on both sides of the Iron Curtain had decriminalized sodomy as well.¹⁴⁵ Notably, most former British colonies of

¹⁴² International Commission of Jurists, *Sexual Orientation, Gender Identity and International Human Rights Law*- Practitioners Guide No. 4 (Geneva, 2009).

¹⁴³ Hubert and Kennedy, "Beginnings," *Journal of homosexuality*, Vol. 38 No. 1/2 (1999).

¹⁴⁴ M Kane, "Social Movement Policy Success: Decriminalizing state sodomy laws," 1969-1998. *Mobilization*, Vol. 8 No. 3 (2003).

¹⁴⁵ P Narayan, "Somewhere over the Rainbow: International Human rights Protection for sexual minorities in the New Millennium," *Boston University International law Journal* Vol. 24 (2006): 313.

Africa, the Caribbean and South East Asia have retained their anti-sodomy laws, even after attaining independence. This fact augments the argument contained in Chapter 1 that homophobia – as opposed to decriminalization - is a concept that was actually introduced to Africa during the colonial era. Most former colonies contained statutes with ‘savings clauses’¹⁴⁶ that maintained the laws enacted by the colonial masters through to the independent states, thus maintaining the homophobia. Currently, about six countries have enacted legislation allowing same-sex marriages, with South Africa being one of the countries.¹⁴⁷

This global trend towards decriminalization in domestic circles has also seen an emergence of judicial precedents from various domestic as well as regional courts. What is evident is that domestic courts are increasingly drawing on comparative Constitutional law. They are engaged in a conversation across borders about the meaning of constitutional and human rights matters. Even when they reach different conclusions, courts are bound to respond to comparative law arguments.¹⁴⁸

Notably, the European Court of Human Rights has decided several cases on the subject with persuasive arguments for decriminalization. In the case of *Dudgeon v United Kingdom*,¹⁴⁹ the European Court of Human Rights struck down laws in

¹⁴⁶ For instance, Article 2 (1) of the Independence Act of 1964, Chapter 65 of the Laws of Zambia.

¹⁴⁷ Op cit International Commission of Jurists, *Sexual Orientation, Gender Identity and International Human Rights Law- Practitioners Guide* No. 4. (2009).

¹⁴⁸ Op cit International Commission of Jurists, *Sexual Orientation, Gender Identity and Justice. A Comparative Law Casebook* (2011).

¹⁴⁹ *Dudgeon v United Kingdom*, ECHR No. 35765/97 (1981).

Northern Ireland that prohibited all sexual activity between men, on the grounds that they violated the right to privacy guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Court in that case stated as follow:

Where the Court does not see any justification for the alleged infringement of human rights, it would be its duty to strike down unconstitutional laws, for while there must be deference to the legislature as it represents the views of the majority in a society, the Court must also be acutely aware of its role which is to protect minorities from the excesses of the majority. In short, the Court's duty is to apply the law; in Constitutional matters, it must apply the letter and spirit of the Basic law and the Bill of Rights.

The European Court of Human Rights has also had occasion to address the majority's negative views towards homosexuality. In the case of *Smith & Grady v the United Kingdom*,¹⁵⁰ the Court opined as follows in its judgment:

The question for the court is whether the above-noted negative attitudes constitute sufficient justification for the interferences at issue. The Court observes from the Report of the Homosexual Policy Assessment Team that these attitudes, even if sincerely felt by those who expressed them, ranged from stereotypical expressions of hostility to those of homosexual orientation, to vague expressions of unease about the presence of homosexual colleagues. To the extent that they represent a predisposed bias on the part of the heterosexual majority against a homosexual minority, these negative attitudes cannot, of themselves, be considered by the Court to amount to sufficient justification for the interferences with the applicants' rights outlined above any more than "similar negative attitudes towards those of a different race, origin or color".

¹⁵⁰ *Smith and Grady v UK*, 29 EHRR 23 (1999).

The European Court in *Salgueiro da Silva Mouta v Portugal*¹⁵¹ also affirmed 'sexual orientation' as a prohibited category of discrimination, striking down a decision of a Portuguese court that dispossessed a father of his custody rights because he was gay. Similarly, in *E B v France*,¹⁵² the same Court found that it was discriminatory for the state to reject an application to adopt based on the candidate's sexual orientation.

