

The (de) criminalisation of sexual conduct between same-sex partners: A study of Namibia, South Africa and Zambia

A research Paper submitted to the Faculty of Law of the
University of the Western Cape, in partial fulfilment of the
requirements for the degree of Masters of Law (LLM International
Law and Human Rights)



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June 2012

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ACKNOWLEDGEMENTS

I would firstly like to thank my supervisor Professor Le Roux for his guidance throughout the entire process of bringing this paper to life. For pushing me to do my best even when I was not fully capable of understanding what my best was.

I especially want to thank my parents Professor and Mrs Mufune, for investing so much in me and for always encouraging me to be better and do better. I hope I have made you proud.

To my sisters, Lwimba and Lusungu Mufune, all my friends especially Ada Ama-Njoku, Molatelo Kgwantha and Dignitie Bwiza who helped keep me awake and focused for hours on end just so I could work, thank you, your efforts and encouragement were highly appreciated.

Lastly but not least, I would like to thank the Lord Almighty for seeing me through and for always guiding my hand.



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SECTION ONE: INTRODUCTION

1.1 General background

One of the outspoken leaders of the campaign for anti-homosexual legislation in Uganda, Bishop Julius Oyet, is reported to have said the following prayer at a recent gathering of church leaders:

“Father, our children today are being deceived by the West. To buy them, to give them school fees so that they can be homosexuals. We say no to that”.¹

The short prayer powerfully captures the key features of increasingly vocal anti-gay and anti-lesbian sentiment on the African continent. The first feature is that Bishop Oyet’s anger is not merely directed at the recognition of gay marriages, as is the case in other regions of the world, but at gay and lesbian relationships as such. He is demanding the criminalisation and punishment of all sexual conduct between persons of the same sex. In Oyet’s religious world, liberal toleration (let alone equal recognition) has been replaced with a desire for complete cultural elimination of gay and lesbian persons. The second feature is that Bishop Oyet presents his campaign as part of the struggle against Western colonialism (and neo-colonialism) and thus frames it from an international human rights perspective as part of the rights to self-determination and cultural identity.

Oyet’s campaign and the manner in which it is framed are not unique to Uganda. His views are regularly echoed by other cultural leaders in southern African countries. In South Africa, for example, the President of the Congress of Traditional Leaders of SA (Contralesa) Patekile Holomisa, unleashed a heated debate when he appealed in May

¹Kaoma K “African Antigay Politics in the Global Discourse” available at <http://www.publiceye.org/maqazine/v25n3/whos-colonialist.html> (accessed on 1st June 2012).

2012 to parliament to remove the constitutional protection of sexual orientation in the equality clause of the Constitution.²

Comments like these by cultural leaders like Oyet and Holomisa make it essential to reassess the status of the criminalisation of sexual conduct between same-sex partners from an international human rights perspective. As it is, homosexuality is unlawful in numerous African countries. Globally, countries have laws that criminalise consensual sexual activity among persons of the same-sex.³ These laws, that in effect control sexual behaviour between consenting adults, have progressed over time, to reflect prevailing societal standards.⁴

1.2 What are sodomy laws?

For the purposes of this research paper, any law that criminalises consensual sexual conduct between two same-sex partners will be regarded as a sodomy law.⁵ The precise sexual acts meant by the term sodomy are rarely spelled out in the law,⁶ but are typically understood by courts to include any sexual acts deemed unnatural. These acts may include oral sex, anal sex and bestiality.⁷ The focus of this paper falls only on the criminalisation of consensual sexual conduct between same-sex partners.

Some authors, such as Goodman, suggest that existing sodomy laws are in general only symbolic in that they have no practical effect because they are not enforced

²Rousseau M "Stop protecting gays, traditional leaders tell ANC" City Press, 6 May 2012 available at <http://www.citypress.co.za/SouthAfrica/News/Stop-protecting-gays-traditional-leaders-tell-ANC-20120505> (accessed on 26 June 2012).

³ These laws, it would appear, are differently worded as gross indecency, buggery, debauchery, carnal intercourse against the order of nature, and so forth. See Boudh S "South and Southeast Asia Resource Centre on Sexuality: Working Paper" (2008) available at http://www.tarshni.net/downloads/working_%20Paper_Sboudh_16Mo8.pdf (accessed on 3 March 2012).

⁴Fradella H "Legal, Moral and Social Reasons for Decriminalizing Sodomy" (2002) *Journal of Contemporary Criminal Justice* 279-301.

⁵Although according to the United Nations Human Rights Watch, the term "sodomy law" is misleading because some laws prohibit sexual activity between consenting female partners and some laws prohibit any kind of sexual contact between consenting male partners, regardless of whether its sodomy. See Machiror F "Homosexuality in Africa: The Tension between human rights and normative values" in *Sodomy Laws around the World* available at <http://www.glapn.org/sodomylaws/index.htm> (accessed on the 7th October 2011).

⁶See Machiror F, "Homosexuality in Africa: The Tension between human rights and normative values" available at <http://www.iqlhrc.org/cqi-bin/lowarticle/pressroom/pressrelease/576.html> (accessed on the 31st August 2011).

⁷*Sodomy Laws around the World* available at <http://www.glapn.org/sodomylaws/index.htm> (accessed on the 7th October 2011).

regularly.⁸ Conversely other authors, like Fradella, argue that even though sodomy laws have had little practical consequences, their controversial force for large sections of society preserve their existence.⁹ Existing sodomy laws, in particular those in Africa, are part of the colonial legacies, some of which have been codified into legislation. Goodman suggests that these laws have always compromised of so-called “unnatural offences” which includes consensual sexual acts between men and sexual acts between women.¹⁰

1.3 The main objectives of the paper

The main objective of this paper is to explore the legal status of sodomy laws in three African states (South Africa, Zambia and Namibia) from an international human rights perspective. The paper presents an argument that sodomy laws violate a number of international human rights, most notably the right to equality or non-discrimination and the right to privacy, and that these violations cannot be justified with an appeal to the international human rights of culture and self-determination. In fact, judicial intervention to declare sodomy laws unconstitutional might even be justified purely as a principle of constitutional democracy as such. An argument to this effect is developed in section 2 of the paper.

While authors such as Nowak,¹¹ Smith,¹² and Nickel,¹³ agree that human rights provide a network of standards and procedural rules for human relations, all of which are applicable to governments, it is often stressed that there is no international consensus on the morality or criminality of homosexuality which is reflective of international standards in domestic legislations all over the world.¹⁴ In fact, when it comes to sodomy, in many cases it seems that it is a question of immorality and culture vs. legality with

⁸Goodman R “Beyond the enforcement principle: sodomy laws, social norms and social panoptics.” (2001) *California Law Review* 643-740.

⁹Fradella (2002)279.

¹⁰Goodman (2001) 676.

¹¹Nowak M *Introduction to the International Human Rights Regime* (2003) 3.

¹²Smith R *Textbook on International Human Rights* (2005) 10.

¹³Nickel JW *Making Sense of Human Rights* (2007) 3.

¹⁴Fradella (2002) 479.

strong moral and religious influences.¹⁵ On the other hand, sodomy laws are only a small part of the larger, comprehensive and controversial topic of sexual orientation and as such much of the debate looks at the question of sodomy in relation with human rights, generally.¹⁶

The main sources of the contemporary conception of human rights are the Universal Declaration of Human Rights,¹⁷ and the many human rights documents and treaties that followed in international organisations such as the United Nations, the Council of Europe, the Organization of American States, and the African Union. The first 21 articles of the Universal Declaration present rights that are similar to those found in historic bills of rights. These civil and political rights include rights to equal protection and non-discrimination and privacy.¹⁸ Internationally, sexual orientation has been considered and debated under the ambit of the rights to equality, non-discrimination and privacy.¹⁹ While a comprehensive discussion of these instruments is beyond the limited scope of this paper, section 2 below traces a growing trend towards the protection of same sex relationships in international human rights law.

In sections 3 and 4 of the paper, this international trend is applied to Zambia and Namibia respectively. The gist of the argument is that the on-going criminalisation of consensual sex between same-sex partners is unconstitutional in both Zambia and Namibia, and that these two states should follow the example of South Africa, where sodomy laws were declared unconstitutional soon after the advent of constitutional democracy.

While many African Countries subscribe to various international human rights instruments, it is evident that sodomy laws have never been abolished and are still in

¹⁵ Fradella (2002) 280.

¹⁶ In its report the International Commission of Jurists considered sodomy laws as a violation of international human rights standards. International Commission of Jurists "International Human Rights Law and the criminalization of same-sex sexual conduct *International Human Rights Law and the Criminalisation of Same-Sex Conduct*" (2010) 2.

¹⁷ Universal Declaration of Human Rights, 1948.

¹⁸ Nickel (2007) 3.

¹⁹ International Commission of Jurists (2010) 2.

effect in almost all of the common law countries in Africa.²⁰ Zambia, a former British colony, still criminalises consensual same-sex activity under laws it inherited from Britain; similarly Namibia still criminalises consensual same-sex conduct under Roman-Dutch common law inherited from South Africa. Ironically both England and South Africa have done away with these laws. In fact, South Africa is one of the few countries in the world that explicitly protects persons' sexual orientation under its constitution and it was the nation that put forward before the United Nations Human Rights Council a declaration to recommend that the rights of gay, lesbian and transgender people are protected for the first time.²¹

Much has been written on the constitutionality of certain law in countries like Namibia, Zambia and South Africa. And while authors such as De Vos and Barnard in their work look at how sodomy laws were repealed and made unconstitutional in South Africa,²² authors like Tshosa,²³ in her work considers constitutionality in Namibia generally, while Ndulo and Kent do the same in respect of Zambia.²⁴

Because of the limited scope of a research paper, the study is restricted to a discussion of Namibia, Zambia and South Africa. The three countries present themselves for comparison. The three countries all depict themselves as modern constitutional democracies. All three are members of the African Union and SADC. These three countries are all committed to the Universal Declaration of Human Rights, parties to the African Charter on Human and People's Rights (ACHCR) and all three constitutions recognise the right to privacy and equality as fundamental rights.

²⁰Case law and customary practice have redefined these pieces of legislation, reshaping them as laws that criminalise any aspect of homosexual conduct and facilitate extreme homophobic policies in a number of countries. See Cowell F "Colonial Sodomy: Homophobic threat within common law" (2010) available at http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=472:colonial-sodomy-homophobic-threat-within-common-law&catid=91:rights-in-focus&Itemid=296 (accessed on 25th February 2012).

²¹Jordans F "UN Gay Rights Protection Resolution Passes, Hailed as Historic Moment" available at <http://www.huffingtonpost.com/2011/06/17/un-gay-rights-protection-resolution-passes- n 879032.html> (accessed on 25th February 2012).

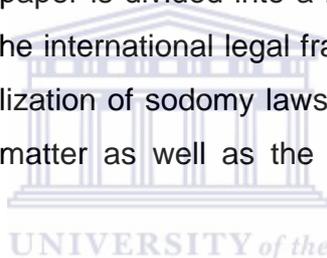
²² De Vos P and Barnard J "Same-sex marriage, civil unions and domestic partnership in South Africa" (2007) *SALJ* 265-290.

²³ Tsosha O "The Status of international law in Namibian national law: A critical Appraisal of the Constitutional strategy" (2009) *Namibian Law Journal* 3-31.

²⁴Ndulo M and Kent R "Constitutionalism in Zambia: Past, Present and Future" (1996) *JAL* 256-278.

Despite this, once again mention is made of how South Africa, unlike Zambia and Namibia, repealed the common law criminalising sodomy, thereby making the first step towards decriminalising homosexuality and towards recognising sexual orientation as a right in southern Africa and the SADC region as a whole.²⁵ South Africa achieved this success by arguing under the right to equality and privacy.²⁶ This raises the question why the same approach cannot be followed in countries like Namibia or Zambia, where human rights are part and parcel of the law. South Africa is for the most part extremely liberal on the topic of homosexuality as compared to Namibia and Zambia. Zambia and Namibia are fairly conservative African countries and while their constitutions reflect international human rights standards, the question of the constitutionality of sodomy laws has yet to be brought before their respective courts.

The remainder of the research paper is divided into a number of sections. Section two consists of an in-depth look at the international legal frameworks in place that are used as arguments for the decriminalization of sodomy laws. This chapter will also focus on international case law on the matter as well as the case that finally did away with sodomy laws in South Africa.



Section three focuses on the specific domestic sodomy laws in Zambia. Attention will be paid to how these laws came to apply in the country and why they are still present. The right to culture will be introduced here as an argument

Section four centers on the domestic law in Namibia which criminalises consensual same-sex activity. Attention is given to how the country inherited the laws and how it took a different route from South Africa in respect of maintaining its sodomy laws.

Section 5 presents a summary of the most important findings of the research and a discussion of the conclusions reached.

²⁵ International Gay and Lesbian Human Rights Committee More Than A Name: State Sponsored Homophobia and its consequences(2003)265

²⁶ *National Coalition for Gays and Lesbian Equality and Others v. Minister of Home Affairs* 2000 (2) SA 1(CC).

SECTION TWO:

SEXUAL ORIENTATION AND THE INTERNATIONAL HUMAN RIGHTS DISCOURSE

2. 1 Introduction

Human rights, it is stressed applies to everyone simply because they are born human.²⁷ This statement seems to imply that all human beings, regardless of their sexual orientation, are entitled to the full enjoyment of all human rights. In addition, according to the Vienna Declaration and Programme of Action:²⁸

“human rights and fundamental freedoms are the birth right of all human beings, their protection and promotion is the first responsibility of governments.”

This principle of the universality of all human rights is reflected in all other universal and regional human rights instruments. For instance, in terms of Article 1 of the UN Declaration of Human Rights:

“all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”.

The Preamble of the International Covenant on Civil and Political Rights states that

“considering that in accordance with the principles proclaimed in the Charter of the UN, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”.

It is argued that laws that criminalise same-sex activity maintain stigma and discrimination towards homosexual or bisexual persons, because even though such sodomy laws purport to regulate same sex sexual conduct, in truth criminalising sexual conduct between partners of the same sex has the consequence of making the

²⁷Mickelson K “How Universal is the Universal Declaration” (1998) *University of New Brunswick Law Journal* 4-5.

