

**GAY RIGHTS: IS SAME SEX MARRIAGE MORALLY
JUSTIFIED IN ZAMBIAN SOCIETY?**

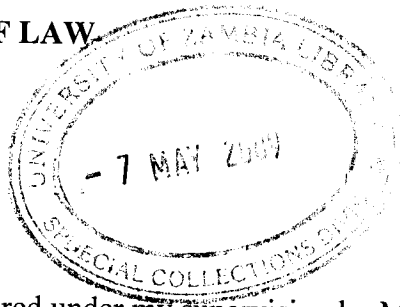


By
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University of Zambia
Lusaka
January 2009

THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW



I recommend that the obligatory essay prepared under my supervision by Muhandu Emeldah titled:

**GAY RIGHTS: IS SAME SEX MARRIAGE MORALLY
JUSTIFIED IN ZAMBIAN SOCIETY?**

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

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Obligatory Essay

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By

Muhandu Emeldah M.

Computer Number: 25010298

Submitted to the University of Zambia in partial Fulfillment of the requirement of the Bachelor of Laws Degree Programme.

School of Law
University of Zambia
Lusaka.

DECLARATION

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

Made this 13th day of ~~January~~ February 2009

By the said..... *Muhandu*.....

At Lusaka.

DEDICATION

To my late father Joel Muhandu, I doubt you would have been happy with this topic. You would have suggested a thousand others for me. Miss you

PREFACE

This paper seeks to explore gay rights in Zambia, and to investigate whether this minority group has any hope of being recognized soon in this country. It will explain the main concepts in the research and give a brief account of the historical evolvement of gay activism in Zambia and in the world. Gays in Zambia have been very highly marginalized while all around the world gay rights groups are emerging and are speaking up for their cause.

Gay men have been arrested and charged under the Penal code of Zambia. They have also in various instances been badly attacked. It has been said that homosexuality occurs in every culture, even in animals but studies have shown that it occurs less in other cultures such as the African and Asian cultures; and that homosexuality only came to be known in these places after the advent of the Westerners and colonialism. This may explain why many in Zambia are adverse to it.

In countries such as South Africa, case law in favour of gay rights is continually accumulating a result of the inclusion of the rights of gays in their Constitution. This research will look at this as well as numerous other issues in investigating the status of gay rights in Zambia.

ACKNOWLEDGEMENTS

First of all I would like to thank my heavenly Father for the good health he blessed me with so that I could finish this paper without mishap.

I would like to express my gratitude to the following people: my mother for egging me on always because I needed it.

My brother and sisters, for loving me unconditionally, always believing in me, and helping me get through difficult patches in my life.

My friends Chisola Mihova and Mbuwa Kachinga for always being there when I need them.

Munsaka Siamwiza for being my ever supportive boy.

Thabo Musonda for always lending a hand when she could.

And my room mate Charity Kosita for keeping the noise levels at a minimum, at the right times.

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CHAPTER ONE

1.0 TITLE OF THE STUDY

Gay rights: Are homosexuality and gay marriage justifiable in Zambian society?

1.1 INTRODUCTION

The issue of homosexuality in Zambia is one that has not been highly publicized although it is an issue that is making a lot of news in the world today. There are not many individuals in Zambia that have come out of the closet to say that they are gay or for that matter to say that they want to have a same sex marriage. This is attributed to the fact that homosexuality is currently outlawed in Zambia.

A lot of gay men have been arrested and charged under the Penal code of Zambia, though after a great deal of publicity the cases are usually dropped or settled out of court. The courts throw many of these cases out of court for lack of evidence. The president of LEGATRA, an organization for gay activists in Zambia, had been very badly attacked twice in the recent past. One incident was at a seminar in Siavonga. The second was in Lusaka. That attack left him seriously injured.¹

Western society currently holds two views about homosexuality. These are the traditional view and the modern view. The traditional view holds that homosexuality is an aberration, disorder and that the behavior is pathological. The other view holds that it is a normal variant in humans and is determined from birth.

It has been articulated that 10 per cent of the world is gay. This is according to the first Kinsey Report (*Sexual Behavior in the Human Male*)² in which it was stated that “10% of the males are more or less exclusively homosexual for at least three years between the

¹ <http://theafricanveil.org/zambia> (16/07/08)

² A. C. Kinsey, W. B. Pomeroy and C. E. Martin, *Sexual Behavior in the Human Male* (Philadelphia: W. B. Saunders Company, 1948), p.651.

ages of 16 and 55.” This statistic has been used widely by gay activists although this study was conducted on American males only. It is doubtful whether this statistic would be true in Zambia.

It has been said that homosexuality occurs in every culture, even in animals but studies have shown that it occurs less in other cultures such as the African and Asian cultures; and that homosexuality only came to be known in these places after the advent of the Westerners and colonialism.³

1.2 STATEMENT OF THE PROBLEM

Homosexuality in Zambia is illegal. This is by virtue of the Penal Code which outlaws it. The law enforcement authorities have the authority to prosecute those who feel that their orientation is not straight. The Penal Code was inherited from the British colonialists as it was then and very little has been changed in its provisions since then therefore while the British have repealed a considerable number of their laws with regard to this aspect, Zambia still uses the same old law.

1.3 PURPOSE OF THE RESEARCH

This research seeks to investigate the issue of homosexuality and gay marriage in Zambia in relation to whether human beings possess a right to choose their sexual preference, the illegality of homosexuality in Zambia and whether it violates any such right or any other right and to compare the case of Zambia with the situation obtaining in the world today.

As a former British colony, Zambia inherited all of Britain's legal systems and Penal code. Britain has since repealed or modified its legal system while Zambia still continues to use the same old laws. Laws concerning Homosexuality are to be found in the Penal

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code under the infamous sodomy laws. They are put together with acts such as Bestiality under the title "Unnatural Offences".

Homosexuality in Zambia has been called insane, madness and animalistic. The public view is that homosexuality should not be allowed as Zambia is a Christian nation and homosexuality is immoral.⁴

The police were instructed to arrest anybody who supports homosexuals and bisexual people or anyone who says that they are gay. In fact according to a report that was published on a gay website <http://africanveil.org>, the government in December 2006 issued a statement that gay marriages would never be allowed in Zambia. The National Parliament in Zambia has spoken strongly against the gay community and says that such abnormal people should be arrested.⁵

In the year 1999 an NGO was actually formed to fight against gay people. It was called Zambia Against People with Abnormal Sexual Acts [ZAPASA].

1.4 OBJECTIVES

The objectives of this study are:

- to find out whether the state of the law regarding homosexuals in Zambia is justified
- to analyse whether any human rights are being violated by the current provisions of the law that outlaw homosexual activities
- to find out whether the law in Zambia regarding gay marriages is in line with international human rights law
- to do a comparative analysis on the Zambian situation with other African and non-African countries in the world
- to find out whether the atmosphere in Zambia is suitable for change in the penal laws in order to allow freedom to gays to express themselves

⁴ <http://theafricanveil.org/zambia> (16/07/08)

⁵ Ibid.

