



UNIVERSITY  
*of*  
LUSAKA

SCHOOL OF LAW

**ANTI-HOMOSEXUALITY IN ZAMBIA AND ITS AFFRONT TO HUMAN RIGHTS**

**BY**

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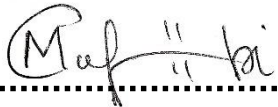
**An obligatory essay submitted to the University of Lusaka in partial  
fulfilment of the requirements for the award of the Bachelor of Law (LLB)**

**Degree.**

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## DECLARATION

I **CHIJATA KEEMBELA MUFWAMBI**, hereby declare that this dissertation titled **“ANTI-HOMOSEXUALITY IN ZAMBIA AND ITS AFFRONT TO HUMAN RIGHTS.”** which is hereby submitted to the School of Law at the University of Lusaka as part of the requirements for the award of the Bachelor of Laws (LLB) degree, is my original work and has not previously been submitted for the award of a degree at this or any other tertiary institution. The sources that have been used or quoted have been indicated and duly acknowledged as complete references.

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## **SUPERVISORS RECOMMENDATION**

I **THERESA LUMBAMA-KAPUTO**, do recommend that this dissertation titled “***ANTI-HOMOSEXUALITY IN ZAMBIA AND ITS AFFRONT TO HUMAN RIGHTS***” authored by **CHIJATA KEEMBELA MUFWAMBI**, student ID: **LLB20121156** done under my supervision, be accepted for examination and admitted by the university. I have checked it carefully and I am satisfied that it meets the necessary requirements pertaining to the format laid down in the guidelines regulating directed research under the university regulations.

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**MRS THERESA LUMBAMA**

**(Supervisor)**

.....  
**(Date)**

## **DEDICATION**

This research is dedicated to the voiceless to whom it speaks. May it bring you peace and comfort with its contents, serving as a reminder that you are not ignored or unheard but noticed and acknowledged. Let it serve as an education to you and those without an understanding of what it means to be different.

## **ACKNOWLEDGMENTS**

Gratitude and thanks first and foremost go to my mother. She has been a pillar of light and integrity like no other without whom I would not be where I am today. Secondly, I would like to thank my supervisor, Mrs Thresa Lumbama-Kaputo. She has overseen every nook and cranny of my work, offered sage advice that enabled me to tackle this topic, and she has exercised the utmost patience with me. Thirdly I would like to thank my older and only brother, for his support. Lastly, I thank my friends, both those who have graduated and those still with me. L400 would not have been possible without you all.

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## **ABSTRACT**

This research paper seeks to cast a light on sexual minority LGB individuals within Zambia who are constantly overlooked and when found out are treated in the most inequitable manner by society. It begins by introducing the topic of human rights and how it relates to homosexuality in that the discrimination of homosexuals is not a new phenomenon but an error of the past still practised by some today. The paper goes on to discuss the discrimination in light of the Zambian context and presents it as a problem in need of remedy.

The paper tackles the issue of homosexuality through the gay debate that analyses law and morality arguments on the subject. The purpose of this is to understand the place of homosexuals within society and to show that they are no less deserving of protections generally under the law nor inherently immoral and a danger to society.

The paper then discusses human rights in-depth and how they relate to homosexuals. An elaboration of what human rights are, how they apply to all including LGB individuals and how they are violated is discussed. The rights violated are discussed as well as how human rights come into play to combat anti-homosexual laws and sentiments that prevent LGB individuals from fully realising their rights.

The paper further delves into the Zambian atmosphere in which homosexuality is viewed as a controversy and speaks to how Zambian homosexuals are treated. Examples of this treatment and efforts to combat it within the country are given. A historical significance of the issue and its many arguments is undertaken, followed by a series of findings and recommendations targeted at the present stance on the realisation of human rights for homosexuals in Zambia.

## CHAPTER ONE: GENERAL INTRODUCTION

### 1.0 INTRODUCTION

Human rights refer to the basic rights and freedoms every individual worldwide inherently possesses and is owed, regardless of their place of birth, death, race, sex, personal beliefs, or how one chooses to live their life and any other status.<sup>1</sup> Despite the fact that all persons have and are entitled to these rights, due consideration must be taken so as not to infringe upon the rights of another. This essentially restricts the exercise of one's rights. This particular principle fosters an environment of equality, wherein no one individual's rights stand above that of another.

Basic human rights seek to foster shared universal values and these values are defined and protected under international human rights law and were adopted by The United Nations General Assembly in 1948, which codified them under The Universal Declaration of Human Rights (UDHR).<sup>2</sup> Many countries, including Zambia and Britain, are members of the United Nations and signatories to its declaration.

The rapid adoption and development of international human rights in the modern world is attributed to the numerous atrocities of the Second World War (WWII), by Nazi Germany which was a major world antagonist at the time. Many marginalised individuals were persecuted during WWII among them homosexual men and women. Identified homosexuals were targeted and transported to concentration camps, wherein they were: tortured, and exposed to degrading and inhumane conditions of living and labour, as well as targeted for extermination.<sup>3</sup> Gay men were identified by the marking of a pink triangle on their prison uniforms, while lesbian women were identified by the marking of a black triangle; The markings set them apart from other prisoners, resulting in their marginalization and exclusion as they were seen as less than human and unclean.<sup>4</sup>

Post WWII, the international human rights agenda was heavily pursued to prevent gross disregard for human life and avoid repeating past mistakes. However, this agenda did not fully extend to individuals of different sexual orientations. Neither the

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<sup>1</sup> United Nations, 'OHCHR | What Are Human Rights?' (OHCHR) <<https://www.ohchr.org/en/what-are-human-rights>> accessed 19 April 2023.

<sup>2</sup> *ibid*

<sup>3</sup> Helen Lungu, 'GAY RIGHTS: DO THEY HAVE a PLACE under the ZAMBIAN LEGAL SYSTEM?' (Degree Thesis LLB2000) <[space.unza.zm/handle/123456789/2804](https://space.unza.zm/handle/123456789/2804)> accessed 19 April 2023.

<sup>4</sup> *ibid*

Allied powers nor new German states recognized homosexual inmates as victims of the war.<sup>5</sup> Many homosexual victims were unable to claim post-war compensation as some were still serving their prison sentences, and others were forced to suffer in silence as anti-sodomy laws were not abolished but were even further adopted by the liberating powers.<sup>6</sup> These individuals faced challenging decisions, as they either had to keep their experiences buried or speak out and face further discrimination under anti-homosexuality laws put in place by the authorities responsible for protecting their human rights.<sup>7</sup>

To address the homophobic injustices faced by homosexual persons, many countries and international organisations have signed treaties, declarations and enacted laws that seek to end anti-homosexuality sentiments worldwide. Among these is the United Nations (UN) a front-runner for the advocacy of human rights. In 2011 the UN Council passed a resolution that reprimanded international acts of violence based on sexual orientation and gender identity, expressing concern for LGBT persons<sup>8</sup>. In 2012 the UN General Assembly passed a resolution criminalising extrajudicial killing that involves crimes motivated by a victim's sexual orientation and gender identity.<sup>9</sup>

In tandem with the UN, the African Commission on Human and Peoples' Rights (AU) adopted Resolution 275 in 2014.<sup>10</sup> The Resolution urges African member states to combat violence against homosexuals and protect their human rights. However, not all countries have adopted these declarations as they are non-obligatory and thus still have laws and societal attitudes against homosexuality.

## **1.1 BACKGROUND OF THE STUDY**

Zambia today is a member of the UN and The African Commission on Human and Peoples' Rights. It is therefore party to the UDHR and African Charter on Human and Peoples' Rights, which both advocate for the promotion and facilitation of human

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<sup>5</sup>n 3

<sup>6</sup> ibid

<sup>7</sup> ibid

<sup>8</sup> Human Rights Campaign Staff, '10 Ways the U.N. Has Protected LGBTQ Human Rights' (hrc.org 18 September 2017) <<https://www.hrc.org/news/ten-ways-the-united-nations-has-protected-lgbtq-human-rights>> accessed 19 April 2023.

<sup>9</sup> ibid

<sup>10</sup> 'Resolution 275 – What It Means for the State and Non-State Actors in Africa – CFNHRI' <<https://cfnhri.org/resources/resolution-275-what-it-means-for-the-state-and-non-state-actors-in-africa/Resolution%20275%20expresses%20grave%20concern>> accessed 19 April 2023.

rights. The two organizations as demonstrated recognize that the rights of homosexual people are human rights. Despite this Zambia has not ratified any instruments that call for the abolition of anti-homosexual law and sentiment which the country harbours. Zambia's commitment to the promotion and facilitation of human rights is evidenced in its Constitution under Part III.<sup>11</sup> The Zambian Constitution provides for the fundamental rights and freedoms every Zambian citizen is entitled to and is referred to as the Bill of Rights. Under the preamble of Zambia's Constitution is a declaration that every Zambian swears to '*uphold the human rights and fundamental freedoms of every person*'.<sup>12</sup>

The protection of human rights within the country, however, is limited and more often than not does not apply to all Zambians within the country as there exists within the country a minority of LGB persons who are gravely marginalised and excluded due to anti-homosexuality legislation and strong homophobic attitudes.<sup>13</sup> As a former British colony, Zambia inherited a majority of its penal code, which included anti-homosexuality/sodomy laws. The Penal Code Act under Chapter XV provides for these laws under Sections 155, 156 and 158<sup>14</sup> and regards them as unnatural offences.

The prevalence of these laws has bred an almost uninhabitable environment for LGB persons who are constantly denied the enjoyment of their inert human rights. Such rights include the right to privacy, freedom of expression, health care, protection and ultimate non-discrimination. The choice LGB Zambians face is the denial of their very nature or persecution due to anti-homosexuality laws and sentiment within the country.<sup>15</sup>

The Zambian government has shown a reluctance to rid the country of its discriminatory sodomy laws which do not permit a sizable portion of its citizens to live freely. Zambia's anti-homosexual stance is believed to be attributed to several

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<sup>11</sup> Chapter 1 of The Laws of Zambia

<sup>12</sup> No. 2 of 2016

<sup>13</sup> Prudence Phiri, 'For Gay Men in Zambia, Where Homosexuality Is Banned, Suicide Is a Common End' (*Global Press Journal* 18 December 2016) < Prudence Phiri, 'For Gay Men in Zambia, Where Homosexuality Is Banned, Suicide Is a Common End' (*Global Press Journal* 18 December 2016) <<https://globalpressjournal.com/africa/zambia/gay-men-zambia-homosexuality-banned-suicide-common-end/>> accessed 29 September 2023.

<sup>14</sup> Chapter 87 of The Laws of Zambia

<sup>15</sup> n 13

factors all emanating from its continued practice of old and regressive colonial law. Strict Victorian-era law imposed by British colonists clashed with a long rich history of local cultural attitudes to sexuality, in the process overhauling Zambia's native cultural traditions, some of which maintained a flexible and uninhibited view of sexuality and gender roles<sup>16</sup>

## **1.2 STATEMENT OF THE PROBLEM**

The law, religion and human rights play a major part in how society views persons with same-sex attractions today. The gay debate has ensued in many a society and has been a topic of contention for Zambia. The physical engagement of any and all forms of homosexual activity or behaviour is deemed unnatural in Zambia and viewed as taboo by many.

Section 155 of The Penal Code Act criminalises same-sex carnal relations both consensual and non-consensual. Section 156 criminalises any and all attempts to commit the unnatural offences outlined in Section 155. Section 158 speaks to indecent practices between males and criminalises said acts of gross indecency between men both in public or private, and attempts to procure said acts.

The above-cited law upon close inspection is noted to only criminalise the actual act of same-sex carnal relations or the attempt to engage in same-sex activity. The current law exacerbates stigmatisation against persons believed to be of a different sexual orientation which has resulted in violence against said individuals and a loud promotion of anti-gay propaganda without an actual understanding of what it means to be a homosexual. This does not allow for LGB persons to live freely and enjoy basic human rights to their fullest and in extremes their rights are denied.

Major proponents of this stigmatisation are the government and political figures who insist that homosexuality is taboo and not Zambian. The clergy of the Christian church in Zambia is regarded as a guide towards moral conduct, especially since Zambia identifies as a Christian nation, but have been cited on numerous occasions preaching homophobic teachings which have resulted in strong societal hate for homosexuals.

