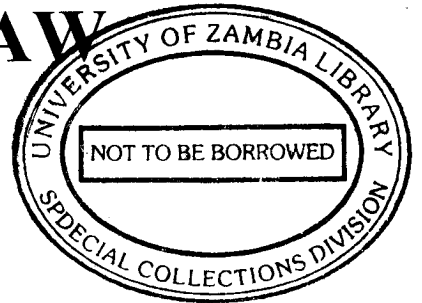


**THE UNIVERSITY ZAMBIA
SCHOOL OF LAW**



**THE RIGHTS OF THE MARGINALIZED IN SOCIETY: A
CRITICAL ANALYSIS OF GAY AND LESBIAN RIGHTS IN
ZAMBIA**

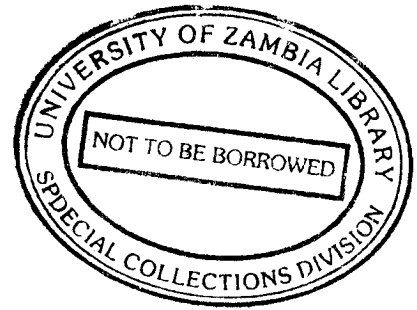
BY

ZAZA ZENZO McQUEEN

UNZA

FEBRUARY, 2008

THE UNIVERSITY OF ZAMBIA SCHOOL OF LAW



**THE RIGHTS OF THE MARGINALIZED IN SOCIETY: A CRITICAL ANALYSIS
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ZAZA ZENZO McQUEEN

**Being a Paper Submitted in Partial Fulfillment of the Examination Requirements
for the Degree of Bachelor of Laws of the University of Zambia**

THE UNIVERSITY OF ZAMBIA

SCHOOL LAW

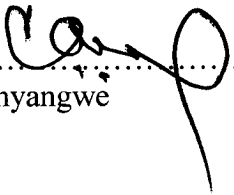
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**THE RIGHTS OF THE MARGINALIZED IN SOCIETY: A CRITICAL
ANALYSIS OF GAY AND LESBIAN RIGHTS IN ZAMBIA**

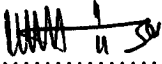
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RESEARCH.

Supervisor.....
Prof. Carlson Anyangwe

Date.....30/1/08.....

DECLARATION

I, **ZAZA ZENZO McQueen**, of Computer Number: 22093095 **DO HEREBY** declare that the contents of this research paper are based on my findings and that I have not used any person's work without acknowledging it.

Signature 
Zaza Zenzo McQueen

Date 24/01/08

ABSTRACT

The Directed Research Project I have embarked on addresses the issue of the rights of the marginalized in society. I have particularly focused on ~~the~~ how the gay and lesbian persons have continued to be marginalized in society in which they live. In trying to realize the aforementioned, the paper looks ^{at} the evolution of the concept of gay and lesbian rights and these rights have been recognized in other jurisdictions.

Of great concern in this paper is the controversy of the Zambian Sodomy laws which do not conform to international set standards for the protection of gay and lesbian persons under the concept of human rights

Finally, the paper looks at how the Zambian law can be reconciled in order to meet the international standards.

DEDICATIONS

In loving memory of my beloved parents. To my grandparents (Mr. Bernard S. Zaza and Mrs. Gladys N. Zaza), uncles, brothers and sisters. To all my friends: Lungisani, Evelyn, Edward, Sonia, Charles and all those who are working towards the goal of education with production.

ACKNOWLEDGEMENT

A paper in law is rarely the work of a single individual. It represents a few ideas of an author, expanded, tested and given life by other people of that author's world. As such, law can be described as the art of competitive plagiarism. This paper is no exception. Much of the material in it has come from the insights and anecdotes of many people out there with far longer experience than the author. So many of them have been very generous in sharing their knowledge that it would be impossible to mention them all here. I hope they will accept my apologies and gratitude's and forgive the unaccustomed anonymity that has been befallen them. Some of them have gone into print, and I am particularly grateful to Fr. Peter Henriot SJ. and Fr. Boyd Kapunga Nyirenda for permission to use extracts from their monthly-published bulletins.

My gratitude is due to University of Zambia for providing me with a conducive atmosphere of study. I am also grateful for the friendly assistance I have found at the University, especially the always-helpful Librarians.

In appreciation, I remember the following persons who have assisted me in the composition of this paper. In the first place, I am highly indebted to my supervisor Professor Carlson Anyangwe for his guidance and patience in ensuring that this work met the required standard. I am also grateful to Dr Munalulu the co-coordinator of this

research course and for teaching me a methodology which has helped me to write such a scientific paper; to all my colleagues, especially Lungisani Zulu, Andrew Siamana, Joseph Akapelwe, Edward Sampa, Charles Thomas Sinkala, Kimena Kintu, Morgan Mwiinga, Joseph Mileji, Mumbelunga Funjika, Sonia Shamwana, Oliver Sitambli, Morgan Mwiinga and Tembo Ngulube, whom I have worked with and whose insights have helped me considerably in the realization of this work. I am grateful to Joseph Akapelwa and Brian Nalishuwa for encouraging and assisting me to write the different parts of this work.

For special advice on various issues, I would like to thank John Phiri, who is currently an advocate of the High Court of Zambia. To Marshall Mweembani, I am appreciative for been a source of inspiration.

I am highly indebted to Evelyn Funjika, for being another great source of encouragement and inspiration.

Many thanks go to my family for supporting me both materially and spiritually during my research. Many thanks go to Malone Zaza and Pauline Zaza, Hellen Zaza for framing the flow of this paper.

I am highly indebted to Joseph Akapelwa for his thoughtful assistance in typing this work. I also thank him for spending his time correcting the grammar of this paper. I am grateful to Chisenga Mwamba for the help she rendered me especially for sacrificing her

time editing my work. I am also very thankful to her for allowing me to use her computer.

Finally, I am duly grateful to all the people who accepted to be interviewed on the subject at hand. Many thanks go to all the works that are cited.

TABLE OF STATUTES

The Constitution of Namibia	
Article 10.....	38, 39
The Constitution of Zambia, Chapter One of the Laws of Zambia	
Article 23(1).....	51
Article 23(2).....	51
Article 23(3).....	51
The Constitution of South African	
Article A (3).....	42
Article 3.....	42
The International Covenant on Civil and Political Rights...	
Article 2(1).....	16, 19,20,52,53
Article 17.....	18, 19, 20, 52, 53
Article 20.....	52
Article 22.....	29
Article 26.....	18, 52, 53
The Interpretation and General Provisions Act, Chapter 2.	
Section 4(2).....	24, 25
The Labour Relations Act, 1995 of South Africa.....	43
The Namibian Labour Act	
Section 107.....	38
The Sexual Offences Act of South Africa	
Section 20(A).....	42
The Penal Code, Chapter 87 of the Laws of Zambia	
Section 155.....	23, 27, 29, 53, 59
Section 158.....	23, 24, 27, 29, 53, 59
Section 394.....	29
The Universal Declaration of Human Rights	
Article 2.....	16
The United Nations Charter	
Article 1(3).....	16

TABLE OF CASES

<u>Bowers v. Hardwick</u> Supreme Court of the USA (1986) 478 US, 186 106 S.CT. 2841.....	15
<u>Nicholas Toonen v Australia</u> Communication no. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).....	17, 52, 53
<u>Sutherland v. United kingdom No. 25186/94</u>	48

TABLE OF CONTENTS

DECLARATION	i
ABSTRACT	ii
DEDICATIONS	iii
ACKNOWLEDGEMENT	iv
TABLE OF STATUTES	vii
TABLE OF CASES	viii
INTRODUCTION	1
CHAPTER ONE: HUMAN RIGHTS AND THE HISTORICAL DEVELOPMENT OF GAY AND LESBIAN RIGHTS IN THE WORLD	4
(i). Marginalization.....	5
(ii). Definition and overview of gay and lesbian rights.....	7
(a). Definition of homosexuality.....	7
(b). An overview of the history of gay and lesbian rights.....	9
(iii). Concept of Human rights.....	12
(iv) Homosexuality at International Law.....	16
(v). Conclusion.....	21
CHAPTER TWO:GAY AND LESBIAN SITUATION IN ZAMBIA	22
(i). The legal position of Homosexuality in Zambia.....	23
(ii). The Gay and Lesbian Movement in Zambia.....	25
(iii). The Zambian Government's Position on Homosexuality.....	28
(iv). The Church and the general public on homosexuality.....	30
(v). Conclusion.....	33

CHAPTER THREE: THE LAW ON HOMOSEXUALITY IN OTHER JURISDICTION.....	35
(i). The legal status of homosexuality in Africa.....	36
(a) Namibia.....	37
(b) South Africa.....	41
(ii). The legal status of homosexuality in Europe.....	47
(iii). Conclusion.....	48
CHAPTER FOUR: THE LEGAL IMPLICATIONS OF ZAMBIA’S LEGAL POSITION ON HOMOSEXUALITY VIS-À-VIS INTERNATIONAL LAW.....	49
(i). The Violations of the Rights of Lesbian, Gay, Bisexual and Transgender Persons in Zambia.....	50
(ii). Substantive Violations of the International Convention on Civil and Political Rights.....	52
(iii). Conclusion.....	55
CHAPTER FIVE: SUMMARY AND RECOMMENDATIONS.....	57
(i). Summary.....	58
(ii). Recommendations.....	60
BIBLIOGRAPHY.....	63

INTRODUCTION

Society is said to be both dynamic and diverse. Thus, it characterizes people of different race, age, color, sex, personalities but only to mention a few. Furthermore, society revolves around moral and legal rules. It is key to note that while moral rules are not legally binding on individual, legal rules are. However, both systems of rules play an imperative role in so far as they moderate human conduct. As such, they determine which conduct is moral or immoral, good or wrong and, legal or illegal.