²⁸ Adopted unanimously by all states at the World Conference on Human Rights in 1993, Vienna Declaration of Programme Action.

individual a criminal on the basis of his or her sexual orientation.²⁹ In addition, sodomy laws have the effect of disempowering lesbian and gay people in a variety of situations that are detached from their sexuality, situations such as the right to adopt and start a family or to get married.³⁰

2.2 Does international human rights law safeguard the right to sexual orientation?

Currently, it seems that a great deal of the discussion in respect of sexual orientation has arisen in the context of laws that criminalise sexual activity between same sex partners.³¹ These laws appear to be contrary to international principles of equality and non-discrimination and fuel hatred and violence, in effect these laws may be argued as giving homophobia a state-sanctioned seal of approval.³² Internationally, the United Nations High Commissioner for Human Rights, Navi Pillay, and UN Secretary-General, Ban Ki-moon, have both called for the worldwide decriminalisation of homosexuality and for further measures to counter discrimination and prejudice directed at those who identify themselves as lesbian, gay, bisexual or transgender (LGBT).³³

Within the international human rights discourse, there is no collective consensus in the debate over sexual orientation or gender identity.³⁴ Historically the concept of sexual orientation is not expressly part of the human rights discourse. Despite this it is evident

²⁹ In *Lawrence v Texas* the US Supreme Court invalidated as unconstitutional a Texas state law criminalising anal sex between men: "[T]here can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal". See *Lawrence v Texas* 595 US 558, 585 (2003).

³⁰ Fradella (2002) 279-301.

³¹ International Commission of Jurists *International Human Rights Law and the Criminalisation of Same-Sex Sexual Conduct* (2010) 2.

³² UNHCR "Laws Criminalising homosexuality are incompatible with international human rights standards and fuels homophobia" available at <http://www.ohchr.org/EN/NewsEvents/Pages/homophobia.aspx> (accessed on 31st March 2012).

³³ UNHCR "Laws Criminalising homosexuality are incompatible with international human rights standards and fuels homophobia" available at <http://www.ohchr.org/EN/NewsEvents/Pages/homophobia.aspx> (accessed on 31st March 2012).

³⁴ International Commission of Jurists (2010) 2, in fact the United Nations has often faced difficulties passing resolutions on gay rights issues because there is no international consensus on the morality of homosexuality see also Zebley J "UN Rights Council passes 1st Gay Rights Resolution" available at http://www.jurist.org/./index_2011_06_17.php (accessed on 25th January 2012) (accessed on 25th February 2012).

that laws criminalizing same-sex relations between consenting adults remain on the statute books in more than 76 countries.³⁵

In December 2008, sixty-six states signed a document in which they acknowledged the principle that international human rights law protects against human rights violations based on sexual orientation and gender identification.³⁶ Still a counter-statement was signed by 57 states who expressed distress

“at the attempt to introduce to the UN some notions that have no legal foundations in any international human rights instrument”.³⁷

Three years later, in 2011, the United Nations Human Rights Council passed a Gay Rights Protection Resolution which for the first time in history endorsed the rights of Gay, Lesbian and transgender people. The Resolution showcases the human rights abuses and violations that lesbian, gay, bisexual and transgender people face around the world because of their sexual orientation.³⁸ Despite this achievement and the trend to the protection of sexual orientation by international human rights bodies, it is evident that there's no enforcement mechanism to strengthen or indeed make the resolution binding.³⁹

Nevertheless, an assessment of international human rights standards and their authoritative interpretation by treaty bodies and human rights courts seem to make

³⁵Ottoson D “State-sponsored homophobia: A world Survey of laws prohibiting same-sex activity between consenting adults” (2007) available at http://www.ildaq.org/statehomophobia/ILGA_State_Sponsored_Homophobia.pdf (accessed on the 25 January 2012).

³⁶(A/63/635, 22 December 2008).

³⁷International Commission of Jurists(2010) 8.

³⁸It is claimed that the Gay Rights Protection Resolution is the beginning of a formal UN procedure to document human rights abuses against homosexual persons as well as discriminatory laws and acts of violence. See Jordans F “UN Gay Rights Protection Resolution Passes, Hailed as Historic Moment” available at <http://www.huffingtonpost.com/2011/06/17/un-gay-rights-protection-resolution-passes- n 879032.html>(accessed on 25th February 2012); see also Zebly J “UN Rights Council passes 1st Gay Rights Resolution” available at http://www.jurist.org/./index_2011_06_17.php (accessed 24th January 2012). (accessed on 24th February 2012).

³⁹Jordans F “UN Gay Rights Protection Resolution Passes, Hailed as Historic Moment” available at <http://www.huffingtonpost.com/2011/06/17/un-gay-rights-protection-resolution-passes- n 879032.html> (accessed on 25th February 2012).

strong contention that the criminalisation of same-sex conduct is a violation of rights guaranteed under international law.⁴⁰

For instance, Article 2 of the Children's Convention prohibits discrimination and requires governments to ensure protection against discrimination based on an "adolescents" sexual orientation.⁴¹ And since April 1993, the United Nations High Commissioner for Refugees (UNHCR) has recognized in several Advisory Opinions that gays and lesbians qualify as members of a "particular social group" for the purposes of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees.⁴² Moreover, according to the UNHCR:

"Homosexuals may be eligible for refugee status on the basis of persecution because of their membership of a particular social group. It is the policy of the UNHCR that persons facing attack, inhuman treatment, or serious discrimination because of their homosexuality, and whose governments are unable or unwilling to protect them, should be recognized as refugees."⁴³

It is also important to mention that the main UN body that discusses human rights, the Commission on Human Rights adopts resolutions and initiates new treaties - works mainly through its Special Rapporteurs and its Working Groups.⁴⁴ In respect of this paper, it is especially important to note that two of the Special Rapporteurs have addressed sexual orientation in their reports and actions.⁴⁵

Sexual orientation, it is argued by some, is very much part of international law because international law protects individuals' private lives and their decisions to form intimate personal relationships, which includes the rights to engage in sexual activity. In addition,

⁴⁰ Bonthuys E and Domingo W "Constitutional and International Law context" in Bonthuys E and Albertyn C *Gender, Law and Justice* (2007) 51-81.

⁴¹ Convention of the Rights of the Child (1989) ART 2.

⁴² International Commission of Jurists (2010) 5.

⁴³ UNHCR/PI/Q&A-UK1.PM5/Feb. 1996.

⁴⁴ According to the Human Rights Education Association (HREA) these are appointed to address specific concerns. http://www.hrea.org/index.php?doc_id+432 accessed on 2nd February 2012.

⁴⁵ The Special Rapporteur on Extrajudicial Summary or Arbitrary Executions Report E/CN.4/2003/3 Para 66-67 see also Special Rapporteur on Violence against Women, its Causes and Consequences A/HRC/4/34/ADD.1, March, 2007.

individuals are protected from discrimination based on their fundamental personal characteristics under international law.⁴⁶

2.3 The rights to equality and non-discrimination

As mentioned earlier, it is evident under international law that laws that criminalise same-sex sexual conduct treat individuals differently on the basis of their orientation, and this difference in treatment cannot be justified as courts around the world have recognised that it amounts to discrimination.⁴⁷ Furthermore, it is apparent that the right to be free from discrimination is guaranteed by international law provisions on non-discrimination and equal protection of the law.⁴⁸ The right to non-discrimination is not limited to a specific number of grounds, every international and regional human rights instrument that protects against discrimination includes “other status” or language equivalent thereto.⁴⁹

2.3.1 Non-discrimination under international law

A number of UN treaty bodies interpreting international treaties and regional courts interpreting parallel non-discrimination provisions, have asserted that discrimination on the basis of sexual orientation is prohibited under international law and furthermore, that criminalisation of same sex conduct is a form of prohibited discrimination.⁵⁰ To this end, articles 2 of the UNDHR, article 2(1) of the ICCPR, article 2(2) ICESCR, and article (2) of the African Charter all deal with non-discrimination, whilst article 26 of the ICCPR, article 3 of the African Charter all deal with equal protection under international law.

In addition, it seems that the UN Committee on the Elimination of all forms of Discrimination against Women (CEDAW) has also expressed concern about the laws that classify sexual orientation as a sexual offence and has recommended that such

⁴⁶Bonthuys E and Domingo W (2007) 73.

⁴⁷International Commission of Jurists (2010) 12.

⁴⁸ “At this point it seems relevant to note that even though the right to non-discrimination protects against discrimination in the enjoyment of other human rights; the right to equal protection of the laws is an independent right as it prohibits discrimination in law or in fact in any field regulated and protected by public authorities”. International Commission of Jurist (2010) 5. See also UN Human Rights Committee, General Comment No 18, 10 Nov 1989, para 12.

⁴⁹International Commission of Jurist (2010) 5.

⁵⁰International Commission of Jurist (2010) 6.

penalties be abolished.⁵¹ The UN committee on the Rights of the Child, issued a General Comment in 2003 explaining that under the non-discrimination provision of article 2, prohibited grounds of discrimination included “adolescents sexual orientation”.⁵²

The UN Committee against Torture, also stated that

“the principle of non-discrimination is a basic and general principle in the protection of human rights and fundamental to the interpretation and application of the convention...States parties must ensure that, in so far as the obligations arising under the convention are concerned their laws are in practice applied to all persons, regardless of sexual orientation, transgender identity or adverse distinction”.⁵³

The UN Committee on Economic, Social and Cultural Rights which monitors the application of the ICESCR stated that

“other status as recognised in article 2(2) includes sexual orientation and gender identity”.⁵⁴

Later decisions of the Human Rights Committee under the ICCPR made in *Edward Yound v Australia*,⁵⁵ and *X v Colombia*,⁵⁶ have also concluded that discrimination based on sexual orientation violates non-discrimination as captured under article 26 of the ICCPR.

In addition, it seems that arresting or detaining persons under a provision that criminalises same-sex sexual activity also violates rights under international law as it constitutes an arbitrary deprivation of liberty.⁵⁷ In this context, according to the UN Working Group on Arbitrary Detention, the detention and prosecution of individuals “on

⁵¹Spinelli B and Democratici G *30 years CEDAW 1979/2009 Shadow Report* (2011) 3.

⁵²Committee on the Rights of the Child, General Comment 4, UN Doc. CRC/GC/2003/4, 1 July 2003, para 6.

⁵³Committee Against Torture, General Comment 2 UN doc. CAT/C/GC/2, 24 Jan 2008, para 21.

⁵⁴Committee on Economic, Social and Cultural Rights, General Comment 20, UN Doc. E/C.12/GC/20 10 June 2009, para 32.

⁵⁵Communication No. 941/2000 UN Doc. CCPR/C/78/D/941/2000, 12 August 2003.

⁵⁶Communication No.1361/2005, UN Doc, CCPR/Co/89/1361, 30 March 2007.

⁵⁷International Commission of Jurists (2010) 3.

account of their homosexuality” is arbitrary because it violates the ICCPR’s guarantees of “equality before the law and the right to equal legal protection against all forms of discrimination, including that based on sex”.⁵⁸

2.3.2 Excursus: sexual orientation and equality under the South African Constitution

From the above one could correctly infer and even argue that international human rights are afforded to all people, regardless of their status or whether they are in majority or minority. It is for this reason that authors such as Ilyayambwa suggests that the jurisprudence of a nation or region has to accommodate the changes that are occurring in society, otherwise the law becomes irrelevant and redundant.⁵⁹ The development of the South African Constitutional Jurisprudence is an example of such an “accommodation” and the transformative effect that the trend towards the protection of sexual orientation can have. The South African Constitution makes explicit in section 9 what is already implicit in international law.

In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*,⁶⁰ the constitutionality of section 25(5) of the Aliens Control Act 96 of 1991 which overlooked giving persons, who are partners in permanent same-sex life partnerships, the benefits it extended to (heterosexual) spouses was brought under scrutiny. In the High Court the rights of equality and dignity were found to be closely connected in the present case and it was held that section 25 (5) strengthened harmful stereotypes of gays and lesbians in the country.⁶¹ In addition, section 25 (5) was held to discriminate unfairly against gays and lesbians on the overlapping grounds of sexual orientation and marital

⁵⁸Report of the Working Group on Arbitrary Detention; UN Doc. E/ON.4/2004/3, 15 December 2003, para.73

⁵⁹Ilyayambwa M “Homosexual Rights and the Law: A South African Constitutional Metamorphosis” (2012) *International Journal of Humanities and Social Science* 50-58.

⁶⁰*National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs* 2000 (2) SA 1 (CC).

⁶¹Implicitly, S25 (5) carried the message that gays and lesbians did not have the inherent humanity to have their families and family lives in such same-sex relationships respected or protected and constituted an invasion of their dignity. Ilyayambwa (2012) 53.

status and seriously limited their equality rights and their right to dignity.⁶² The court held that the omission from section 25 (5) of partners in permanent same-sex life partnerships was inconsistent with the constitution.⁶³

The Constitutional Court in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*,⁶⁴ was asked to confirm the above decision made by the Witwatersrand High Court that the common law offence of sodomy, the inclusion of sodomy in schedules to certain Acts of Parliament and a section of the Sexual Offences Act which prohibits sexual conduct between men in certain circumstances were unconstitutional and therefore invalid.⁶⁵

Constitutional Court justice Kate O'Regan, in her account of the Supreme Court's decision, explained how her view of jurisprudence embraced a broader definition of equality than in other Western democracies. To this end the honourable Justice O'Regan argued that "equality is substantive and it is about remedying particular types of discrimination that render groups vulnerable".⁶⁶

The Constitutional Court held that "equality ought to be defined in terms of a history of disadvantage."⁶⁷ The court held that the criminal offence of sodomy, the inclusion of sodomy in schedules to certain Acts of Parliament and a section of the Sexual Offences Act all of which are aimed at prohibiting sexual intimacy between gay men, violate the

⁶²It did so in a way which wasn't responsible and justifiable in an open and democratic society based on human dignity equality and freedom *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs* 2000 (2) SA 1 (CC) at para 55.