1.4.1 This research seeks to answer the following questions:

- How have gay rights evolved through history?
- Do humans have the right to choose their sexual preference?
- Is it an abuse of any human right to prosecute people on the basis of their sexuality?
- Is it an abuse of the right to non-discrimination and equality to deny people the right to free expression of their homosexuality?
- Is same sex marriage morally justified in Zambian society?
- Who determines what is morally justified in Zambian society?
- Is the prohibiting provision on the Penal Code a violation of any human right whatsoever it may be?

1. 5 OPERATIONAL DEFINITION OF TERMS

Gay: one who has romantic relationships with people of the same sex as him or her.

Homosexual: the same definition as gay.

Sexual orientation: an enduring emotional sexual or affectional attraction to another person which refers to feelings and self concept.

Methodology

This research will employ qualitative method of research such as desk research and online research. It will constitute a great deal of secondary data such as information from articles books and the internet research.

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Chapter two will give an account of the status of gay rights, gay laws and gay activities across the Globe generally at present.

Chapter three will look at the position of gay rights in Africa and the influence of religion, culture and education on society's attitude towards gays and what or who sets the standards for moral justification of certain things; in this case gay rights..

Chapter four will look at a comparative study of gay rights in Zambia more specifically and in other countries such as South Africa where gay rights have been recognized and incorporated into the legal system.

Chapter five will make a conclusive analysis on the Zambian legal system and try to make an assessment of the way forward for gay laws in Zambia.

1.6 HOMOSEXUALITY

Homosexuality has been around since many years before Christ. The Bible talks about an incident where Lot was visited by two men. When the male residents heard about this they demanded to Lot to release them so that they could have sexual intercourse with them. This was in Sodom and Gomorrah. Around 630 BC Dorian aristocrats in Crete had adopted formal pederastic relations between adult princes and adolescent boys, with the double aim to educate the youths and curb population growth. ⁶

Pederasty spread through ancient Greece, influencing sports, literature, politics, philosophy, art and warfare, and causing, according to some, a flowering of culture; it

⁶ www.en.wikipedia.org (22/01/09)

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was associated with gymnasia and athletic nudity. In the Greek empire homosexuality between man and boy became not only widespread but idealised and romantised.⁷

During this same period Nero became emperor of Rome. He married two men in legal ceremonies with at least one spouse accorded the same honours as Caesar's wife.⁸

To say that we hear little of homosexuality does not mean that it did not exist, but rather that it was not a source of neurotic anxiety. For example, King James VI was notorious for his relationships with men like Lennox and others.⁹

Homosexuality had been accepted by all ancient cultures as a normal part of human sexuality. The rise of Christianity, however, led to the beginning of homophobia. The first law against homosexual marriage was promulgated by the Christian emperors Constantius II and Constans. In the year 390, the Christian emperors Valentinian II, Theodosius I and Arcadius declared homosexual sex to be illegal and those who were guilty of it were condemned to be burned alive in front of the public.¹⁰

Around 1102 the Council of London took measures to ensure that the English public knew that it was sinful, marking a significant shift in church attitudes towards homosexuality, which previously had been more or less indifferent, at worst amounting to mild condemnation. Many priests were homosexuals, likely one of the causes of the change in attitude, as moral reformers such as Bernard of Cluny called for change.¹¹

⁷ Bancroft J. Deviant Sexual Behaviour Modification and Assessment. (Oxford: Clarendon Press). 1978. p.8

⁸ *ibid*

⁹ Hawkes J. ed. Sex in History. The Past in the Present. (London: Thames and Hudson, 1953). p149

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¹¹ *ibid*

Between 1250 and 1300, homosexual activity passed from being completely legal in most of Europe to incurring the death penalty in all but a few contemporary legal compilations.¹²

1.7 A GENERAL HISTORY OF HOMOSEXUALITY IN FRANCE

In eighteenth and nineteenth century Europe, same-sex sexual behaviour and cross-dressing were widely considered to be socially unacceptable, and were serious crimes under sodomy and sumptuary laws. Any organized community or social life was underground and secret. Social reformer Jeremy Bentham wrote the first known argument for homosexual law reform in England around 1785, at a time when the legal penalty for "buggery" was death by hanging in his book *Offences Against Oneself*.¹³ However, he feared reprisal, and his powerful essay was not published until 1978. The emerging currents of secular humanist thought which had inspired Bentham also informed the French Revolution, and when the newly-formed National Constituent Assembly began drafting the policies and laws of the new republic in 1792, groups of militant 'sodomite-citizens' in Paris petitioned the Assemblée nationale, the governing body of the French Revolution, for freedom and recognition.¹⁴ In 1791 France became the first nation to decriminalise homosexuality, probably thanks in part to the homosexual Jean Jacques Régis de Cambacérès who was one of the authors of the Napoleonic code.¹⁵

¹² John Boswell, *Christianity, Social Tolerance, and Homosexuality* (New York: Routledge) 1980 p. 293.

¹³ www.en.wikipedia.org (22/01/09)

¹⁴ Blasius, Mark and Phelan, Shane (eds.), "We Are Everywhere: A Historical Sourcebook of Gay and Lesbian Politics", (New York: Routledge). 1997

¹⁵ www.wikipedia.org (22/01/09)

1.9 HISTORY OF HOMOSEXUALITY IN GERMANY

Modern historians usually look to German activist Karl Heinrich Ulrichs as the pioneer of the LGBT rights movement. Ulrichs came out publicly and began publishing books about same-sex love and gender variance in the 1860s, a few years before the term "homosexual" was first published in 1869. Ulrichs' *Uranians* were people with a range of gender expressions and same-sex desires; he considered himself "a female psyche in a male body".¹⁶

From the 1870s, social reformers in other countries had begun to take up the Uranian cause, but their identities were kept secret for fear of reprisal. A secret British society called the "Order of Chaeronea" campaigned for the legalisation of homosexuality, and counted playwright Oscar Wilde among its members in the last decades of the 19th century.¹⁷

When Adolf Hitler assumed power in Germany, as well as the Jews, the gays were among the minority groups that were targeted. They were murdered, books about homosexuality and sexuality and gay organisations were banned.¹⁸

In the 1890s, English socialist poet Edward Carpenter and Scottish anarchist John Henry Mackay wrote in defense of same-sex love and androgyny; Carpenter and British homosexual rights advocate John Addington Symonds contributed to the development of

¹⁶ Ibid.

¹⁷ McKenna, Neil "The Secret Life of Oscar Wilde: An Intimate Biography". (London: Century) 2003.