This paper shall endeavor to show how society, in particular the Zambian society, through its moral and legal rules has continued to marginalize certain groups of people. What will be of great concern in this study is the general reaction of society not only in Zambia but even the world over, whereby upon discovery of their sexual orientation, gay and lesbian persons are shunned, condemned, castigated and even suffer from other ill treatment.

Activists of gay and lesbian rights have branded the discrimination suffered by these people as being inconsistent with the principles of human rights. There is, however, a controversy over rights of gay person as different people. Some analysts even argue that the protection of human rights does not intend to protect the gay and lesbians rights. This controversy has already been experienced even in both international and regional organizations whose central concern is the protection of human rights and as such should have a guide as to what falls within the ambits of human rights protection.

Thus, this study shows the origin and legal basis of the subject matter, the arguments for and against, and the philosophy of 'accident' and 'substance'.

Owing to the continued marginalization of the gays and lesbians by different members of society on the basis of their sexual orientation, the research will seek to bring to light the various ways in which this class of people have suffered.

In view of the aforementioned, this dissertation aims at evaluating the subject study of human rights in respect of groups of people who are marginalized by society. It shall also seek to show how some legislation in Zambia have contributed to marginalizing gay and lesbian persons.

Some of the questions that this dissertation seeks to address in trying to realize the above aims include the following:

1. Can human rights be taken away from an individual on the basis that the individual has a sexual orientation which is different from that of other members of society?
2. What is the legal status of gay and lesbian persons in different jurisdictions in the world?
3. How is the status of the gay and lesbian persons in other jurisdictions different from the Zambian one?
4. Is the Zambian government's position in respect of the gay and lesbian persons inconsistent with international law?

Suffice to state that though this research shall be confined to the prevailing state of affairs in Zambia with respect to how the gay and lesbian persons have continued to be marginalized, regard shall also be given on the prevailing situations in other countries such as South Africa, Namibia and European countries as a whole.

To accomplish the foregoing, this research shall proceed by way of qualitative methodology. Other methodologies that shall be employed include desk and field investigations. Primary data will mainly emanate from statutes, subsidiary legislation, precedents, Parliamentary debates while secondary data will be collected from key informants, reports and commentaries among others. Other relevant sources that will be used shall be acknowledged in due course of the research.

This study is divided into five chapters: Chapter One looks at the concept of human rights and the historical development of gay and lesbian rights in the world.

Chapter Two discusses gay and lesbian situation in Zambia.

Chapter Three looks at the law on homosexuality in other jurisdictions such as Namibia, South Africa and European countries.

Chapter Four elaborates the legal implications of Zambia's legal position on homosexuality vis-à-vis international law.

Chapter Five offers a summary of the entire essay and gives recommendations on how to resolve the controversy surrounding gay and lesbian activities in Zambia today.

CHAPTER ONE

HUMAN RIGHTS AND THE HISTORICAL DEVELOPMENT OF GAY AND LESBIAN RIGHTS IN THE WORLD

- (i) Marginalization
- (ii) Definition and overview of gay and lesbian rights
 - a) Definition of homosexuality
 - b) An overview of the history of gay and lesbian rights
- (iii) Concept of Human rights
- (iv) Homosexuality at International Law
- (v) Conclusion

CHAPTER ONE

HUMAN RIGHTS AND THE HISTORICAL DEVELOPMENT OF GAY AND LESBIAN RIGHTS IN THE WORLD

This chapter discusses the historical development of gay and lesbian rights struggles in the world and the legal basis upon which the struggles are based.

(i) Marginalization

Marginalization refers to the overt or covert trends within societies whereby those perceived as lacking desirable traits or deviating from the group norms tend to be excluded by wider society and ostracized as undesirables.

Wing Leung describes a marginal person as "...one who does not belong. . . . The marginal man...dwells at the margin of two cultures and two societies...and possesses a marginal mentality...with its unresolved identity crises."¹

The idea was also amply expressed by Louis Wirth speaking of minority groups thus: "A group of people who, because of their physical or cultural characteristics, are singled out

¹<http://en.wikipedia.org/wiki/marginalization>

from the others in the society in which they live for differential and unequal treatment, and who therefore regard themselves as objects of collective discrimination."²

In this respect, what is apparent first is a distinctive social group, with their own characteristic features, then the singling out or victimization by the more numerically dominant members of the host society, and hence the subsequent unequal treatment leading to acts of discrimination, social ostracism, etc. This is the essence of marginalization.

Within the Developed World, racial, or ethnic minority groups, stand out as being the most marginalized social groups.³ This also includes the poor, the elderly, the sick, the disabled, the obese, teenage mothers, and homosexuals. All these groups tend to suffer from some forms of marginalization and a typical host of social ills; poverty, unemployment, poor education and poor health. They each tend to be ostracized and so suffer various forms of social exclusion.⁴ In fact, much of the progressive reform of the last century has been driven by the need for societies to mitigate damaging internal unrest, by a deliberate reversing of previous trends that engendered political and social marginalization of racial and political minorities, and to a certain degree, women.⁵ From the foregoing discussions, it is shown that minority groups in society are marginalized in various ways. This paper, however, focuses on only one aspect of marginalization in society, thus homosexuals, a term used to refer to gays and lesbians. It is important to mention that the term marginalization will be used synonymously with discrimination.

²Ibid

³ http://en.wikipedia.org/wiki/human_Development_index

⁴Cf. ibid

⁵ Cf. ibid

We shall now turn to look at an overview of the historical development of gay and lesbian rights in the world. Before this discussion, we shall give a definition of homosexuality.

(ii) Definition and overview of gay and lesbian rights

(a) Definition of homosexuality

Suffice to mention on the outset that the term “homosexuality” will be used in this study to refer to both men and women. Homosexuality can refer to both attraction and sexual behavior between people of the same sex, or to a sexual orientation.⁶ When describing the latter, it refers to enduring sexual and romantic attraction towards those of the same sex, but not necessarily to sexual behavior.⁷ Homosexuality is contrasted with heterosexuality, bisexuality and asexuality.

Etymologically, the word *homosexualis* Greek and Latin hybrid with *homo* (often confused with the later Latin meaning of "man", as in *homo sapiens*) deriving from the Greek word for *same*, thus connoting sexual acts and affections between members of the same sex, including lesbianism.⁸ In the English-speaking world, the term gay had been used within the subculture for decades before becoming popularized by the gay rights

⁶Sexual orientation refers to the direction of an individual's sexuality, usually conceived of as classifiable according to the sex or gender of the persons whom the individual finds sexually attractive. The most commonly used categories of sexual orientation are heterosexuality (being sexually attracted to members of the opposite sex), homosexuality (being sexually attracted to members of the same sex) and bisexuality (being sexually attracted to members of either sex).

⁷<http://en.wikipedia.org/wiki/homosexuality>

⁸ Cf. *Ibid.*

movement in the 1970s.⁹ In a narrow sense, gay refers to male homosexuality, but it often is used in its broadest sense, especially in media headlines and reports, to refer to homosexuality in general. Lesbian, however, always denotes a homosexual woman.¹⁰

Others have defined homosexuality from the psychological perspective as “not a type of conduct, but a condition characterised by a psychosexual propensity towards others of the same sex.”¹¹

The underlying aspect with persons termed as homosexuals is that they prefer to have sexual relations with persons of their own sex. Being a homosexual and knowledge of others as being homosexuals arouses many different reactions in different people. For some, being gay is a mark of social and moral decay. More often than not and for this reason, gay persons have been side lined and left out of the ambit of human rights protection. Peterson observes that, “the labeling of gays as sexually degenerate and unnatural is the same kind of labeling that has been used to justify the denial of rights to individuals belonging to minority communities.”¹²

There, thus, exists in many countries, laws that actually criminalised homosexual activities. Such laws are generally referred as ‘sodomy laws’. But gay and lesbian activists argue against such laws as being out of line with human rights principles.

⁹ Cf. Ibid.

¹⁰ Cf. Donald, J. West, **Homosexuality**, London, Gerald Duckworth Co. Ltd., 1967, Pp.12-13.

¹¹ Schofield, M., **Sociological Aspects of Homosexuality**, London: Longman’s Green & Company Limited, 1965, p.11.

¹² Peterson H., **Created Equal; Why Gay Rights Matter to America**, New York, St Martins Press, 1994, p. 26.

(b) An overview of the history of gay and lesbian rights

The term 'homosexuality' was first coined in the late 19th century by a German psychologist, Karoly Maria Benkart, under the pseudonym Kertbeny.¹³

Homosexuality was made or better still so termed in response to an imminent threat of criminalization of homosexual acts. It was put to use to express defiance and indignation at bigotry, ignorance and intolerance towards male to male, or female to female genital relations.¹⁴ As a result of the aforementioned, Benkart endeavored to show that homosexuality was nothing but an innate and natural phenomenon.¹⁵ The scholar sought to make people understand that homosexuality was as natural as heterosexuality. As such, he contended that there was nothing criminal about it.