The American region has also had its fair share number of such cases. In its Advisory Opinion on the Juridical Condition and Rights of the Undocumented Migrants,¹⁵³ the Inter-American Court of Human Rights pointed out that:

It is perfectly possible, besides being desirable; to turn attention to all the areas of discriminatory behavior, including those which so far have been ignored or neglected at International level (e.g. inter alia social status, income, medical state, age, sexual orientation, among others)"

The Inter-American Commission has also reiterated that the criminalization of homosexuality and deprivation of liberty simply because of sexual preference is a practice "contrary to the provisions of the various articles of the American Convention and must therefore be corrected."¹⁵⁴

The African system of human rights unlike the others did not have much jurisprudence in relation to the topic of homosexuality. In the few times where the matter has come up, the Court has refused to acknowledge that sexual

¹⁵¹*Salgueiro da Silva Mouta v Portugal*, ECHR No. 33290/96 (1999).

¹⁵²*E B v France*, ECHR, No. 3546/02, (2008).

¹⁵³ Inter-American Court of Human Rights, *Juridical Condition and Rights of the Undocumented Migrants* (Advisory Opinion OC-18/03: Decision of September 17, 2003), Series A No. 18.

¹⁵⁴ Inter-American Commission on Human Rights, (Press Release: No. 24, 1994).

orientation should be a protected ground under Article 2 of the African Charter on Human and Peoples Rights stating: 'homosexuality offends the African sense of dignity and morality and is inconsistent with positive African values.'¹⁵⁵ However, it has been noted that the current position of the African Commission on Human and Peoples rights actually mirrors the position taken by the European Court of Human Rights previously.¹⁵⁶ Notably, it took 26 years of petitioning for the European Court of Human Rights to finally uphold a complaint from a homosexual applicant, it is thus believed that even with the African Court, it will take some time, but eventually, it shall follow the same trend as its European counterpart.¹⁵⁷ The European Commission on Human Rights repeatedly held that the legal regulation of homosexuality was 'necessary for the protection of society.'¹⁵⁸

Aside from these comparative law arguments, various stakeholders have also consistently called for the decriminalization of homosexuality and prevention of abuse and harassment of the gay people. In 2008, a group of human rights experts drafted, developed, discussed and refined the Yogyakarta Principles¹⁵⁹ following an expert meeting held in Yogyakarta, Indonesia in November, 2006. 29 distinguished experts from 25 countries with diverse background and expertise relevant to issues of human rights law unanimously adopted the

¹⁵⁵ Rapporteur at the 16th Ordinary Session of the ACmHPR, quoted in E A Ankhumah, *The African Commission on Human and Peoples Rights – Practices and Procedure* (1996), 174.

¹⁵⁶ P Johnson, "Homosexuality and the African Charter on Human and Peoples' Rights: What can be learned from the history of the European Convention on Human Rights?" *Journal of Law Society* Vol. 40 (June, 2013): 249-79.

¹⁵⁷ *Ibid* 279

¹⁵⁸ *GW v Germany*, 1307/61, (October 4, 1962)

¹⁵⁹ International Commission of Jurists (ICJ): *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*, (March 2007), <http://www.unhcr.org/refworld/docid/48244e602.html> accessed on 3rd October, 2012).

Yogyakarta principles. These Principles mandate States to embody principles of equality and non-discrimination on the basis of sexual orientation in national Constitution or other appropriate legislation. They also mandate states to repeal criminal and other legal provisions that prohibit consensual sexual activity among people of the same sex who are over the age of consent. The Principles further mandate states to undertake programs of education and awareness to promote and enhance the full enjoyment of all human rights by all persons, irrespective of sexual orientation or gender identity.

The work of the International Commission of Jurists (ICJ) in this regard can also not be overlooked. The ICJ has long been hailed as a pre-eminent Organization in the world, and is amongst the world's leading human rights Organizations generally. The ICJ holds consultative status with the United Nations Economic and Social Council; the United Nations Educational, Scientific and Cultural Organization; the Council of Europe; and the African Union. It also maintains co-operative relations with various bodies of the Organization of American States¹⁶⁰. The Commission has published several documents concerning sexual orientation and homosexuality, some of which have been quoted in this Paper. Their position on homosexuality and sexual orientation has also been unequivocal: it is a human rights issue and countries should decriminalize homosexuality.