¹⁸ Giles, Geoffrey J. "'The Most Unkindest Cut of All': Castration, Homosexuality and Nazi Justice," *Journal of Contemporary History*, vol. 27 (1992): pp. 41-61

Havelock Ellis's groundbreaking book *Sexual Inversion*, which called for tolerance towards "inverts" and was suppressed when first published in England.¹⁹

In Europe and America, a broader movement of "free love" was also emerging from the 1860s among first-wave feminists and radicals of the libertarian left. They critiqued Victorian sexual morality and the traditional institutions of family and marriage that were seen to enslave women. Some advocates of free love in the early 20th century, including Russian anarchist and feminist Emma Goldman, also spoke in defence of same-sex love and challenged repressive legislation.²⁰

2.1 HISTORY OF GAY RIGHTS IN THE UNITED STATES

In the United States, several secret or semi-secret groups were formed explicitly to advance the rights of homosexuals as early as the turn of the twentieth century, but little is known about them.²¹ A better documented group is Henry Gerber's The Society for Human Rights formed in Chicago in 1924, which was quickly suppressed²²

Immediately following World War II, a number of homosexual rights groups came into being or were revived across the Western world, in Britain, France, Germany, Holland, the Scandinavian countries and the United States. These groups usually preferred the term homophile to "homosexual", emphasising love over sex. The homophile movement began in the late 1940s with groups in the Netherlands and Denmark, and continued throughout the 1950s and 1960s with groups in Sweden, Norway, the United States,

¹⁹ www.en.wikipedia.org (22/01/09)

²⁰ *Ibid.*

²¹ www.en.wikipedia.org (22/01/09)

²² *ibid*

France, Britain and elsewhere. ONE, Inc., the first public homosexual organization in the U.S, was bankrolled by the wealthy transsexual man Reed Erickson. A U.S. transgender-rights journal, *Transvestia: The Journal of the American Society for Equality in Dress*, also published two issues in 1952.²³

The new social movements of the sixties, such as the Black Power and anti-Vietnam war movements in the U.S, the May 1968 insurrection in France, and Women's Liberation throughout the Western world, inspired some LGBT activists to become more radical, and the Gay Liberation Movement emerged towards the end of the decade. This new radicalism is often attributed to the Stonewall riots of 1969, when a group of transgender, lesbian and gay male patrons at a bar in New York resisted a police raid. Although Gay Liberation was already underway, Stonewall certainly provided a rallying point for the fledgling movement.²⁴

Immediately after Stonewall, such groups as the Gay Liberation Front (GLF) and the Gay Activists' Alliance (GAA) were formed.²⁵

One of the values of the movement was gay pride. Organized by an early GLF leader Brenda Howard, the Stonewall riots were commemorated by annual marches that became known as Gay pride parades. From 1970 activists protested the classification of homosexuality as a mental illness by the American Psychiatric Association in their DSM, and in 1974 it was replaced with a category of "sexual orientation disturbance" then "ego-

²³ ibid

²⁴ ibid

²⁵ Op.cit

dystonic homosexuality", which was also deleted, although "gender identity disorder" remains.²⁶

From the anarchistic Gay Liberation Movement of the early 1970s arose a more reformist and single-issue "Gay Rights Movement", which portrayed gays and lesbians as a minority group and used the language of civil rights — in many respects continuing the work of the homophile period.²⁷

Gay and lesbian rights advocates argued that one's sexual orientation does not reflect on one's gender; that is, "you can be a man and desire a man... without any implications for your gender identity as a man," and the same is true if you are a woman.²⁸ Gays and lesbians were presented as identical to heterosexuals in all ways but private sexual practices and butch "bar dykes" and flamboyant "street queens" were seen as negative stereotypes of lesbians and gays.²⁹

During this period, the International Lesbian and Gay Association (ILGA) was formed (1978), and it continues to campaign for lesbian and gay human rights with the United Nations and individual national governments.³⁰

Lesbian feminism, which was most influential from the mid 1970s to the mid 1980s, encouraged women to direct their energies toward other women rather than men, and advocated lesbianism as the logical result of feminism.³¹

²⁶ *ibid*

²⁷ B. D. Adam, J. Duyvendak, & A. Krouwel (Eds.), "The global emergence of gay and lesbian politics" (Philadelphia: Temple University Press) 1985 pp. 30-90.

²⁸ David Valentine, "'I Know What I Am': The Category 'Transgender' in the Construction of Contemporary U.S. American Conceptions of Gender and Sexuality" (Ph.D. diss., New York University), 2000, p. 190.

²⁹ www.en.wikipedia.org (22/01/09)

³⁰ *ibid*

Many women of the Gay Liberation Movement felt frustrated at the domination of the movement by men and formed separate organisations; some who felt gender differences between men and women could not be resolved developed "lesbian separatism". The term "gay" came to be more strongly associated with homosexual males.³²

1.2.2 HISTORY OF GAY RIGHTS IN CANADA

In Canada, the coming into effect of s.15 of the Canadian Charter of Rights and Freedoms in 1985 saw a shift in the gay rights movement in Canada, as Canadian gays and lesbians moved from liberation to litigious strategies. Premised on Charter protections and on the notion of the immutability of homosexuality, judicial rulings rapidly advanced rights, including those that compelled the Canadian government to legalize same-sex marriage.³³

In the 1990s, organizations began to spring up in non-western countries, such as Progay Philippines, which was founded in 1993 and organized the first Gay Pride march in Asia on June 26, 1994. In many countries, LGBT organizations remain illegal (as of 2006) and transgender and homosexual activists face extreme opposition from the state.³⁴

Gender variant peoples across the globe also formed minority rights movements in the 1990s — Hijra activists campaigned for recognition as a third sex in India and Travesti groups began to organize against police brutality across Latin America, while activists in

³¹ Op.cit

³² ibid

³³ Stychin C.F. *Law's Desire. Sexuality and The Limits of Justice.* (Routledge: London). 1995 p.3

³⁴ www.en.wikipedia.org (22/01/09)

the United States formed militant groups such as Transsexual Menace. In many cases, LGBTI rights movements came to focus on questions of intersectionality, the interplay of oppressions arising from being queer and underclass, colored, disabled, etc³⁵

.LGBT movements are opposed by a variety of individuals and organizations. They may have a personal, moral or religious objection to homosexuality. Studies have consistently shown that people with negative attitudes towards lesbians and gays are more likely to be male, older, religious, politically conservative, and have little close personal contact with openly gay individuals,^[27] as well as supporting traditional gender roles.

1.2.3 HISTORY OF GAY RIGHTS IN ZAMBIA

Historically in Zambia, there has not been any documented evidence of homosexual activity before the 1990s. When the British colonialists came to Zambia, they brought with them their laws which they administered in the territory. At independence these laws were carried forward and have changed little since then.

The following is the story of Francis Chisambisa, one of the founding members of LEGATRA which was the association for Lesbians, Gays, and Transsexuals in Zambia.

I'm 32 years old, I have been on the run since 1998, and all that's been happening is that they extend my months of stay here ever since I applied for asylum.

I came to south Africa in 1998 having run away from Zambia and having been the first to come out of the closet declaring that I was

³⁵ ibid

there living in Zambia and started an organization called "LEGATRA" I must say that since that time I had to seek asylum in South Africa and must admit that its not that easy out here because up to now its hard for me to get into college especially that I cant easily work and raise funds for furthering my career.

Most of the Zambian guys that really represented the gay rights have all left. Thanks to Ndanji that had continued the work out in South Africa regarding our rights, his work at the mask really inspired a lot in Zambia that are in the closet, I must say that Ndanji was the first gay activist that took our rights openly around the world even though he risked his life but still went ahead.