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<sup>16</sup> Ben Westcott CNN, 'The Homophobic Legacy of the British Empire' (CNN12 September 2018) <<https://edition.cnn.com/2018/09/11/asia/british-empire-lgbt-rights-section-377-intl/index.html>> accessed 19 April 2023.

The discrimination of LGB persons in Zambia is fuelled by its leaders and backed by law. This leaves homosexual individuals without adequate protection under the law, and a failure by authorities to ensure enjoyment of their human rights. The mere belief that an individual in Zambia is homosexual is enough for a majority of a society not well versed on the matter to subject such a person to public ridicule which in turn violates their rights guaranteed under Part III<sup>17</sup> of the Zambian Constitution, resulting in less than human treatment.

Despite the current law, there exist both international and local stakeholders who are opposed to Zambian anti-homosexuality and view it as archaic. Claims have been made that it goes against the very human rights Zambia has sworn to protect in its constitution; claims substantiated in mere public sentiment, case law and the very legislation in question. While the country purports to value the lives of all its citizens, it is unarguable that there exists a minority or marginalised set of people who identify as lesbian, gay and bisexual, and these people are not permitted to exist freely within the country even when they do no harm and are law-abiding citizens.

### **1.3 RESEARCH OBJECTIVES**

The core objective of this research is to show that LGB persons are entitled to the same human rights as heterosexual persons. Discriminatory sodomy laws have denied LGB persons their inherent rights, and a violation of these rights based on sexual orientation amounts to a violation of fundamental human rights owed to every human being. This shall be done by:

- I. Analysing the jurisprudential aspects of law and morality concerning homosexuality.
- II. Discussing the international law influences on anti-homosexual law relating to human rights.
- III. Discussing anti-homosexuality in Zambia and its effects on the human rights of LGB persons in the country.

### **1.4 RESEARCH QUESTIONS**

- I. What is the interlink between law and morality relating to homosexuality?

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<sup>17</sup> n 12



- II. What are the international law influences on anti-homosexual relating to human rights?
- III. How has anti-homosexuality in Zambia affected the homosexual population of the country?

### **1.5 PURPOSE AND SIGNIFICANCE OF THE STUDY**

The purpose of this study is to show that human rights are inherent and inalienable towards homosexual persons as much as heterosexual persons. The significance of the study is to showcase how the human rights of LGB persons in Zambia are violated by current anti-homosexuality legislation which has resulted in a hostile homophobic environment.

### **1.6 LITERATURE REVIEW**

**Bolatito LA 2013**,<sup>18</sup> argues that homosexuality is unnatural as it goes against reason because it threatens the very nature of man, such as the institution of marriage devaluing it. He does however mention the probable existence of biological factors uncontrollable by man that lead to homosexual attraction. This research counters the assertion that homosexuality is unnatural through the acknowledgement of the existence of biological factors to show that homosexuality is a natural occurrence and a natural part of human evolution to disparage the unnatural argument that calls for the existence of anti-homosexual laws.

**Devlin P**<sup>19</sup> argued that homosexuality is a sin against the nature God intended and the law should encompass this to be justified morally as the law and morality are one. This research tackles the morality aspect that criminalises homosexuality and seeks to disparage its view by looking at the findings of other authors who disagree with the argument.

**Hart LA**<sup>20</sup> argued against Devlin in stating that the law and morality are two separate entities, and while the latter does influence the law, it should do so in a manner that does not discriminate against LGB minorities but serves all as positive morality. This research agrees with the author in that while morality does exist, not one morality

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<sup>18</sup> L-A Bolatito, 'The Natural Law Theory of Morality and the Homosexuality Debate in an African Culture' (2013) 9 OGIRESI: a New Journal of African Studies 182  
<<https://www.ajol.info/index.php/og/article/view/84685/74673>> accessed 21 April 2023.

<sup>19</sup> Peter Cane, 'Taking Law Seriously: Starting Points of the Hart/Devlin Debate\*' (2006) 10 The Journal of Ethics 21.

<sup>20</sup> n 19

applies to all and it should not be an excuse to hamper the rights of sexual minorities.

**Crane P. 2013**,<sup>21</sup> in analysis of Devlin's view, makes note that naturalists have in recent times moved natural religion to secular natural concerned with biology and psychological evidence to determine what is natural as morally right. This research analyses the gay debate as a whole, a crucial part of homosexual jurisprudence by showing how arguments in favour of the decriminalisation of homosexuality are much more rational than those that do not as they embody the spirit of human rights.

**Malupande S. 2000**,<sup>22</sup> in his study, acknowledges that both scientists and psychologists through extensive study are of the opinion that homosexuality is neither an abnormality nor a disease of the mind, but it is shaped by complex biological, psychological and social factor interactions at an early age. This notion proves that sexuality is developed over time and that homosexuality is not a choice. This research agrees with the author in that homosexuality is neither a disease nor an abnormality of the mind. It seeks to showcase how the natural argument of homosexuality favours same-sex attracted persons as opposed to its negative through modern findings in science.

**Mkandawire SB et al 2019**<sup>23</sup> hold the view that at present homosexuality is and has always been taboo in Zambia as same-sex relations are unheard of customarily. This research disagrees with this author in that it seeks to showcase how the view taken is narrow and a product of discriminatory anti-sodomy laws enacted and enforced in Zambia which have bred an environment that is homophobic and does not seek to acknowledge the existence of sexual minorities within the country.

**Bajaha B**<sup>24</sup> argues that Africans suffer a form of postcolonial amnesia, due to the influence of colonialism as studies of African cultures reveal numerous traditions

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<sup>21</sup> *ibid*

<sup>22</sup> SYDNEY MALUPANDE , 'Human Rights in Zambia: Freedom of Sexual Orientation - Homosexual Law Reform' (Degree Thesis LLB2000) <<http://dspace.unza.zm/handle/123456789/2952>> accessed 1 April 2023.

<sup>23</sup> Sitwe Benson Mkandawire, Steriah M Simooya and Pauline Namakau Monde, ZAMBIAN CULTURE: HARNESSING CULTURAL LITERACY with a FOCUS on SELECTED MYTHS and TABOOS (2nd edn., University of Zambia Press 2019) <<http://dspace.unza.zm/handle/123456789/6946>> accessed 19 April 2023.

<sup>24</sup> Binta Bajaha, 'Postcolonial Amnesia: The Construction of Homosexuality as "Un-African" ' <<https://www.lse.ac.uk/gender/assets/documents/research/graduate-working-papers/Postcolonial-Amnesia.pdf>> accessed 1 April 2023.

which some would consider homosexual. This research agrees with the author's point of view in that before colonialism, the concept of sexualities other than heterosexual were not frowned upon and the notion of homosexuality as un-African is a foreign concept.

**Boy-Wives and Female Husbands: Studies in African Homosexualities 2021**,<sup>25</sup> an anthropological study has shown that among several Bantu tribes of Zambia, same-sex practices are frequent among locals, especially during initiation rites, and that interactions between the old and young are not uncommon as in Greek and Roman times. This research attempts to showcase that Zambia though presenting an anti-homosexual stance at present has elements of a homosexual past wherein homosexuals were not as marginalised or stigmatised as they are today.

**Van Klinken A. 2015**,<sup>26</sup> finds it laughable that a democratic society such as Zambia bases justification for its sodomy law on religion and politics introduced by foreign masters whose way of life was inherently homophobic, as opposed to the clear and true customary views of the nation. This research agrees with this author and attempts to source where the anti-homosexual sentiments in Zambia are coming from, as well as how and why those elements are in place.

**Buckle L. 2020**,<sup>27</sup> points out that Britain abolished the very sodomy laws maintained today by a number of its former colonies, acknowledging the system of hate and violation of human rights they bred. This research looks at the history of Zambia's anti-sodomy laws and seeks to showcase how its former colonisers have abolished the very laws still in place that restrict and deny the human rights owed to LGB persons within the country.

**Sishuwa S. 2022**,<sup>28</sup> states vigorously that Zambia's sodomy laws have created a hostile environment for LGB persons in the country to the extent that their rights to

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<sup>25</sup> Will Roscoe, Stephen O Murray and Marc Epprecht, *Boy-Wives and Female Husbands : Studies in African Homosexualities* (State University Of New York Press 2021).

<sup>26</sup> Adriaan van Klinken, 'Queer Love in a "Christian Nation": Zambian Gay Men Negotiating Sexual and Religious Identities' (2015) 83 *Journal of the American Academy of Religion* 947 <<https://academic.oup.com/jaar/article-abstract/83/4/947/2572507>> accessed 1 April 2023.

<sup>27</sup> Leah Buckle, 'African Sexuality and the Legacy of Imported Homophobia' (Stonewall 1 October 2020) <<https://www.stonewall.org.uk/about-us/news/african-sexuality-and-legacy-imported-homophobia>> accessed 1 April 2023.

<sup>28</sup> Sishuwa Sishuwa, 'Zambia Has Killed the Death Penalty, but Other Rights Remain on Death Row' *The Guardian* (24 December 2022) <<https://www.theguardian.com/global->

life, assembly, privacy and free speech, as they live in fear. This research aims to show how the human rights of LGB persons are violated due to the existence of anti-homosexuality laws that are not only discriminatory because they only apply to sexual minorities, but that such laws have bred a hostile environment wherein LGB persons are openly denied their rights.

**Kaaba O and Sambo PT. 2022,**<sup>29</sup> voice out that the description of homosexuals as subhuman and a call for their arrest by church leaders and government officials denies same-sex attraction-oriented individuals their constitutional rights. They argue that human rights are absolute and should not be curtailed based on such negative prejudice. This research is centred around the human rights of sexual minorities and showcases how these rights are enshrined in Zambia's Constitution but do not entirely apply to said minorities.

**Couvaras J. 2013,**<sup>30</sup> argues that should homosexuality continue to be criminalised on the basis that Zambia is a Christian nation at the insistence of various political and religious figures, the human rights of homosexuals shall continue to be infringed upon. This research agrees with the author and seeks to show why Zambia has maintained its stance on sodomy despite a global change of heart in other states, and that the current state of affairs is a contradiction of what the Constitution under part III seeks to protect.

**Cáceres C et al 2009,**<sup>31</sup> acknowledge that LGB persons are a marginalised minority, and are not free to enjoy said rights in countries where anti-homosexual law and sentiment are prevalent as their fundamental rights and freedoms are curtailed. This research agrees with the author and offers findings, recommendations and conclusions on how Zambia as a country can combat its current anti-homosexuality

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development/2023/jan/09/zambia-has-killed-the-death-penalty-but-other-rights-remain-on-death-row> accessed 25 February 2023.

<sup>29</sup> O'BRIEN KAABA and PAMELA TOWELA SAMBO, 'THE CONSTITUTIONAL STATUS of GAY PEOPLE in ZAMBIA' (www.makanday.com 22 September 2022) <<https://www.makanday.com/posts/the-constitutional-status-of-gay-people-in-zambia>> accessed 3 April 2023.

<sup>30</sup> Jean Couvaras , 'CRIMINOLOGICAL EVALUATION of GAY RIGHTS under the ZAMBIAN CRIMINAL JUSTICE SYSTEM: A Comparative Human Rights View ' (Degree Thesis LLM2013) <<http://dspace.unza.zm/handle/123456789/3235>> accessed 1 April 2023.

<sup>31</sup> Carlos F Cáceres and others, 'Review of Legal Frameworks and the Situation of Human Rights Related to Sexual Diversity in Low and Middle Income Countries ' (UNAIDS 2009) <[https://data.unaids.org/pub/report/2009/20091215\\_legalframeworks\\_sexualdiversity\\_en.pdf](https://data.unaids.org/pub/report/2009/20091215_legalframeworks_sexualdiversity_en.pdf)> accessed 1 April 2023.

stance to permit inclusive protection and establishment of human rights as opposed to the bias against sexual minorities.

## **1.7 METHODOLOGY**

This research section explains how information was identified, selected, processed and analysed to enable readers to evaluate the study's validity and reliability.

### **1.7.1 RESEARCH APPROACH**

This paper uses a qualitative research approach because it is the most practical method to review, clarify and verify assertions with regard to human rights and homosexuality, as the thesis evaluates the current legal framework and stance pertaining to homosexuality in Zambia.