¹⁶⁰<http://www.icj-aust.org.au> (accessed on 4th August, 2013).

3.5 Conclusion

As can be seen from this Chapter, there is a strong argument for decriminalization based on a comparative human rights perspective. The chapter has outlined a number of cases where reform has been occasioned by judicial intervention such as the Fiji case. This gives a very compelling argument especially in light of the fact that most of these countries have legislation that is similar to our current penal legislation on homosexuality. The chapter also demonstrates the global trend towards decriminalization as well as the view of the international community and organizations on the subject.

CHAPTER FOUR

Conclusions and Recommendations

4.1 Conclusion

What is evidently manifest in Zambia is that the society is generally very averse to any notion of 'gay rights' or homosexuality. Every opportunity where such a notion has been raised has been met with stiff resistance and has sparked severe outrage from the society at large. Most importantly, our policy makers have been at the center of this outrage and homophobia and have on various occasions spoken against homosexuals. This state of homophobia has been premised on a number of reasons ranging from Biblical principles to calling homosexuality un-African or unnatural and immoral. A dissection of these reasons under Chapter Two clearly shows that none of these reasons can justify the criminalization of homosexuality. The most common argument advanced for criminalization in Zambia is that 'Zambia is a Christian nation and homosexuality is a sin'. Much as this argument is very compelling from a religious point of view, it is a fallacy in so far as it proposes to base the law on Biblical principles. Much as the Zambian Constitution declares Zambia a Christian nation in its preamble, its Laws are not subject to interpretation based on Biblical principles.

Further, the insistence on criminalization of homosexuality based on Biblical principles would require that all 'sins' be criminalized, which is definitely not the case in Zambia. For instance, acts such as adultery and fornication, which are sins under the Bible are not criminalized under the Penal Code, and to the

author's knowledge, they are quite prevalent in the Zambian society.¹⁶¹ The other arguments of unnaturalness, un-African or immoral have all been sufficiently addressed in Chapter Two and it has been clearly shown that these arguments do not warrant criminalization of the conduct. As the Wolfenden Report suggests, sexuality is not the law's business.

Unfortunately, the Constitutionality of the provisions of the Penal Code have so far never been tested, probably, because the court cases involving homosexuality have if brought before the court, not raised the Constitutional issues.¹⁶² A compelling argument for the unconstitutionality of the provision would be the scientific argument that was presented in Chapter two. Much as one has to admit the evidence is not conclusive, it is a factor that cannot be ignored. The fact that there is even the slightest possibility that homosexuality could actually be caused by genetics, which is a factor over which one has no control, puts homosexuality in a class such as race, ethnicity or indeed sex. It is therefore absurd that the law would seek to punish individuals over a matter over which they have no control. There is thus a strong case for discrimination under the Zambian law by continuing with these penal provisions on homosexuality.

¹⁶¹Magistrate Choonya stated that most couples aged between 23 and 45 divorced because of infidelity, drunkenness and sexual related issues. She said couples above the age of 50 usually divorced because spouses suspected their partners of practising witchcraft and other things. Information available at <http://www.lusakatimes.com/2012/05/13/divorce-cases-soar-zambia/> (accessed on 31st July, 2013).

¹⁶² The Kapiri Mposhi accuseds' defense lawyer had made an application to raise Constitutional issues, but these were later dropped.

The individuals' freedoms of privacy and equality before the law also are freedoms that are being violated by the penal provisions. Private consensual sex between any persons is protected by the right to privacy, and the invasion or curtailing of this right ought to be necessarily justifiable before the law can seek to take it away. In this instance, there has been no justifiable rationale for the criminalization of homosexuality as no resultant harm to the public has been proven.

In construing the constitutionality of the Penal provisions, the Court would also have to be guided by certain international norms and trends. Zambia as a signatory to many United Nations instruments such as the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights, is under an obligation to respect the provisions of those Treaties even domestically. It is trite that the United Nations have included 'sexual orientation' as a prohibited ground of discrimination in a number of comments and opinions. It is granted that the said treaties have not been domesticated under Zambian law; however, Zambia still has made a commitment to the international community that it will abide by the treaties it has ratified. Further, though not binding, international treaties and the opinions of senior courts from other jurisdictions, have persuasive value in our domestic courts.