Looking at my situation out here I would say that its not that easy to continue more of my work regarding Zambian gay rights because most of the Zambians that I would want to work with are not willing to risk their lives. We do get to read a few things from **Behind The Mask** but looking at my country ever since Ndanji left Behind The Mask, there is not much news from Zambia, but we really appreciate The Mask because it does bring news to a lot of African countries too.

I must say that now I'm happy that Ndanji has managed to launch the first Zambian gay website, its what we have all been looking forward to, we have really waited this long for this and for all the work that he's doing to keep all the African gay guys and the world at large,

we will contribute in any way we can and support African veil.

Where ever he's doing this special work, we are all behind him.³⁶

In December 2006, the Zambian government announced that gay activities would not be tolerated. The police were instructed to arrest anybody who supports homosexuals and bisexual people or anyone who says that they are gay. In fact according to a report that was published on a gay website <http://www.africanveil.org>, the government in December 2006 issued a statement that gay marriages would never be allowed in Zambia. The National Parliament in Zambia has spoken strongly against the gay community and says that such abnormal people should be arrested.³⁷

The President of LEGATRA, an organization for gay activists in Zambia, had been very badly attacked twice in the recent past. One incident was at a seminar in Siavonga. The second was in Lusaka. That attack left him seriously injured.³⁸

Zambian authorities have vowed never to tolerate gay marriages nor homosexuality, describing homosexuality as 'unnatural,' and not permissible even in a human rights context.³⁹

³⁶ www.theafricanveil.org/zambia (16/07/08)

³⁷ Ibid.

³⁸ Ibid

³⁹ www.monstersandcritics.com (16/07/08)

CHAPTER TWO

2.0 THE EVOLUTION OF GAY RIGHTS IN EUROPE AND THE UNITED STATES

The following chapter will follow the evolution of gay rights in Europe and the United States as these are the places where gay rights advocates have been very active and a lot has been done in the area of gay rights such that they are making a big impact on the world especially in terms of human rights legislation internationally and nationally as well.

Discrimination against gays and lesbians has continued in countries throughout the world. It often results in the arrest and imprisonment of homosexuals on charges relating directly or indirectly to their sexual orientation. In almost all the cases, charges of sodomy were employed to discredit a political figure or organization. The question is whether it is a violation of human rights to persecute or discriminate on the basis of sexual orientation.

In the United States public attitudes towards homosexuality seem to be relaxing in recent years. A few years back it would have been unimaginable to have an openly gay bishop, as the Episcopalian church now does. However it has been done. In spite of this the Americans are not one in their views on homosexuality. A large portion of the population still think homosexuality should not be entertained.

As far back as 1969, in New York City, the police raided a popular gay bar, the Stonewall Inn, for allegedly selling liquor without a license. The raid touched off two days of rioting

and galvanized what had until then been a loosely formed gay awareness movement. In the 1980s when HIV was discovered it was blamed on the gays. It was also said to be a gay disease thus increasing the stigma.⁴⁰

The United States has also seen a number of court cases in this respect. In the United States decision of **Bowers v Hardwick**⁴¹ the Supreme Court decision upheld the constitutionality of a Georgia sodomy law that criminalized oral and anal sex in private between consenting adults. The court was of the view that classifying homosexual sex as illegal sodomy was valid because there was no constitutionally protected right to engage in homosexual sex.

Seventeen years later the Supreme Court directly overruled the Bowers case in **Lawrence v. Texas**,⁴² and held that such laws were unconstitutional.

Lawrence v. Texas⁴³ was a landmark case in the United States. In the ruling the justices struck down the sodomy law in Texas. This was an opposite view from the previous case of Bowers.

Lawrence explicitly overruled Bowers... the majority held that intimate consensual sexual conduct was part of the liberty protected by substantive due process under the Fourteenth Amendment. Lawrence has had the effect of invalidating similar laws throughout the United States that purport to criminalize sodomy between consenting

⁴⁰ Leigh W. Rutledge. *The Gay Decades From Stonewall to The Present. The People and Events that Shaped Gay Lives.* (New York: Penguin. 1992). p20

⁴¹ 478 U.S. 186 (1986)

⁴² 539 U.S. 558 (2003)

⁴³ *ibid*

same sex adults acting in private. It may also invalidate the application of sodomy laws to heterosexual sex based solely on morality concerns.⁴⁴

The outcome of the case was widely celebrated by gay rights advocates.

We shall now proceed to look at some international treaties and conventions in order to see how they have been addressing the issue of discrimination on the basis of sexual orientation. The **ILO Convention (No. 111) on Discrimination in Employment or Occupation (1958)** has anti discrimination provisions in article 1 however this treaty of the International Labour Organization does not prohibit discrimination on the basis of sexual orientation; however it permits state parties to add additional grounds. Article 1 provides:

For the purpose of this convention, the term discrimination includes

a) Any distinction, exclusion or preference made on the basis of race, colour, sex, religion political opinion, national extraction or social origin which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

This convention is important in helping gays against discrimination in employment.

Furthermore the **International Covenant on Civil and Political Rights (1966)** also has an anti discrimination clause in article 2 and 26. The Covenant is important because in 1994, it was heavily relied on in the case **Toonen vs. Australia**⁴⁵. In this case the Human Rights Committee held that the references to sex in Article 2, paragraph 1, and 26 of the ICCPR should be taken to include sexual orientation. As a result of this case, Australia

⁴⁴ Paper Submitted by Professor Khan to the San Diego Law Review on Sexual Privacy. 2008

⁴⁵ Communication no.488/1992, UN Doc CCPR/C/50/D/488/1992(1994)

repealed the law criminalizing sexual acts between males in its state of Tasmania. With this case, the Human Rights Committee created a precedent within the UN human rights system in addressing discrimination against lesbian, gays and bisexuals. Article 1 of the ICCPR provides:

- 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

Article 26 provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The provisions laid out above as well as the Human Rights Commission's interpretation of article 1 of the ICCPR in the Toonen case will indeed be perceived as windows of opportunity for gay activists. Indeed the Toonen case is already quite popular. Following this precedent one might conclude that were-ever sex is mentioned in an instrument, it should also be construed to mean sexual orientation. This however is a highly debatable issue. This provision was never meant to over homosexuals when it was drafted.

Since April 1993 the United Nations High Commissioner for Refugees (UNHCR) has recognized in several Advisory Opinions that gays and lesbians qualify as members of a "particular social group" for the purposes of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees. In its publication "Protecting Refugees," the UNHCR states: "Homosexuals may be eligible for refugee status on the basis of persecution because of their membership of a particular social group. It is the policy of the UNHCR that persons facing attack, inhuman treatment, or serious discrimination because of their homosexuality, and whose governments are unable or unwilling to protect them, should be recognized as refugees."⁴⁶

It is difficult to say whether there is full agreement over the above. However as it is an advisory opinion, it is not binding. There is still a large number of countries where it is predominantly thought that gays should not be given any manner of rights or recognition. Therefore gays will not be given asylum in these countries especially in Africa. Excepting South Africa of course.