From the foregoing, it may be mentioned that much of the impetus for the development of gay and lesbian rights struggles just as that of international human rights law in general as it exists today emerged in reaction to the atrocities committed during the Second World War. Like the Jews, Gypsies and the disabled, the Nazis also targeted lesbians and gays for extermination.¹⁶ As many as one hundred thousand men were identified as homosexuals and were immediately transported to concentration camps. Wearing the pink triangle (since adopted as the international symbol of the gay rights movement), these men were among the millions who were shot, hanged, gassed, worked

¹³ [Http://plato.Stanford.edu/entries/homosexuality/#history#history](http://plato.Stanford.edu/entries/homosexuality/#history#history)

¹⁴ Cf. Geatye and Tomkins, **Understanding Human Rights**, London, Manshell Publishing LTD, 1996, p. 316.

¹⁵ Cf. Ibid.

¹⁶ [Http://plato.Stanford.edu/entries/homosexuality/#history#history](http://plato.Stanford.edu/entries/homosexuality/#history#history)

or starved to death in the concentration camps.¹⁷ Suffice to state that several thousand lesbians who were identified as such were not spared from the brutality which the gays suffered. It is important to mention that lesbians were not identified as homosexuals but as 'anti social elements' and wore the black triangle. Such lived, labored, starved and died alongside vagrants and petty criminals who had received the same classification.¹⁸

Sadly enough, after the Second World War II, the liberating powers kept the fate that the homosexuals suffered hidden. This was mainly because the gays and lesbians were still regarded as criminals. Furthermore, homosexuality was still a criminal offence in Britain, the United States and the then Soviet Union (Russia) and generally the rest of the world. Suffice to add that homosexuality among adults was not decriminalized in West Germany until 1969.¹⁹ Additionally, after the war, homosexuals were omitted from memorials erected to the victims of Nazism and there was no financial compensation for homosexuals victims as was extended to all the other persecuted on the grounds of race or conscience.²⁰ In 1982, the West Germany government agreed to the demands of a group called Rosawinkel which campaigned for the rights of gay and lesbian concentration camp survivors.²¹

Despite this clear indication of their particular vulnerability to human rights abuses aforementioned, lesbians and gay men were not specifically included in the framework

¹⁷ Clapman A and Waaldijk L., Homosexuality; European Community Issue, Netherlands, Kluwer Academic Publishers, 1993.p2.

¹⁸ Cf. *ibid.*

¹⁹ Cf. *ibid.* p3

²⁰ Cf. Helen Lungu, Gay Rights: Do they have a place in the Zambian Legal System, Lusaka, UNZA Press, 2000, p7.

²¹ Clapman A. and Waaldijk L. p.2

for international human rights protection when the United Nations drew up the Universal Declaration on Human Rights (UDHR), after the end of the Second World War. It is, however, not clear to as whether the subject matter of gay and lesbian rights was left from the protection of the law intentionally by the United Nations when they drew up the UDHR. Furthermore, did this therefore mean that homosexuals were meant to be excluded from the framework of human rights and how they are to be applied? It is our considered view that the international community did not specifically provide for the protection of gay and Lesbian rights because there is no such a thing as right to sex. It is surprising, however, that systematic discrimination against some vulnerable groups has been addressed in subsequent document such as the International Convention on the Elimination of All Forms of Racial Discrimination and the International Convention on the Elimination of All Forms of Discrimination against Women but they did not unfortunately address the issue of homosexuality. In other words, these documents have provided an important framework for combating violations against women and ethnic minorities, yet there has been little recognition in the international community that gay men and lesbians require and deserve similar protection. Thus, the protection of the rights of the minority groups did not extend to the gay men and lesbians.

This is where gay rights activists came in and made radical approaches to ensure the human rights protection applies equally even to homosexuals. Their advocacy for the protection of gay and lesbian rights was fundamentally centered on the understanding and interpretation of what human rights are.

We shall now turn to discuss the concept of human rights as a fulcrum round which gay and lesbian rights activists base their arguments for the protection of gay and lesbian rights.

(iii) The concept of Human rights

Literally, “human rights mean the rights of humans or the rights of man...”²² And since all human beings have the same basic nature and have it equally, gay and lesbian rights activists argue that all people irregardless of their sexual orientation have same equal rights and need to enjoy the protection of their rights equally. This is based on the understanding that human rights are “rights for all individuals.”²³ It is imperative to mention that although bestiality is also a sexual orientation, enjoyment of the right to practice such is regarded as unnatural and a criminal offence in many jurisdictions. It is further argued that the source of human rights is thus the human being, human nature, or humanity irregardless of all accidental attributes attached to humanity such as race, colour, sex, only but mention a few. According to the classical theories and documents, human rights derive from natural rights. Thus, they further argue that human rights are “inherent and inalienable rights that are due to man simply because of being human.”²⁴ In short, to call them(human rights) ‘human’ implies that all human beings have them “equally and in equal measure by virtue of their humanity regardless of sex, race, age, regardless of high or low birth, social class, origin and ethnic or tribal affiliation.”²⁵

²² Anyangwe Carlson, **Introduction to Human Rights and Humanitarian Law**, Lusaka, University of Zambia press, 2004,p. 1

²³ Lovis H., **The Age of Rights**. New York, Columbia University Press, 1990, p.2

²⁴ Levin, L. 1981. **Human Rights: Answers and Questions**. Paris: United Nations Publications, p. 11.

²⁵ Lovis, p.2

By the very fact that human rights are universal and should apply equally, gay and lesbian rights advocate for homosexuals to also be included in the ambit of human rights protection. In the same vein, Donnelly in his book entitled International Human Rights 2nd ed., at page 8 has the following to say; “if all human beings have them simply because they are human, human rights are held equally by all. And because being human cannot be denounced, lost, or forfeited, human rights are inalienable.”²⁶

From the foregoing discussions, it may be asked, what exactly are gay and lesbian rights advocating for?

On the exterior, it is palpable that homosexuals face various kinds of ill treatment merely by virtue of their sexual orientation. There are many crimes that have been committed against gays and lesbians stemming from a homophobic attitude towards them generally by the rest of society. This homophobic attitude is one of such intense hatred towards homosexuals such that when confronted they are beaten, ridiculed, and even killed. This homophobic attitude towards homosexuals that society holds is fundamentally based on what Aristotle in his metaphysics termed as ‘accidents’²⁷

By the term ‘accident,’ Aristotle meant, “What exists in and is said of another.” He differentiates ‘accident’ from ‘substance’ (what does not exist in another and not said of another).²⁸ An example of what Aristotle means, consider what is named by the word ‘white.’ The reality that this word names (a particular color) can be said of another thing

²⁶ 1998. Colorado, USA: Westview Press

²⁷ <http://www.aquinasonline.com/Magee/index.htm>

²⁸ Ibid.

as for instance, 'this thing is white'. 'White' is said of 'this thing' as though this color belongs to 'this thing'. Furthermore, it is understood to exist in "this thing;" one does not find any "white" except that is in "this thing" or some other thing.²⁹

This basic notion of Aristotle's logic reflects the basic distinction in the way reality is structured and reflects the basic way that we view reality. The fundamental distinction is between substance and accident. Substance is whatever is a natural kind of thing and exists in its own right. Examples are rocks, trees, animals, etc. What an animal is, a dog for example, is basically the same whether it is black or brown, here or there, etc. A dog is a substance since it exists in its own right; it does not exist in something else, the way a color does. Accidents are the modifications that substance undergoes, but that do not change the kind of thing that each substance is. Accidents only exist when they are the accidents of some substance. Examples are colors, weight, sexual orientation and motion. One never finds any substance that we experience without some accidents, nor an accident that is not the accident of a substance. Every dog, for instance, has some color, place, size. Nevertheless, it is obvious that what a dog 'is' is not the same as its color, or its size, etc.

From the aforesaid, it is submitted that sexual orientation is in self an accident of the substance humanity. Thus, to deny gays and lesbian rights on the basis of their sexual orientation is in way to discriminate them on the basis of accidents. They are as much human beings as heterosexuals are.

²⁹ Ibid.

This homophobic attitude that society holds towards homosexuals varies from society to society. In some societies, there is however no legal protection for the homosexuals. This is principally true in countries where sodomy laws exist.

A homosexual appealing to the law for protection against violent homophobic attackers would instead end up being arrested for sodomy activities. Such arrests occur even when the accused has actually not been caught in the act. This was the case in the American case of **Bowers v. Hardwick**³⁰, where on one evening in 1982, a policeman entered the home of one Mr. Hardwick, under a warrant for drinking in public. The officer, however, found one Mr. Hardwick engaged in homosexual conduct and immediately arrested him for sodomy acts.

Additionally, in some societies, sodomy laws might however not exist, but the general outcry against gays and lesbians by the rest of society instills feelings of self worthlessness in homosexuals such that they opt to remain silent over the atrocities being committed against them, even where the legal system can protect them. In such societies, what silences the homosexuals to advocate for their rights is public opinion. It is, however, worth noting that; “silence makes it difficult for concerned human rights agencies to monitor abuses or to take action on the part of the victims.”³¹

³⁰ Supreme Court of the USA (1986) 478 US, 186 106 S.C.T. 2841

³¹ Dunto C and Palmberg M., **Human Rights and Homosexuality in Southern Africa; Breaking the Silence**. Current African issue, vol. 19, 1996, p.10

(iv) Homosexuality at International Law

The Organs of the United Nations have not particularly touched on the rights of sexual orientation. In the United Nations Charter, however, reference is made to Article 1(3) that provides, though in part, that: "...encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion..."³²

In the same vein, the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) do not also expressly provide for the right to sexual orientation.