⁶³The Constitutional Court reasoned that; "In the first place, protecting the traditional institution of marriage as recognised by law may not be done in a way which unjustifiably limits the constitutional rights of partners in a permanent same-sex, life partnerships. In the second place there's no rational connection between the exclusion of same-sex life partners from the benefits under S 25 (5) and the government interest sought to be achieved thereby, namely the protection of families and the family life of heterosexual spouses". *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs* at para55.

⁶⁴*National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 1999 (1) SA 6.

⁶⁵According to Ilayambwa (2012) 53, the Constitutional Court strictly had to decide on the constitutionality of the inclusion of sodomy in the schedules and of the sections of the Sexual offences Act, and this could not be done without also considering the constitutionality of sodomy as a common law offence.

⁶⁶ Ilayambwa (2012) 53.

⁶⁷The court decided that, since the apartheid regime repressed gays and lesbians and made them disadvantaged group, the rights of this group would be protected *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs* at para 36.

right to equality in that they unfairly discriminate against gay men on the basis of their sexual orientation.⁶⁸

It is argued that homosexual people are a vulnerable minority group within given societies and the fact is that sodomy laws criminalise their most intimate relationships, thus interfering with their right to dignity.⁶⁹ The criminal offence of sodomy as well as the prohibition of certain same-sex consensual sexual activity, criminalises private conduct between consenting adults which does not cause any harm to anyone else, thereby intruding on the innermost sphere of human life violates the constitutional right to privacy.⁷⁰

In fact it is contended that the only harm caused is by the provision as it can and often does, affect the ability of gay persons to achieve self-identification and self-fulfilment, generally the harm gives rise to a wide variety of other discrimination, which collectively unfairly prevent a fair distribution of social goods and services and the award of social opportunities for gay persons.⁷¹

In conclusion, both the Human Rights Committee under the ICCPR and the Committee on Economic, Social and Cultural rights have issued rulings to the effect that sexual orientation, although not explicitly mentioned in the ICCPR or ICESCR, is protected under the non-discrimination provisions of these codifications of international human rights law. This interpretation of the right to equality is fully in line with growing state practice in leading democracies, like South Africa, to the same effect.

⁶⁸Such discrimination is presumed to be unfair since the Constitution expressly includes sexual orientation as a prohibited ground of discrimination. Iyayambwa (2012) 53-4 See also Jivan U "From Individual protection to recognition of relationships: same-sex couples and the South African experience of sexual orientation reform" (2007) *Law, Democracy and Development* 19-46.

⁶⁹This devalues and degrades gay men and therefore constitutes a violation of their fundamental right to dignity. Sheill K "Losing out in the intersections: lesbians, human rights and activism" (2009) *Contemporary Politics* 55-71.

⁷⁰The court resolved that; "The criminalisation of sodomy in private between consenting males in a severe limitation of gay men's right to equality in relation to sexual orientation, because it hits at one of the ways in which gay persons give expression to their sexual orientation". *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs* at para 36.

⁷¹*National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs* at para.36.

2.4 The Right to Privacy

Another argument often used under international human rights to advance lesbian, gay, bisexual and transgender individuals' rights is under the right to privacy protected under article 12 of the UNDHR and article 17 (1) of the ICCPR.⁷²

In this respect *Toonen v Australia*,⁷³ in which it was held that that adult consensual activity in private is covered by the concept of the right privacy,⁷⁴ is often cited as an example which illustrates how the right to privacy is protected.

Briefly the facts where that one Mr Toonen, an activist for the promotion of the rights of homosexuals in Tasmania, one of Australia's six constructive states, challenged two provisions of the Tasmanian Criminal Code namely section 122 (a) and (c) and section 123, which criminalised various forms of sexual contacts between consenting adult homosexual men in private. Mr Toonen asserted that sections 122 and 123 of the Tasmanian Criminal Code violated article 2(1), and article 17 and 26 of the ICCPR, because the sections in the Criminal Code did not differentiate between sexual activity in private and sexual activity in the public domain. It seems that in their enforcement, the consequences of these provisions resulted in a violation of the right to privacy, because they allowed the police to enter a household on the mere suspicion of consenting adult homosexuality.⁷⁵

The Committee found that the criminal provisions of the Tasmanian Criminal Code challenged in this case differentiated between individuals in the exercise of their right to privacy on the basis of sexual activity, sexual orientation and sexual identity. In addition, the Tasmanian Criminal Code did not outlaw any form homosexual activity between

⁷²International Commission of Jurist (2010) 7. See also *Toonen v Australia, Communication No.488/1992 UN Doc. CCPR/C/50/D/488/1992, 4 April 1994*, the Human Rights Commission noted in interpreting privacy under the ICCPR that "it is undisputed that adult consensual activity in private is covered by the concept of privacy".

⁷³*Toonen v Australia, Communication No.488/1992 UN Doc CCPR/C/SC/D488/1992 (1994)*.

⁷⁴At para 8.2.

⁷⁵It was argued that in Australian society and especially in Tasmania, the violation of the right to privacy may lead to unlawful attacks on the honour and the reputation of the individual concerned. At para 2.6.

women in private and only some forms of heterosexual activity between men and women in private.⁷⁶

Mr Toonen contended the fact that the laws in question weren't currently enforced by the judicial authorities of Tasmania did not mean that homosexual men in Tasmania enjoy effective equality under the law.⁷⁷

The Human Rights Committee (HRC) in deciding this case rejected that for purposes of article 17 of the ICCPR, moral issues are exclusively a matter of domestic concern.⁷⁸

The Human Rights Committee further noted that it is important to recognise that privacy can be spatial or decisional. Spatial privacy it would appear denotes concealment in ones' home and the bedroom, places that the state may not invade without compelling cause.⁷⁹ Decisional privacy denotes instances where a person is entitled to privacy for decisions he or she makes about personal relationships and activities.⁸⁰

By adopting thus understanding of the right to privacy under international law, the Committee in essence confirmed the understanding of the right to privacy under a number of domestic jurisdictions. For example, the Constitutional Court of South Africa held in *National Coalition for Gay and Lesbian Equality*,⁸¹ that

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

⁷⁶ At para 2.4.

⁷⁷ At para 2.3.

⁷⁸ In fact the Human Rights Committee (HRC) was of the opinion that the afore-mentioned argument would open the door to states withdrawing a potentially large number of statutes interfering with privacy from the scrutiny of the HRC. At Para 8.6.

⁷⁹ *Toonen v Australia*, Para 8.2.

⁸⁰ *Toonen v Australia*, Para 8.2.

⁸¹ *National Coalition for Gay and Lesbian Equality v Minister of Justice and others* 1999 (1) SA 6 at para.32.

It would appear as if a relational concept of privacy was also applied in *S v Jordan*.⁸², The South African Constitutional Court held that the fact that commercial sex or sex work was involved, removed the sex from the protection of the right to privacy understood in decisional or relational terms in spite of the fact that the sex took place in a private bedroom.⁸³

As far as the jurisprudence of the USA is concerned, Edmundson observes that there is a tendency for the right to liberty to overlap with the right to privacy in the decisional sense.⁸⁴ At the same time, Edmundson notes that the opinion of the Supreme Court of the United States in *Lawrence v. Texas*,⁸⁵ which invalidated a statute criminalising homosexual sodomy, thereby overruling its 1986 decision in *Bowers v Hardwick*,⁸⁶ suggests a theoretical relationship between the right to liberty (decision making) and the right to privacy.⁸⁷

The facts in brief of the *Lawrence* case were these: Houston police were dispatched to Lawrence's apartment in response to a reported weapons disturbance. The officers found Lawrence and Garner engaged in a sexual act. Lawrence and Garner were charged and convicted under Texas law of "deviate sexual intercourse, namely anal sex, with a member of the same sex (man)". Lawrence and Garner were convicted and ordered to pay \$141.25 in costs. The Court of Appeals considered defendants' federal constitutional arguments under both the Equal Protection and Due Process Clauses of the 14th Amendment. The Supreme Court ruled in favour of Lawrence.

It is evident that the right to privacy as a substantive right first approached the US courts in *Grisworld v Connecticut*,⁸⁸ where the court found that the Bill of Rights created "penumbras" or "zones of privacy" that enveloped marital privacy as a fundamental liberty and interest. In 1973 the right to privacy was extended beyond "marital privacy"

⁸²*S v Jordan* 2002 (6) SA 642 (CC)

⁸³*S v Jordan* 2002 (6) SA 642 (CC) at para 28.

⁸⁴Edmundson W "Privacy" in Golding M and Edmundson W *Philosophy of Law and Legal theory* (2005) 271-283.

⁸⁵*Lawrence v Texas* (2003) 539 US 558.

⁸⁶*Bowers v Hardwick* (1986) U.S 478.

⁸⁷Edmundson (2005) 274.

⁸⁸381 US 479 (1965) At 484-5.

to include a woman's personal decision to abort her foetus.⁸⁹ In 1986, the court in *Bowers v Hardwick* refused to include homosexual sodomy to the list of due process liberty rights.⁹⁰ The 11th circuit remanded Hardwick's case, requiring the state to demonstrate a compelling interest for continuing to ban private consensual sodomy.⁹¹

As already mentioned above *Lawrence v Texas* overturned the *Bowers* case and the resistance against expanding due process liberty rights and extended it to include the privacy of homosexual persons.⁹² The court, in addition, also found the right to privacy encompasses both spatial and decisional elements. What this means is that in terms of the right to privacy, the home and bedroom of an individual are places that the state may not invade without compelling cause and it also entails that a person is entitled to privacy for decisions s/he makes about personal relationships and activities.⁹³ On both accounts and versions of privacy (spatial and decisional) the criminalization of intimate consensual intercourse between two consenting adults violates the right to privacy under the US Constitution.

Notwithstanding the above, it is interesting to note the dissenting opinion of Justice Scalia in the *Lawrence* case. Justice Scalia argued that the majority incorrectly disallowed Texas's sodomy without overruling *Bowers'* declaration that homosexual sodomy was not a fundamental right.⁹⁴ Furthermore, Judge Scalia in his dissenting judgement warned against considering emerging modern and international trends when deciding cases for the reason that loosening fundamental rights on unpredictable modern and international trends, in effect violates established constitutional principles and ultimately means the end of all moral legislation.⁹⁵ Justice Scalia agreed with the

⁸⁹ *Roe v Wade* 410 U.S. 113 (1973) for this period of time the court also recognised due process liberty rights in family matters, such as the ability of parents to direct their children's upbringing and the right to learn a foreign language in school. See also Butcher (2004) 1418.

⁹⁰ *Bowers v Hardwick* (1986) U.S. 478, see also Butcher (2004) 1418-19.

⁹¹ At page 1213.

⁹² Butcher (2004) 1420.

⁹³ *Lawrence v Texas* US SC, 539 US 558 (2003).

⁹⁴ At page 594.

⁹⁵ In the honourable Justices' opinion the legal profession in the US was signing on to the so-called homosexual agenda without allowing social change to be made from the bottom up rather than change to be imposed. At page 598-9 see also Tribe L "Lawrence v Texas: The "Fundamental Right" that dare not speak its name" (2004) *Harvard Law Review* 1893-1955.

conclusion made in *Bowers v Hardwick* that a democratic majority could legislate against sexual behaviour where it found that behaviour “immoral and unacceptable”.⁹⁶

The brief analysis of the domestic jurisprudence developed by the South African Constitutional Court and the United States Supreme Court, clarify and provide sound support for the understanding of the right to privacy under international law as applied by the Human Rights Committee of the ICCPR in the *Toonen* communication. On the Committee’s authoritative interpretation of the right to privacy under international law, the criminalisation of consensual sex between same-sex partners violates both the protection of private places and private or personal decisions.

2.5 Regional instruments on equality and non-discrimination

The UN international human rights system, as well as the African Union contributed to the establishment of a human rights system in Africa, which has positively and indispensably impacted on the advancement of Human Rights and of justice.⁹⁷ Despite this, it seems that some of the promises made about such rights being guaranteed under global, continental, regional and national legal instruments have remained unfulfilled.⁹⁸

As far as Africa is concerned, the African Charter is the foundational normative instrument for the protection and promotion of human rights in Africa.⁹⁹ The African Charter has been commended as a document which sets out international human rights standards with an “African twist” in that it contains civil, political, economic, social and cultural rights. Furthermore, the African Charter provides for “peoples’ rights” and several rights not found in other instruments and specific 3rd generation or collective rights not found in other instruments.¹⁰⁰

⁹⁶ Butcher (2004) 1417. See also Tribe (2004) 1908.

⁹⁷ Nderitu W “The International Justice System and Human Rights in Africa” in Bosl A and Diescho J *Human Rights in Africa: Legal perspectives on their protection and promotion* (2009) 81-109.

⁹⁸ Nderitu (2009) 86-7.

⁹⁹ Nderitu (2009) 87.

¹⁰⁰ Heyns C “The African Regional: Human Rights System: the African Charter” (2004) *The Dickinson School of Law of the Pennsylvania State University* 683 This approach it is argued enhances universality, and indivisibility, and demonstrates the interdependence attaching to all Human Rights at least on paper.

It seems that even though the members of the African Union adhere to the African Charter, the domestication, hence applicability of the African Charter by national laws still remains an issue, and like other International laws it is left to the discretion of states parties to decide how to give effect to treaties in their national law.¹⁰¹

Articles 2 and 3 of the African Charter enshrine the principles of non-discrimination and equality before the law. In terms of these articles, the enjoyment of the rights and freedoms recognised in the charter apply equally and to all

“...without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any opinion, national and social origin, fortune, birth or other status.”¹⁰²

The inclusion of “other status” renders the list non-exhaustive, for example, discrimination on the basis of age, disability or sexual orientation could be read into it (as it has been under the ICCPR and ICESCR).

Homosexuality is unlawful in several African countries, a condition which seems to have garnered an increased reproach from activists and the Western world.¹⁰³ UN Secretary General Mr Ban Ki-Moon told delegates at the African Union Delegation in 2012, that discrimination based on sexual orientation or gender identity “promoted governments to treat people as second class citizens or even criminals.”¹⁰⁴ The UN secretary general further held that “confronting discrimination based on sexual orientation or gender identity is a challenge, but we must not give up on the ideas of the universal declaration of human rights”.¹⁰⁵

¹⁰¹ Heyns (2004) 683.