Convention for the Protection of Human Rights and Fundamental Freedoms (1950)
(article 8, 14) Sexual orientation is not mentioned explicitly in any of the provisions of the Convention. Nonetheless, the relevance of the Convention (usually called European Convention on Human Rights, abbreviated as ECHR) was established in a series of cases where the **European Court of Human Rights** has dealt with several cases concerning sexual orientation and has found that discrimination in the criminal law regarding consenting relations between adults in private is contrary to the right to respect for private

⁴⁶ UNHCR/PI/Q&A-UK1.PM5/Feb. 1996

life in article 8 ECHR. The court was the first international body to find that sexual orientation criminal laws violate human rights and has the longest and largest jurisprudence in addressing sexual orientation issues as can be seen from cases such as *Dudgeon v UK*, 1981, *Norris v Ireland*, 1988, and *Modinos v Cyprus*, 1993.

Regarding sexual orientation discrimination in the military services, the Court has held that the ban on homosexuals in the military was in breach of Article 8 ECHR. This was in the case of *Lustig-Prean and Beckett v UK*, 2000⁴⁷.

It has also been held by the Court in ***Salgueiro da Silva Mouta v Portugal***⁴⁸ that a homosexual father cannot be denied custody of his child based on his homosexual orientation, the matter infringing upon the father's right to family life in Article 8 ECHR. The Court confirmed that Article 14 ECHR was to be interpreted as including sexual orientation.

There is also the **European Social Charter (1961)**. This treaty protects social and economic rights and its European Committee of Social Rights examines the human rights record of states. It can hear opinions from groups that have a consultative status with the Council of Europe, such as the International Lesbian and Gay Association (ILGA). This shows that gay issues are treated with importance in Europe.

The **Commissioner for Human Rights** was appointed by the Council of Europe in 1999. The office of the Commissioner for Human Rights is an independent institution within the Council of Europe that aims to promote awareness of and respect for human rights in

⁴⁷ 31 EHRR 23

⁴⁸ 1999 IX Eur. Ct HR 309

its member States. The Commissioner can receive individual complaints and has addressed sexual orientation issues in his reports and visits to member states.⁴⁹

The Parliamentary Assembly of the Council of Europe has an important role in monitoring the human rights situation in the member states and the states seeking membership with the Council of Europe. Various states repealed their criminal laws against lesbians, gays and bisexuals before being admitted as members or continued to be pressed for compliance with promises made at the time of becoming member of the Council.⁵⁰

The Assembly adopted several resolutions and recommendations regarding sexual orientation. These are found in Recommendation 924/1981 which was aimed at ending discrimination against lesbians, gays and bisexuals.

There are several European Union laws offering protection from discrimination based on sexual orientation.

The **Charter of Fundamental Rights of the European Union** is an important instrument in the fight for the rights of the homosexual in Europe. It was proclaimed in Nice in December 2000. The Charter not binding document but is important because it expresses the EU vision on human rights. It is especially important for lesbians, gay and bisexuals the Charter is because of the explicit non-discrimination provisions in Article 21 (1) which provides:

⁴⁹ www.humanrightswatch.org (18/09/08)

⁵⁰ *ibid*

"Any discrimination based on any ground such as sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited".

According to European Union law discrimination against transgender persons is a form of sex discrimination. This was pronounced by the Court of Justice in the case of **P v S and Cornwall County Council**⁵¹, where it was held that the dismissal of an individual following gender reassignment was unlawful discrimination on the grounds of her sex. Such a form of discrimination is called Gender identity discrimination.

⁵¹ [1996] ECR I-2143).

CHAPTER THREE

3.0 GENERAL FACTS ON GAY ISSUES IN SOUTH AFRICA

This chapter, will look at how historic events have impacted the development of gay rights briefly in Africa as it tackles the position of gay rights in Africa and the influence of religion, culture and education on society's attitude towards gays and what or who sets the standards for moral justification of societal values; in this case gay rights.

The South African Constitution was the first in the world to outlaw discrimination based on sexual orientation and on 1st December 2006 South Africa made history by becoming the fifth country in the world and the first in Africa to legalise same sex marriage and a year later an equal age of consent was achieved. The age of consent is 16 regardless of sexual orientation and all sexual offences are defined in gender neutral terms.⁵²

In Dec 2006 South Africa's Constitutional Court ruled in favour of same-sex marriages. It ordered that parliament amend marriage laws to allow gay weddings within a year. The South African Constitution outlaws discrimination against gays and lesbians, but social attitudes remain more conservative as this chapter shall show.⁵³

The only openly gay person among the Delmas treason trialists [in South Africa] Simon Nkoli always emphasized that the battles against homophobia and racism were inseparable. He said "I'm fighting for the abolition of apartheid, and I fight for the right

⁵² www.wikipedia.org (22/01/09)

⁵³ Paper by Jacklyn Cook on Engendering Gay and Lesbian Rights: The Equality Clause in the South African Constitution. University of Witwatersrand Johannesburg South Africa

of freedom of sexual orientation. These are inextricably linked with each other. I cannot be free as a black man if I'm not free as a gay man."⁵⁴

3.1 THE STATUTE AND CASE LAW ON SEXUAL ORIENTATION IN SOUTH AFRICA

S 9 of the Constitution of 1996 states:

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal treatment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair

The South African courts have already delivered judgments on gay rights that have seen same-sex couples getting married. The rulings however only changed the legal definition

⁵⁴ B. Luirink. Moffies. *Gay Life in Southern Africa*. (Cape Town: David Philip Publishers, 1998). p5

of marriage but did not address the other statutory regulations. However as we shall see the law has moved further still to rectify this situation.

The Promotion of Equality and Prevention of Unfair Discrimination Act, 2000⁵⁵ is one Act that gives greater effect to the constitutional guarantee. The Act prohibits discrimination against any person in terms of section 6. In terms of the Act the prohibited grounds for discrimination again include marital status and sexual orientation.⁵⁶

The status of gay and lesbian issues in the broader movement for democracy [however] remains tenuous: gay issues continue to be seen as both frivolous and unafrican.⁵⁷

On October 8, 1998, the Constitutional Court confirmed a High Court ruling that criminalization of sodomy was unconstitutional and ordered the removal of such provisions from the statute books.