The UDHR under Article 2 declares that:

Everyone is entitled to all the rights and freedoms set forth in the declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, National or social origin, property, birth or other status.³³

Similarly, the ICCPR provides though in part:

...the rights recognized in the present covenant, without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, National or social origin, property, birth or other status.³⁴

As can be noted from the aforementioned two provisions, sexual orientation is not particularly or specifically mentioned. A question that begs an immediate answer at this

³² Article 1(3) of the United Nations Charter 1945

³³ Article 2 of the Universal Declaration of Human Rights, 1948

³⁴ Article 2 of the International Covenant on Civil and Political Rights, 1966.

point in time would be that, 'is the list of prohibited grounds of discrimination to be construed as exhaustive?' it is submitted that the use of phrases 'such as' and 'other status' in the abovementioned provisions suggests that the grounds mentioned as prohibited grounds of discrimination are mere examples. Thus, it follows that sexual orientation may suffice as a prohibited ground of discrimination. In the same vein, Peter Nobel, Sweden's first Ombudsman against discrimination in international law commenting on Article 2 of both the UDHR and ICCPR had this to say: "it can clearly be argued and there is very little doubt about it among leading human rights experts that individuals with a sexual orientation other than the majority are included and they shall be protected from discrimination."³⁵

Additionally, in Nicholas Toonen v Australia³⁶ the United Nations Human Rights Committee held that 'sex' in the list of protected categories in the International Covenant on Civil and Political Rights should be understood to include 'sexual orientation'.

Suffice to make mention that the back-bone to the claim for gay rights stem from the Universal Declaration of Human Rights (UDHR) just like the general recognition of the human rights concept. Furthermore, the UDHR provides a framework from which clearly identified rights can be drawn out as being fundamental human rights. Suffice to state that the UDHR is just a declaration thus it is not necessarily binding on states. However, over the years it has crystallized into customary international law in that it declaratory

³⁵ May 1996, written Communication

³⁶ Communication No. 488/1992, Human Rights Committee, views of the committee, march 31, 1994.

manner is considered as a guiding norm for the international community.³⁷ To this extent, the international community feels bound by the UDHR declarations.

For the purposes of advancing gay and lesbian rights, activists have generally relied upon the provisions of the ICCPR. The case of Nicholas Toonen v Australia³⁸ shall show how gay and lesbian rights activists have heavily relied on the ICCPR to justify the existence of gay and lesbian rights.

Toonen brought the complaint before the Human Rights Committee where he was challenging certain provisions of the Tasmanian Criminal Code (Australia being responsible for the acts of a component state within its federal structure) which made criminal various forms of sexual conduct between men, including all forms of sexual contacts between consenting adult homosexual men in private. Toonen, specially claimed that the legislation prohibiting homosexuality violated his rights as protected and provided for in Articles 2(1), 17 and 26 of the ICCPR.

Article 2(1) provides that “each state party to the present covenant undertakes to respect and to ensure to all individuals within its territory and jurisdiction the rights recognized in the present covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, National or social origin, property, birth or other status.”

³⁷ Anyangwe, Introduction to Human Rights and Humanitarian Law p.33

³⁸ Communication no. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

In its comments on Article 2(1), the committee confined itself to “noting, however, that in its view, the reference to ‘sex’ is to be taken as including sexual orientation.”³⁹

Thus although the ICCPR does not explicitly provide for gay and lesbian’s right to sex per se, the term ‘sex’ in section 2(1) of the ICCPR is construed to including sexual orientation. As such, Gay and lesbian rights activists thus claim on the basis of the aforementioned principle.

Article 17 of the ICCPR guarantees the right to privacy. It provides that no one shall be subjected “to arbitrary or unlawful interference with his privacy.”

Since most sexual acts, whether heterosexual or homosexual, are done in private, the contention is that homosexuals should be left without interference in their sexual conduct as long as this is done in private. Privacy will thus typically protect behavior:

frequently considered deviant, which the state or other public authorities are called upon to tolerate on the principle that obnoxious as it may be it should not be the subject of public regulation because it is private or takes place in private.⁴⁰

The committee noted, however, that there were limitations to the right of privacy. The most important as regards homosexual activity is that the act must be between consenting

³⁹ Supra Note 15 at p. 548.

⁴⁰ Supra Notes 4 at p. 25.

adults. Furthermore, that interference of privacy should in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the circumstances.

The Human Rights Committee decided finally that no weight should be given to the fact that for the previous ten years, the law against Homosexual activity had not actually been enforced in Tasmania. It decided that the disputed legislation was incompatible with Article 17 and 2(1) of the ICCPR, and that the statute be repealed.

Additionally, the committee could not accept either that “for the purpose of Article 17, of the Covenant, moral issues are exclusively a matter of domestic concern as this would open the door to withdrawing, from the Committee’s scrutiny, a potentially large number of statute that interfere with privacy.”⁴¹

Article 20 of the ICCPR provides that all persons “are equal before the law and are entitled without any discrimination to equal protection of the law.”

For the gay and lesbian activists, the foregoing provision is construed to mean that even the homosexuals are to find protection in the law where violations or abuses against them occur.

⁴¹ Ibid.

(v) Conclusion

This Chapter has broadly discussed the human rights and the historical development of Lesbian and gay rights struggles. The Chapter has also discussed how gay and lesbian rights have now been found as a concern of international law by bring such rights to be measured according to international standards, in particular the provisions of the ICCPR.

It should be noted, however, that what has been discussed above is the general application and arguments of gay right activists. Such supposedly rights are viewed differently regions of the world. The varying views will be considered in the following chapter.

CHAPTER TWO

GAY AND LESBIAN SITUATION IN ZAMBIA

- (i) The legal position of Homosexuality in Zambia
- (ii) The Gay and Lesbian Movement in Zambia
- (iii) The Zambian Government's Position on Homosexuality
- (iv) The Church and the general public on homosexuality
- (v) Conclusion

CHAPTER TWO

GAY AND LESBIAN SITUATION IN ZAMBIA

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CHAPTER TWO

GAY AND LESBIAN SITUATION IN ZAMBIA

This chapter discusses the gay and lesbian situation in Zambia. The first part of the chapter discusses the legal position of Homosexuality in Zambia. The second part looks at the Gay and Lesbian Movement that arose to fight for the rights of the Homosexuals in Zambia. The third part looks at the position of the Zambian Government with regard the subject matter. Finally, the fourth part discusses the views of the Church and the general public pertaining gay and lesbian persons. A conclusion shall follow thereof.

(i) The legal position of Homosexuality in Zambia

It is important to state at the outset that Homosexuality is illegal in the Zambian legal system. In fact, it is a criminal offence to practice as such in the Zambian Legal jurisdiction. This is covered in both section 155 and 158 of the Penal code, Chapter 87 of the Laws of Zambia. Section 155 establishes that

“155. Any person who-

- (a) has carnal knowledge of any person against the order of nature; or
- (b) has carnal knowledge of an animal; or
- (c) permits a male person to have carnal knowledge of him or her against the order of nature;

is guilty of a felony and is liable to imprisonment for fourteen years”.⁴²

⁴² Section 155 of the Penal Code, Chapter 87 of the Laws of Zambia

The aforementioned criminal provision clearly provides that homosexuality is unnatural offence and that anyone engages in such activities is liable for a fourteen year jail sentence.

On the other hand section 158 provides that

158. “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 with himself or with another male person, whether in public or private, is guilty of a felony and is liable to imprisonment for five years”⁴³.

The aforementioned criminal provision expressly criminalizes homosexual acts whether in public or private. Furthermore, no regard is given as to whether the acts are between consenting adults. It must be noted further that homosexuality is not a status crime. Thus, it is not illegal to be homosexual. The illegality, however, begins with acts or practice of homosexuality.

On the face of it, Chapter 87 of the Laws of Zambia appears not to provide particularly for homosexual acts between females. However, the apparent *lacuna* is remedied by the provisions in the Interpretation and General Provisions Act, Chapter 2. Section 4(2) reads; “Words and expressions in a written law importing the masculine gender includes females”⁴⁴

⁴³ Section 158 of the Penal Code, Chapter 87 of the Laws of Zambia.

⁴⁴ Section 4(2) of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia

By virtue of the foregoing provision, the wording of Section 158 of the Penal Code is construed to include women who are practicing lesbianism. Section 158 therefore outlaws acts of indecency among men and women.

The law discussed above lays a legal position as regard homosexuality in the Zambian legal jurisdiction. We shall now turn to look at the gay and lesbian movement that arose to fight the injustices that the homosexuals suffer as a result of the law.

(ii) The Gay and Lesbian Movement in Zambia

The issue of Homosexuality is not novel in Zambia. It has existed under cover for a long time. Homosexuals have existed in their closets and never before came into the open about their sexual orientation. The issue of Homosexuality was brought to the public eye by a self – proclaimed homosexual revelation. In mid July of 1998, one Francise Yabe Chisambisha, ‘came out in the open’ and boldly stated his sexual orientation.⁴⁵ Mr. Chisambisha actually confessed to The Post Newspaper that he had sexual relationships with over thirty-three (33) different men within the country.