### **1.7.2 RESEARCH DESIGN**

The research design adopted in this paper is the evaluative approach. This is because this research assesses arguments that seek to shed light on how anti-homosexuality in both law and sentiment leads to a violation of the human rights of sexual minorities, particularly in Zambia.

### **1.7.3 RESEARCH TYPE**

The research type employed in this study is the descriptive type. This is because this paper seeks to describe how the human rights of sexual minorities are violated by anti-homosexual laws and sentiments, particularly in Zambia.

### **1.7.4 DATA COLLECTION**

Data collection for this study was done from books, articles, reports, past interviews, thesis, and various internet sources.

### **1.7.5 DATA ANALYSIS**

The data analysis method used in this study is qualitative and uses the narrative style. This narrative style of data analysis is preferred for this research because it focuses on interpreting the content of data collected on homosexuality and human rights, and the meaning of said data. The data analysed is presented to the reader not only through a narration strictly but also through an engagement in a form of discourse under the narrative style to draw meaning from it.

## **1.8 ETHICAL CONSIDERATIONS**

This research was made permissible by the University of Lusaka under the L400 program a final dissertation requirement evidenced by an introduction letter issued by the university, and an assigned supervisor who oversaw the research. The study was undertaken in line with university guidelines.

## **1.9 SCOPE OF STUDY**

This study shall look into Zambian anti-homosexual legislation and the harm it inflicts upon LGB persons which ultimately violates their human rights. It shall also look at arguments that call for the decriminalisation of sodomy laws.

## **1.10 LIMITATION OF STUDY**

This study employs the use of the LGB (lesbian, gay and bisexual) which is a shortened version of the full LGBT. The T representing transgender persons has been purposefully omitted to focus on sexual orientation and not gender identity, due to the global controversies surrounding transgenerism. Potential research subjects due to the sensitive nature of the study also showed a reluctance to speak on the record and opted to give off the record views (without documentation such as voice recordings, transcriptions and consent form signatures) anonymously to protect themselves.

## **1.11 DEFINITION OF TERMS AND ACRONYMS**

- Bisexual - An individual with the capacity for a romantic, emotional and/or physical attraction to persons who are either male or female, or both.<sup>32</sup>
- Gay - Men whose enduring romantic, emotional and/or physical attraction is inclined towards other men; formerly included women who are attracted to other women or referred to as a state of bliss or happiness.<sup>33</sup>
- Heterosexual – An individual whose romantic, emotional and/or physical attraction is to people of a different gender.<sup>34</sup>
- Homophobia – The irrational fear and/or hatred of homosexuals, the dread of being close to homosexual persons, in the case of homosexuals themselves self-loathing (Internalised homophobia).<sup>35</sup>

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<sup>32</sup> 'IOM SOGIESC Glossary of Terms' (International Organization for Migration 21 May 2021) <<https://www.iom.int/resources/iom-sogiesc-glossary-terms>> accessed 27 March 2023.

<sup>33</sup> n 31

<sup>34</sup> ibid

- Homosexual – An individual who experiences romantic, emotional, and/or physical attraction to persons of the same sex.<sup>36</sup>
- LGBT - Lesbian, gay, bisexual, transgender, sometimes shortened to LGB to refer to particular populations who identify as such.<sup>37</sup>
- Lesbian – A woman whose enduring romantic, emotional and/or physical attraction is inclined towards other women.<sup>38</sup>
- Sexual orientation - An individual's sexual preference or sexual behaviour. It describes a person's feelings and attraction to others; an enduring capacity for deep romantic, emotional, and/or physical feelings and attraction or connection with others, which is either heterosexual, homosexual, bisexual, and encompasses a wide range of other representations.<sup>39</sup>

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<sup>35</sup> Kopano Ratele, 'Hegemonic African Masculinities and Men's Heterosexual Lives: Some Uses for Homophobia' (2014) 57 *African Studies Review* 115.

<sup>36</sup> *ibid* n 32

<sup>37</sup> n 32

<sup>38</sup> n 32

<sup>39</sup> *ibid* n 32

## CHAPTER 02: HOMOSEXUAL JURISPRUDENCE

### 2.0 INTRODUCTION

Various social standards include different beliefs, values, and laws that individuals adhere to; standards that prescribe a norm of behaviour that is considered right or moral.<sup>40</sup> Morality can therefore refer to the difference between what is right and what is wrong, a concept from the onset that is subjective. Morality is thus a social construct consisting of societal values that are universally accepted by people of a particular grouping, whose ideals, beliefs, and behaviour have been developed and adopted over time.<sup>41</sup>

Friedrich Nietzsche once stated:

If you crush a cockroach, you are a hero. If you crush a beautiful butterfly, you are a villain. Morality has aesthetic standards.<sup>42</sup>

His words acknowledge the fact that what is moral or acceptable/right to one may not be to another depending on several factors such as culture and personal belief.

### 2.1 LAW AND MORALITY

Law has been defined as a set of rules that prescribe the appropriate actions, conduct or behaviour every individual/citizen must obey that are put forth by a controlling authority and said rules are enforced by legal consequences.<sup>43</sup> In essence, laws are territorial and thus apply per jurisdiction. Failure to adhere to the law of a particular jurisdiction means that a sanction is likely to be imposed, which is why laws must be obeyed and followed.

Much like morality, different laws apply to different groupings, and what is law in one jurisdiction may not be in another. Morality on one hand is concerned with the view of what is right and wrong in a society, while law on the other hand seeks to maintain peace, order and stability in society by prescribing dos and don'ts. Morality in the

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<sup>40</sup> Naresh Kumar, 'What Is Law and Morality in Jurisprudence || Jurisprudence ||' (17 December 2022) <<https://www.lawnotes4u.in/what-is-law-and-morality-in-jurisprudence/>> accessed 29 September 2023.

<sup>41</sup> ibid

<sup>42</sup> Toru Chiba, 'Fairmont State University Library: Library - News Blog: Library News' (library.fairmontstate.edu 15 February 2023) <<https://library.fairmontstate.edu/news/1/Friedrich-Nietzsche-Morality-and-Truth#:~:text=%22If%20you%20crush%20a%20cockroach>> accessed 29 September 2023.

<sup>43</sup> Bryan A Garner and Henry Campbell Black, *Black's Law Dictionary* (8th edn., West 2004).



strict sense appears to be a matter of probity while law appears to be concerned with the carrying out of justice when breached.

Nietzsche argued that morality is not inherently absolute but a societal construct, created and enforced by a particular group of people and that it should not be taken for granted, but questioned and re-evaluated.<sup>44</sup> His argument calls for a jurisprudential approach as both law and morality carry two distinct meanings, though it cannot be denied from his assertion that morality has the potential to become law when enforced, and law can base its foundations on morality.

## **2.2 THE GAY DEBATE**

The gay debate is a jurisprudential argument that has ensued over time between naturalists and positivists, and more recently conservatives and progressives/liberals. It is a question of gay rights and their position in the world; as to whether homosexuals should be curtailed by law or allowed the same rights and freedoms as heterosexuals.<sup>45</sup> The debate focuses on legal, political, religious and human rights arguments both for and against homosexuality, but mainly is a question of law and morality.

### **2.2.1 HART V DEVLIN**

The mid-20th century debate between Patrick Devlin a naturalist/conservative proponent and Herbert Hart a positivist/progressive proponent tackled the relationship between law and morality and addressed the limitations of criminal law with regard to a proposal of the Wolfenden Committee which focused on the decriminalisation of male homosexual male activity in private and prostitution in England.<sup>46</sup> It should be noted that the debate focused on the regulation of same-sex homosexual conduct particularly between males as a point of reference.

Devlin's argument was against the decriminalisation of homosexuality propelled by public morality, legal moralism and Christianity as a base. Herbert Hart however was

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<sup>44</sup> Som Dutt, 'A Critical Evaluation of Morality through Nietzsche's Eyes' (Nietzsche's Philosophy27 December 2022) <<https://medium.com/nietzsches-philosophy/a-critical-evaluation-of-morality-through-nietzsches-eyes-e987a002d4b6#:~:text=Nietzsche>> accessed 29 September 2023.

<sup>45</sup> 'The Great Gay Debate | C-SPAN.org' (www.c-span.org27 June 2002) <<https://www.c-span.org/video/?170993-1/great-gay-debate#>> accessed 29 September 2023.

<sup>46</sup> Peter Cane, 'Taking Law Seriously: Starting Points of the Hart/Devlin Debate\*' (2006) 10 The Journal of Ethics 21.

for the decriminalisation of homosexuality and based his argument on the harm principle and liberalism.<sup>47</sup>

Natural law proponents such as Patrick Devlin teach that what is natural is morally right and that the law cannot exist without adhering to what is moral. Morality in this instance cannot deviate from the natural order for which man was intended to live and behave. Devlin argued that criminal law should not be limited to regulating conduct that has direct adverse effects on citizenry but also conduct that has the potential to erode the very moral foundation of a society such as homosexuality which is not Christian.<sup>48</sup> The argument presupposes that public morality towards homosexual activity be it in public or private which at the time England viewed as immoral from a mostly religious standpoint should be criminalised.

This argument advances legal moralism or the legal enforcement of morality suggesting that it is okay for criminal law to curtail certain actions if they are found to be inherently immoral by the public majority even when those actions cause no harm or offence to non-consenting parties.<sup>49</sup> This essentially means that the majority win at the expense of the minority. Devlin makes use of the utilitarian doctrine in this manner and states that public morality bears the weight of both politics and morals to be upheld.<sup>50</sup> He argues that homosexual activity of any kind even among consenting adults offends public morality and should be regulated by criminal law because ultimately society decides for itself what is good or bad and thus enforces these values making them law. For Devlin, homosexual activity especially that of a sexual nature is an immorality that exploits human weakness, and to strengthen humanity there must be no limit to which the state should pass legislation against homosexuality.<sup>51</sup>

Herbert Hart opposed Devlin's view by resorting to the harm principle stating that the only purpose for which power can be used to legally force an individual to conduct themselves in a particular manner justifiably is to prevent harm from occurring to others by the conduct.<sup>52</sup> Hart's argument further combated Devlin's public morality by

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<sup>47</sup> n 19

<sup>48</sup> *ibid*

<sup>49</sup> *ibid*

<sup>50</sup> *ibid*

<sup>51</sup> *ibid*

<sup>52</sup> n 19

the use of what he referred to as constitutional morality. Constitutional morality refers to a commitment by law that embraces a faithful application of constitutional values that both satisfies and protects the constitutional rights of a collective and an individual at par.<sup>53</sup> This particular argument debunks the view that Hart's argument against Devlin was self-centred and focused solely on the individual rather than the whole. While one religion may make up the fabric of a nation's beliefs in turn dictating their moral standards not all ascribe to that belief system and the law should seek to incorporate all provided no individual rights are being infringed upon.

A society is made up of different individuals who despite common belief systems have different personal values to which they ascribe. Hart simply stated that the law should not be biased in its dispensation of justice and protection as the world is not black and white but constitutes a grey area that must be managed if that grey area does not significantly damage the rest of the world by its mere existence why should it not be acknowledged and protected but instead be discriminated against.<sup>54</sup> Hart's assertions point to the protection of basic human rights despite minor disagreements on issues such as sexuality.

Furthermore, Devlin argued legal moralism stating that homosexuality is inherently immoral and should be curtailed by the law. This argument however was one-sided as well, as it only took into account the Christian nature of England at the time for which even though he stated the nation's majority were against homosexuality, many of its preceding monarchs and nobility have been recorded in history as same-sex loving. Hart countered this argument with his use of liberalism. He asserted that the only morally legitimate justification for the criminal prohibition of harm prevention is when one party is non-consenting.<sup>55</sup> This essentially means that the party that causes harm imposes said harm at the expense of all others without due regard for both society as a whole and the individual. Prevention of harm in the form of criminal prohibition must not be conservative in application but be liberal to account for all and not a few. Hart argued that liberalism entails vesting one with the power to either enforce or waive their legal right in law as such individuality forms a commonality within society and that homosexuals due to anti-sodomy law have not been afforded

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<sup>53</sup> *ibid*

<sup>54</sup> *ibid*

<sup>55</sup> *ibid*

such privilege. Essentially, he favoured the decriminalisation of homosexuality as it would afford same-sex-loving persons a form of equality and equity under the law.