Various rulings by South Africa's Constitutional Court, including one allowing gay couples to adopt children, have since been added.⁵⁸

While South African lesbians and gays have achieved unprecedented political recognition and legal protection, the rationale for these developments appears to draw more on

⁵⁵ Act No. 4 of 2000

⁵⁶ Promotion of Equality and Prevention of Unfair Discrimination Act, Act No. 4 of 2000

⁵⁷ Gevisser, Mark, & Cameron, Edwin. *Defiant desire. Gay and lesbian lives in South Africa.* (Johannesburg: Raven Press. 1994.) p.4

⁵⁸ ABC News Tuesday, November 30, 2004

Western ideals of social justice and human rights than on claims about traditional acceptance and social roles for same-sex patterns.⁵⁹

Black lesbians experience a particular oppression [in Africa]. Luirink describes an interview with Tiny Machida, 28 years old and chairperson of Gays and Lesbians of Zimbabwe's, (GALZ) who experienced conflict with her family over her sexuality. Her father threw her out of the house when he found her in bed with a girlfriend, and she lived in the streets for over a year. She explained her parents response in terms of "it is their culture" "as in the case of Simon Nkoli, Tina Machida's family dragged her from one nyanga to the next. The one burnt stones to steam out evil spirits, another prescribed medicinal herbs. A third pushed her in a dam to wash "it off",⁶⁰

In this vein homosexual activity is seen in Africa as a western importation. It is not seen as something that could be part of the African culture or lesser still something that can be natural or in other words that someone can be born like that.

In May 1996 South Africa was the first jurisdiction in the world to provide constitutional protections for Lesbians, Gays, Bisexual and Transgender people through clause 9.(3) of the South African Constitution which disallows discrimination on race, gender, sexual orientation and other grounds.⁶¹

⁵⁹ Murray, Stephen, & Roscoe, Will (Eds.) *Boy-wives and Female Husbands. Studies of African Homosexualities.* (New York: St. Martins Press. 1998) p.278

⁶⁰ Luirink, Bart. *Moffies. Gay life in Southern Africa.* (Cape Town: Ink) 1998 p.70

⁶¹ www.wikipedia.org (22/01/09)

The gay rights clause in the South African post apartheid constitution explicitly prohibiting discrimination on the basis of sexual orientation was the first of its kind in the world. It is argued that the inclusion of the sexual orientation clause was largely due to the ability of the male dominated gay rights movement to form strategic alliances with the anti apartheid struggle, to mobilize the master struggle of equality and non discrimination and to lobby effectively during the constitution making process.⁶²

In Dec 2006 South Africa two game rangers, Vernon Gibbs and Tony Halls, became the first same-sex couple to legally wed in South Africa on December 1, a day after President Thabo Mbeki's government authorised gay marriages.⁶³

South Africa is the first country in Africa and the fifth country in the world to legalise same-sex marriages.

Despite the new law, which gives same-sex couples the right to marry legally, many South Africans still oppose gay marriage and homosexuality. Conservative churches have vocally stated their opposition to the marriages, and many traditional groups denounce homosexuality as "un-African". And gay men and lesbians often face violence in Soweto and other townships across South Africa.⁶⁴

⁶² Paper by Jacklyn Cook on Engendering Gay and Lesbian Rights: The Equality Clause in the South African Constitution. University of Witwatersrand Johannesburg South Africa

⁶³ www.africanveil.org (16/07/2008)

⁶⁴ *ibid*

In the South African case of **National Coalition for Gay and Lesbian Equality and another v Minister of Justice and others**,⁶⁵ the Constitutional Court of South Africa, acting on the Equality Clause of South Africa's 1996 Constitution (which was the first constitution to ever include sexual orientation in its anti-discrimination provisions) unanimously overturned "sodomy laws" in the country. In the decision, it held that laws that criminalized consensual homosexual conduct violated not only the principles of equality and dignity but privacy protections. Both the majority opinion and a concurrent opinion affirmed that respecting gay and lesbian equality and dignity played an important part in overcoming South Africa's repressive past.

In another decision **National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and Others**,⁶⁶, a decision addressing the partnership rights of gays and lesbians, the Constitutional Court overturned legislation which restricted immigration benefits (including the right to accord residency to a foreign partner) to "spouses" while denying it to same-sex partners. It was held by the court that the denial discriminated against gays and lesbians on the grounds of sexual orientation and marital status. It also held that this denial reinforced harmful stereotypes of gays and lesbians, invading their constitutional right to dignity by conveying a message that same-sex relationships lacked the same validity as heterosexual ones. It ordered the legislation changed.

⁶⁵ 1998 (2) SACR 102

⁶⁶ 2000 (2) SA 1 CC

In another case, **Satchwell v President of Republic of South Africa and Another**,⁶⁷ the Constitutional Court found unconstitutional a law giving benefits to the “spouses” of judges but not their same-sex life partners. It ordered the legislation changed accordingly.

In Du Toit and another v Minister of Welfare and Population Development and another,⁶⁸ in a unanimous judgment, the Constitutional Court held that statutory provisions which allowed only married couples to adopt a child jointly violated constitutional rights and that it was discriminatory on the grounds both of sexual orientation and of marital status. It ordered that language be added to the statutes to allow same-sex life partners jointly to adopt children on an equal basis with heterosexual married couples.

The South African Law Commission, which proposes law reforms to Parliament, is considering revisions to marriage law that would formally recognize same-sex unions, though it is still uncertain what form that recognition will take.⁶⁹

3.2 HOMOSEXUALITY IN ZIMBABWE AT PRESENT

Meanwhile in Zimbabwe President Robert Mugabe had been especially outspoken in recent years in vilifying homosexuals and blaming them for his country’s ills. According to Mugabe, “Homosexuals have no rights whatsoever.” He was quoted as having said, “If pigs and dogs don’t do it, why must human beings?” At this writing, Mugabe was trying

⁶⁷ 2001 (12) BCLR 1284 (T)

⁶⁸ 2002 (10) BCLR 1006 CC

⁶⁹ A report by Human Rights Watch, *More than a Name: State-Sponsored Homophobia and Its Consequences in Southern Africa*. 2003

to block a local gay organization from joining a human rights session at the World Council of Churches meeting scheduled for December 1998 in Harare.⁷⁰

Keith Goddard, a Zimbabwean gay activist, was arraigned in June 1998 on sodomy charges after he complained to police about an attempt to blackmail him. At this writing, he was free, pending trial. Activists believed his arrest was part of Mugabe's campaign against the organization, Gays and Lesbians of Zimbabwe (GALZ), of which Goddard was the programs manager. As of this writing, judgment was indefinitely postponed by the judge in the trial of Zimbabwe's former president, Canaan Banana, on eleven charges of sodomy, attempted sodomy, and illegal assault. Banana, who was president from 1980 to 1987, had pleaded not guilty to all charges.⁷¹

3.3 HOMOSEXUALITY IN ZAMBIA AT PRESENT

In neighboring Zambia, the Zambia Independent Monitoring Team (ZIMT), a nongovernmental human rights organization, began campaigning for gay and lesbian rights and gave its support to a new gay and lesbian association, despite hostile press coverage and threats from the government. The new group, which calls itself the Lesbians, Gays and Transgender Persons Association, applied for registration, which provoked Zambia's Vice-President Christon Tembo to declare that "anyone who promotes homosexual practices after today will be arrested." In October, President Frederick Chiluba denounced ZIMT for supporting homosexuality, which he called "unbiblical" and "against human nature." First President Kenneth Kaunda, however,

⁷⁰ Human rights watch report. Special issues and campaigns. Lesbians and gay rights.1999.