Following the above declaration by Chisambisha, an association to look into the interest of gay and lesbian persons was formed though the legal status of this association triggered a lot of debate in the country. The association was called the Lesbians, Gays and Transgender Persons, LEGATRA.

⁴⁵ The Post Newspaper. July 14, 1998,p15.

The objectives of this association were;

- (a) giving legal advice and protection to any person being discriminated against on the basis of his or her sexual orientation;
- (b) offering counseling to victims of gay-lesbian bashing or oppression;
- (c) creating support groups for victims of any form of discrimination on the basis of sexual orientation;
- (d) conducting HIV education and outreach campaigns to persons or groups of persons who do not easily have access to the government and non-governmental HIV/AIDS programs, including prisoners;
- (e) helping parents, friends and relatives of gay and lesbian persons;
- (f) supporting government, NGOs and the United Nations efforts in popularizing human rights education, promotion and protection mechanism;
- (g) advocating for law reforms to enhance and ensure the democratic process in Zambia is inclusive to all persons regardless of any distinction.⁴⁶

LEGATRA may be said to be the brainchild of the Zambia Independent Monitoring Team, ZIMT, which lobbied for its formation. ZIMT had included among its functions, to advocate for the gay and lesbian rights. LEGATRA also run a monthly magazine known as LEGATRA News.

LEGATRA had defended its existence based on the Republican Constitution. It noted that the “Republican Constitution is supreme in Zambia and therefore any Act of Parliament which is contrary to the Constitution may be quashed on that basis.”⁴⁷

⁴⁶ LEGATRA Legal Opinion, Drawn by Messrs S.K. & Associates, October/November 1998.p.2.

⁴⁷ Ibid.

From this, LEGATRA believed that in spite of the declaration of Zambia as Christian Nation in the preamble of the Constitution, there is a provision in the same Constitution for Freedom of thought and religion and that, “no Act of Parliament has been enacted to the effect that the Bible shall form part of our laws nor that the Bible is supreme. The Bible cannot therefore be used to suppress people with different thoughts and beliefs.”⁴⁸

The Association also believed that in spite of Section 155 and 158 of the Penal Code, Chapter 87 of the Laws of Zambia, which makes homosexuality a criminal offence, the intentions of the Association was to have these provisions abolished.

According to Section 155 of the Penal Code, homosexuality is an unnatural offence. That is, homosexuality is an act done against the natural order of man. From above mentioned penal provision, it may be said that the homosexual person is a victim. In this connection, LEGATRA claimed that its activities were not to encourage unnatural acts but, “rather, the Association is acting as a support unit of victims just like an NGO taking care of drugs victims, AIDS victims and prison victimization.”⁴⁹

LEGATRA therefore viewed itself as the gay and lesbian community’s champion, ready to speak for them and to lobby for the reform of the existing laws against homosexuals in the country.

⁴⁸ Ibid.

⁴⁹ Ibid.

We shall now turn to discuss the position of the Zambian Government vis-à-vis homosexuality.

(iii) The Zambian Government's Position on Homosexuality

Government' position on the subject matter was specially addressed in Parliament on the 15th of September, 1998, when a point of order was raised by Dr. Ludwig Sondashi who wondered why some people had gone around declaring their homosexual status and wanted to know what the Government's position on the matter was.

In response to the above request, Lieutenant General Christon Tembo, the then Vice President of the Republic of Zambia, made available to the National Assembly a communication on the Government Policy on Homosexuality which he said was a "clear reflection of the legislation and particular the Penal Code, Cap 87 of the Laws of Zambia."⁵⁰

The then Vice President stated that, "Homosexuality goes against the order of nature and morality as understood in the Zambian society. Homosexuals acts are therefore criminalized."⁵¹ He stated that homosexuality was a criminal offence according to sections 155 and 158 of the Penal Code.

⁵⁰ Parliamentary Debates on Government Policy Statement on Homosexuals in Zambia. Tuesday 15th September 1998.p.1.

⁵¹ Ibid.

The then Vice President further made mention that anybody who agitated for homosexual practices in Zambia was at risk of being arrested for the criminal acts or for conspiracy to commit criminal acts as per section 394 of the same Penal Code, which makes it an offence for any person to conspire with another to commit homosexual practices.⁵²

The then Vice President of Zambia while submitting a communication on Government Policy Statement on Homosexuals in Zambia had this to say; “the provisions of the Penal Code that have been cited are in no way inconsistent with or in contravention of Article 22 of the International Covenant on Civil and Political Rights, (ICCPR), to which Zambia is a party.”⁵³

The justification for non contravention was based on the principle of the Limitation Clauses in the Constitution of Zambia which allowed the State to derogate the rights of freedom of Association and Assembly which otherwise would limit gay and lesbian associations. In this connection, the then Vice President mentioned the following;

Mr. Speaker, Sir, all the above Articles while guaranteeing the Freedom of Association and Assembly, have limitation clauses for the purposes of protecting certain public interests such as public morality. This confirms that human rights do not operate in a vacuum but within social norms, which are a summation of numerous interests and generally accepted international legal principles.⁵⁴

The then Vice President further observed that since homosexuality is criminalized, it then followed that an Association such as LEGATRA formed to further the interests of homosexuals could never be registered in Zambia. In this connection, he stated that;

⁵² Cfr. Ibid.

⁵³ Ibid., p. 3.

⁵⁴ Ibid.

“those who will persist in championing the cause of homosexuals in Zambia risk being arrested for felonies of committing criminal acts or for conspiracy to commit the criminal acts. This is the government’s position.”⁵⁵

From the foregoing, it is certain that the position of the government of Zambia is to treat homosexual acts as a serious crime.

We shall now turn to look at the position of the Church in particular the Catholic Church and the general public’s reaction to homosexuality.

(iv). The Church and the general public on homosexuality

The Church generally in Zambia has maintained and argued that homosexuality is against Christianity. They have argued that legalizing homosexuality in Zambia will contradict the notion of Zambia as a Christian Nation. It is further argued that homosexuality is sin and therefore should not be tolerated. They base their arguments on the Bible which in Leviticus 20:30 which describes homosexuality as detestable, whose only sanction is death.

The Catholic Church has also stated their position with respect to the subject matter. The Catholic’s view on homosexuality has been based on the dignity of man and the purpose of sex. The Roman Catholic Church has an unusual relationship with homosexuality.

⁵⁵ Ibid., p. 4.

Traditional Catholic doctrine on homosexuality has been one of total rejection: sexuality is supposed to be a matter between males and females only. That has changed in the 20th century as behavioral research revealed that sexual orientation was not necessarily a matter of choice.⁵⁶ Today the Catholic position has become somewhat conflicted: homosexuality is natural and even biological, but still disordered.

This has become a critical distinction for the Catholic Church because theological teaching dictates that sins only exist when personal choice also exists — thus, if one's sexual orientation is not chosen, then it cannot also be sinful.⁵⁷ It doesn't matter if the orientation is caused by genetics or is caused by environmental conditions in childhood: the end result is a set of inclinations which are not freely chosen, and, hence, not sinful.

This does not mean, however, that the Catholic Church has begun to approve of homosexuality.

On the contrary, disapproval remains and continues to be quite strong — yet the focus has shifted. Homosexual behavior is still regarded as a sin because it is obviously something which a person chooses to do and can choose not to do.⁵⁸ Homosexual orientation may not be treated as a sin anymore, but it is treated as a disorder.⁵⁹

⁵⁶ <http://www.catholic.com/library/homosexuality.asp>

⁵⁷ Cf. Ibid.

⁵⁸ Cf. Ibid.

⁵⁹ **The Catechism of the Catholic Church**, Nairobi, Paulines Publications-Africa, 1992

The Catholic Church's official position on homosexuality can be found in the Catechism of the Catholic Church:

2358. The number of men and women who have deep-seated homosexual tendencies is not negligible. They do not choose their homosexual condition; for most of them it is a trial. They must be accepted with respect, compassion, and sensitivity. Every sign of unjust discrimination in their regard should be avoided. These persons are called to fulfill God's will in their lives and, if they are Christians, to unite to the sacrifice of the Lord's Cross the difficulties they may encounter from their condition.

2359. Homosexual persons are called to chastity. By the virtues of self-mastery that teach them inner freedom, at times by the support of disinterested friendship, by prayer and sacramental grace, they can and should gradually and resolutely approach Christian perfection.⁶⁰

What's particularly interesting about the Catholic's position on homosexuality is how intimately connected it is with the Catholic's position on birth control. Because the connection is so fundamental, any shift on the Catholic description of homosexuality as "disordered" would risk undermining the Catholic opposition to "artificial" contraception like birth control pills, condoms, and sterilization.⁶¹ The basis reason here for the rejection of homosexuality is that it constitutes a threat to the continued existence of human species. Thus, it may be that one of the most important reasons why the Roman Catholic Church remains locked into their opposition to homosexuality may have nothing to do with homosexuality.

⁶⁰Ibid.