### **2.3 NATURALISM TO HUMANISM**

Since its notable publication in the mid-20<sup>th</sup> century, the Hart v Devlin debate has been dubbed a pinnacle rendering of the gay debate which has come a long way since. With the advancement of science and technology, human understanding of homosexuality has broadened with the present acknowledgement and discovery that homosexuals have existed for a long period and are accounted for in various points of history. Couvaras states that it is viably arguable that homosexuality is natural based on the fact that it has existed throughout history and is not a recent phenomenon, a fact evidenced by various historical records, both oral and documentary that demonstrate its practice by different cultures such as the Egyptians and various Southern African tribes who have lived with this phenomenon for a long time.<sup>56</sup> Such discovery suggests that homosexual inclinations are learned but most likely occur naturally globally.

In his analysis of the Hart v Devlin debate, Peter Crane makes note of both scientific and historical discoveries on homosexuality through the acknowledgement of an evolved naturalism and gives his critique on the subject of law and morality. Naturalists initially believed that what is natural is what is right, and that would be God's will, which should be law. They have since moved from such beliefs to what Crane refers to as secular naturalism. Secular naturalism in this instance means the rejection of the supernatural law such as God, but a movement towards scientific and empirical evidence to explain what is natural and why it should prevail as law.<sup>57</sup> Secular naturalists believe that what is human is bound to be natural as well as right and strongly advocated for the enforcement of human rights.<sup>58</sup> Secular naturalism, which is based on the belief that everything can be explained through natural causes, is now being embraced by secular naturalists also called humanists who reject mysticism and religious doctrine as forms of blind faith; instead, they rely on human qualities of compassion, critical thinking, and experience and expression to

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<sup>56</sup> n 30

<sup>57</sup> n 19

<sup>58</sup> ibid

solve the problems that humanity faces. Secular humanism is therefore a non-religious worldview rooted in science, logic, and humanist ethics.

Initially, homosexuality was viewed as unnatural by a majority hence the need for anti-sodomy laws. In **Magaji v the Nigerian Army**,<sup>59</sup> two males were convicted for having carnal knowledge of each other against the order of nature and it was stated:

Carnal knowledge or sexual intercourse between males is against the order of nature, nature should mean God and not just the generic universe that exists independently of mankind or people.

The above case presents a strong naturalist pre-humanist view of homosexuality. Secular naturalism as a brand of naturalism, along with the advancement of science somewhat favours Hart's positivist view. This is because it favours the natural aspect of humanity, and modern science has come to acknowledge that homosexual attractions are as much of a product of human development as heterosexual. Thus, the claim that homosexuality is not an abnormality is favoured by most nations today. This is evidenced by research done by numerous scientists and psychologists such as Marmor who alleges that homosexuality is an inter-species phenomenon and naturally occurring as much as heterosexuality.<sup>60</sup> Bagemihl a biologist goes on to support this view as he asserts that animals just like humans also engage in all kinds of non-reproductive sexual behaviour; he also states that "To say homosexuality is unnatural is to say that the stars do not shine!".<sup>61</sup> Couvaras further goes on to assert in favour of homosexuality that it should not be criminalised due to advancements in biology and genetic research which show that homosexuality is a natural part of human evolution and that it may very well form part of the genetic makeup of some people and that science has concluded it is not a choice but a predisposition.<sup>62</sup>

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<sup>59</sup> 2 – 3 SC 32 (2008)

<sup>60</sup> Judd Marmor, *Homosexual Behaviour: A Modern Reappraisal* (New York: Basic Books 1980).

<sup>61</sup> Bruce Bagemihl, *Biological Exuberance: Animal Homosexuality and Natural Diversity* (St Martin's Press 2000).

<sup>62</sup> n 30

### **2.3.1 CONSERVATISM V LIBERALISM: THE NEW AGE GAY DEBATE**

Even though modern findings have shown how secular naturalism agrees with homosexuality, due to naturalist roots a negative view of the subject is still held. Today at present such arguments have moved towards conservatism and liberalism.

Bolatito holds this particular conservative view in stating that homosexuality is a threat to the nature of man which is to ultimately find a partner, start a family, and have children.<sup>63</sup> Despite his narrow view, he does acknowledge the existence of biological factors uncontrollable by man that lead to homosexual attraction which in itself is somewhat contradictory to his conservative views.

Liberals on the other hand do not believe heterosexuality and homosexuality to be that different, except in terms of attraction. Liberals argue that heterosexual rights such as marriage, freedom of expression and non-discrimination should apply to same-sex loving persons as well; these are basic rights that affect one's everyday interactions and mental health.<sup>64</sup>

Conservatives argue for preserving a heterosexual way of life, while liberals point to scientific and historical evidence showing their long-standing coexistence. Conservatives view homosexuality as a threat and infringement on their rights, particularly in relation to the institution of marriage. Liberals question how criminalizing homosexuality protects conservatives and argue that it does not harm them.<sup>65</sup> Other than personal belief which doesn't apply to all no concrete answer has justified the use of anti-sodomy laws to protect heterosexuals from homosexuals.

### **2.4 ANALYSIS AND CRITICISM OF THE GAY DEBATE**

Crane in his assertions makes use of evidence that showcases homosexuality as natural, in that it is difficult to agree with Devlin as a naturalist especially when secular humanism agrees in favour of Hart upon inspection that same-sex attractions are natural, a point proven when naturalists turned away to secular naturalism.<sup>66</sup>

He also acknowledges that the bottom-line disagreement between Devlin and Hart results from a difference of opinion about what constitutes immorality; where Hart

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<sup>63</sup> n 18

<sup>64</sup> Rod Dreher, 'Same-Sex Marriage: Conservative and Liberal Views' BBC News (10 May 2012) <<https://www.bbc.com/news/world-us-canada-18015135>> accessed 16 October 2023.

<sup>65</sup> n 69

<sup>66</sup> n 19

thought the law should penalise the consequences of conduct, Devlin sought to have the law penalise conduct itself.<sup>67</sup> This goes back to the root of homosexual jurisprudence in that Devlin believed homosexuality was inherently immoral, while Hart called for a separation of law and religious morality where a difference in morals is present and no significant harm affects the inherent rights of another.

It is put forth by Crane that criminal law has main three characteristics that explain why it continues to be the focus of debates on homosexual jurisprudence, the first being that criminal law is coercive.<sup>68</sup> Coerciveness seeks compliance with legal norms through the threat of sanctions for non-compliance.<sup>69</sup> This aspect of criminal law is admirable in the prescription of behaviour but restrictive the criminalisation of sin forces the average law-abiding homosexual to adhere to the law out of fear of sanction instead of genuine belief in its protective value even when same-sex conduct harms no others inherent rights.

Secondly, criminal law also carries a stigmatic characteristic in that it holds those found liable to be harmful to society in the strictest sense.<sup>70</sup> Thirdly, criminal law restricts an individual's autonomy.<sup>71</sup> The usual and likely penalties of anti-sodomy law are imprisonment, for instance in Zambia's case. Imprisonment implies that an individual's inherent rights will be restricted in that they cannot, move or express themselves as they normally would unsupervised.

Regarding the criminalisation of homosexual conduct, Crane argues that the three characteristics of criminal law should be taken into consideration with the harm principle for the utilitarian good. This is because the law as Hart put it must be both equal and equitable in its application.

He goes on to say in addition that the law as much as morality has both a statistical and dynamic understanding. The description of law as a set of norms that prescribe orderly human conduct provides for a statistical understanding, while dynamically the law may be considered law as a process of conflict resolution by the exercise of

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<sup>67</sup> *ibid*

<sup>68</sup> *ibid*

<sup>69</sup> *ibid*

<sup>70</sup> *ibid*

<sup>71</sup> *ibid*

political power.<sup>72</sup> Morality from a statistical point of understanding may be regarded as a set of norms concerned with the right conduct of individuals, while dynamically it is the process of practical reasoning.<sup>73</sup> Both are notably norms of conduct with morality being incorporated into law as laws must be accepted by the societies they govern.

However, where discrimination exists without proper justification or reason but is based on selfish or one-sided views, the law's dynamic aspects are morally discriminatory.<sup>74</sup> The competition between law and morality arises from the constant battle over which morality should apply, as morality provides a set of critical standards for assessing law to be rightly valid in the eyes of the society it governs.

## **2.5 CONCLUSION**

The relevance of the gay debate addresses whether criminal law should be used to regulate the consented sexual conduct between two adults of the same sex. Non-consensual sexual relations, regardless of the age involved, are generally disapproved and violate the right to choose, leading to disagreement, this demands a solution, not consensual acts between adults.

Disagreements over societal values can lead to social instability, so the law seeks to protect society by aligning with morality. Without turning moral values into laws, there would be no way to enforce them, resulting in chaos. The objective of the law is to uphold social unity by incorporating moral standards that people are willing to accept, even if they conflict with personal beliefs, as long as fundamental rights are respected. The law encourages compliance with norms, fostering beneficial social cooperation despite significant disagreements. Therefore, arguments supporting homosexual freedom in the gay debate are more convincing than criminalization.

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<sup>72</sup> n 19

<sup>73</sup> *ibid*

<sup>74</sup> *ibid*



## **CHAPTER 03: INTERNATIONAL HUMANS RIGHTS INFLUENCES ON ANTI-SODOMY LAWS**

### **3.0 INTRODUCTION**

Human rights are inherent to all individuals at birth, they cannot be taken away and apply universally to all.<sup>75</sup> They provide for a set of fundamental rights to every human being that all countries at an international and domestic level should adhere to regardless of race, gender, sexuality and discrimination.<sup>76</sup> This includes rights such as the right to life, liberty, security, and freedom from discrimination.

Human rights have become a central aspect of global discourse and serve as a benchmark for evaluating the progress of societal development. Human rights, particularly in relation to homosexuality, have significantly influenced legal discussions. Anti-sodomy laws, or anti-homosexuality laws, often contradict human rights principles and are closely monitored by human rights organizations. These laws are scrutinized due to their violation of fundamental human rights established in international agreements.

Under the threat of anti-sodomy laws, sexual minorities, specifically LGB individuals, are denied their inherent human rights, including equal treatment, respect, dignity, autonomy, and freedom. This contradiction occurs despite the universal principles of human rights, which advocate for equal treatment and recognition of the rights of all individuals regardless of their sexual orientation.

### **3.1 THE LEGACY OF ANTI-HOMOSEXUALITY LEGISLATION**

The term sodomy is drawn from Abrahamic texts such as the bible and Quran and is said to refer to same-sex sexual activity or sexual activity between man and beast, which is unnatural per such religious doctrine.<sup>77</sup> During the Middle Ages sodomy was considered a grave sin against God and thus considered a crime. The Catholic Church, following its Abrahamic roots and beliefs in the Bible, has played a

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<sup>75</sup> Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23

<sup>76</sup> n 1

<sup>77</sup> Human Dignity Trust, 'A History of Criminalisation | Human Dignity Trust' (www.humandignitytrust.org.2022) <<https://www.humandignitytrust.org/lgbt-the-law/a-history-of-criminalisation/>> accessed 20 October 2023.

significant role in shaping societal attitudes towards same-sex sexual activity and has condemned homosexuality as a grave sin for centuries.<sup>78</sup>

Sodomy laws are laws that criminalize consensual same-sex sexual activity and discourage any mention or expression of homosexuality. They have been in existence for over 500 years and can be traced back to the colonial period, when European powers introduced them in their influenced countries. These laws are also known as anti-homosexuality laws.<sup>79</sup> They are largely based on prevalent cultural and religious beliefs of that period, and have since persisted.

During the colonization era, European powers enforced strict moral and legal standards on colonized territories, including the outlawing of same-sex sexual conduct and any mention of homosexuality. These laws can be traced back to religious beliefs and cultural norms influenced by Catholicism. The purpose of imposing these laws was to establish moral superiority and control over the colonized populations under the guise of promoting civilization.<sup>80</sup>

### **3.2 POST-COLONIAL INFLUENCES OF ANTI-HOMOSEXUALITY LAWS**

The spread of sodomy laws during the colonisation era was in large part championed by the British with other colonies having far less impact in the spread of such laws.<sup>81</sup> Today sixty-four countries still criminalise homosexuality, more than half of which are African, and of the Commonwealth nations over half of that list still maintains inherited British sodomy laws.<sup>82</sup> The impact of inherited sodomy law is greatly felt by the African continent which has been a subject of global human rights debate and remained a stronghold of anti-homosexuality sentiment as numerous African leaders have come out to say that homosexuality is un-African.