⁷¹ *ibid.*

suggested that homosexuality was “here to stay” and that “we need time to examine it carefully.”⁷²

It is the law in Zambia however that anyone who practices homosexual acts is liable to imprisonment. This is also true in other countries. These laws are what are being called by some as the infamous sodomy laws.

3.4 A REVIEW ON SOUTH AFRICA’S POSITION

Coming back to the South African case study, the master narrative of equality was equated with non-discrimination. According to Botha and Cameron, this had a strong appeal. They argued that the constitutional protection of gays “is no doubt the product of our peculiar history, where institutionalized discrimination against people on the ground of race was perfected through the legal system. The racial legacy has given the majority of South Africans repugnance for the use of legal processes for irrational discrimination”.⁷³

[B]roadly popular prejudices [still] exist across a wide spectrum of communities”.⁷⁴

In South Africa we have a really good legal framework, what we need now is a change in our social under-standings, our attitudes” (Zackie Achmat, SABC-TV, January 31, 2001). Such social understandings may change following a recent ruling that same-sex partners of members of the [gay movement] will, in future, have the same benefits as

⁷² ibid

⁷³ Donald West, & Richard Green (Eds.), *Socio-legal Control of Homosexuality: A Multinational Comparison*. (New York: Plenum). 1997

⁷⁴ B. Luirink Moffies. *Gay Life in Southern Africa*. (Cape Town: David Philip Publishers 1998) p.145

spouses. Regulations amending the definition of “marital status” and “spouse” to include partners in permanent life partnerships have been published in the Government Gazette.⁷⁵

3.5 A LOOK AT INTERNATIONAL LEGISLATION

International human rights bodies have also declared discrimination and violence based on sexual orientation or identity to violate human rights. The European Court on Human Rights has repeatedly cited the right to privacy in condemning laws criminalizing same-sex acts between consenting adults. The U.N. Human Rights Committee considers sexual orientation to be protected from discrimination under international law. As was seen in the last chapter.

According to the International Gay and Lesbian Human Rights Commission (IGLHRC), in 1998 more than eighty-five countries maintained laws that criminalize sexual activity between consenting adults of the same sex. In some countries the statutes regulated specific sexual acts regardless of the gender of the people involved, whereas other countries maintained laws that prohibit a wide range of same-sex practices. Many laws are broad in scope, dealing with “unnatural acts,” “immoral acts,” or acts causing “public scandal.” In some countries general laws against “loitering” or “hooliganism” are used to arrest or persecute homosexuals. In some countries, laws discriminating against homosexuals are not enforced: some of the former Soviet republics, for example, which

⁷⁵ Gevisser, & Cameron (Eds.), *Climbing on her shoulders: an interview with Umtata’s first lesbian*. (Johannesburg: Ravan Press) 1994. p193

had provisions in their penal codes outlawing homosexual activity, removed these provisions without debate when the penal codes were revised.⁷⁶

Mention may be made to the African Charter on Human and People's Rights here. It was adopted by the Organisation of African Unity now the African Union. It condemns discrimination but so far it has not dealt with sexual orientation. Only one country in Africa has accepted homosexuality. In Egypt homosexual are imprisoned as in all other African countries. It is therefore not surprising that the African Union has not dealt with sexual orientation. Most countries in the Union are still upholding sodomy laws.

There exists a wealth of information on gay rights in South Africa as compared to other countries in Africa. This is partly due to the fact that it is a hot issue there right now, it is also a thing that has recently come out in the open. Thirdly South Africa has a very diverse population which until recently has been dominated by whites. This might explain a little why the issue of gay rights has been so hot there. The next chapter will look at the Zambian position

⁷⁶ Ibid

CHAPTER FOUR

4.1 GAY RIGHTS IN ZAMBIA

The following chapter will tackle the position of gay rights in Zambia and will also look at the status of the law with regard to LGBTs and their rights in Zambia.

First of all the law provides:

Zambian Penal code Cap 87 Section 155; Unnatural Offences

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.⁷⁷

The Penal Code of Zambia Cap 87 provides in Section 157:

Any male person who whether in public or in 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

⁷⁷ The Penal Code of Zambia Cap 87

person with himself or with another male person whether in public or in private is guilty of a felony and is liable to imprisonment for five years.⁷⁸

The *Zambian Penal code* does not mention sex between two consenting women but legally *Cap 87 Section 155* covers lesbians (sex against the order of nature).

Such archaic laws are used in Zambia to prosecute homosexuals. These laws are archaic because they have not been amended or altered for a long, long time. These are the laws that were handed down by the early colonialists. However, at present they seem to serve the *Zambian society* pretty well because they reflect the values of the society. It is true that people will tend to respect and obey laws that reflect the values of their society. This is how laws acquire legitimacy. It is however not clear whether there are any transgender people in Zambia.

The public attitude about homosexuality in Zambia is that it is morally wrong. Both from the traditional and the Christian perspective. It has been pronounced to be insane, madness and it has been likened to the behaviour of dogs and animals. Very few groups are sympathetic towards homosexuals in Zambia. The majority of people in Zambia ascribe to the Christian faith. Homosexuality is not allowed in Christianity. It is sin. This is why the large number of people are not sympathetic to homosexuals. They are regarded as immoral, unnatural and a disease to society. Also homosexuality is not something that has existed traditionally and is abhorred by those who value customs and traditions.

⁷⁸ *ibid*

The politicians, in particular the Vice President and the President have instructed the police to arrest anybody who supports LGBT people or anyone who says that they are gay. The National Parliament has spoken strongly against the LGBT community and says that such abnormal people should be arrested.⁷⁹ To be homosexual is considered deviant and unnatural in Zambia. This is so because even traditionally such things have never been seen nor reported therefore they may even be associated with evil. This is in addition to the deeply ingrained Christian values that exist in the society. Most people believe that men were made for women and vice versa.

In the last quarter of 1999 an NGO calling itself Zambia Against People with Abnormal Sexual Acts [ZAPASA] was formed to fight against homosexuals.

The issue of homosexuality in Zambia is one that has not been highly publicized although it is an issue that is making a lot of news in the world today. There are not many individuals in Zambia that have come out of the closet to say that they are gay or for that matter to demand that they be allowed to marry. This is attributed to the fact that homosexuality is currently outlawed in Zambia and people are arrested because they are homosexuals. It is assumed that by virtue of their being gay, they are engaging in behaviour that is outlawed. They are arrested on this premise because it is almost impossible to monitor the private activities of people.

A lot of gay men have been arrested and charged under the Penal code of Zambia, though after a great deal of publicity the cases are usually dropped or settled out of court. The courts throw many of these cases out of court for lack of evidence. The president of

⁷⁹ www.africanveil.com (16/07/08)

LEGATRA, an organization for gay activists in Zambia, had been very badly attacked twice in the recent past. One incident was at a seminar in Siavonga. The second was in Lusaka. That attack left him seriously injured in the eye.⁸⁰

The Zambia Human Rights Report for 1998 indicates that a Zambian man, Francis Chisambisha, was expelled from Chipembi Farm College where he was pursuing a course in agriculture, after publicly acknowledging his homosexual status to the Zambian newspaper. Furthermore, the formation of an organisation called Lesbians, Gays and Transgender Persons Association (LEGATRA), "attracted huge protests from some sections of the Zambian community".⁸¹

Homosexuality in Zambia is illegal. This is by virtue of the Penal Code which outlaws any sexual act between consenting adults of the same sex. The law enforcement authorities have the authority to prosecute those who feel that their orientation is not straight. The Penal Code was inherited from the British colonialists as it was then and very little has been changed in its provisions since then therefore while the British have repealed a considerable number of their laws with regard to this aspect, Zambia still uses the same old laws.