⁶¹<http://www.catholic.com/library/homosexuality.asp>

It appears to be a general consensus that homosexuality will not be publicly accepted in Zambia. The Zambian Public seems totally against toleration the gay and lesbian person in society. Most persons talked to during this research expressed their feelings on the subject with strong terms, generally likening homosexuals to the behavior of dogs and pigs. There is a wide- spread anti-homosexual activity including threats of violence and imprisonment, stigmatization and marginalization of homosexuals. The homophobic majority of Zambians do not consider the homosexuals as their equals. The general public claimed that the homosexual persons need to be helped both spiritually and psychologically.

Suffice to state that the majority of Zambians are so anti -homosexual that their anger and violence is in some instances directed not only to the homosexuals but also to persons advocating for homosexual rights. Reports in the press read on the threats of violence especially against Mr. Alfred Zulu, the then ZIMT president, a sympathizer of homosexuals. The Post Newspaper carried a story of how Evelyn Hone students tried to manhandle and beat up members of ZIMT who had organized a debate or public discussion on the area under discussion.⁶² As a result of the public's outcry against the homosexuals and the stigmatization of this group of persons, the gay and lesbian persons have been forced into hiding their sexual-orientation for fear of rebuke. It is important to not that all this marginalization, stigmatization, violence against the homosexuals and other injustices against homosexuals have been as a result of the effects of the law.

⁶² The Post Newspaper, October 1998,p16.

It is however argued by other people that legalizing homosexuality pose a danger to the continuity of the human species in the sense that homosexual persons are not able to have children.

(v). Conclusion

This Chapter has shown what the law is as regard homosexuality. It has been shown that homosexuality is a criminal offence in Zambia as provided for in sections 155 and 158 of the Penal Code, Chapter 87 of the Laws of Zambia. It has also been shown that homosexuality is regarded as a criminal offence by the Zambian government. Furthermore, homosexual persons have been unjustly treated by members of the public.

In the next Chapter, we shall scrutinize the Law on Homosexuality in other jurisdictions and compare it with the Law relating to the same in the Zambian legal system. The laws that shall form the basis of discussion in the next Chapter are those to be found in Namibia, South Africa and the European States.

CHAPTER THREE

THE LAW ON HOMOSEXUALITY IN OTHER JURISDICTIONS

- (i) The legal status of homosexuality in Africa
 - a) Namibia
 - b) South Africa
- (ii) The legal status of homosexuality in Europe
- (iii) Conclusion

CHAPTER THREE

THE LAW ON HOMOSEXUALITY IN OTHER JURISDICTIONS

This Chapter discusses the law on homosexuality as they apply in Namibia and South Africa and selected states of Europe. The laws of such jurisdictions are discussed in comparison with the Zambian legislation.

(i) The legal Status of homosexuality in Africa

In Africa, homosexuality is illegal for gay men in 29 countries and for lesbian women in 20 countries.⁶³ The legal status in many ways mirrors the widespread homophobia on the continent, documented so clearly by statements made by, for example President Mugabe of Zimbabwe and President Museveni of Uganda. Zimbabwe is more known for its homophobia and extreme statements made by President Mugabe, including various claims that homosexuality is not an African phenomenon but rather a Western decadency. Homosexuality is illegal in Zimbabwe, and some individuals have been prosecuted and convicted for their sexual orientation, including the country's first president, Banana.⁶⁴ But it does not fully describe the situation, as African gay and lesbian organizations also can refer to many victories over the last years. We shall now turn to look at countries

⁶³ <http://www.africa.homosexuality>

⁶⁴ http://news.bbc.co.uk/1/in_depth/africa

that stand apart when it comes to the legal status of Homosexuality in Africa, thus, Namibia and South Africa.

a) Namibia

Namibia has no statute law that criminalizes the practice of homosexuality. However, there is Common Law offence of committing unnatural sex, and thus to this extent homosexual practices or same sex acts are illegal.⁶⁵ The Common Law makes it illegal for males to indulge in homosexual relationships. However, the position as regard female same sex relationships (lesbianism) is not clear.⁶⁶ This can be interpreted as discriminatory because Common Law is silent on the issue of lesbianism. There is no morality or sense in legalizing man to man sexual relationships and not make the position known with regard women to women sexual relationships, when the two practices amount homosexual tendencies or acts. It is thus uncertain as to what the Common Law seeks to criminalize. It is uncertain whether it seeks to criminalize homosexual practices and if so, it should by necessity include lesbianism or the illegality is only as regards gay men. It should be kept in mind that there is no statutory offence committed by homosexual acts but purely Common law offence.

⁶⁵ Cf. *ibid.*

⁶⁶ Cf. *ibid.*

Suffice to mention, however, that the Namibian Constitution prohibits discrimination on the ground of inter alia, sex and guarantees equality of all persons before the law.⁶⁷ Additionally, the Namibian Constitution and bill of rights has a basic theme of tolerance which in essence recognizes individual's right to be different. This being the case, it would be prudent and in line with the Constitution to allow homosexuals to freely practice their sexual orientation or preferences.

Most interesting of the Namibian legislation is the wording of the Labour Act. The Labour Act has a provision which expressly proscribes discrimination based on sexual orientation.⁶⁸ It is thus illegal to discriminate anyone at places of work on the ground of sexual orientation. This piece of legislation points to the fact that homosexuals have as much potential to do any job as heterosexuals can. Accordingly, one's sexual preference has nothing to do with one's ability to work professionally at any position.

Notwithstanding the fact that the statute laws do not criminalize homosexual practices, there have been calls for legislation to criminalize homosexual acts. These calls are especially from top government officials. Efforts have been made by some government officials to oppose the practice of homosexuality by championing the introduction of laws that criminalizes the practice. For example, in 1998, the then Minister of Home Affairs

⁶⁷ Article 10 of the Constitution of Namibia

⁶⁸ Section 107 of the Namibian Labour Act

Jerry Ekandjo revealed plans to draft controversial anti-homosexual legislation to provide heavy penalties to curb homosexual practices in Namibia. He had the following to say;

It is my considered opinion that the so called gay rights can never qualify as human rights. They are wrongly claimed because it is inimical to true Namibian Culture, African Culture and religion. They should be classified as human wrongs which rank sin against society and God.⁶⁹

The revelation of the draft anti-homosexual legislation was received with opposition and much condemnation within and out of the country especially from Rainbow project.⁷⁰ The Rainbow project is an organization that campaigns for the protection of the rights of homosexuals in Namibia. The main contention behind the opposition of the proposed draft legislation was that it would contradict the Constitution and the Bill of rights which guaranteed equality of all persons without discrimination under Article 10.⁷¹ The outcry prompted the government rescind its decision to legislate an anti-homosexual Act. This episode shows that the people of Namibia will not sit back and allow government to enact laws that are discriminatory.

The above situation is contrary to the situation in Zambia where the government will not even allow any talks or advocacy for gay rights. The legislation in Namibia as compared to the Zambian one is much more accommodating and tolerant. Discrimination on the ground of sexual orientation does not benefit anyone because human rights are vested in every human being by virtue of being human. Additionally, fundamental human rights

⁶⁹ www.illga.org

⁷⁰ Cf. *ibid.*

⁷¹ Cf. *ibid.*

have nothing to do with any particular religion, culture or even sexual preference. This view is accepted in Namibia and thus the law remains intact and non discriminatory.

A land mark ruling for gay and lesbian rights was hand down by the Namibian High Court in April 1997.⁷² The facts of this case are that, Liz Frank, who was born in German, brought an application for discrimination on the ground of her sexual orientation against the Immigration Selection Board. Ms Frank had applied to the Board to be granted a permanent residence basing the application on her professional contribution to the educational reforms in Namibia. She had in the country for eight years and been in a longstanding relationship with a Namibian partner who is also female. It was her claim that her application had not been granted by the authority in question because of her involvement in a homosexual relationship. She further claimed that had she been in a heterosexual relationship with a Namibian, she would have been able to marry and thereby gain the constitutional right to stay in Namibia and apply for citizenship. She argued that because of her sexual orientation, the Immigration Selection Board was not able to grant her permanent residence. She argued further that the denial by the Select Board to grant her a permanent residence violated her constitutional right to equality, freedom from discrimination, her right to privacy and the right of the family to be protected by the state. Interesting, the Immigration Select Board did not give any ground

⁷² Ibid.

in opposition. The High Court ordered the Board to grant the applicant permanent residence.⁷³

The decision from the foregoing case clearly shows that discrimination on grounds of sexual orientation is not to be tolerated in Namibia regardless of who the person behind such action is.

Having looked at homosexual laws in Namibia, we shall now turn to discuss homosexual laws in South Africa.

b) South Africa

South Africa stands apart when it comes to the legal status of gays and lesbians in Africa, and stands in comparison with Western European countries. Not only is homosexuality legal and visible, but there exists a national legislation which bans discrimination on the basis of sexual orientation.

Homosexual practices are perfectly legal in South Africa. There is no law, statute or common law that criminalizes homosexual activities. Unlike the Zambian situation as we

⁷³ <http://www.afrol.com/htm/categories/gay/gay-afrol.htm>

saw in the previous Chapter, the plight of homosexual persons in South Africa is considered as a concern of human rights. Concluded in the South African Constitution is an explicit provision entrenched in the Bill of rights that protect against unequal treatment and discrimination based on a person's sexual orientation. Article A (3) of the South African constitution provides that; "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds including race, gender, sex, pregnancy...sexual orientation,..."⁷⁴

The legislation in South Africa in relation to the subject of homosexuality prevails now as a result of advocacy and development of the legal system. Prior to 1998, it was proscribed by law to practice homosexuality in South Africa. Homosexual practices were against the Common Law crimes of sodomy, unnatural sexual offences and contrary to section 20(A) of the Sexual Offences Act. This legislation existed side by side with the provisions of the constitution.