The advancement of anti-LBG propaganda has created an environment of hostility towards homosexual-identifying individuals who in turn are denied a variety of fundamental human rights based on their sexual orientation. Hepple, in his work, asserts that sodomy laws have contributed to the violation of sexual minority human

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<sup>78</sup> n 77

<sup>79</sup> n 78

<sup>80</sup> Human Rights Watch, 'This Alien Legacy' (Human Rights Watch 17 December 2008) <<https://www.hrw.org/report/2008/12/17/alien-legacy/origins-sodomy-laws-british-colonialism>> accessed 20 October 2023.

<sup>81</sup> n 86

<sup>82</sup> Reality Check Team, 'Commonwealth Summit: The Countries Where It Is Illegal to Be Gay' BBC News (12 May 2021) <<https://www.bbc.com/news/world-43822234>> accessed 20 October 2023.

rights in three ways: equality, privacy and discrimination.<sup>83</sup> This has branched off into many more violations over the years in different countries. Post-colonial sodomy laws have downgraded LGB persons to an inferior status below the average human or rather heterosexual, a sentiment echoed by many African leaders in countries wherein such law persists.<sup>84</sup>

The effect of such laws not only extends to labelling homosexuals as sub-human but is an outright declaration that their innate inclinations are unnatural and based on no proper justification their expressions have been declared illegal. This assault on the human dignity of homosexuals is a constant source of ridicule at the expense of their mental health and has been used as a tactic to destroy one's rivals, careers and lives.<sup>85</sup> The negative perception of homosexuality in pre-colonised states with anti-homosexuality laws has resulted in the promotion of violence against homosexuals which is strongly encouraged by authorities, to the point where police officers and citizens generally are given the authority to arrest, blackmail, and otherwise mistreat homosexuals who lack legal protection, forcing them into the shadows where they must live in fear and secrecy.<sup>86</sup>

### 3.3 EXAMPLES OF ANTI-HOMOSEXUALITY LEGISLATION IN VARIOUS NATIONS

**Nigeria** possesses the Same-Sex Marriage (Prohibition) Act enacted in 2013, a product of pre-existing post-colonial inherited sodomy laws. The law penalises all forms of same-sex activity from sexual conduct to mere identification as a homosexual for which severe penalties are imposed to the extremes of stoning by death per Sharia law.<sup>87</sup> Predominantly Muslim, the country has a major intolerance for homosexuality despite the active presence of a homosexual community within that is constantly disregarded, targeted and denied human rights. Interviews by well-wishing and pro-LGB organisations have found numerous arrests of individuals

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<sup>83</sup> Joshua Hepple, 'Will Sexual Minorities Ever Be Equal? The Repercussions of British Colonial Sodomy? Laws' (12AD) 8 The Equal Rights Review <<https://www.equalrightstrust.org/content/joshua-hepple-will-sexual-minorities-ever-be-equal-repercussions-british-colonial-sodomy>> accessed 20 October 2023.

<sup>84</sup> *ibid* 7

<sup>85</sup> *ibid*

<sup>86</sup> n 86

<sup>87</sup> Human Rights Watch, "'Tell Me Where I Can Be Safe' | the Impact of Nigeria's Same Sex Marriage (Prohibition) Act' (Human Rights Watch 6 June 2017) <<https://www.hrw.org/report/2016/10/20/tell-me-where-i-can-be-safe/impact-nigerias-same-sex-marriage-prohibition-act>> accessed 20 October 2023.

suspected of being homosexual who have been subjected to forced anal examination, beaten by police officers, extorted and killed, all actions that appear to be endorsed by both the state and citizenry.<sup>88</sup>

**Uganda** as a former British protectorate inherited its anti-homosexuality laws from its former colonial masters and has since held a strong anti-homosexuality sentiment. The Ugandan penal code already criminalises same-sex conduct, but this was stiffened with the signing of the Anti-Homosexuality Act 2014, which was further improved by the state to curb any form of homosexuality with the signing of the Anti-Homosexuality Act 2023.<sup>89</sup> The law not only criminalises same-sex sexual activity but provides for different forms of homosexuality which are classified as a crime. It also prohibits any advocacy of homosexuality or rights pertaining to homosexuals and allows for public discrimination of LGB individuals.<sup>90</sup>

The barbaric nature of this newly enacted law was showcased in August 2023, a 20-year-old man was charged with aggravated homosexuality for engaging in sexual intercourse with a 41-year-old man believed to have an undisclosed disability. His lawyer claims the activity was consensual and private, suggesting that the allegations may have been fabricated for public reasons.<sup>91</sup> Aggravated homosexuality per Ugandan law is said to involve same-sex activity with children or vulnerable persons, and sexual activity leading to HIV contraction, and it applies to repeat offenders with the punishment being the death penalty.<sup>92</sup>

**Botswana** before 11th June 2019, upheld anti-homosexuality laws inherited from the British, which criminalized same-sex sexual activity. These laws not only prohibited physical intimacy between homosexuals but also led to discrimination against homosexuals, including denial of necessary services like healthcare. However,

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<sup>88</sup> n 88

<sup>89</sup> Ashwanee Budoo-Scholtz, 'Uganda's President Signs Repressive Anti-LGBT Law' (Human Rights Watch 30 May 2023) <<https://www.hrw.org/news/2023/05/30/ugandas-president-signs-repressive-anti-lgbt-law>> accessed 20 October 2023.

<sup>90</sup> *ibid*

<sup>91</sup> 'Uganda's Anti-LGBT Laws: Man Faces Death Penalty for "Aggravated Homosexuality"' BBC News (29 August 2023) <<https://www.bbc.com/news/world-africa-66645740>> accessed 20 October 2023.

<sup>92</sup> n 95

Botswana has now become the latest African country to abolish these laws, taking a step towards equality for all its citizens.<sup>93</sup>

### **3.4 THE INTRODUCTION OF HUMAN RIGHTS**

In challenging the discriminatory practices of anti-sodomy laws, the emergence and growth of international human rights law has been a game changer that has shed light on the numerous ways in which homosexuals have been ostracised. This entails that heterosexuals are no different from homosexuals and are deserving of equal treatment, dignity, and respect under human rights law. For this reason, international human rights organisations, civil societies, and activists have joined forces to speak out against the criminalisation of consensual same-sex sexual activity, calling for its decriminalization and outright abolishment.

#### **3.4.1 THE HUMAN RIGHTS FRAMEWORK**

The human rights framework centred around anti-homosexuality is focused on the decriminalisation and abolition of anti-gay laws.<sup>94</sup> The argument advanced is that the human rights that are enshrined in various instruments apply to all human beings including homosexuals who have been subjected to severe discrimination as history has shown, and there is no need to formulate new human rights laws but only enforce the already existing laws and acknowledge that the prejudice suffered by LGB persons today is a violation of human rights. Countries bound by these instruments are called upon by human rights proponents to deliberately and legally protect the human rights of LGB people, an endeavour which was not undertaken in the past.

Based on the Universal Declaration of Human Rights and other international human rights treaties, in an effort to rid the world of anti-homosexuality, nations are asked to locally *protect* LGB individuals from homophobic-incited violence, to prevent cruelty, inhumane and degrading treatment.<sup>95</sup> This protection ideally should come about through the prohibition of discriminatory laws and the repeal of laws that criminalise

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<sup>93</sup> Khonani Ontebetse, 'Botswana Clears Path to Decriminalise Homosexuality' (FairPlanet20 July 23AD) <<https://www.fairplanet.org/story/the-african-nation-going-against-the-tide-on-sodomy-laws/>> accessed 20 October 2023.

<sup>94</sup> United Nations, 'OHCHR | about LGBTI People and Human Rights' (OHCHR) <<https://www.ohchr.org/en/sexual-orientation-and-gender-identity/about-lgbti-people-and-human-rights>> accessed 22 October 2023.

<sup>95</sup> n 89

same-sex relations, to safeguard the fundamental rights and freedoms inherent to persons for LGB persons in totality and not partiality.<sup>96</sup> This means that it is not enough under the human rights framework for a state to say that it supports human rights while under its domestic law, sexual minorities are under threat, but deliberate steps must be taken to acknowledge their salient human rights legally under domestic law. The principles of equality and non-discrimination form the base upon which the decriminalisation and abolition endeavour is being undertaken.<sup>97</sup> This is done through the use of various international instruments and organisations that advance the LGB human rights cause.

### **3.4.2 INTERNATIONAL INFLUENCES OF INSTRUMENTS AND ORGANISATIONS**

The Universal Declaration of Human Rights (UDHR) adopted by the United Nations General Assembly in 1948, establishes the foundation for the promotion of equal rights and dignity for all individuals.<sup>98</sup> The Universal Declaration of Human Rights (UDHR) 1948,<sup>99</sup> states that "all human beings are born free and equal in dignity and rights." This declaration has been a cornerstone in the global human rights movement, and its principles have been essential in challenging anti-sodomy laws.

Although the Universal Declaration of Human Rights (UDHR) does not explicitly mention sexual orientation, it affirms the rights to non-discrimination, privacy, and freedom of expression that are applicable to all human beings, including those who identify as lesbian, gay, or bisexual. The declaration is not legally binding, but its universal application to human beings and incorporation into many constitutions around the world gives it significant moral weight.<sup>100</sup> Due to the status of international human rights principles being regarded as universal, inherent and inalienable, it can be argued that these principles form some form of legalised moral law especially when taking into account their non-discrimination factor.

The 1966 International Covenant on Civil and Political Rights (ICCPR) was the first significant international attempt to explicitly combat anti-homosexuality, and it has

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<sup>96</sup> *ibid*

<sup>97</sup> n 89

<sup>98</sup> *ibid*

<sup>99</sup> Universal Declaration on Human Rights (adopted 10 December 1948) 217 A(III) (UNGA),

<sup>100</sup> 'The International Human Rights Framework' ([www.unicef.org](https://www.unicef.org)) <<https://www.unicef.org/armenia/en/stories/international-human-rights-framework>> accessed 20 October 2023.

since had a significant impact on human rights.<sup>101</sup> Article 17 of the ICCPR affirms the right to privacy, stating that "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home, or correspondence." This provision has been interpreted by international human rights bodies, such as the United Nations Human Rights Committee, to include consensual same-sex sexual activity between adults as part of an individual's private life.

In **Toonen v. Australia**,<sup>102</sup> the Human Rights Committee took to interpreting references to sex in the ICCPR under Article 2, paragraph 1 which speaks to non-discrimination, and Article 26 which speaks to equality before the law in stating they should include sexual orientation. The landmark case resulted in the repeal of Tasmania's laws criminalizing same-sex sexual acts and set a precedent in the United Nations' human rights system for addressing discrimination against LGB people.

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) under Article 1 defines torture and the definition is broadly defined by human rights advocates and not limited to governments but has also been said to include the treatment of LGB individuals.<sup>103</sup>

In addition, The Convention on the Rights of the Child (1989) under Article 2 prohibits discrimination against children in all forms and requires that governments ensure protection against said discrimination. Organisations such as the United Nations, the Human Rights Commission and Amnesty International among others interpret this to include discrimination of differently sexually orientated children.<sup>104</sup>

Not much is often said about lesbianism in the grand scheme of things but the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1981) has been interpreted to include discrimination of female same-sex

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<sup>101</sup> "Sexual Orientation and Human Rights' (Umn.edu2019) <<http://hrlibrary.umn.edu/edumat/studyguides/sexualorientation.html>> accessed 20 October 2023.

<sup>102</sup> Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994)

<sup>103</sup> "Sexual Orientation and Human Rights' (Umn.edu2019) <<http://hrlibrary.umn.edu/edumat/studyguides/sexualorientation.html>> accessed 20 October 2023.