¹⁰² Organisation of the African Union, African Charter on Human and Peoples’ Rights (Banjul Charter) 27 June 1981 CAB/LEG/07/2.

¹⁰³ “Homosexual acts are illegal in most African countries including key Western allies such as Uganda, Nigeria, Kenya, Egypt and Botswana. Both the US and UK have recently warned they would use foreign aid to push for homosexuality to be decriminalised on the socially conservative continent. BBC News “African Union: Ban Ki-Moon urges respect for gay rights” available at <http://bbc.co.uk/news/world-africa-16780079> (accessed on 1 February 2012).

¹⁰⁴ BBC News “African Union: Ban Ki-Moon urges respect for gay rights” available at <http://bbc.co.uk/news/world-africa-16780079> (accessed on 1 February 2012).

¹⁰⁵ BBC News “African Union: Ban Ki-Moon urges respect for gay rights” available at <http://bbc.co.uk/news/world-africa-16780079> (accessed on 1 February 2012).

In *Zimbabwe NGO Human Rights Forum v Zimbabwe*¹⁰⁶ the African Commission on Human and Peoples' Rights found that,

“together with equality before the law and the equal protection of the law the principle of non-discrimination provided under Article 2 of the Charter provides the foundation for the enjoyment of all human rights...the aim of this principle is to ensure equality of treatment for individuals irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age or sexual orientation”.

Similarly the concept of discrimination has been dealt with consistently by the European Court in its case-law with regard to Article 14 ECHR. Article 14 of the European Convention on Human Rights prohibits discrimination based on "sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".¹⁰⁷ At the same time, it is evident that article 14's non-discrimination protection is limited in that it only prohibits discrimination with respect to rights under the Convention.¹⁰⁸ In addition Protocol 12¹⁰⁹ extends the prohibition on discrimination to cover discrimination in any legal right, even when that legal right is not protected under the Convention, so long as it is provided for in national law.¹¹⁰

In fact the European Human Rights Court has made decisions in its case-law that not every distinction or difference of treatment amounts to discrimination. For instance in the case of *Abdulaziz, Cabales and Balkandali v. The United Kingdom* the court found that “a difference of treatment is discriminatory if it ‘has no objective and reasonable

¹⁰⁶Communication 245/2002, Zimbabwe Human Rights, NGO Forum v. Zimbabwe, and Zimbabwe's response to the decision, Annexure 111 to the Twenty First Activity Report of the African Commission on Human and People's Rights, EX/CL/322 (X), January 2007, at para. 169.

¹⁰⁷The last of these allows the court to extend to Article 14 protection to other grounds not specifically mentioned such as has been done regarding discrimination based on a person's sexual orientation. European Union Agency for Fundamental Rights *Handbook on European Non-Discrimination Law* (2010) 60.

¹⁰⁸Thus, an applicant must prove discrimination in the enjoyment of a specific right that is guaranteed elsewhere in the Convention (e.g. discrimination based on sex - Article 14 - in the enjoyment of the right to freedom of expression Article 10).

¹⁰⁹Protocol 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No.177) is an anti-discriminatory treaty of the Council of Europe.

¹¹⁰European Union Agency for Fundamental Rights (2010) 60.

justification', that is, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'.¹¹¹ However, in *Norris v Ireland*,¹¹² the European Court of Human Rights held explicitly that Irish laws criminalising homosexuality interfered with Mr Norris's right to privacy and thus were contrary to article 8 of the European Convention for Human Rights.

In conclusion, in terms of the authoritative rulings of the African Commission and the European Court on Human Rights mentioned above, both the African regional human rights regime and the European human rights convention protects sexual orientation, either under the right to equality or privacy.

2.6 The will of the majority and constitutional democracy

It was mentioned above how Justice Scalia's dissenting opinion in *Lawrence v Texas* argued against considering emerging modern and international trends when deciding cases, for the reason that grounding fundamental rights on unpredictable modern and international trends in effect violates established constitutional principles of democracy and ultimately means the end of all moral legislation. The argument the judge makes seems to be echoing those made by Justice O'Higgins in *Norris v Ireland*, who also held that human rights conventions are international agreements which do not and cannot form part of domestic laws, nor can they affect any democratic questions which arise there under.¹¹³ It is clear that the central problem for international lawyers within democratic states is the determination of the legal nature of international law.¹¹⁴

¹¹¹*Abdulaziz, Cabales and Balkandali v The United Kingdom* 1985 7 EHRR 471, 493.

¹¹²*Norris v Ireland (1988)* ECHR 22, 8.

¹¹³*Norris v Ireland (1988)* ECHR 22, 8, the case centred on the court having to decide whether Irish laws criminalising homosexuality interfered with Mr Norris's right to privacy which was contrary to article 8 of the European Convention for Human Rights. The honourable court found that the Irish legislation in question interfered with Mr Norris's right to respect for his private life under Article 8 para.1 of the Convention.

¹¹⁴Capps P *Human Dignity and the Foundations of International Law* (2009) 187-8.

According to Warner a democratic state can be considered as being legitimate only when its citizens have a *prima facie* obligation to obey it.¹¹⁵ The only authority that is applied by citizens of a given state is exercised through electing decision makers who represent the views and preferences of the citizens who voted for them. The assertion is that representative decision makers may legitimately impose obligations on those who elected them.¹¹⁶ In a representative democracy, it is clear that value determinations are made by the elected representatives of the majority. It is however also clear that regardless of how open the democratic process is, those with most of the votes are in a position to vote themselves in advantageous positions at the expense of the others, or otherwise refuse to take disadvantaged interests of minorities into account.¹¹⁷

In this respect it is not surprising that in given democracies, various rights that pertain to minorities aren't given priority in terms of law.¹¹⁸ But then again, according to American constitutional writer John Hart Ely, even rights that aren't explicitly mentioned in the Constitution ought to receive constitutional protection because of the role they potentially play in keeping open the channels of political change and thus the democratic process.¹¹⁹

Homosexual persons for years have been the victims of social, political as well as legal injustice. Although open processes are symbolic of what one would expect in a democracy, it is clear that those with the most votes are placed in a position to vote themselves in a privileged position at the expense of others, or if not to refuse to take their interests into account.¹²⁰ Under such situations, Ely argues that the idea of "one person, one vote" makes a mockery of the equality principle.¹²¹ Ely highlights that "one person; one vote" which is fundamentally a majoritarian principle, offers no protection for minorities against majority oppression, which leads one to the argument for

¹¹⁵ This relationship between state and those governed is considered a mainstay of democratic theory. Warner R "Adjudication and Legal Reasoning" in Golding M and Edmudson W *Philosophy of Law and Legal theory* (2005) 259-277.

¹¹⁶ And in fact if most people disapprove they can vote them out of power. Capps (2009) 189 see also Warner (2005) 266 and Ely J *Democracy and Distrust* (1980) 135.

¹¹⁷ Ely (1980) 135.

¹¹⁸ Waldron J "Legislation" in Golding M and Edmudson W *Philosophy of Law and Legal theory* (2005) 236-247.

¹¹⁹ Ely (1980) 136.

¹²⁰ Ely (1980) 135.

¹²¹ Ely (1980) 135.

heightened judicial inspection of laws motivated by “prejudice” against the kind of distinctive groups that have been described as discrete and insular minorities.¹²² This argument is captured brilliantly in the South African judgment in *Minister of Home Affairs v Fourie* where the court found that “Gays and Lesbians are a permanent minority in society who in the past have suffered from patterns of disadvantage. Because they are a minority unable on their own to use political power to secure legislative advantages, they are exclusively reliant on the Bill of Rights for their Protection”.¹²³

2.7 Conclusion

This section presented an argument that sodomy laws violate a number of international human rights, most notably the right to equality or non-discrimination and the right to privacy. This is the position under the ICCPR, the ICESCR, the African Charter, the European Convention and a number of minor international law instruments. This international law protection is also reflected in state practices of leading democracies like South Africa and the USA. States are free to choose their own methods for implementing international legal standards and obligations, and for bringing national law into compliance with these obligations.¹²⁴ Some of the principle means through which international human rights norms can be applied alongside municipal law or otherwise applied by domestic courts and other competent authorities are through Constitutions,¹²⁵ Acts of Parliament, incorporation of said law domestically, automatic

¹²²Ely (1980) 145-70. See also Dworkin *R Freedom's Law: The Moral Reading of the American Constitution* (1996). 17. Dworkin distinguishes between majoritarian democracy and constitutional democracy. Here Dworkin highlights that the constitutional idea of democracy as opposed to the majoritarian idea means that government are subject to conditions of equal status for all citizens. Simply when majoritarian bodies provide and respect equal status for all their citizens, then the decisions of these institutions should be accepted. However when these bodies do not respect the equal status for all citizens, or when their decisions are defective, it is there can be no objection in the name of democracy, to other procedures that protect and respect certain classes of people better.

¹²³*Minister of Home Affairs v Fourie (2005) ZACC 19, 2006* see also *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others CCT10/99 (1999) ZACC 17, 2000* at para.25 where the Constitutional Court held that “The impact of discrimination on gays and lesbians is rendered more serious and their vulnerability increased by the fact that they are a political minority not able on their own to use political power to secure favourable legislation for themselves. They are accordingly almost exclusively reliant on the Bill of Rights for their protection.”

¹²⁴ Office of the High Commissioner for Human Rights “Internal Human Rights Law and the Role of the Legal Professions: A general Introduction” (2002) available at <http://www.ohchr.org/Documents/Publications/training9chapter/en.pdf> (accessed on 2nd March 2012.)

¹²⁵ Office of the High Commissioner for Human Rights (2002) 5.

applicability, and judicial discretion.¹²⁶ As will become clear in the next two sections Namibia follows a monistic approach to the application of international human rights norms, while Zambia follows a dualistic approach, In spite of these differences, Namibian and Zambia are both under an international law obligation to repeal all sodomy laws. Not doing so will render the application of those laws unconstitutional.

The following two sections not only present a case analysis of how law criminalises same-sex conduct in Zambia and Namibia, but also the idea of “the right to culture” will be introduced in relation to how these countries acknowledge the international human rights treaties mentioned above and how they use the right to culture as well as public opinion to legitimately execute sodomy laws.



¹²⁶Office of the High Commissioner for Human Rights (2002) 20.

SECTION THREE:
SODOMY LAW IN ZAMBIA

3.1 Positive Law in Zambia

Consensual sex between same-sex couples in Zambia is unlawful. In this respect homosexuality is considered an “offence” against morality in terms of Chapter 87 of Zambia's Penal Code Act.¹²⁷ Section 155 which criminalises “homosexuality” in Zambia reads as follows:

"Any person who has carnal knowledge of any person against the order of nature or permits a male person to have carnal knowledge of him or her against the order of nature is guilty of a felony and is liable to imprisonment for fourteen years"

Section 156 of the same Acts adds the following:

“Attempt to commit unnatural offences: "Any person who attempts to commit any of the offences specified in the last preceding section is guilty of a felony and is liable to imprisonment for seven years."

Section 158 of the Act criminalises all indecent practices between males as follows:

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

Additionally, in terms of section 394 of the Zambian Penal Code, it is an offence for any person to conspire with another to commit any of the above felonies.¹²⁸

From the afore-mentioned provisions it is evident that the Zambian Penal Code does not make specific mention to the word “homosexuality”. Sections 155, 156 and 158 criminalises “carnal knowledge” and “gross indecency” instead. The term “gross

¹²⁷ Chapter 87 of the Penal Code Act 15 of 2005.

¹²⁸ Daka J, *Sexual Offences in Zambia and How Police Deal with them* (2004) 162.

indecentry” as employed by some penal codes with an English influence, such as the Zambian Penal code, is argued to be very flexible.¹²⁹ The offence seems to only target acts between men, certainly it is reported that in practice it was used to root out men who have sex with men who were caught in non-sexual circumstances, allowing arrests wherever they gathered or met.¹³⁰

Historically, it is apparent that the offence of gross indecentry did not involve penetration.¹³¹ As a result, it appears that the offence of gross indecentry seems to imply a lower standard of proof, and the authorities are free to infer “gross indecentry” from any suspicious activity, the term is deceptive, a legal connection between “unnatural” sexual acts and the associated identification of a certain class of person.¹³²

It should be mentioned at this point that, historically, same-sex consensual sexual activity between women had never been expressly punished.¹³³ Despite this, it appears that the term “gross Indecency” has been used to extend criminal penalties to sex between women.¹³⁴ In this respect Zambia criminalises lesbianism.¹³⁵

As with the term “gross indecentry” the Zambian Penal Code does not provide any definition for the phrase “carnal knowledge against the order of nature”. In fact the sections dealing with carnal knowledge against the order of nature are argued to be vague.¹³⁶ This is because the conduct the provisions seeks to prohibit is so unclearly

¹²⁹ *NG Haut v PP* (1995) Singapore Law Report, Vol 2, 783.

¹³⁰ Gupta A and Long S *This Alien Legacy: The Origins of Sodomy Laws in British Colonialism*(2008) 59.

¹³¹ Gupta and Long (2008) 60.

¹³² Gupta and Long (2008) 60.

¹³³ Long S “British Sodomy Laws Linger in Former Countries: The Gay and Lesbian review worldwide” (2009) *Boston Gay and Lesbian Review* 16.

¹³⁴ Long (2009) 18.

¹³⁵ In terms of S158 (2) “any female who, whether in public or private, commits any act of gross indecentry with a female child or person or procured or female child or person to commit any act of gross indecentry with her, or attempts to procure the commission of any such act by any female in public or private, commits a felony and is liable, upon conviction to imprisonment for a term of not less than 7 years and not exceeding 14 years”.