As has been shown in Chapter two, homosexuality is conduct that has existed in Africa since time immemorial as documented by various authors, who also demonstrated that the African set up was tolerant of the conduct and this tolerance only seemed to change after colonization as well as introduction of

penal codes by the British colonial masters. It is therefore apt for one to state that homophobia, rather than homosexuality, is actually a western concept that was introduced to Zambia and most of Africa during the colonial era. It is however sad to note that most of the Western world including Britain, have decriminalized sodomy and homosexuality, while most African countries, most of them being former colonies of Great Britain, still maintain these archaic law.

The role of the policy makers in any quest for legislative change or reform cannot be over emphasized. In the Zambian political set up, it is rather unfortunate that all calls for change have so far been met with stiff resistance and outrage from our policy makers as well. What is very evident from all these sparks of outrage from our policy makers and other stake holders in Zambia, is that very few if any of them, have actually done any research in the area or given a convincing reason why the Statute books should remain unchanged. In any society, the use of state power to criminalize any conduct has to be justifiable on reasonable grounds. Policy makers are therefore under a duty to ensure that what remains under the Statute books is justifiable to not only the majority of the population, but the minority and the marginalized as well. It is not the role of policy makers to enact penal legislation based merely on public opinion, the statute must be necessary in order to prevent some harm to private individuals or public morality indeed. It is therefore incumbent upon the policy makers to ensure that legislation, especially penal legislation which has severe consequences for the persons involved, is justifiable in the society. Private morality is not a matter that should be legislated by penal laws, especially where consensual acts are in question. Much as it is accepted that the majority of the Zambian population are opposed to gay rights, the use of state

machinery to impose a particular pattern of behavior is not justifiable in a democratic society.

What is also evident from the responses of various policy-makers as well as other individuals on this issue is ignorance over homosexuality. For instance, a renowned politician is reported¹⁶³ to have said that homosexuality is a matter of choice because it is a learnt behavior according to scientific research and that no person is born gay. Other policy makers and individuals of course just go to the common argument ‘Zambia is a Christian nation’, thus apparently equating the statute books to the Bible which of course is a fallacy. There is no one policy maker in so far as the author is aware who has given a concrete argument in defence of criminalization of homosexuality that is reasonably justifiable in our democratic state. At best, what is given as rationale for criminalization amounts to an excuse rather than a reasonably justifiable ground in this democratic state. It would thus appear that even our policy makers do not have sufficient education and information on awareness. Factors such as the scientific argument in Chapter two have never been addressed by our policy makers in any serious manner.

In spite of all the negative sentiments surrounding homosexuality in Zambia, it is undeniable that we have Zambians practicing homosexuality in Zambia. This is an undeniable fact and is known by the policy-makers. Like Chisambisa, there are many homosexuals in our country, but these will not speak out

¹⁶³ The Editor, “No Person is born a Homosexual, Katele Kalumba and Francis Manda,” Lusaka Times, March 4, 2012, <http://www.lusakatimes.com/2012/03/04/person-born-homosexual-katele-kalumba-francis-manda/> (accessed on March 20, 2013).

publicly nor make their condition known for fear of victimization. The views of the majority on the subject are well known, and so many choose not to speak out on their condition. However, what is more evident from all the hype on the topic is that individuals do not really care whether one is homosexual or not, provided it is not displayed or talked about in public. Most individuals consulted informally have a very negative view on homosexuality, but do not advocate for criminalization of the conduct.

4.2 Recommendations

The biggest threat to progress in any society remains and has always been the human race. Where society is so instilled in a belief that has been cultivated over time, changing such a belief or attitude has always been a challenge. Homophobia in Africa is one such attitude that presents a big challenge in so far as the rights of homosexuals are concerned. But like racism, gender inequality and vices such as Apartheid, with time and a better understanding of the matter at hand, this issue too can be addressed.