In May, 1998, the High Court of South Africa struck down as unconstitutional, Common Law crimes of sodomy and the provisions under the Sexual Offences Act. In particular, the High Court struck down section 20(A) of the Sexual Offices Act as unconstitutional. This holding was confirmed later in the same year by the South African Constitutional Court. The legislation in question was held to be in conflict with Article 3 of the Constitution.

⁷⁴ Article A(3) Bill of Rights, Constitution of South Africa

Judge Ackerman observed that;

The law independently breached rights to equality, dignity and privacy. Such laws undermined self-esteem, cause psychological harm, legitimated violence and blackmail against lesbians, gay, bisexual and trans-sexual people.⁷⁵

It was further submitted in the same case that the Constitution was the supreme law of the South Africa and in line with this principle; the legislation in question decriminalized homosexual practices.⁷⁶

It can be seen from the aforementioned case that situation in South Africa vis-à-vis homosexuality did not just happen to facilitate for tolerant legislation on the subject matter. The law as it is now is as a result of the legal system evolving, advocacy and fighting for the rights of homosexuals to not only are tolerated but also to be treated as equals. Important to mention that legislation shapes the mind set and behavior of society thus there is a closer relationship between societal behavior and the law.

Additionally, the South African Labour law prohibits the discrimination of persons on grounds of sexual orientation at places of work.⁷⁷ The only part of discrimination is as regards the age of consent. The age limit for heterosexual practice is set at 16 years while the age of consent for homosexual practice is set at 19 years.⁷⁸

⁷⁵ www.ilga.org

⁷⁶ Cfr. Ibid.

⁷⁷ Labour Relations Act, 1995

⁷⁸ www.ilga.org.

In comparison to the *Zambian law*, the legislation of South Africa is extremely good tolerant. Zambia has not reviewed its laws on homosexual practices ever since their enactment. The issue of homosexuality in Zambia viewed negatively. So harsh is the response from the government in particular, that even a discussion on the matter is not allowed or encouraged. Such stance of even disallowing discussions on the matter is inexcusable. People need to be left to make informed and independent decisions and not structure their behavior to the dictates and tunes of the government. The fact that South Africa has a more liberal and tolerant approach in relation to homosexuality does not in itself entail that the Government and the majority of South Africans are homosexuals. It only simply means that people are free to do what they desire without fear of castigation, discrimination and harassment.

It suffices to make mention that law has an effect on how people perceive issues. For instance, the South African public is more tolerant of homosexual persons because the law is equally tolerant in the sense that it does not condemn homosexual practices. This is, however, not the case in Zambia. The *Zambian public* is prone to discrimination and castigation of homosexual persons because the law allows such. In fact, the law is often used as justification for abusing homosexual persons.

Quite recently, the South African Constitutional Court held the Aliens Act to be unconstitutional. This was based on the premise that the Act in question unfairly

discriminated against lesbians and gay couples by denying them the same rights those heterosexual couples had under the Act.⁷⁹

The case followed a dispute between National Coalition for Gay and Lesbian Equality (NCGLE) and the Department of Home Affairs about the status of same sex couples. The Coalition and the commission on Gender Equality asked the court to extend immigration rights to homosexual couples to bring the existing law in line with the constitution.

The court held that Section 25(5) by omitting to confer on persons who are partners in permanent same sex life partnerships the benefits it extends to spouses, unfairly discriminates, on the grounds of their sexual orientation and marital status against partners in such same sex partnership.⁸⁰

The fact that the laws of South Africa do not discriminate against homosexuality does not necessarily mean that there are no incidents of discrimination on the grounds of sexual orientation in that country. Not all people accept the existence of gay and lesbian rights. However, discrimination, victimization, stigmatization and violence against homosexuals is not as rampant as it is in Zambia. At least in South Africa the Homosexual person can seek audience before the Court for complaints of discrimination and victimization.

⁷⁹ Cfr. Ibid.

⁸⁰ www.ilga.org.

For the example the Legal Resource foundation of South Africa, on the instruction of NCGLE, has been corresponding with the South African Law Commission into reviewing the South Africa Marriage Act. They furthermore intend to ensure that a Project Committee is constituted and of which a nominee of NCGLE, a member. This is in an effort to bring same sex unions on the same basis as the marriages of heterosexual unions.

The legislation in both Namibia and South Africa may be used to as a ground to invalidate the contention that homosexuality is anti-Africa thus not allowable in Zambia. Suffice to mention that Zambia is no more African than other states; so to say that homosexuality is ant-African or anti culture does not hold no water. We are living in an era of dramatic alteration where man and woman's life styles are constantly changing as such the law should be seen to be dynamic to reflect everyday views, aspirations and values of man.

We now turn to discuss the legal status of homosexuality in Europe

(ii) The legal status of homosexuality in Europe

Under the foregoing subheading, reference will be made to the legislation on homosexuality that prevails in some of the member states of the Council of Europe (EC). Furthermore, emphasis will be put on the works and pronouncements of the European Court of Human Rights (ECHR) on the topic of homosexuality.

The legislation on homosexuality in most of the members of the Council of Europe does not discriminate homosexuals in the strict sense. The prevailing situation is that homosexual practices are deemed criminal in the absence of certain conditions. In the United Kingdom for instance, it is an indictable offence both at common law and by statute to commit buggery with an animal or another man. The Sexual Offences Act deals with un-natural offences which includes homosexual practice (buggery). The Act however provides that it is not a crime for one man to commit buggery with another man if the two have consented and are above the age of 21⁸¹. The Act further provides that such acts should be done in private.⁸² From the aforementioned, it can be concluded that homosexual practices in UK will only be deemed as a crime for want of conditions proscribed by the law.

It is however imperative to state that although the law on homosexuality in most of the members of the Council of Europe does not discriminate on the basis of sexual orientation per se, it does discriminate when it comes to the age of consent. The age limit

⁸¹ Cf. Section 1(7) of the Sexual Offences Act 1967.

⁸² Cf. *ibid.*

or age of consent varies from country to country. For instance, the age of consent as it applies in the UK is 21 years. However, in other member states of the Council of Europe, the age of consent is 16 years. It is however surprising that the age of consent for homosexual and heterosexual practices among member states of the EC is treated differently, with the former usually been higher than the latter. This in itself is a form of discrimination because it points to a difference and unequal treatment of sexual orientation. The foregoing was appositely observed in Sutherland v. United Kingdom No. 25186/94 in this case, the applicant age 18 years contented that the age limit difference in the UK was discriminatory. The European Commission found that Article 14 and 8 of the European Convention of Human Rights was violated. It then concluded that there was no objection and reasonable justification for the difference in the age of consent of 18 years for male homosexuals and 16 years for male heterosexuals.

(iii) Conclusion

It has been shown from the foregoing discussions that some jurisdictions both within Africa and Europe have laws that are both tolerant and non discriminatory to homosexual persons as compared to the Zambian laws.

We shall now turn to discuss the legal implications of Zambia's current legal position on homosexuality vis-à-vis International Law. We shall show how the Zambian Municipal laws violate International law.

CHAPTER FOUR

THE LEGAL IMPLICATIONS OF ZAMBIA'S LEGAL POSITION ON HOMOSEXUALITY VIS-À- VIS INTERNATIONAL LAW

- (i) The Violations of the Rights of Lesbian, Gay, Bisexual and Transgender Persons in Zambia
- (ii) Substantive Violations of the International Convention on Civil and Political Rights
- (iii) Conclusion

CHAPTER FOUR

THE LEGAL IMPLICATIONS OF ZAMBIA'S LEGAL POSITION ON HOMOSEXUALITY VIS-À- VIS INTERNATIONAL LAW

This Chapter will discuss the legal implications of Zambia's position on homosexuality vis-à-vis International law. It shall endeavor to show how some the provisions of the Penal code, Cap 87 of the Laws of Zambia violate certain provisions of the ICCPR to which Zambia is a part.

(i) The Violations of the Rights of Lesbian, Gay, Bisexual and Transgender Persons in Zambia

Zambia is state party of the International Covenant on Civil and Political Rights (ICCPR) following its accession on April 10, 1984, and will present its third periodic report due on June 30, 1998 before the U.N. Human Rights Committee.

The Constitution of Zambia of 1991, as amended by Act no. 17 of 1996, establishes in its

Article 11 that “every person in Zambia has been and shall continue to be entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, color, creed, sex or marital status (...)”.⁸³

Furthermore, article 23(1) of the Constitution states that “no law shall make any provision that is discriminatory either of itself or in its effect.”⁸⁴ The constitutional antidiscrimination clause is established by article 23(2) that reads “no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority” whereby discrimination is defined, according to article 23(3), any

different treatment to different persons attributable, wholly or mainly to their respective descriptions by race, tribe, sex, place of origin, marital status, political opinions color 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.⁸⁵

⁸³ Article 11 of The Constitution of Zambia

⁸⁴ Ibid., Article 23(1)

⁸⁵ Ibid ., Article 23(3)

(ii) Substantive Violations of the International Convention on Civil and Political Rights

Under this subsection we shall refer to Articles 2(1), 26 (Non-discrimination) and 17 (Freedom from Arbitrary Interference with Privacy, Family, Home) of the ICCPR and see how other Courts have interpreted them.