¹³⁶ It is suggested that in contemporary Zambia, the vagueness of the term “carnal knowledge” is a serious concern. The sections are extremely vague and embarrassing in law. See Long (2009) 20.

defined (as has already been stressed) that it is impossible for the ordinary citizen and society to interpret and to have any certainty about their application.¹³⁷

In *The People v Emmanuel Sikombe*¹³⁸, the defendant Mr Sikombe was charged with attempting to have carnal knowledge of one Mukamba Mokama against the order of Nature, and for gross indecency. The court found that the term “carnal knowledge against the order of nature” as contemplated by the Penal Code is historically defined as a crime that can be equated with anal sex. The International Gay and Lesbian Human Rights Committee (IGLHRC), upon commenting on the case, came to define the term “carnal knowledge” in respect of sections 155, 156 and 158 as a deliberately vague term that can be interpreted expansively to target a wide range of homosexual behaviour.¹³⁹ The honourable judge held that “carnal knowledge against the order of the nature” is legally (or at least historically) restricted to anal sex.

This means that “gay rape” and “bestiality”, although different concepts, can be and are treated as equivalent with the term “carnal knowledge”.¹⁴⁰ Consequently, it can therefore be argued that the term “carnal knowledge” has permitted laws that were initially limited to private sexual acts to be used to criminalise any act publicly considered to be “homosexual”.¹⁴¹

What is clear from the afore-mentioned about the terms “gross indecency” and “carnal knowledge against the order of nature” is that these terms are mostly legal, political and social attempts to satisfy ambiguous, umbrella terms with specific acts in accordance with the shifting of what “nature” or social values or culture would actually allow.¹⁴²

¹³⁷ Indeed the UK itself, through the Sexual Offences Act of 1956, long ago replaced the term “carnal knowledge” with sexual intercourse in the interests of precision.

¹³⁸ Unreported case Number IB/535 of 1998. See also Kulusika S *Text, Cases and Materials on Criminal Law in Zambia* (2006) 109.

¹³⁹ International Gay and Lesbian Human Rights Commission *State Sponsored Homophobia and its Consequences* (2003) 90.

¹⁴⁰ Daka J (2004) 165.

¹⁴¹ Cowell, F “Colonial Sodomy: Homophobic threat within common law” (2010) available at http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=472:colonial-sodomy-homophobic-threat-within-common-law&catid=91:rights-in-focus&Itemid=296 (accessed on 25th February 2012)

¹⁴² Long suggests that laws that criminalise so broad a range of behaviours are clearly not ones that allow individuals to say with certainty whether a particular act is permitted. Long (2009)23.

3.2 Social values in relation to homosexuality in Zambia

The broad scope of the Zambian criminalisation of consensual same-sex sexual activity is supported by a strong social stigma against this kind of activity. There is no doubt that homosexuality not only carries a legal sanction but also offend deeply held social values.¹⁴³ In 2011, the Foreign Affairs Minister at the time, Given Lubinda, in no uncertain terms assured the Zambian electorate that the country's leaders would not bow to outside pressure to respect and tolerate homosexuality in the nation.¹⁴⁴ Opposition leader, Felix Mutati, has also stated:

“Our position is very clear; we will go by what is currently in the Constitution. Anything below that will be abrogating values. Zambia is a Christian nation and Christianity is against homosexuality, so any position to change the status quo will be a tough one”.¹⁴⁵

In addition, a government spokesman proclaimed in 1998 that homosexuality was

“un-African and an abomination to society which would cause moral decay”; he warned that ‘if anybody promotes the law will take its course. We need to protect morality’.¹⁴⁶

In opposition to these official statements, Long argues that there is no reason to believe that white colonialists brought same-sex sexual behaviour to the continent of Africa.¹⁴⁷ In fact it could even be argued that some same-sex sexual behaviour was indigenous to

¹⁴³ Government Spokesperson, Jackson Shamenda, recently told a media briefing in Lusaka that the laws of the land are very clear and homosexuality is not allowed in Zambia. He added that Government would not entertain the amendment of the law to allow for the recognition of gay rights. Lusaka Times ‘The Laws of the Land are very clear, homosexuality is not allowed in Zambia-Government’ available at <http://www.lusakatimes.com/2012/03/01/laws> (accessed on 31st March 2012).

¹⁴⁴ Zambia C “Constitutional Recognition of Non-Discrimination on the Basis of Sexual Orientation” available at <http://www.oblogdeoblogda.wordpress.com/2012/01/21/gay-zambia-constitutional-recognition-of-non-discrimination-on-the-basis-of-sexual-orientation/> (accessed on 1 April 2012).

¹⁴⁵ Zambia C “Constitutional Recognition of Non-Discrimination on the Basis of Sexual Orientation” available at <http://www.oblogdeoblogda.wordpress.com/2012/01/21/gay-zambia-constitutional-recognition-of-non-discrimination-on-the-basis-of-sexual-orientation/> (accessed on 1 April 2012).

¹⁴⁶ Zambia C “Constitutional Recognition of Non-Discrimination on the Basis of Sexual Orientation” available at <http://www.oblogdeoblogda.wordpress.com/2012/01/21/gay-zambia-constitutional-recognition-of-non-discrimination-on-the-basis-of-sexual-orientation/> (accessed on 1 April 2012).

¹⁴⁷ Long (2009) 25.

the continent and that all European colonialists did was to bring about the criminal categorisation of that behaviour.¹⁴⁸

In addition, because of colonial rule on the continent, it is evident that laws that criminalise homosexuality, including those in Zambia, are deeply rooted in European Christian culture, in particular in the medieval religious fear of non-procreative sex, which required the ban of sexual acts which were biblically condemned.¹⁴⁹

Notwithstanding this, the irony that one seems to observe from the statements made by officials of the Zambian government is that the laws which criminalise homosexuality, which some politicians now defend, are themselves colonial impositions.¹⁵⁰

3.3 How did sodomy laws come to apply in Zambia?

In comparison to other colonial powers, it appears that Britain had a strong influence in spreading what we now understand to be sodomy laws.¹⁵¹ Historically under English law, sodomy seems to have stemmed from the offence of “Buggery”¹⁵².

According to the International Gay and Lesbian Human Rights Commission, the offence of “Buggery” commonly encompassed either bestiality or anal sex between men.¹⁵³ It is evident that essentially, the common law offence of “Buggery” as well as the crime of “gross indecency” made male-male sexual contact in England illegal.¹⁵⁴ Around 1885 Henry Labouchere a member of the British parliament successfully introduced a law that criminalised male-male consensual sexual contact.¹⁵⁵ The law that came to be known as “Labouchere’s Law stated that:

¹⁴⁸Long (2009) 25; see also Sara “Thoughts on UN Secretary General, Ban-Ki Moon’s recent visit to Zambia” available at <http://www.thebestofzambia.com/2012/03/thought...> (accessed on 31st March 2012).

¹⁴⁹International Gay and Lesbian Human Rights Commission (2003) 271.

¹⁵⁰Sara “Thoughts on UN Secretary General, Ban-Ki Moon’s recent visit to Zambia” available at <http://www.thebestofzambia.com/2012/03/thought...> (accessed on 31st March 2012).

¹⁵¹Kirby M (2011) 23.

¹⁵²International Gay and Lesbian Human Rights Commission (2003) 270.

¹⁵³International Gay and Lesbian Human Rights Commission (2003) 270.

¹⁵⁴Common law “buggery” covered anal sex and “gross-indecency”, embraced the rest. International Gay and Lesbian Human Rights Commission (2003) 270-1.

¹⁵⁵International Gay and Lesbian Human Rights Commission (2003) 271.

“Any male person who, in public or in private, commits or is a party to the commission of, or procures or attempts to procure the commission by any male person, of any act of gross indecency”.¹⁵⁶

When the British colonised India in 1858, they introduced another law that would have far-reaching effects on its colonies, in terms of so-called sodomy laws.¹⁵⁷ The Indian penal code, specifically section 377¹⁵⁸ stated the following,

“Un-natural Offences- whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment...for a term which may extend to 10 years and shall be liable to a fine.”

In terms of section 377 of the Indian Penal Code, issues of consent or of the age of the participants or of the privacy of the happening were irrelevant. To this end, Kirby explains that because of section 377 “legally same sex activities were linked and equated to the conduct of violent sexual criminal offences”.¹⁵⁹

The authority for law-making within British colonial territories was in the hands of the Colonial Power. Laws such as section 377 it would seem, were an attempt by Britain to set standards of behaviour, both to reform persons within colonised territories and to protect the colonisers against moral lapses.¹⁶⁰ Arguably section 377 was one of the first pieces of colonial statute law that was combined into penal codes of colonised territories such as Northern Rhodesia, today known as Zambia.¹⁶¹

It is apparent that upon gaining independence from their former colonial masters, the new governments of former colonised countries in question either enacted a new criminal code that codified existing criminal practice along with other legislative

¹⁵⁶The sentence was up to two years in prison, Gupta and Long (2008) 5.

¹⁵⁷Kirby (2011) 28.

¹⁵⁸Which officially came into force in January 1862, see Kirby (2011) 28. See also *Naz Foundation v Delhi* (2009) 4 LRC 838 (Delhi High Court) 3.

¹⁵⁹Kirby (2011) 29.

¹⁶⁰Gupta and Long (2008) 14.

¹⁶¹Kirby (2011) 27.

provisions or some countries simply amended existing colonial criminal or penal codes; or decided to keep the common law in place.¹⁶² It is argued that maintaining colonial legal systems was a preferred choice for many new governments of former colonies because the existing law provided a system of established practice which appeared to be important to the newly independent states.¹⁶³

The British colonial rulers in Northern Rhodesia implemented its Penal Code in 1930, and in 1933 new provisions on sexual offences were added to the Penal Code.¹⁶⁴ It is suggested that the laws on sexual offences inherited from the British were implemented effortlessly into the Penal Code of Zambia, upon independence in 1964 and that these laws criminalising consensual same sex sexual conduct still find relevance and as has been showcased above, remain in force today.¹⁶⁵

Interestingly, England from whom Zambia inherited its laws criminalising consensual same-sex sexual conduct from no-longer prohibits such conduct.¹⁶⁶ It is evident that as Britain moved toward the final days of its imperial power, an official recommendation by a set of legal experts, what is now known as Wolfenden Report of 1957, was established advising that homosexual behaviour between consenting adults in private should no longer be a criminal offence.¹⁶⁷ The Wolfenden Committee in the report expressed with near agreement of all parties involved that

“the laws function is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others...It isn't, in our view, the function of the law to intervene in the private life of citizens, or to seek to enforce any particular pattern of behaviour. Unless a deliberate attempt is made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain

¹⁶²Kirby (2011) 34.

¹⁶³Gupta and Long (2008) 14.

¹⁶⁴Hatchard J and Ndulo M *Readings in Criminal Law and Criminology in Zambia* (1994) 25.

¹⁶⁵International Gay and Lesbian Human Rights Commission (2003) 271.

¹⁶⁶Sara “Thoughts on UN Secretary General, Ban-Ki Moon’s recent visit to Zambia” available at <http://www.thebestofzambia.com/2012/03/thought...> (accessed on 31st March 2012).

¹⁶⁷A royal commission of inquiry was established, chaired by Sir. John Wolfenden, a university vice-chancellor. See Kirby (2011) 33.

a realm of private morality and immorality which is, in brief and crude terms, not the laws' business".¹⁶⁸

As a consequence of the report, important debates were started in Britain involving leading jurists.¹⁶⁹ And within a decade of the Wolfenden Report, the United Kingdom Parliament reformed the law for England and Wales.¹⁷⁰ Reforming laws were then enacted for Scotland and Northern Ireland.¹⁷¹

All the same this, the Wolfenden Report is apparent came too late for most of Britain's colonies including Zambia, for the reason that when they won independence in the 1950's and 1960's, they did so with the unchanged English sodomy laws still in place.¹⁷² In addition, few of those independent states have carried out steps to repeal the "imported" English sodomy law since the end of colonialism.¹⁷³ Countries like Zambia are as a result now faced with a developing body of international human rights law and precedent's demanding the repealing of sodomy laws.¹⁷⁴

3.4 Can the right to equality and non-discrimination be used to repeal sodomy law in Zambia?

In section two above, it was noted that human rights treaties do not specifically mention sexual orientation. On the other hand, it was also noted that discrimination on the grounds of sexual orientation has been determined to be incompatible with international

¹⁶⁸ *The Wolfenden Report: Report of the Committee on Homosexual Offences and Prostitution* (1963)23.

¹⁶⁹ "Excuses were advanced, by the government of the day for not proceeding with the reform, generally on the footing that British society was 'not yet ready' to accept the proposals." See Kirby (2011) 33.

¹⁷⁰ Kirby (2011) 33.

¹⁷¹ In *Dudgen v UK* (1981) 4 EHRR 149 the European Court of Human Rights held that the UK was in breach of its obligations under the European Convention on Human Rights by continuing to criminalise the private consenting sexual conduct of adult homosexuals in North Ireland.

¹⁷² According to Gupta and Long (2008) 7 "the influence of the legislative reforms in the country from which the imperial criminal codes had been received resulted, within a remarkably short time, in the legislative modification of the same-sex prohibition in the penal laws of Canada (1969), Australia (1974), New Zealand (1986), Hong Kong (1990) and Fiji (2005) and S.A (1998)".

¹⁷³ Gupta and Long (2008) 7.

¹⁷⁴ Gupta and Long (2008) 8.

human rights standards as set out in instruments such as the ICCPR, the ICESCR, and the African Charter.¹⁷⁵

It seems that the ICCPR and the ICESCR are often referred to as the International Bill of Rights, because they contain all fundamental human rights and freedoms which are included, almost word for word, in all major international and regional Human Rights instruments as well as the Constitutions of all modern states.¹⁷⁶

Furthermore, in terms of article 2(2) of the ICCPR

“...state parties to the ICCPR are duty bound to take the necessary steps, in accordance with their constitutional processes to adopt such legislative or other measures as may be necessary to give effect to the rights contained in that covenant”.

It is apparent that many State parties to international human rights instruments such as the ICCPR are bound by the principles contained therein and are obligated to respect, safeguard and realise the human rights of all citizens.

The ICCPR was adopted by the UN General Assembly in 1966 and entered into force in 1976. Zambia is a state party of the ICCPR following its accession on April 10, 1984.¹⁷⁷

Article 2(1) of the ICCPR states as follows:

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

¹⁷⁵In their preambles, the treaties “recall that human rights are universal and shall apply to all individuals, and stressing therefore its commitment to guarantee the equal dignity of all human beings and the enjoyment of rights and freedoms of all individuals without discrimination on any ground”.