Reform in any area could either be judicial or policy through legislative reform. Judicial intervention would require a judicial review case such as the Fiji case which would require the judiciary to make a pronouncement on the subject. To better address this problem, firstly, it has to be a question of imparting knowledge to the masses. It has been shown in the paper that most individuals that speak strongly against homosexuality actually do so from a point of ignorance and advance arguments that cannot be sustained. Education and

sensitization would thus play a huge role in trying to diffuse the beliefs of the people. It would be preferable that such sensitization and awareness programs be directed at policy makers to start with. Policy makers are always at the very core of any legislative reforms in a country, and if these have the knowledge required for affirmative action in so far as the protection of the homosexual community is concerned, then there is a higher chance of acceptance among the people they represent, although this may not be guaranteed.

Policy reform worked in the United Kingdom through the Wolfenden Committee. A similar committee could be set up in Zambia to further research the topic. A similar example is Malawi where President Joyce Banda's government announced on Monday that it had imposed a moratorium on the laws concerning homosexuality until the 193-member parliament could decide on the highly contentious issue. The Kasonkomona arrest, though unfortunate on his part, is an issue that in the author's opinion should force the courts to face the aspect of gay rights and the public. It may also help other individuals and indeed organizations to speak out concerning gay rights. This is not a matter that needs to keep on being sidelined or ignored, especially when it is without doubt that the Zambian society does have homosexuals in its midst. It is thus timely and welcome that the judiciary has been presented with this opportunity to address activism, if not homosexuality strictly speaking.

The Kapiri Mposhi case is also timely had the application for the determination of constitutionality been followed through by defense counsel. It would also help if government were to engage in more research and development in the

matter. In this way, government could actually take a stance which they could defend even to the electorate. For instance, the scientific argument is the most persuasive argument especially for a country like ours. If government could take an interest to get further information in this area, it could create a platform for a sustainable argument for decriminalization. The raising of Constitutional issues if one were arrested on alleged homosexual activity is thus, one way in which this situation can be redressed.

It is the author's belief that the information that is already there is enough to sustain an argument for decriminalization. It is therefore highly recommended that private consensual sex between individuals of the same sex be decriminalized and the Penal Code provisions on homosexuality be repealed. It is a fact that this is happening anyway, and so far, no harm has resulted in our society. Even the policy makers are aware that homosexual practices are still being done by Zambians in spite of the penal legislation. It has also been shown that much as people do not like homosexuality, very few actually think that these people should actually be convicted for it. The majority of people just do not want to see homosexuality anywhere near them or actually see it being done in public, but they are tolerant to the practice being done in private: thus the call for decriminalization. The repeal of the penal provisions on homosexuality is thus highly recommended.

The author would recommend that an interested organization such as the Law Association of Zambia actually apply for judicial review of the legislation so that the Courts are given an opportunity to interpret the said penal provisions.

This was done by the Law Association concerning the Public Order Act;¹⁶⁴ the same could be done for the Penal Code. Litigation is thus an avenue for change that has to be seriously considered in this fight for reform. The Fiji case is an apt example here, not to mention the other cases cited in this dissertation.

The role of civil organizations cannot be overemphasized in such matters. The government needs to create an atmosphere where organizations can freely educate the masses on LGBT issues without the threat of arrests or deportation. The more people talk about this issue, the more acceptable it becomes with time. It is an undisputed fact that the younger generation is usually more embracing and liberal in discussing issues that were normally seen as taboo by older generations. It is therefore imperative that government allow such organizations to conduct such awareness campaigns to better educate the masses so that individuals cannot speak from ignorance. For starters, registration of such organizations should not be politicized as was done in the LEGATRA case. Freedom of association is guaranteed under the Bill of Rights and if the aim of the Association was simply to provide a platform for people to engage in discussions over issues concerning homosexuality, then there would be no justification for the Registrar of Societies to refuse such registration. Such organizations could be instrumental in creating public awareness on homosexuality and also educating the masses on homosexuality so that the public has more information on the subject.

¹⁶⁴ Daily Nation Newspaper, "LAZ petitions provisions of Public Order Act" 29th November, 2012, <http://zambiadailynation.com/2012/11/30/laz-petitions-provisions-of-public-order-act/> (accessed on 22nd July, 2013).

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