These laws have not been amended because as has been mentioned earlier, Zambia is very comfortable with them because they reflect the values of the larger part of society.

⁸⁰ Paper submitted to the Human Rights Committee by Stephano Fabeni on the Violations on the Rights of LGBT Persons in Zambia. 2007.

⁸¹ Amnesty International (AI). 1999. Annual Report 1999. London: Amnesty International.

The Human Rights Education Association is of the view that the main principles guiding the rights approach on sexual orientation relate to equality and non-discrimination.⁸²

Until the recent past homosexuality was not even something that could be openly discussed. It was a taboo. It was not even considered whether or not gays had rights. They were looked at as animals. Even now in Zambia gays are still considered with disgust by the majority of the population.

Zambia is state party to the International Covenant on Civil and Political Rights (ICCPR) following its accession on April 10, 1984, which provides that all are equal before the law and none should be discriminated against on the basis of amongst other qualifications, sex.

Sex here is understood to mean gender. This was the intention of the draftsmen. At the time the Convention was made, homosexuality was not a big contentious issue. However this same provision has been construed to include sexual orientation in the Toonen case. It is difficult to tell how far reaching such precedents will be in time.

The Constitution of Zambia 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, whatever his race, place of origin, political opinions, color, creed, sex or marital status. However this provision has not been tied to gay rights yet. Such an attempt would more than likely bring about a public outcry.

⁸² <http://www.hrea.org/erc/library/display> (16/07/08)

In 1994, in **Toonen v Australia**⁸³, 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 Covenant because sex must be construed to mean sexual orientation. As a result of this case, Australia repealed the law criminalizing sexual acts between males in its state of Tasmania. With this case, the Human Rights Committee created a precedent within the UN human rights system in addressing discrimination against lesbian, gays and bisexuals.

Such provisions as are found in the penal code of Zambia reinforce social stigma against those who proclaim to be different and thereby promoting discrimination.

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, the law will take its course. We need to protect public morality. Human rights do not operate in a vacuum." ⁸⁴

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

⁸³ Toonen v. Australia, Communication no. 488/1992, U.N. Doc CCPR/C/50/D/488/1992

⁸⁴ Paper submitted to the Human Rights Committee by Stephano Fabeni on the Violations on the Rights of LGBT Persons in Zambia. 2007.

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, after local newspapers printed articles exposing his sexuality in a highly inflammatory manner.⁸⁵

It has been said that homosexuality occurs in every culture, even in animals but studies have shown that it occurs less in other cultures such as the African and Asian cultures; and that homosexuality only came to be known in these places after the advent of the Westerners and colonialism.⁸⁶

It has been shown that Zambia does not provide a favourable environment for homosexuals. They are not even safe in Zambia as past incidents have shown. Furthermore the public feeling toward homosexuality does not even seem to be relaxing. One might therefore conclude that Zambia is not ready for the promotion of gay rights worse still gay marriage.

⁸⁵ Paper submitted to the Human Rights Committee by Stephano Fabeni on the Violations on the Rights of LGBT Persons in Zambia. 2007.

⁸⁶ R. T. Barnhouse, *Homosexuality: a Symbolic Confusion*, (New York: The Seabury Press, 1979) p.157.

CHAPTER FIVE

5.1 CONCLUSION

The purpose of this research was to investigate the issue of homosexuality and gay marriage in Zambia in relation to whether human beings possess a right to choose their sexual preference, the illegality of homosexuality in Zambia and whether it violates any such right or any other right and to compare the case of Zambia with the situation obtaining in the world today.

As a former British colony, Zambia inherited all of Britain's legal systems and Penal Code. Britain has since repealed or modified its legal system while Zambia still continues to use the same old laws. Laws concerning Homosexuality are to be found in the Penal code under the infamous sodomy laws. They are put together with acts such as Bestiality under the title "Unnatural Offences".

As Zambia has been declared to be a Christian nation, homosexuality is seen as immoral and it is regarded by the general populace as something that should not be entertained.

However, the retention of codes that criminalize sexual relationships between same-sex consenting adults has had 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

In this vein homosexual activity is seen in Africa as a western importation. It is not seen as something that could be part of the African culture or lesser still something that can be natural or in other words, that someone can be born like that.

Homosexuality is still considered a crime in most African countries. In Nigeria, acts deemed “unnatural”, such as sodomy, can be punished with up to 14 years imprisonment. In...countries that have adopted Islamic shari’ah law, conviction for sodomy can result in the death penalty. The weight of the law, and the stigma attached to homosexuality, has driven MSM (men who have sex with men) and WSW (women who have sex with women) underground.⁸⁸

The only country that has made headway is South Africa though even there; there are still majorities who disagree with the passing of those pro-gay laws.

Following the international movement and the precedent that has been set in the Toonen case, it is wrong to persecute people on the basis of their sexual orientation because all human beings are free and should not be discriminated against.

Concerning the question on whether sexual orientation, researchers say, “despite recent neurobiological findings suggesting homosexuality is genetically-biologically determined, credible evidence is lacking for a biological model of homosexuality.”⁸⁹

⁸⁸ ZNAN NEWS A publication of the Zambia National AIDS Network JANUARY 2006

⁸⁹ R. Friedman, M.D. & J. Downey, M.D., *Journal of Neuropsychiatry*, vol. 5, No. 2, Spring 1993.

Zambia is not ready for same sex marriage. Who then determines what is morally justified in Zambian society? It is the church, traditional leaders, teachers, and those who hold high esteem in people's minds in Zambia. None of these so far has been pro-gay. Thus gays have a very long way to go in Zambia.

The status of gay and lesbian issues in the broader movement for democracy [however] remains tenuous: gay issues continue to be seen as both frivolous and unafican.⁹⁰

The provisions in the Zambian Penal Code are a violation of the private rights of homosexuals. It is public acts however that should be punished because they are highly offensive to many and they may corrupt public morals.

Zambia is a long way away from relaxing her attitude towards gays. These unfortunate people are forced to be in hiding and they live in perpetual fear of violence against them as in the Chisambisa case. There would be hope if society were at least indifferent to them but as it is, many still feel very strongly about this issue and are ready to do something about it. Promotion of gay rights would bring about a public outrage. Zambia is not ready for the promotion of gay rights and gay marriage at this point in time.

⁹⁰ Gevisser, Mark, & Cameron, Edwin. *Defiant desire. Gay and lesbian lives in South Africa.* (Johannesburg: Raven Press.) 1994. p.4

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