¹⁷⁶Bangamwabo FX “The Implementation of international and regional human rights instruments in the Namibian Legal framework” in Horn N and Bosl A *Human Rights and the Rule of law in Namibia*(2008) 165-186.

¹⁷⁷Zambia C “Constitutional Recognition of Non-Discrimination on the Basis of Sexual Orientation” available at <http://www.oblogdeoblogda.wordpress.com/2012/01/21/gay-zambia-constitutional-recognition-of-non-discrimination-on-the-basis-of-sexual-orientation/> (accessed on 1 April 2012).

However it is important to note that Zambia is a dualist state and as such international obligations have to first be domesticated before they can be directly applicable in the country.¹⁷⁸

Part III of the Zambian constitution contains the Bill of Rights which provides for the fundamental rights and freedoms to which each individual in Zambia is entitled.¹⁷⁹ It is maintained that the Zambian Bill of Rights is comparable to the International Covenant on Civil and Political Rights.¹⁸⁰

To this end the legal foundation for non-discrimination amongst people in Zambia is firmly in place. In terms of Article 11 of the Constitution of Zambia of 1991¹⁸¹:

“...every person in Zambia has been and shall continue to be entitled to the fundamental rights and freedoms of the individual, that is to say the right, whatever his race, place of origin, political opinions, colour, creed, sex or marital status but subject to the limitations contained in this part, to each and all of the following namely; a) Life, liberty, security of the person and the protection of the law b) freedom of conscience, expression, assembly, movement and association c) protection of young persons from exploitation (and) d) Protection for the privacy of his home and other property and from deprivation of property without compensation”.

It is contended that Article 11 of the Zambian Constitution cannot be equated with an equality clause, since it only proclaims what rights are provided for by the Bill of Rights.¹⁸² For the reason of being a human being, everyone in Zambia has the right to enjoy all fundamental rights and freedoms without any unfair discrimination.¹⁸³ To this

¹⁷⁸Ndulo and Kent (1996) 267.

¹⁷⁹International Gay and Lesbian Human Rights Commission (2007) 3.

¹⁸⁰International Gay and Lesbian Human Rights Commission (2007) 3.

¹⁸¹As amended by Act 17 of 1996.

¹⁸²Zambia C “Constitutional Recognition of Non-Discrimination on the Basis of Sexual Orientation” available at <http://www.oblogdeoblogda.wordpress.com/2012/01/21/gay-zambia-constitutional-recognition-of-non-discrimination-on-the-basis-of-sexual-orientation/> (accessed on 1 April 2012).

¹⁸³Zambia C “Constitutional Recognition of Non-Discrimination on the Basis of Sexual Orientation” available at <http://www.oblogdeoblogda.wordpress.com/2012/01/21/gay-zambia-constitutional-recognition-of-non-discrimination-on-the-basis-of-sexual-orientation/> (accessed on 1 April 2012).

end, article 23 (1) of the Zambian Constitution provides “that no law shall make any provision that is discriminatory either of itself or in its effect”. In addition, article 23(2) of the Constitution reads that

“no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public”.

The principle of non-discrimination enshrined in article 23 of the Zambian constitution, outlaws differential treatment of a person or group of persons based on his or her particular status or situation such as race, colour, sex, language, religion, political and other opinion, national or social origin, property, birth or other status such as age, ethnicity, disability, marital, refugee or migrant status.¹⁸⁴

In Zambia the right to equality involves every person enjoying civil, political, social, economic and cultural rights in the same way irrespective of who they are or whatever situation they may be in.¹⁸⁵ Certainly, it is clear that article 23 of the Zambian Constitution implies that “the right to equality” means that everyone in Zambia should enjoy the fundamental rights and freedoms listed in the Bill of Rights without any unfair discrimination.¹⁸⁶

However in spite of the Zambian Constitution’s strong anti-discrimination provisions, sections 155, 156 and 157 under Chapter 87 of the Zambian Penal Code which criminalises same-sex sexual conduct in private between consenting adults still manages to not only promote discrimination against homosexual persons in the country but also contravenes article 2(1), 17 and 26 of the ICCPR.¹⁸⁷

¹⁸⁴Article 23(3) defines “discrimination” as any “different treatment to different persons attributable, wholly or mainly to their respective descriptions by race, tribe, sex, place of origin, marital status, political opinions colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description”. See also *Legal Resources Foundation v Zambia, African Commission on Human and Peoples Rights, Communication No.211/98 (2001)*.

¹⁸⁵International Gay and Lesbian Human Rights Commission *The Violations of the Rights of Lesbian, Gay, Bisexual and Transgender Persons in Zambia* (2007) 4.

¹⁸⁶International Gay and Lesbian Human Rights Commission (2007) 4.

¹⁸⁷International Gay and Lesbian Human Rights Commission (2007) 4.

As a state party it is clear that Zambia has voluntarily agreed to be bound by provisions in the ICCPR, and it would appear that where Zambian laws, such as the Constitution, don't sufficiently provide for the promotion and protection of human rights, one can turn to the ICCPR to make-up for what is lacking in the domestic law.¹⁸⁸ Indeed, Zambia is a signatory to major regional and international treaties protecting Human Rights and in terms of these treaties has an obligation to respect, safeguard and realise the human rights of all citizens, but these provisions have no effect in Zambia if they are not integrated into the domestic legislation.¹⁸⁹

What one observes in Zambia is that the violation of the rights of members of the LGBT community carries on relentlessly, despite the Zambian government declaring their acceptance of fundamental human rights principles by ratifying them at both regional and international level.

3.5 What about the right to culture?

According to a prominent blogger and social activist by the name of Sara,

“[i]ndividuals and organisations would do well to respect each other’s laws, culture and freedom of conscience. The human rights treaties should not be used as a tool to push a particular ‘right’ at the expense of another. Surely a nation and its people have a “right” to follow their collective conscience?”¹⁹⁰

In Africa, culture has been thought to be the basis of society and development, incorporating the values, customs and characteristics of various people, and promoting communication and discussion amongst people.¹⁹¹ Certainly, Africa’s fight for freedom from colonial rule can be argued to have also been a fight for its identity and cultural heritage as well as a fight for respect for human rights for the reason that the goal of colonialism in Africa was to suppress African cultures and the rights of African

¹⁸⁸International Gay and Lesbian Human Rights Commission (2007) 4-5.

¹⁸⁹Chanda A “Zambia” in Christof Heyns (ed)*Human Rights in Africa* (2004) 1685.

¹⁹⁰Sara “Thoughts on UN Secretary General, Ban-Ki Moon’s recent visit to Zambia” available at <http://www.thebestofzambia.com/2012/03/thought...> (accessed on 31st March 2012).

¹⁹¹Gawanas B “The Implementation of international and regional human rights instruments in the Namibian Legal Framework” in Bosl A and Diesho J *Human Rights in Africa: Legal Perspectives on their protection and promotion* (2009) 135-162.

people.¹⁹² Accordingly, it would be wrong to argue, that culture has no place in the human rights discourse.¹⁹³ At the moment it is evident that Africa is once again faced with having to defend its cultural legacy against the influences of globalisation and Western lifestyles on traditional modes of living and social values.¹⁹⁴

Notwithstanding this, it is suggested that there are increased efforts to counter economically motivated interests in globalisation through policies of weighing Western influences against the dominant rules found in given cultures.¹⁹⁵ Interestingly, this has meant the questioning of the notion of universality of human rights.¹⁹⁶

The right to culture is mentioned in the UDHR article 22¹⁹⁷ and 27 (1),¹⁹⁸ article 27 of ICCPR,¹⁹⁹ and article 1(1),²⁰⁰ article 3,²⁰¹ article 6(2),²⁰² and article 15 of the ICESCR.²⁰³

The idea that a people, culture or ethnic group are to be evaluated on the basis of its own values and norms of behaviour and not on the basis of those of another culture or

¹⁹²Gawanas (2009) 141.

¹⁹³In fact in accordance with the human rights discourse, and in order to guarantee the protection of African cultures, the Organisation of African Unity adopted the African Cultural Charter in 1976. The African union adopted similar cultural protections under the Nairobi Declaration of 2005 and Algiers Declaration in 2008.

¹⁹⁴Gawanas (2009) 142.

¹⁹⁵Hinz M "Human Rights between universalism and cultural relativism? The need for anthropological jurisprudence in the globalising world" in Bosl A and Diesho J *Human Rights in Africa: Legal Perspectives on their protection and promotion* (2009) 3-32.

¹⁹⁶Cultural and social diversities and particularities are referred to in order to show that they don't provide for the necessary societal ground for the alleged universality of human rights.

¹⁹⁷Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

¹⁹⁸Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

¹⁹⁹In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

²⁰⁰All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

²⁰¹The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

²⁰²The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

²⁰³See Article 15(1) (a), (2) and (4).

ethnic group, can be understood as cultural relativism.²⁰⁴ Simply, each culture must be observed in terms of its own structure and values, instead of being rated by the standards of some other society exalted as absolute.²⁰⁵ Accordingly, cultural relativism argues that human values, far from being universal, differ a great deal according to different cultural viewpoints.²⁰⁶ In fact it is apparent that some would apply this belief to the promotion, protection, interpretation and application of human rights which could be interpreted differently within different cultural, ethnic and religious traditions as a result, human rights are culturally relative rather than universal.²⁰⁷ In other words, the promotion and protection of human rights observed as culturally relative would only be subject to State discretion, rather than be imposed through international legal obligations.²⁰⁸

Nevertheless and without disregarding the place of the right to culture under international human rights, the cultural relativism argument could potentially pose a dangerous threat to the effectiveness of international law and the international system of human rights that has been carefully created over the years.²⁰⁹ Furthermore, it is evident that where cultural tradition alone influences states like Zambia's compliance with international standards, then widespread disregard, abuse and violation of human rights is given legitimacy.²¹⁰ In addition, United Nation Secretary General Ban Ki Moon has stated that

“as men and women of conscience we reject discrimination in general and in particular discrimination based on sexual orientation and gender identity....where

²⁰⁴ Cultural relativism suggests that every society has its own moral code to guide members of that society, but that these values are of worth to those who live by them, though they may differ from our own. Juang R *Africa and the Americas Culture, Politics and History* (2008) 17.

²⁰⁵ Ayton-Shenker D “The challenge of Human Rights and Cultural Diversity” available at <http://www.un.org/rights/dpil627e.htm> (accessed on 11th May 2012).

²⁰⁶ Ayton-Shenker D “The challenge of Human Rights and Cultural Diversity” available at <http://www.un.org/rights/dpil627e.htm> (accessed on 11th May 2012).

²⁰⁷ Hinz (2009) 6.

²⁰⁸ Ayton-Shenker D “The challenge of Human Rights and Cultural Diversity” available at <http://www.un.org/rights/dpil627e.htm> (accessed on 11th May 2012).

²⁰⁹ By rejecting or disregarding their legal obligation to promote and protect universal human rights, States advocating cultural relativism could raise their own cultural norms and particularities above international law and standards. Capps (2009) 94.

²¹⁰ Capps (2009) 95.

there is a tension between cultural attitudes and universal human rights, human rights must carry the day.”²¹¹

A number of international treaties, most notably, the Convention for the Elimination of Discrimination against Women (CEDAW),²¹² deal specifically by the claim that the right to equality and non-discrimination could be justified with reference to existing cultural traditions. These treaties do not accept the cultural defence of human rights violations. On the contrary, article 5 of CEDAW places an obligation on state parties, like Zambia, to

“take all appropriate measures to modify the social and cultural patterns of conduct of men and women with a view to achieving the elimination of prejudices and customary and all other practices which are based on [...] stereotyped roles for men and women”.

3.6 Conclusion

This section argues that the extensive criminalisation of consensual sexual conduct between same-sex partners in the Zambian Penal Code violate the Zambian Constitution and Zambia’s international law obligations. Those same obligations mean that these violations cannot be justified with an appeal to the human rights to culture and self-determination. The sodomy laws in Zambia are best understood as relics inherited from colonial times and English imperial law. These laws have long since been repealed by the former colonial master. There is no justification for their continued application in Zambia. Not only are these laws value and a violation of the rule of law, they also violate the constitutional right to equality and non-discrimination.

²¹¹Human Rights Committee General Comment 18 available at <http://www2.ohchr.org/english/bodies/hrc/comments.htm> (accessed on 24th May 2012).

²¹²Zambia ratified the Convention on 21 June 1985.

SECTION FOUR:

SODOMY LAW IN NAMIBIA

4.1 Positive Law in Namibia

Most of what creates the body of Namibian law is not codified and must be extracted from the evolving body of common law jurisprudence.²¹³ As a result, it is important to distinguish between the criminalisation of sodomy under Namibian common law and Namibian statute law.

4.1.1 Sodomy under Namibian common law

Namibia inherited its common law from South Africa. In the 17th century, Dutch colonisers in southern Africa brought about the Roman Dutch common law as part of its new legal regime.²¹⁴ The crime of sodomy under the newly introduced Roman-Dutch law was not only a criminal offence, but also included a list or sub-categories, if you will, of so-called “un-natural offences”.²¹⁵

The list of Roman Dutch law unnatural offences were controlled within a collection of non-procreative sexual practices, practices which it is evident comprised of sexual acts between men, sexual acts between women, bestiality, male-female anal intercourse and masturbation.²¹⁶

The Roman-Dutch law treated sodomy in a manner reflecting a belief rooted in Christian theology, that only those sexual acts were permissible which aimed at childbearing.²¹⁷ As South African jurist Edwin Cameron writes, under Roman-Dutch law “only

²¹³ Amoo S *An introduction to Namibian Law: Materials and Cases* (2008) 10.

²¹⁴ Burchell J and Milton J *Principles of Criminal Law* (2000) 16.

²¹⁵ Goodman (2001) 676.

²¹⁶ Burchell and Milton (2000) 638-642.