<sup>104</sup> ibid

loving individuals specifically to condemn bias against them, especially in countries that deliberately look down on women such as that Arab states.<sup>105</sup>

Another notable example of international human rights influence on anti-homosexuality law and sentiment is the European Court of Human Rights (ECtHR), which has issued numerous landmark judgements regarding the illegality of sodomy laws and various forms of anti-homosexual treatment.<sup>106</sup> The case of *Dudgeon v United Kingdom*<sup>107</sup> saw a man named Jeffrey Dudgeon had his house raided by police, who confiscated his personal belongings such as private letters and journals. He was taken into police custody and interrogated for approximately four-and-a-half hours regarding his sexual life.

He stated on record that he was aware of his sexuality from the age of 14, but could not express himself as the average heterosexual could for fear of his current predicament in which he experienced fear of imprisonment, harassment and blackmail at the hands of the police, and that he suffered psychological distress.<sup>108</sup>

The legal challenge to anti-sodomy legislation has also been heavily influenced by non-governmental organisations (NGOs). Many organisations, including Human Rights Watch, Amnesty International, the Iranian Railroad for Queer Refugees, and AMERA International, work tirelessly to raise awareness concerning the challenges that LGB people face due to anti-homosexuality laws. These NGOs document human rights violations and support local activists and communities that are afflicted with homophobia, in an effort to raise awareness towards LGB violations, advance legal changes and advance human rights standards.

### **3.5 EXAMPLES OF HUMAN RIGHTS VIOLATED BY ANTI-HOMOSEXUALITY**

As universal entitlements, human rights ideally should be extended to everyone regardless of one's sexual orientation. For homosexuals, however, that isn't always the case, as the United Nations among other organisations has noted a variety of violations of LGB human rights. These violations stem primarily from discriminatory

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<sup>105</sup> n 107

<sup>106</sup> *ibid*

<sup>107</sup> (1982) 4 EHRR 149

<sup>108</sup> n 89



laws that promote stigmatisation and intense homophobia based on sexual orientation. The following violations have been documented globally:

#### **I. The Right to Equality and Non-discrimination**

Homosexuals as much as heterosexuals deserve equal treatment and protection under the law, however, inequality and discrimination expressed in many forms are extended to them in countries where homosexuality is frowned upon and can range from denial of basic services such as healthcare to refusal of employment based on sexual orientation.<sup>109</sup>

#### **II. The Right to Life and Protection Under the Law**

In countries riddled with homophobia, the lives of homosexuals are under constant threat as punishments for same-sex conduct can be as extreme as the death penalty. Even in states where the punishment is not death, homosexuals are constant targets of hate crimes.<sup>110</sup> Victims of violence have little to no protection under the law, and the very authorities that are meant to protect them ignore their plight but instead opt to perpetuate it. Some citizens will even celebrate the death of a homosexual with the government taking no action or showing a reluctance to.<sup>111</sup>

#### **III. The Right to Human Dignity**

Homosexuals are forced to live in fear where the law does not allow for their existence. This prevents them from fully expressing themselves and forces them to deny a portion of their being that is integral to who they are.<sup>112</sup> Individuals who identify as homosexual are very often regarded as sub-human a label that hampers their dignity as members of the human race, expression of their sexual identity is heavily persecuted and frowned upon.<sup>113</sup>

#### **IV. The Right to Privacy**

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<sup>109</sup> n 89

<sup>110</sup> ibid

<sup>111</sup> n 93

<sup>112</sup> ibid 115

<sup>113</sup> n 89

Most anti-homosexual states criminalise consensual same-sex sexual activity, acts done in private and not let out for the public eye. Despite this, LGB people's privacy is violated because law enforcement is constantly searching for LGBT people who are involved in intimate relationships to the point where they are outed and compelled against their will to disclose their sexual orientation a situation that heterosexual people are not subject to.<sup>114</sup>

#### **V. The Right to Family and Personal Relationships**

Unlike heterosexuals, homosexuals are not permitted by anti-homosexual laws to form families of their own, or to enter into mutual loving, consenting relationships romantic relationships with others.<sup>115</sup> They are denied the right to marry and adopt, as well as seek out potential partners.

#### **VI. The Right to adequate healthcare**

In homophobic nations, homosexuals suffer stigmatisation and discrimination once their sexuality is discovered. More often than not they are either denied medical treatment or reported to the police by the very medical practitioners they entrust their life to.<sup>116</sup> As they are forced to repress themselves, homosexuals often suffer from mental stress with no avenue for mental health available to aid in coping with their circumstances.

#### **VII. The Right to Freedom of Association and Expression**

Freedom of assembly is a fundamental human right not freely extended to homosexuals in homophobic societies. Whether through ordinary public gatherings, peaceful protests, or support groups governments discourage any public or private get-togethers that are associated with sexual orientation or celebration of sexual identity, and bar advocacy of LGB rights.<sup>117</sup>

#### **VIII. The Right to Education**

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<sup>114</sup> n 89

<sup>115</sup> ibid

<sup>116</sup> n 93

<sup>117</sup> ibid 115

Education enables individuals to gain knowledge about the world and meet societal expectations. However, homophobic societies hinder learning related to homosexuality, preventing understanding of diverse sexual orientations and inhibiting acceptance. Some educational institutions discourage teaching materials on same-sex health and safe practices, while favouring such discussions for heterosexual teachings in subjects like biology.

#### **IX. The Right to Freedom of Movement**

Homosexuals in places where anti-gay laws are prevalent are restricted in their movement, especially when one's sexual identity is made public; such individuals are also stopped from seeking asylum deliberately by governments and arrested.<sup>118</sup> Homosexuals who flee homophobic societies cannot return to visit their families and loved ones for fear of persecution.<sup>119</sup>

#### **3.6 CONCLUSION**

The above-mentioned human rights are but some of the fundamental rights homosexuals are denied due to anti-homosexual laws and sentiments. The emergence of human rights in the world has shed light upon the injustices suffered by homosexuals permitted by anti-homosexual law; human rights constantly seek to acknowledge and protect LGB individuals from the infringement upon their being. Human rights have influenced the world in the hopes of producing a just, equal, and inclusive society free from homophobic prejudice. Through the Use of various treaties, domestication of international instruments and advocacy of various pro-LGB human rights organisations, the human rights framework has paved the way for a truly equal and non-discriminatory society to right the wrongs of the past.

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<sup>118</sup> n 89

<sup>119</sup> ibid

## CHAPTER 04: THE INTERPLAY BETWEEN HUMAN RIGHTS AND HOMOSEXUALITY IN ZAMBIA

### 4.0 INTRODUCTION

Despite progress made globally towards the acceptance of human rights for all sexual orientations, some countries, like Zambia, still strongly oppose homosexuality in both law and culture. This opposition leads to various forms of discrimination and human rights violations against sexual minorities, as they are seen as going against natural and religious norms. Zambia's climate towards sexual minorities has been referred to as highly homophobic and therefore can be said to be hostile towards same-gender attracted persons.<sup>120</sup> The common view is that homosexuality is a sin and taboo, it is held without an understanding of homosexuality. The relationship between human rights and homosexuality implies that the fundamental principles of equality, dignity, and freedom, while respecting the rights of others, should apply to all individuals, regardless of their sexual orientation.<sup>121</sup>

### 4.1 ANTI-HOMOSEXUAL ORIGINS IN ZAMBIA

Zambia, like many African countries, has undergone a myriad of cultural shifts that have impacted its traditional values, cultural norms and ultimately its conservative values surrounding human sexuality.<sup>122</sup> These shifts cannot be solely attributed to independent national growth but weigh heavily on the country's colonial past from which its anti-homosexuality laws find their origin. During the colonial era, British laws criminalizing same-sex sexual activity were introduced in 1911 and termed "unnatural acts"; these laws continued to be enforced even after Zambia gained independence in 1964.<sup>123</sup>

Anti-homosexuality sentiments in Zambia can therefore be traced back to the colonial era, during which the British authorities attempted to impose their way of life on the native population; actions undertaken involved undermining traditional values, cultural norms, and conservative beliefs of locals, which ultimately led to a negative

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<sup>120</sup> 'Zambia | Human Dignity Trust' (www.humandignitytrust.org.) <<https://www.humandignitytrust.org/country-profile/zambia/>> accessed 19 April 2023.

<sup>121</sup> 'The International Human Rights Framework' (www.unicef.org) <<https://www.unicef.org/armenia/en/stories/international-human-rights-framework>> accessed 20 October 2023.

<sup>122</sup> n 24

<sup>123</sup> Derrick Silimina, 'LGBTQI Rights Remain Sensitive Issue | D+c - Development + Cooperation' (www.dandc.eu5 December 2022) <<https://www.dandc.eu/en/article/fashion-event-steers-uproar-zambia-religious-moralists-criticise-promotion-homosexuality>> accessed 5 November 2023.

perception of homosexuality.<sup>124</sup> The imposition of a British way of life was done at the expense of what was then referred to as community which fostered an accepting environment as historical evidence suggests a pre-colonial same-sex culture existed in many African countries.<sup>125</sup>

## 4.2 THE LEGAL FRAMEWORK

The Zambian legal framework on homosexuality is centred around the criminalisation of same-sex sexual activity. The Penal Code Act provides for anti-homosexuality laws under part XV<sup>126</sup> and characterises them as 'Offences against morality'. These laws exclusively target same-sex activity, raising concerns of discrimination based on sexual orientation; they criminalise homosexuality without proper justification, unlike heterosexual activity. The term "sodomy" originates from the story of Sodom and Gomorrah, an Abrahamic tale in which it is believed God destroyed the cities due to the practice of active homosexuality and other forms of sexual perversion.<sup>127</sup>

Sodomy by its original definition refers to oral and anal intercourse generally, and **Bass v The State**<sup>128</sup> defined sodomy as "sexual acts involving the sex organs of one person and the mouth or anus of another." The definition demonstrates that not only homosexuals but heterosexuals are capable of committing acts of sodomy. Zambia's sodomy laws focus only on the sexual acts of LGB persons for the mere fact that they do not conform to the majority heterosexual standard.<sup>129</sup> Kapembwa makes mention that Zambia's archaic sodomy laws unfairly target and discriminate against homosexuals, even though heterosexuals also engage in similar acts sometimes. The labelling of same-sex relationships as abnormal is based on false information and flawed reasoning, leading to the stigmatization and exclusion of sexual minorities without justification.<sup>130</sup>

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<sup>124</sup> n 24

<sup>125</sup> ibid

<sup>126</sup> n 14

<sup>127</sup> n 83

<sup>128</sup> 849 S.E.2d 718 (2020)

<sup>129</sup> Julius Kapembwa, 'Against the Order of Nature? What about Oral and Anal Sex between Man, Wife? Think Again!' (Zambia: News Diggers!5 December 2019) <<https://diggers.news/guest-diggers/2019/12/05/against-the-order-of-nature-what-about-oral-and-anal-sex-between-man-wife-think-again/>> accessed 10 November 2023.

<sup>130</sup> n 143

Zambia's penal laws against homosexuality are crouched under three sections and provide for three types of criminalisation. The first is Section 155(a)<sup>131</sup> which provides for the engagement of carnal knowledge against the order of nature as a felony for which the punishment is imprisonment for a period of up to fourteen years. This section targets both consensual and non-consensual same-sex relations among sexual minorities regardless of gender though mostly used against men in Zambia.<sup>132</sup> The term carnal knowledge refers to an element necessary for the establishment of many sexual crimes and refers to sexual intercourse that is considered illegal by a state.<sup>133</sup> The phrase 'against the order of nature' is regarded as an unnatural offence under the Penal Code Act and its meaning has been linked to homosexuality. **The People v Shadreck Mwanza**<sup>134</sup> saw the defendant a juvenile aged 19 charged under Section 155(a) of Chapter 87 of the Laws of Zambia with an unnatural offence against the order of nature in that he had carnal knowledge of a fellow minor, a boy aged six years old. The court affirmed that same-sex relations among males regardless of age are against the order of nature and an unnatural offence. In 2013, two Kapiri Mposhi men living together were charged under Section 155(a) as well, and the courts affirmed the definition of an unnatural offence against the order of nature to mean same-sex relations even though consensual.<sup>135</sup>

It should be noted that Section 155(b)<sup>136</sup> speaks to unnatural offences that refer to bestiality and Section 155(c)<sup>137</sup> speaks to unnatural offences that speak to males having carnal knowledge of either a male or female against the order of nature. Zambian law is mostly applicable to homosexuals as Kapembwa alleged.