In the case of Nicholas Toonen v Australia,⁸⁶ the applicant brought this application before the Human Rights Committee challenging certain provisions of the Tasmanian Criminal Code (Australia being responsible for the acts of a component state within its federal structure) which made criminal various forms of sexual conduct between men, including all forms of sexual contacts between consenting adult homosexual men in private. Toonen specially claimed that the legislation prohibiting homosexuality violated his rights as protected and provided for in Articles 2(1), 17 and 26 of the ICCPR.

The Human Rights Committee found that the criminalization of same-sex sexual conducts between consenting adults violated Articles 2(1), 17, and 26 of the ICCPR. According to the Committee, 'sex' as provided in Articles 2(1) and 26 must be construed as including sexual orientation. That decision constitutes an important term of reference for the Committee as well as for other treaty bodies and U.N. special procedures with reference to discrimination on grounds of sexual orientation in the light of the ICCPR.

⁸⁶ Communication no. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

The most egregious violation of LGBT rights in Zambia is constituted by the Zambian Penal code, Chapter 87 of the Laws of Zambia that still criminalizes same-sex sexual conducts in private between consenting adults contravening to Articles 2(1), 17 and 26 of the ICCPR.

Section 155 of the Penal Code Act of 1995, Chapter 87 of the Laws of Zambia (as amended by Act no. 26 of 1933), establishes that “Any person who- (a) has carnal knowledge of any person against the order of nature; or (b) has carnal knowledge of an animal; or (c) permits a male person to have carnal knowledge of him or her against the order of nature; is guilty of a felony and is liable to imprisonment for fourteen years”.⁸⁷

Similarly to the Tasmanian statute outlawed by the Human Rights Committee in *Toonen* case, section 155 punishes the crime of “unnatural offences”. Section 156 punishes with imprisonment for seven year the “attempt to commit unnatural offences”.⁸⁸

Section 158 of the Penal Code explicitly targets same-sex sexual conducts with the provision that criminalizes “indecent practices between males”. Section 158 reads “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 with himself or with another male person, whether in public or private, is guilty of a felony and is liable to imprisonment for five years”⁸⁹.

⁸⁷ Section 155 of the Penal Code, Chapter 87 of the Laws of Zambia

⁸⁸ Ibid., section 156

⁸⁹ Ibid., section 158

As pointed out below, the criminal provisions above mentioned not only per se violate the ICCPR, but reinforce social stigma and homophobia against sexual and gender non normative behavior, whether perceived or real, that may easily cause discrimination or more serious forms of human rights abuses, such as crimes motivated by hatred that attempt to life or physical integrity of individuals perceived as gay, lesbian, bisexual or transgender.

The retention of codes that criminalize sexual relationships between same-sex consenting adults has a devastating impact on same-sex practicing people in Zambia. Gays, lesbians, and bisexuals in Zambia live in constant fear of arbitrary detention, discrimination in education, employment, housing, and access to services, and extortion—all buttressed by the existence of sections 155 – 158 and lack of specific legal protections for LGBT under Zambian law.

Zambians who have fought against discrimination related to sexual orientation or gender identity have been systematically silenced. On 23 September 1998 in a statement to Parliament, published in the Times of Zambia, Zambian Vice President Christon Tembo vowed that, "If anybody promotes gay rights after this statement, the law will take its course. We need to protect public morality. Human rights do not operate in a vacuum." It was a clear instruction for arrests by the police of anybody who identified or supported gays and lesbians. As a result, an NGO calling itself Zambia Against People with Abnormal Sexual Acts [ZAPASA] was formed to fight against homosexuals. When LGBT organizers appeared in the newspaper to announce their wishes to register

the organization, government officials warned that any attempt to register the group or hold public meetings would be met with arrests. The then Home Affairs Minister Peter Machungwa ordered police to arrest anyone who attempted to register a group advocating for homosexual rights. Registrar of Societies Herbert Nyendwa, who is responsible for processing requests for legal recognition of civic groups, swore he personally would never register an LGBT group. LGBT activists were forced to go underground. Francis Chisambisa, one of the founding members of Lesbians Gays and Transgender Association (LEGATRA), was forced to flee Zambia in 1988, after local newspapers printed articles exposing his sexuality in a highly inflammatory manner. Chisambisa was eventually granted political asylum in South Africa where he has been living for the past nine years away from his family, friends and with limited financial support.

Extortion of gay men remains a major problem, and is often conducted with police participation. Gay men interviewed for this note all reported that blackmail of men believed to be gay was a regular occurrence and often led its victims to financial ruin, depression and ostracism from family and community. A recent report on a Zambian human rights website included an report by a police officer in which he described the targeting of gay men—both Zambian and foreigners—for police-instigated extortion attempts.

Equally disturbing, given Zambia's HIV high rates which runs about 17% among adults, at present, there are no programs—government-sponsored or privately funded—that respond to the HIV-related needs of same-sex practicing men in Zambia. Statistics gathered throughout Africa have shown that men who have sex with men are at

increased risk for HIV transmission. The government of Zambia's National AIDS Control Program fails to even mention men who have sex with men.

(iii) Conclusion

Sections 155-158 of the Zambian Penal Code criminalize any form of consensual same sex conduct in private between consenting adults providing for the possibility of imprisonment from seven to fourteen years. Such provisions reinforce social stigma against gay, lesbian, bisexual and transgender individuals and expose them to the risk of deprivation of liberty, life, physical integrity and health.

Sections 155-158 of the Zambian Penal Code are contrary to the equality principle and anti-discrimination clause of the Zambian Constitution and violate Articles 2(1), 17 and 26 of the ICCPR.

CHAPTER FIVE

SUMMARY AND RECOMMENDATIONS

- i) Summary
- ii) Recommendations

CHAPTER FIVE

SUMMARY AND RECOMMENDATIONS

i). SUMMARY

Homosexuality is an issue that has always divided society principally when the idea is being mooted for the first time.

It has been shown that although some societies have put drastic measures to put a stop to the existence of homosexuals in such domains, homosexuality exists in every society. In fact, gay and lesbian activists have always challenged such laws as being a vehicle of discrimination against homosexuals.

International law has been the foundation for gay and lesbian activists' argument in support of legalizing homosexuality.

Chapter One examined the concept of human rights and the historical development of gay and lesbian rights in the world. It has tried to show that homosexual persons as human as heterosexual persons. As such they too are entitled to all rights enjoyed by all human beings. We have shown that to be different in terms of sexual preferences does not necessarily make one to become less human. Aristotle in his metaphysics has argued that

words, Zambia's legal position against homosexuality falls below the international standards set for the protection of human rights.

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

The way one is prepared to treat sexual minorities is a test of how much one means when talking about the equal right of all humans or the respect for human beings including the universality of human rights...⁹⁰

ii) RECOMMENDATIONS

It is apparent from this study that the issue of homosexuality in Zambia cannot continue to be overlooked. The following recommendations must read in view of the fact that it has been concluded that homosexuality is a human rights concern.

First task is to articulate those rights that fundament human rights. The best example of the articulation of human rights is found in international human rights instruments. The basic human rights having a direct bearing on homosexuality include the right to privacy, non-discrimination and protection against degrading or inhuman treatment. Zambia

⁹⁰ Chris Dunton and Mai Palmberg, **Human Rights and Homosexuality in South Africa**, Current African issues, 19 June, 1996, preface.

could in the pursuit of protection of human rights embrace and make available the above mentioned basic right to homosexual persons who are greatly marginalized in society.

Secondly, it is the duty of the Zambian Human Rights Commission to identify and condemn all forms of discrimination against homosexual persons. The Commission should to educate the masses on the importance of human rights

Thirdly, it is the task of human rights to identify and condemn violations and make it possible to seek redress. Zambia may substantiate this by condemning violation of homosexual person's rights. Momentarily, the government of Zambia condones such violation and is in the forefront denouncing homosexual persons. There is need to put in place a mechanism that will allow homosexuals to seek redress in instances of violation of their rights.

Fourthly, the government of Zambia must revisit the Penal provisions that criminalize homosexual practices in Zambia. As it is currently, the law as it exists today has been a basis of justification for many in the Zambian society to discriminate against homosexual persons.

To the religious, it is recommended that they should love every person equally. They must have in their contemplation that all are precious in the eyes of God. The love which one person can have for, and receive from another is a gift from God. Nonetheless, God expects homosexual persons as well as heterosexual persons to keep his commandments and to work toward achieving a difficult ideal, even if this will only be achieving

gradually. God has a love for every person which is greater than any love which one human being could have for another. In all the circumstances and situations of life, God calls each person, whatever his or her sexual orientation, to fulfill that part of his or her created design which only that person can fulfill.

It is however, important to mention that with the high escalation of HIV/AIDS in Zambia as well as in other countries, homosexual persons should also learn to abstain and more importantly stick to one partner.

Furthermore, since there are reports of incidents of rape in homosexual activities, there is also a need to protect non-consenting partners from abuse. Therefore, the requirement that all sexual relations of homosexual nature must be restricted to consenting adults.

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