²¹⁷ International Gay and Lesbian Human Rights Commission (2003) 259.

male/female sexual acts that were directed to procreation were permitted, all other sexual acts....were cruelly punishable.”²¹⁸

Early Roman-Dutch law contained a complex of offences variously termed *sodomie*, *onkuisd tegen de natuur* (lewdness against nature) or in Latin *Venus monstrosa*. The word *sodomie* which was broadly defined came to succeed or include the other two.²¹⁹ A selection of early definitions from Dutch legal scholars highlights the broadness of the definition. For instance Joost Damhauder (1507-81) separated the offence of sodomy into three categories, namely self-masturbation, unnatural sexual acts between humans and bestiality and stated:

“When someone has committed sodomy with other people, with his own or opposite sex, the same are usually capitally punished with fire”.²²⁰

Carpzovius (1556-1666) held that

“He who wastes the sexual act when copulating with men against nature, having abandoned the use of nature, has he’s head cut off...for example when a man makes love to a woman in the wrong way, deliberately not inserting his member into her organ or not doing it in the correct manner”.²²¹

Some definitions were narrower. Huber (1636-94) maintained that only bestiality and unnatural intercourse between human beings were punishable and Simon van Leeuwan (1626-82) in addition excluded unnatural acts between males and females leaving only male-male acts and bestiality as criminal offences.²²²

²¹⁸Cameron E “Unapprehend Felons: Gays and Lesbians and the Law in South Africa” (1994) in Cameron E and Gevisser M (eds) *Defiant Desire: Gay and Lesbian Lives in South Africa* (1994) 91

²¹⁹In *S v Chikore* 1987 (2) Zimbabwe Law Reports 48 (High Court) at 50 , the court found that the word used in early Roman-Dutch law was “sodomy” and this term at that time, encompassed virtually any form of aberrant sexual behaviour. The crimes now known as sodomy and bestiality were included under this term and some authorities also included acts such as self-masturbation, oral intercourse, lesbianism, and many other such practices.

²²⁰Cited in *S v Kampher* 1997 (4) SA 460 (C).

²²¹Quoted in International Gay and Lesbian Human Rights Commission (2003) 259.

²²²*S v Kampher* 17.

It seems that the shame attached to these acts prevented an effective definition of what constituted the crime of sodomy.²²³

In the early 19th century, Holland had become part of a continent-wide codification movement in Europe.²²⁴ It is suggested that the codification movement in Europe allowed for very few opportunities for Dutch common law to progress within its colonial territories, consequently less of the Dutch Common Law was brought into the territory of South Africa.²²⁵ Adding to this, in around 1810, Napoleon Bonaparte occupied Holland and introduced the country to the French penal code, a generally more open-minded system of criminal justice that did not impose criminal sanctions for sodomy.²²⁶

Regardless of the legal developments in Holland, it is evident that none of these legal changes extended to the Cape Colony.²²⁷ Goodman argues that the codification initiatives experienced in Holland to some extent required the permanent detachment of the new Dutch common law from the Roman Dutch law in the territory of South Africa.²²⁸

Around 1795 and again in 1806 the British occupied the Cape Colony. Although English law slowly began to infiltrate the Cape Colony, Roman Dutch law remained the law of the land in accordance with the rules of colonial succession²²⁹. The deep moral value attached to the legal promotion of procreation, and the vagueness raised by silence in respect of the topic of sodomy would remain regular features in the Roman Dutch crime of sodomy in southern Africa.²³⁰

²²³International Gay and Lesbian Human Rights Commission (2003) 259.

²²⁴Goodman (2001) 677.

²²⁵Goodman (2001) 677.

²²⁶De Vos P "On the Legal Construction of Gay and Lesbian Identity and South Africa's Transitional Constitution" (1996) 12 SAJHR 274.

²²⁷De Vos (1996) 274.

²²⁸Goodman (2001) 678.

²²⁹Hosten WJ et al *Introduction to South African Law and Legal Theory* (1997) 21.

²³⁰Ironically, 3 years afterward, the Netherlands now part of the French empire-saw the introduction of the Napoleonic Code, which abolished Roman-Dutch law altogether and decriminalised all same-sex sexual acts. This repeal had no impact at the Cape the British conquest ensured that a lopped and frozen form of Roman-Dutch law, and the crime of "sodomy", remained in place at the tip of Africa. See International Gay and Lesbian Human Rights Commission (2003) 260.

In 1920, a year after the German defeat in World War I, the then League of Nations presented the former German colony of South West Africa to South Africa as a territory to be mandated.²³¹ The chief feature of the South African administrative rule in Namibia was the establishment of a stable legislative framework.²³² It is for this reason that the South African administration made Roman Dutch law, as existing and applied in the Cape Province as of 1920, the common law of South West Africa.²³³ Consequently the common-law offence of sodomy and the related crime of “unnatural offences” became criminalised in South West Africa, today known as Namibia.

As seen above, historically sodomy was the legal term used in civil law systems to describe all manner of “unnatural sexual offences” which included masturbation, oral sex, anal intercourse between people of the same and opposite sex, sexual intercourse with animals, and even heterosexual intercourse between Christians and Jews.²³⁴ Over time, much of the wide-ranging content of what constituted “sodomy” fell away and it is evident that the above prohibited activities were divided into three separate crimes, namely sodomy, bestiality and a residual category of “unnatural sexual offences”.²³⁵ For our purposes it is only necessary to focus on the first and last of these common law offences.

The crime of sodomy in Namibia, as inherited from South African Roman-Dutch common law, involves the unlawful and intentional sexual intercourse per annum between human males. The elements of the crime of sodomy are unlawfulness, intercourse²³⁶, two males,²³⁷ and intention.²³⁸ The nature and purpose of the

²³¹After WWII, the mandate became one of the most disputed issues in international law. South Africa attempted to incorporate the territory as its fifth province, while both the UN and the International Court of Justice at The Hague refused to recognize its continuing occupation. A long war of liberation resulted in the territory's independence as Namibia in 1990. International Gay and Lesbian Human Rights Commission (2003) 265.

²³²International Gay and Lesbian Human Rights Commission (2003) 265.

²³³Amoo (2008) 15.

²³⁴Hubbard D “Gender and Sexuality: The Law Reform Landscape” in La Font S and Hubbard D *Gender and Sexuality in Namibia*(2007) 99-128.

²³⁵Hubbard (2007) 120.

²³⁶The crime is committed only by the insertion of the penis of the one party in the anus of the other. Other forms of sexual gratification between males do not constitute the crime of sodomy. See Burchell and Milton (2000) 634.

punishment of sodomy constituted the application of the disciplinary sanction to homosexual sex between males.²³⁹

Even though anal intercourse between males is all that is left of the once wide characterisation of “sodomy”, the common law crime of “unnatural sexual offences” criminalises mutual masturbation, sexual gratification obtained by friction between the legs of another person’ and other unspecified sexual activity between men.²⁴⁰ It is quite evident that none of the above mentioned sexual acts are illegal if they take place between a man and a woman, or between two women.²⁴¹ In fact there are few reported cases involving lesbians in Namibia and not a single one in which women have been prosecuted for sexual acts with other women; simply sexual activity between women seems to generally attract less attention.²⁴²

4.1.2 Sodomy under Namibian Statute Law

The apartheid-era legislation in South Africa directed at homosexual conduct did not apply in Namibia.²⁴³ The South African administration in South West Africa did however enact a “Combating of Immoral Practices Act”.²⁴⁴ The Combating of Immoral Practices Act was mainly aimed at heterosexual conduct; but it also defined sexual intercourse between two people who were not partners in a civil or customary marriage as “unlawful carnal intercourse”.²⁴⁵ In 1989, after a war of liberation and international pressure South Africa withdrew its administration from Namibia and in 1990 the Namibian Constitution

²³⁷The crime is committed only where the parties to the act are human males. Thus the crime is not committed if one party is a human female. Boys under the age of 14 years are capable of committing the crime. See Burchell and Milton (2000) 634.

²³⁸The accused must intend to have intercourse per annum and must know or foresee that the other party does not consent or is under age. If he does have such intercourse but by mistake, he lacks fault. See Burchell and Milton (2000) 634.

²³⁹Snyman *Criminal Law* (2002) 438.

²⁴⁰Hubbard (2007) 120.

²⁴¹Under Roman-Dutch law female homosexuality was generally not punishable. See Burchell and Milton (2000) 636 see also Hubbard (2007) 120.

²⁴²Hubbard (2007) 120 suggests that a possible reason why sexual contact between women in the country was never punishable was the general marginalisation of women.

²⁴³ Diane Hubbard “Why the Law on Sodomy should be Repealed” (2000) available at http://www.lib.ohchr.org/HRBodies/UPR/.../NA/JS1_JointSubmission_eng.pdf (accessed on 30 November 2011).

²⁴⁴Act 21 of 1980.

²⁴⁵La Font S “Overview: Gender and Sexuality in Namibia” in La Font S and Hubbard D *Gender and Sexuality in Namibia* (2007) 1-22.

was implemented. In 2000, the Namibian legislature enacted the Namibian Combating of Rape Act.²⁴⁶ This Act covered a wide range of intimate sexual conduct in circumstances that involve force or coercion, including oral sex, anal sex and genital stimulation between people of the same sex or different sexes. The enactment of the Combating of Rape Act was significant in that it has expanded the definition of rape to include forcible sodomy.²⁴⁷ All non-consensual sex or sexual violence in Namibia must be prosecuted under the Combating of Rape Act. Notwithstanding this, it is evident that because of legislation like the Combating of Rape Act, authors such as Hubbard argue that the common law crimes of sodomy and “unnatural sexual offences” are now by law relevant only to sexual acts amongst consenting male adults in Namibia.²⁴⁸

4.1.3 The non-protection of same-sex relationships in Namibia

One of the only clear legal protections ever afforded to gays and lesbians in Namibia was in the Labour Act 6 of 1992, which prohibited discrimination or harassment on the basis of sexual orientation has been removed from the corresponding provision in the successive Labour Act 2007.²⁴⁹ In addition, with the enactment of the Combating of Domestic Violence Act 4 of 2003, which is explicitly limited to romantic relationships between people of “different sexes”, the legal disapproval of gay and lesbian relationships became more evident in Namibia.²⁵⁰

4.1.4 Why Criminalise Homosexuality in Namibia?

²⁴⁶The Combating of Rape Act, 8 of 2000.

²⁴⁷In terms of the Act rape includes the insertion of the penis into the mouth or anus of another person. Legal Assistance Centre (LAC) *Rape in Namibia: An assessment of the Operations of the Combating or Rape Act 8 of 2000*(2007).

²⁴⁸Hubbard (2007) 120.

²⁴⁹The Labour Act, 1992 (No.6 of 1992) laid foundation for sound labour practices in Namibia. See Horn N “International human rights norms and standards: the development of Namibian case and statutory” in Horn N and Bosl A *Human Rights and the rule of law in Namibia* (2007) 141-164 see also Hubbard (2007) 119.

²⁵⁰Section 3 of the Act. The Deputy Minister noted that “the Bill covers cohabiting couples but explicitly emphasised that the Bill ‘does not give protection to any homosexual relationships’”, quoted in Hubbard (2007) 121.

It is reported that thirty-eight out of fifty countries in Africa criminalise consensual homosexual sex.²⁵¹ It is contended that anti-homosexuality laws such as the ones found in many African countries sanction social and cultural authorities to label the homosexual person a criminal.²⁵² To this end, Gayle Rubin maintains that the realm of sexuality has its own politics that are centred on cultural, religious and conservative views.²⁵³

This statement seems reflected in Namibia where parliamentarians have cited the bible in parliament to argue against decriminalising sodomy laws.²⁵⁴ A former deputy Minister of Gender has stated that in Namibia homosexual relationships are not recognised by the Namibian customs or traditions.²⁵⁵ The former Minister of Home Affairs, Jerry Ekandjo has been reported as stating that homosexuality should be classified as a human wrong which must rank as sin against society and God.²⁵⁶ In addition, Hubbard contends in her work that even though

“the law on sodomy is seldom enforced with respect to consenting adults, this does not mean that it sits benignly in the law books dying of disuse. It has been recently cited by prison officials in Namibia as a justification for refusing to provide condoms to prisoners to prevent the spread of HIV. The argument is that since consensual sodomy is illegal, providing condoms might make prison officials accessories to crime”.²⁵⁷

²⁵¹Blandy F “Africans, face prison, intolerance and the death penalty” available at <http://www.telegraph.co.uk> (accessed on 25th January 2012).

²⁵²Blandy F “Africans, face prison, intolerance and the death penalty” available at <http://www.telegraph.co.uk> (accessed on 25th January 2012) see also *Romer v Evans US 620 (1996)* which reflected on how sodomy laws label the homosexual as criminal.

²⁵³Reddy V “Identity, Law, Justice: thinking about sexual rights and citizenship in post-apartheid South Africa” (2010) *Perspectives: Political Analysis and Commentary from Africa* 18-23.

²⁵⁴Adam and Eve have been argued to represent a symbol of heterosexual love in contrast to Sodom and Gomorra Hubbard (2007) 128.

²⁵⁵Hubbard (2007) 128.

²⁵⁶Currier A “Decolonizing the Law: LGBT organizing in Namibia and South Africa” (2011) 54 *Special Issue Social Movement/Legal Possibilities (Studies in Law, Politics and Society)* 17-41.

²⁵⁷Diane Hubbard “Why the Law on Sodomy should be Repealed” (2000) available at http://www.lib.ohchr.org/HRBodies/UPR/.../NA/JS1_JointSubmission_eng.pdf (accessed on 30 November 2011).

4.2 The constitutional status of the criminalisation of sodomy under Namibian law

It was mentioned above that sodomy is criminalised in Namibia under the common law. The constitutionality of these offences has not been challenged in the Namibian courts and the constitutionality of these offences remains a hotly contested and undecided question.

Namibia has an impartial Bill of Rights which enshrines fundamental human rights and freedoms that are incorporated into chapter three of the country's constitution. These fundamental rights include the right to equality (article 10) and the right to privacy (article 13). In terms of article 5 of the Namibian Constitution,

“all fundamental rights and freedoms enshrined in Chapter 3 are obliged to be upheld and respected by all organs of the government legislature, executive, judiciary and all its agencies.”