The second is Section 156<sup>138</sup> which criminalises any attempt to engage in any form of same-sex activity. The section prohibits LGB persons from seeking out one

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<sup>131</sup> n 14

<sup>132</sup> n140

<sup>133</sup> 'Carnal Knowledge' (LII / Legal Information Institute) <[https://www.law.cornell.edu/wex/carnal\\_knowledge#:~:text=Primary%20tabs](https://www.law.cornell.edu/wex/carnal_knowledge#:~:text=Primary%20tabs)> accessed 10 November 2023.

<sup>134</sup> [2011] ZMHC 77

<sup>135</sup> David Smith, 'Zambian Gay Couple Rearrested after Tipoff by Relatives' The Guardian (7 May 2013) <<https://www.theguardian.com/world/2013/may/07/zambia-gay-rights>> accessed 10 November 2023.

<sup>136</sup> n 14

<sup>137</sup> ibid

<sup>138</sup> n 14

another to engage in any form of same-sex relations or homosexual acts. The penalty is a charge of a felony and imprisonment for a period of up to seven years.

The last is Section 158<sup>139</sup> which prohibits what it refers to as indecent practices between men. The section is drafted in such a manner that it specifically targets sexual relations between men and labels these relations as grossly indecent be they in public or private. It prohibits both the engagement of male same-sex relations and the attempt to engage in them. The penalty if found wanting is a charge of a felony and imprisonment for a period of up to five years.

Of note, the provisions providing for Zambia's sodomy laws do not explicitly mention homosexual acts relating to females, the focus being on males. The Interpretation and General Provisions Act Section 4(2)<sup>140</sup> remedies this by stating that words and expressions that refer to the male gender encompass the female as well in written law. This means that sections should not be read at face value but should be read in a manner that includes female homosexuality as and when needed.<sup>141</sup>

### **4.3 JUSTIFICATIONS FOR ZAMBIAN ANTI-HOMOSEXUALITY AND REBUTTALS**

Zambia presents as a country with strong conservative values enshrined not in law but in its cultural and religious beliefs. Conservative Zambia today consists of a majority that strongly opposes homosexuality.<sup>142</sup> Despite the numerous human rights violations bred by the country's stance regarding homosexuality, public attitudes remain opposed to the acceptance of LGB individuals and their inherent rights.

#### **4.3.1 THE LEGAL ARGUMENT**

This argument is prima facie opposed to homosexuality saying that it goes against the law which is a reflection of the will of the Zambian people.<sup>143</sup> Zambia heavily relies on its penal laws to combat same-sex relations, as it is supported by the

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<sup>139</sup> *ibid*

<sup>140</sup> Chapter 2 of The Laws of Zambia

<sup>141</sup> *ibid*

<sup>142</sup> n 26

<sup>143</sup> CHARLES KACHIKOTI, 'Times of Zambia | Why Homosexuality Should Not Be Legalised in Zambia (Part 4)' (24 February 2014) <<https://www.times.co.zm/?p=11247>> accessed 12 November 2023.

existing legal framework. Many believe that these laws serve to protect Zambians from the perceived disorderliness associated with homosexuality.<sup>144</sup>

However, the justification for these laws is constantly under fire from numerous human rights activists. Kaaba and Sambo, human rights proponents in Zambia have stated that homosexuals are human and are entitled to the realisation of their human rights.<sup>145</sup> They put forth that while human rights are not absolute though universal, LGB persons are entitled them, the assertion they are not is based solely on a dislike of an alternate sexual orientation.<sup>146</sup> Homosexual rights being not absolute means one's rights end where another's begins.<sup>147</sup> This means that it is unconstitutional to restrict the human rights of homosexuals in Zambia. Like any other Zambian, they should be entitled to the protections and guarantees outlined in the Bill of Rights, unless they break the law and cause harm to society. In such cases, the justice system should intervene.

Kaaba and Sambo highlight the unconstitutionality of Zambia's penal law against homosexuality by stating that it has curtailed their freedom of expression a right protected by Article 20.<sup>148</sup> They put forth that public morality in the constitutional sense means to uphold fundamental constitutional values and norms above all else.<sup>149</sup> Therefore, constitutional norms must be recognized as public morality with all else measured against them and not the whims of the majority or mob justice.<sup>150</sup>

The authors also highlight how current criminal law not only criminalises consensual same-sex activity in public but in private as well, and state that this contravenes Article 17<sup>151</sup> which guarantees the right to privacy. This criminalisation violates an LGB individual's right to engage in private relationships without interference or discrimination.<sup>152</sup> Kaaba and Sambo further state that matters of sexual orientation

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<sup>144</sup> *ibid*

<sup>145</sup> n 29

<sup>146</sup> *ibid*

<sup>147</sup> *ibid*

<sup>148</sup> n 11

<sup>149</sup> n 29

<sup>150</sup> *ibid*

<sup>151</sup> n 29

<sup>152</sup> *ibid*



are private business, for which we do not see the same scrutinization placed on heterosexuals to explain their sexual intimacies as homosexuals.<sup>153</sup>

#### 4.3.2 THE MORALITY ARGUMENT

The preamble of the Zambian constitution provides for the fact that Zambia is a Christian nation...<sup>154</sup> The declaration is important in Zambia and has been utilised to justify opposition to homosexuality, based on religious beliefs. Most Zambians adhere to Christianity, which strongly condemns homosexuality.<sup>155</sup> Many Zambians are brought up in Christian households wherein they are taught that homosexuality is a sin punishable by God and given no rational explanation as to why, leaving many LGB individuals confused and conflicted.<sup>156</sup>

The church's strong religious influence in Zambia has made it the leading moral authority in matters like homosexuality. In an interview with Chanda a Zambian gay man in 2016, he said that the law at present doesn't acknowledge his status as a homosexual nor permit his existence which has caused him to attempt suicide thrice.<sup>157</sup> The church in particular preached messages that labelled him an abomination and a sin against God which contributed to an identity crisis and psychological confusion on his part.<sup>158</sup>

Van Klinken says that where the church is meant to be a force of good it encourages homophobia and it is a source of hate and violence in Zambia.<sup>159</sup> The moral advocacy of the church against homosexuals forces homosexuals to negotiate their sexual identity in line with common consensus as opposed to understanding who they are and what being homosexual means.<sup>160</sup>

Zambian religious leaders expressed concern about the spread of homosexuality in the country following a fashion event called 'Lusaka July 2022,' where it was alleged that some male guests were dressed in a manner associated with homosexuality

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<sup>153</sup> ibid

<sup>154</sup> ibid

<sup>155</sup> n 26

<sup>156</sup> ibid

<sup>157</sup> Prudence Phiri, 'For Gay Men in Zambia, Where Homosexuality Is Banned, Suicide Is a Common End' (Global Press Journal 18 December 2016) <<https://globalpressjournal.com/africa/zambia/gay-men-zambia-homosexuality-banned-suicide-common-end/>> accessed 12 November 2023.

<sup>158</sup> ibid

<sup>159</sup> n 26

<sup>160</sup> n 26

and promoting LGBT rights.<sup>161</sup> The Human Rights Commission responded to this by stating that human rights should not be confused with crimes and that the agenda by the church to curtail all rights and freedoms of homosexuals and their advocates in the country was not right.<sup>162</sup> The Commission noted that while morality does exist, it must be exercised rightly to allow for the humane treatment of sexual minorities who at present live in fear and are subjected to all manner of discrimination and violations.<sup>163</sup>

#### **4.3.3 HOMOSEXUALITY IS NOT ZAMBIAN: PAST TO PRESENT**

In the late 1980s, Francis Yabe Chisambisha, a gay man in Zambia, approached the Post Newspaper for an interview to share his story and advocate for homosexual rights.<sup>164</sup> His interview sparked a strong reaction from various stakeholders such as the church, political leaders, and NGOs.<sup>165</sup> Chisambisha spoke about the difficulties he faced as a gay man in a society that stigmatized and marginalized individuals like him.<sup>166</sup> The response to his interview was largely negative and due to unrest, the government got involved, with the late President Dr Kenneth Kaunda calling for careful consideration of the issue and describing homosexuals as sick individuals who needed help.<sup>167</sup> Alfred Zulu, the head of the Zambia Independent Monitoring Team (ZIMT), expressed support for Chisambisha and homosexual rights and sought to register an NGO called the Lesbian, Gays, Bisexual and Transgender Persons Association (LEGATRA).<sup>168</sup> Public outrage ensued over this, with government officials vehemently opposed to the idea of registering an organisation that promoted a homosexual agenda, labelling it as criminal.<sup>169</sup> The late president Frederick Chiluba also expressed strong opposition to homosexuality during the 1998 Independence celebrations stating it was un-Zambian.<sup>170</sup>

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<sup>161</sup> RUSSELL POLLITT, 'Zambian Bishops Condemn LGBTQ+ Community, Support Ongoing Criminalization' (www.ncronline.org 10 November 2022) <<https://www.ncronline.org/news/zambian-bishops-condemn-lgbtq-community-support-ongoing-criminalization>> accessed 12 November 2023.

<sup>162</sup> *ibid*

<sup>163</sup> n 184

<sup>164</sup> United Nations High Commissioner for Refugees, 'More than a Name: State-Sponsored Homophobia and Its Consequences in Southern Africa' (Refworld.org 14 March 2003) <<https://www.refworld.org/docid/3f4f59710.html>> accessed 14 November 2023.

<sup>165</sup> *ibid*

<sup>166</sup> n 169

<sup>167</sup> *ibid*

<sup>168</sup> n 169

<sup>169</sup> *ibid*

<sup>170</sup> *ibid*

Former Republican President Edgar Lungu in an interview with SkyNews was also quoted saying that homosexuality is a Western import and they can keep it.<sup>171</sup> He as his predecessors did expressed disgust and said that Zambia would never permit such an un-African and un-Zambian practice, a view the current regime has upheld.<sup>172</sup>

The traditional view of homosexuality in present-day Zambia is that it is deviant behaviour and contradicts societal norms.<sup>173</sup> This view could be the product of many adhering to strict religious teachings and the majority patriarchal nature of Zambian tradition.<sup>174</sup> Pre colonisation, it is arguable that Africans had no notion of the word sexuality as they were a society of acceptance without division, the exception being those who harmed grievously the community.<sup>175</sup>

Murray et al through their book on anthropological studies of African sexualities shed light on African homosexual practices traditionally to which Zambia is mentioned.<sup>176</sup> In their extensive but cautious description of Mukanda, a boys circumcision rite practised in Northern Zambia by the Ndembu/Lunda; they note that initiates pretending to copulate with the penises of older men is not uncommon, of which penetration of the young by the old sometimes occurs.<sup>177</sup> It is believed that the reason for the practice is to strengthen the young initiate's penis to grow as strong as that of the elders he fondles.<sup>178</sup>

They further reveal acts of a homosexual nature among neighbouring Central Bantu groups such as the Luvale, Chokwe, Luchazi etc, that take place during initiation rites.<sup>179</sup> Boys are required to strip off and remain naked to help their recovery from circumcision. This period sees the vilombola (keeper of the initiation lodge) and tulombolachika (initiated assistants of the vilombola), have their penises played with

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<sup>171</sup> David Smith, 'Zambian Gay Couple Rearrested after Tipoff by Relatives' The Guardian (7 May 2013) <<https://www.theguardian.com/world/2013/may/07/zambia-gay-rights>> accessed 10 November 2023.

<sup>172</sup> Sky News, 'Zambia's President Says "No to Homosexuality"' <<https://www.youtube.com/watch?v=DyNQGrwt7lg>> accessed 12 November 2023.

<sup>173</sup> n 22

<sup>174</sup> n 26

<sup>175</sup> n 24

<sup>176</sup> n 25

<sup>177</sup> ibid

<sup>178</sup> n 25

<sup>179</sup> ibid

by initiates an act akin to assisted masturbation.<sup>180</sup> The belief is that the act will hasten the healing process of initiates and is similar to the ndembu. Visitors during the right also experience the same.<sup>181</sup>

Among the Central Bantu of the Luapula province in northwestern Zambia, a kinship of dual sexuality or cross-gendered individuals has also been noted.<sup>182</sup> The southern province of known for its matrilineal lines of succession as opposed to a mostly patriarchal Zambia, along the border close to Zimbabwe houses Ila.<sup>183</sup> They are Bantu-speaking people who practise a matrilineal system and have been observed to house what are referred to as lady-boys or feminine men bordering on transsexual.<sup>184</sup> They dress as a woman and carry on with women's work, living in women's quarters but never copulating with them.<sup>185</sup> They are called mwaami which loosely means prophet in English.<sup>186</sup> Acts of pederasty among the Ila are also regarded as a normal occurrence.<sup>187</sup>

Sexual contact between old and young males in traditional Zambia is not uncommon to the extent that sexual penetration is viewed as essential for strengthening male bonds and attaining manhood.<sup>188</sup> Studies such as the above disparage the notion that homosexuality is un-Zambian. Homosexuality traditionally may only be taboo to speak of because of the supernatural beliefs attached to it.<sup>189</sup>

#### **4.3.4 THE MARRIAGE ARGUMENT**

The marriage argument is centred around the union of man and woman.<sup>190</sup> This argument has been furthered by the issue of consummation in which conservatives have argued that homosexual couples cannot consummate a marriage and should be denied legal acknowledgement.<sup>191</sup> Conservatives argue that to allow or legalise homosexuality is threat to traditional values and sacrilege.<sup>192</sup> To grant homosexuals

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<sup>180</sup> *ibid*

<sup>181</sup> *ibid*

<sup>182</sup> *ibid*

<sup>183</sup> *ibid*

<sup>184</sup> *ibid*

<sup>185</sup> *ibid*

<sup>186</sup> *ibid*

<sup>187</sup> *ibid*

<sup>188</sup> *ibid*

<sup>189</sup> n 25

<sup>190</sup> Dale Carpenter, 'Bad Arguments against Gay Marriage' [2005] SSRN Electronic Journal.

<sup>191</sup> *ibid*

<sup>192</sup> *ibid*

marriage rights is a waste of taxpayers' money as social security benefits offered by the state will be wasted in that the marriage program was not designed for same-sex couples by God due to sexual incompatibilities and impossibilities.<sup>193</sup> Zambians strongly hold the above point of view, especially from the biblical aspect to which they have even attributed that the other purpose for marriage other is procreation.<sup>194</sup>

The argument falls short on several points. Firstly, the term "consummation" implies sexual relations which between homosexuals are illegal due to sodomy laws.<sup>195</sup> The prohibition is an indirect acknowledgement by the arguer that suggests that same-sex partners are just as capable of performing the act as heterosexuals.<sup>196</sup>

The second is the definition of marriage which is a fairly recently coined English term as cultures globally have participated in the act of marriage from perspectives other than the Christian one, to the extent that polygamy, polyandry and polyamory are the norm in some jurisdictions and taboo in others.<sup>197</sup> The third is the waste of state resources and taxpayers' money; homosexuals are a part of society and enjoy social security benefits long before marriage.<sup>198</sup> The last invalidation is that of procreation in that while it is true that same-sex couples cannot biologically reproduce, studies have shown that they can make excellent parents if afforded the chance.<sup>199</sup> Likewise, heterosexual pairings are also capable of making terrible parents as much as good and have been noted to have children out of wedlock opting for adoption more often than not.<sup>200</sup> In instances of unplanned birth, children are often neglected or abandoned, and to better the situation loving homosexual couples may just be the solution to the problem assuming of course that surrogacy is not an option for them.<sup>201</sup>

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<sup>193</sup> *ibid*

<sup>194</sup> n 158

<sup>195</sup> n 210

<sup>196</sup> *ibid*

<sup>197</sup> n 158

<sup>198</sup> *ibid* 224

<sup>199</sup> n 210

<sup>200</sup> *Ibid* 210

<sup>201</sup> *ibid*

#### 4.4 HUMAN RIGHTS ADVOCACY ORGANISATIONS AND LEGAL DEVELOPMENTS: CHALLENGES AND WINS

Despite the major opposition to homosexuality in Zambia, there exists hope in the country in the form of advocacy groups that operate as discretely as possible due to the current laws and attitudes to protect the human rights of sexual minorities. These stakeholders have been evidenced to make significant strides regarding the human rights of LGB persons.

##### 4.4.1 HUMAN RIGHTS ADVOCACY GROUPS FOR SEXUAL MINORITIES

- **The Lotus Identity** - This organisation aims at empowering the homosexual community in Zambia and helping them realise their rights. The organisation operates as a Non-Governmental Organization and as discreetly as possible to aid marginalised LGB individuals in Zambia.<sup>202</sup>
- **Umotto Centre of Culture** – This is a community organisation that is a youth-led Non-Governmental Organization whose advocacy efforts are social-media-oriented media and focused on sexual orientation and gender identity awareness in Zambia.<sup>203</sup>
- **Friends of Rainka** - This is a Zambian Non-Governmental Organization aimed at the protection, advancement, and promotion of the human rights of sexual minorities.<sup>204</sup>
- **Transbantu Association Zambia (TBZ)** – This non-governmental organisation works to improve the socioeconomic, political, and legal standing of intersex and transgender individuals in Zambia.<sup>205</sup> Unlike the previously mentioned organisations that operate clandestinely, it is the only legally recognised organisation established in 2008 and registered in 2012 as its core agenda appears not to focus on homosexuality, even though it does voice its opinion in support of the matter.<sup>206</sup>

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<sup>202</sup> n 128

<sup>203</sup> n 128

<sup>204</sup> ibid

<sup>205</sup> n 128

<sup>206</sup> Alex Muller and Talia Meer, KEY ISSUES RELATED SEXUAL ORIENTATION, GENDER IDENTITY CONSULTATION in ZAMBIA and EXPRESSION IDENTIFIED by COMMUNITY in ZAMBIA (Sean Reggee and others eds, Southern Africa Litigation Centre and Transbantu Association Zambia 2021).

#### **4.4.2 DEVELOPMENTS AND CHALLENGES NOTED BY ADVOCACY ORGANISATIONS IN ZAMBIA**

In the year 2013 Friends of Rainka documented up to approximately forty-three instances of human rights violations against sexual minorities in Zambia during the first half of the year; they noted that both state and non-state actors were responsible for the violence experienced by LGB individuals, which frequently went unreported in the media because homosexuals were the target audience.<sup>207</sup>

In 2014, the state-owned newspaper Times of Zambia, criticised same-sex sexuality based on pseudoscience and a self-identifying gay man attacked in January by a group of people that allegedly included three police officers.<sup>208</sup> Moving forward to 2019, President Edgar Lungu reaffirmed the government's position on homosexuality stating that Zambia will neither support nor compromise human nature due to donor aid.<sup>209</sup> This was amidst the long-awaited trial of two Kapiri Mposhi men charged with carnal knowledge against the order of nature and held in custody since 2013, during which period they were subjected to forced anal examinations and kept in less than habitable solitary confinement conditions.<sup>210</sup>

During the same year, USA Ambassador Daniel Foote took to defend the men stating that their arrest was unlawful after which President Lungu called for his removal for disrespecting Zambian values and justice resulting in his deportation.<sup>211</sup>

#### **4.5 CONCLUSION**

The allegations against Zambia regarding the homophobic nature of the country appear to be more fact than fiction as presented above. The denial of homosexual human rights represents an ongoing struggle for sexual minorities within the country as they are not permitted full realisation of their rights and live in constant fear of persecution. The nation's sodomy laws are justified despite the harm they cause even though they are based on deeply ingrained prejudices and discriminatory practices from an archaic era. Despite the difficulties and dangers involved activists and resistance movements in Zambia persist in their efforts to create forums for

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<sup>207</sup> n 128

<sup>208</sup> ibid

<sup>209</sup> n 24

<sup>210</sup> Colin Stewart, 'Justice Delayed, Justice Denied for 2 in Zambian Gay Trial' (76crimes.com 17 September 2013) <<https://76crimes.com/2013/09/17/justice-delayed-justice-denied-for-2-in-zambian-gay-trial/>> accessed 14 November 2023.

<sup>211</sup> n 192

discussion and interaction to confront the discriminatory practices of the nation and bring attention to the rights of homosexuals. These movements offer a hope that someday Zambia will foster a more inclusive and accepting environment for homosexuals and acknowledge their human rights.



## CHAPTER 05: RECOMMENDATIONS AND CONCLUSION

### 5.0 INTRODUCTION

This research is centred around the interplay between anti-homosexuality and human rights, with its focus on Zambia. This chapter brings the discussion of this paper to a close by putting forth recommendations aimed at the realisation of human rights for LGB persons in Zambia.

### 5.1 RECOMMENDATIONS GARNERED TOWARDS THE REALISATION OF HUMAN RIGHTS FOR LGB MINORITIES IN ZAMBIA

The status of LGB minorities within Zambia as the findings of this study have shown is that they are forced to live in a society riddled with homophobic bias. The arguments that favour the criminalisation of same-sex activity within the nation upon close analysis do just that but have been radicalised in a manner used to curtail and penalise legally any mention or form of homosexuality.

Regardless, however, the current climate towards homosexuality indicates that the country is not ready for a radical change, as that would result in backlash by the majority who hold favour for the current status quo. The presence of advocacy groups, individuals, and even precedents such as **The People v Paul Kasonkomona**<sup>212</sup> is an indication that reform is not impossible. Thus, significant steps in slow, careful but impactful strides must be undertaken.

#### 5.1.1 ACKNOWLEDGEMENT AND LGB SENSITISATION

This author believes that the notion that homosexuality is un-Zambian should be done away with and there be an acknowledgement of LGB persons within the country as opposed to the current denial. A conversation that questions why a sect of society is dragged through the mud and at whose expense, and for what benefit must be had. This will lead to a want of understanding wherein the public will be sensitised on who a homosexual is and what it means. This awareness and education will permit a broader understanding of homosexuals and shed light on the injustices they have suffered thus far.

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<sup>212</sup> [2015] HPA/53/2014

### **5.1.2 INTERNATIONAL AND CIVIL ADVOCACY COOPERATION**

This author believes that a stronger bond between international advocates and local stakeholders must be permitted and formed to permit them to shed light on the numerous violations of sexual minorities such as LGB individuals and what human rights entail for them and all. An awareness of human rights for LGB individuals will aid in reducing the current discrimination born of homophobic bias and misconception.

### **5.1.3 A SEPARATION OF CHURCH AND STATE: RESPECT FOR ALL RELIGIONS AND BELIEFS**

This author believes that the church and other religious bodies against homosexuality must reconsider their stance and review their texts and messages of hate against LGB persons. There must be a separation of church and state that permits the law to respect divergent views on sexuality. This will raise awareness of the fact that while morality and the law do not exist in a vacuum, not one moral code applies to all entirely but that different points of view must be respected without infringing on those of another.

### **5.1.4 STEADY LEGAL REFORM**

This author believes that the ultimate realisation of human rights for LGB individuals in Zambia will come from the decriminalisation of the current sodomy laws. The Bill of Rights, Article 11<sup>213</sup> must be amended to include the protection of LGB citizenry. This will enshrine within the highest form of law within the country that the human rights of LGB persons are to be observed and respected just as much as those of heterosexuals.

The second amendment would be that of Zambia's penal laws against homosexual conduct. The labelling of homosexuality as an unnatural offence must be removed. Furthermore, the criminalisation of consensual same-sex conduct between adults must be removed as well. The law must rightly criminalise acts between unsuspecting minors who know no better and adults who seek to take advantage of them, but not consenting adults.

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<sup>213</sup> n 11

### **5.1.5 GOVERNMENT ACCOUNTABILITY AND REDRESS**

This author believes that the government must also take active responsibility in policing and raising awareness of remnant violations against LGB individuals. This will cause a ripple effect in which even ordinary members of the community will take action to fight the injustices of the past. Redress should also be considered as much physical and psychological harm has been caused. The government should open up inquiries and seek information on how to further improve the lives of LGB persons in the country with clear guidelines and procedures on complaints.

### **5.2 CONCLUSION**

This research has provided an analysis of Zambia's current legal framework against homosexuality which indicates that only the pursuit and engagement of same-sex sexual activity is to be penalised. Though discriminatory, it is a lacuna in the law and a stepping stone that may be utilised by human rights advocates to advance the realisation of human rights for LGB persons cause. It is the belief of this author that the recommendations advanced in this chapter speak to the realisation of human rights for LGB persons in Zambia.

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