In addition, article 24 (3) of the Namibian Constitution spells out a number of rights which can't be derogated from or suspended even if a state of emergency has been declared. These include the protection against discrimination on any ground as stipulated in article 10.²⁵⁸ The accepted limitations under specific articles of the Namibian Constitution, together with the general nature of the provisions of a constitution, prima facie require the exercise of the constitutional jurisdiction of the courts, in interpreting the grey areas of the Constitution, as to what constitutes decency or morality for example.²⁵⁹

4.3 Does equality protect sexual orientation in Namibia?

Ever since Namibia's independence, the courts have been called upon to interpret cases associated with the determination of the constitutionality of legislative provisions

²⁵⁸Bangamwabo (2008) 177.

²⁵⁹Amoo S and Skeffers I “The Rule of Law in Namibia” in Horn N and Bosl A (eds) *Human Rights and the Rule of Law in Namibia* (2008) 17-38.

or practices relating to corporal punishment, the restraining of prisoners by chaining them to each other by means of metal chains and homosexual relationships.²⁶⁰

It has been mentioned earlier in this paper that article 26 of the ICCPR prohibits any discrimination on any of the following grounds; race, sex, religion, colour and language. This non-discrimination provision is reflected by article 10 of the Namibian constitution. Certainly, article 10 which is found under Chapter 3 of the Bill of Rights in the Namibian constitution provides that:

“all persons shall be equal before the law and that no persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status”.

The Namibian constitution clearly provides for freedom from discrimination on the basis of sex, but at the same time it is not always clear to what degree the provision prohibiting discrimination based on sex is applied.²⁶¹ For example in the case of *Muller v President of the Republic of Namibia*,²⁶² a man sought to acquire the surname of his wife upon marriage but was refused to do so because the practice doesn't apply to men.

Whether the prohibition of discrimination on the grounds of sexual orientation is protected by the constitution is an issue which was addressed in *Chairperson of the Immigration Selection Board v Frank*.²⁶³ The case centred on the refusal of the Immigration Board to grant one Elizabeth Frank permanent residence. Ms Frank contested their decision by arguing that their decision was unfair and discriminatory as it was based on her lesbian relationship with the second respondent.²⁶⁴

The Supreme Court hearing the *Frank v Chairperson of the Immigration Selection Board* case on appeal overruled the argument that the immigration board had violated

²⁶⁰Amoo and Skeffers(2008) 22.

²⁶¹Amoo and Skeffers (2008) 23.

²⁶²*Muller v President of the Republic of Namibia*2000 (6) BCLR 655 (NMS).

²⁶³*Chairperson of the Immigration Board v Frank and Another* 1999 NR 257.

²⁶⁴The court set aside the decision of the Immigration Control Board to refuse a permanent residence permit to the first respondent and is set aside and referred the issue back to the Board to reconsider. The court came to this decision by considering the procedure the Board had used.

the applicants' fundamental rights to equality by failing to grant their lesbian relationship equal status with the relationships of men and women who are legally married.²⁶⁵

Despite the courts' final decision to not grant equal status between homosexual and heterosexual relationships, Judge O'Linn was of the opinion that it should have been equated with a universal partnership which is recognised under Namibian law.²⁶⁶ It is however evident that the concept of "universal partnership" as employed by Judge O'Linn was never depended upon by the respondents, the appellants or even the court, instead what was explicitly relied upon here was the lesbian relationship between the respondents.

The Supreme Court's approach to constitutional interpretation in this case was to start with the "plain meaning" of the words in the relevant constitutional provision, guided by "legal history, traditions and usages of the country concerned" followed by a "value judgment in any case where the constitutional provision is not absolute".²⁶⁷

In making such a value judgment, the court stated that it must look to the moral standards, established beliefs, social conditions, experiences and perceptions of the Namibian people, as expressed in their national institutions and constitutions.²⁶⁸

In addition, the court found that it was correct to reflect upon the developing consensus of values in the international community, but at the same it noted that local customs should be the main consideration in order to avoid giving the idea that the Namibian courts are imposing foreign values on the Namibian people.²⁶⁹

²⁶⁵ *Chairperson of the Immigration Board v Frank and Another* (1999) NR 257 at para133B.

²⁶⁶ Judge O'Linn held that "if a man and a woman can tacitly conclude such a partnership because of the aforesaid equality provision in the Constitution and the provision against discrimination on the grounds of sex I have no hesitation in saying that the long terms relationship between applicants in so far as it is a universal partnership, is recognised by law. Should it be dissolved the court will divide the assets of the parties according to the laws of partnership." *Chairperson of the Immigration Board v Frank: and Another* (1999) NR 257.

²⁶⁷ *Chairperson of the Immigration Board v Frank: and Another* (1999) NR 257 at 133B-136A.

²⁶⁸ Para.137. see also *Ex Parte Attorney General, Namibia: In Re: Corporal Punishment by Organs of State* (1991) NR 178 at para197 where it was stated that the one major and basic consideration in arriving at a decision involves an enquiry into the generally held norms, approaches, moral standards, aspirations and a host of other established beliefs of the people of Namibia.

²⁶⁹ *Chairperson of the Immigration Board v Frank and another* (1999) NR 257at para137.

The court identified “the Namibian parliament, courts, tribal authorities, common law, statute law and trial law, political parties, news media, trade unions, established Namibian churches and other relevant community-based organisations” as sources of expressions of Namibian values”.²⁷⁰

In applying a value-judgement to the issue before it, the court in effect noted that the Namibian constitution does not make any explicit provision for the recognition of homosexual relationships nor does it make homosexual relationships being comparable to heterosexual marriages, in addition the constitutional term “family” clearly does not contemplate that a homosexual relationship could be regarded as “natural” or “fundamental” group unit.²⁷¹

In effect, it is evident that by ruling that article 10 does not explicitly protect homosexual relationships, the Supreme Court found that its decision was in line with Namibian trends, contemporary opinions, norms and values in respect of homosexual relationships.²⁷² The Supreme Court of Namibia found that discrimination on the basis of sexual orientation, as it was presented in the setting before it did not amount to “unfair discrimination”, saying that equality before the law did not mean equality before the law for each persons’ sexual relationships.²⁷³

The South African Constitutional Court decided the *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*, a case very similar to the Frank case but with an opposite outcome, by holding that it is unconstitutional for immigration law to favour non-citizen spouses over non-citizen same-sex partners.²⁷⁴

²⁷⁰ *Chairperson of the Immigration Board v Frank and another* (1999) NR 257 at para137

²⁷¹ The court held that in regard to the protection of the "family", "...the Namibian Constitution in sub-article (3) of Article 14 of the said Constitution, provides for the protection of the family as a fundamental right in regard to which the duty to protect is laid upon Society and the State. But the "family" is described as the "natural" and "fundamental" group unit of society. It was clearly not contemplated that a homosexual relationship could be regarded as "the natural group unit" and/or the "fundamental group unit". At para.138.

²⁷² The main evidence cited for this conclusion was the absence of a legislative trend towards the recognition of same-sex relationships in Namibia. See Hubbard D “Ideas about Equality Gender, Sexuality and the Law” in La Font S and Hubbard D *Gender and Sexuality in Namibia* (2007) 88-99.

²⁷³ The Supreme Court in relying on the words of the court in *Muller v President of the Republic of Namibia and Another*, 1995 (9) BCLR655 (NMS), held that “To put it another way, it is only unfair discrimination which is constitutionally impermissible, and which will infringe article 10 of the Namibian Constitution”.

²⁷⁴ *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs* 2000 (2) SA 1

Granted the constitutional framework in South Africa is unlike Namibia's in that discrimination on the grounds of sexual orientation is explicitly forbidden.²⁷⁵ Nevertheless, in contrast to the Frank case, the South African court didn't look for the authorisation of public opinion but found, on the contrary that it is important to give constitutional protection to those who are already vulnerable because of societal prejudice.²⁷⁶

Notwithstanding this and despite its decision to not equate homosexual and heterosexual relationships, the Supreme Court in the Frank case highlighted that nothing in its judgment "justifies discrimination against homosexuals as individuals, or deprives them of the protection of other provisions of the Namibia Constitution".²⁷⁷

It has been over a decade since the Supreme Courts' decision in the *Frank* case, and the Namibian Courts have yet to be presented with another similar case that specifically deals with the constitutionality of same sex sexual relationships, as opposed to procedural fairness. Certainly the *Frank* case is not without some criticisms. For one, Horn refers to the *Frank* judgment as a "debacle".²⁷⁸ And authors such as Hubbard suggest that the Supreme Courts reliance on public value is actually a reliance on "male dominated public opinion for guidance".²⁷⁹

Another criticism one could formulate is how the decision to not equate homosexual and heterosexual relationships in Namibia is contrary to the Constitution of Namibia. To this end, in terms of article 144 of the Constitution

"Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia."

²⁷⁵ See article 9 of the South African Constitution.

²⁷⁶ National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs CCT10/99 (1999) ZACC 17, 2000 at para29D.

²⁷⁷ Para156.

²⁷⁸ Horn "International Human Rights norms and standards: the development of Namibian Case and Statutory Law" in Horn N and Bosl A *Human Rights and the Rule of Law in Namibia* (2008)164.

²⁷⁹ Hubbard (2007)90.

In other words in terms of article 144, all human rights instruments ratified or acceded to by Namibia are part of Namibian domestic law and because of this article international laws should be applied as though they were Namibian laws, unless they are in conflict with an existing Act of Parliament, or where they're not in conformity with the supreme law of the land, the Constitution.²⁸⁰

In Section two above, it was argued that international human rights standards recognise the protection of sexual orientation. This protection, ultimately because of article 144, also forms part of Namibian law. But when one considers the findings of the Supreme Court in the *Frank* case as per the same-sex relationship in question, it is clear that sexual orientation, in violation of international law, isn't afforded that protection in Namibian society.

Indeed the Supreme Court correctly highlighted in the *Frank* case that an issue such as the "lesbian relationship" in question is a very controversial issue in Namibia just as it is in all or most of Africa.²⁸¹ So while it is suggested that article 10 of the Namibian constitution provides strong legal framework for gender equality in the country and even though the constitutional guarantees of equality are strong, it is apparent that they do not work automatically.²⁸² In fact, according to article 69 of the Namibian Constitution,

“all laws in force at the date of independence remain in force until they are explicitly repealed or amended by parliament or declared unconstitutional by a competent court for purposes of continuity and clarity”.

As such the honourable court held that the Namibian Parliament, in acting as the chosen representation of the people of Namibia, is one of the most important institutions to express the current day values of the people, and it is through them that laws such as the common law on sodomy if found to be unconstitutional, should be changed through Acts of Parliament.²⁸³

²⁸⁰ Bangamwabo (2008) 176.

²⁸¹ Para 156.

²⁸² Hubbard (2007) 90.

²⁸³ Para 156.

4.4 Conclusion

It is difficult to truly express the current values of the Namibian people, but it is clear especially when one considers cases like *Frank* case or when one considers how the provision protecting sexual orientation from discrimination was removed from the upgraded Labour Act of 2007, that Namibia on the whole has become less open-minded and less delicate in respect of human rights issues.²⁸⁴

As a result, the question of whether homosexual relationships should be recognised in Namibia and if so to what extent, is a serious and difficult humanitarian, cultural, moral and most important, constitutional issue which will inevitably take time to resolve.²⁸⁵

And while Namibian law has evolved to enact laws that criminalise forced sodomy, it is maintained that a repeal of the common law crime of sodomy and “unnatural sexual offences” would have been fundamentally symbolic in effect, for the reason that consensual sodomy is not prosecuted in practice.²⁸⁶ The failure to remove the common law crime of sodomy is almost certainly an indication that homosexuality is not politically acceptable to the majority of Parliamentarians in Namibia.²⁸⁷

In spite of a high degree of legal certainty in Namibia, the common law crime of sodomy as well as the status of sexual orientation in the country seems to pose a challenge to that certainty. It is contended that even though Namibia has a somewhat liberal constitution, Namibian society is very conservative, and it is for this reason that it is uncertain if or when a law on anti-discrimination on the ground of sexual orientation will be considered.²⁸⁸

²⁸⁴Horn (2008) 164.

²⁸⁵Hubbard (2007) 99.

²⁸⁶Hubbard (2007) 120.

²⁸⁷Hubbard (2007) 121.

²⁸⁸Bangamwabo (2004) 175.

SECTION FIVE:

CONCLUSION

“It is important to start the analysis by asking what is really being punished by the anti-sodomy laws. Is it an act, or is it a person? Outside of regulatory control, conduct that deviates from some punishment when it is violent, dishonest, treacherous or in some other way disturbing of the public peace or provocative of injury. In the case of male homosexuality however, the perceived deviance is punished simply because it is deviant. It is repressed for its perceived symbolism rather than because of its proven harm. Thus it is not the act of sodomy that is denounced...but the so-called sodomite who performs it, not any proven social damage, but the threat that same-sex passion in itself is seen as representing to heterosexual hegemony”

-South Africa Constitutional Court Justice Albie Sachs.²⁸⁹

The arguments presented in this paper for the decriminalisation of sodomy laws, centre on the rights to equality, non-discrimination and privacy, as documented under international human rights law treaties. And even if all the arguments for the decriminalisation were universally accepted, the reality of the matter is, unfortunately, that change does not come easily.

Almost every international and regional human rights treaty is drafted in an open-ended manner, so as to allow for the inclusion of rights not envisaged at the time of drafting these documents.²⁹⁰ Human Rights treaty bodies and courts play no official role in the development of international treaty law, but it is argued that just as constitutional courts contribute to our understanding of national constitutions as “living” texts that decisions made by international human rights treaties and bodies must be interpreted as though

²⁸⁹ *National Coalition for Gay and Lesbian Equality v. Minister of Justice* 1999(1) SA 6 (CC) 108.

²⁹⁰ International Commission of Jurists (2010) 12.

they were “living texts” by the international community especially in light of present-day conditions.²⁹¹

In addition state obligations under international human rights law are threefold, in that states must respect, ensure and fulfil human rights.²⁹² To this end a state observes the obligation to respect the recognised rights by not violating them.²⁹³ In terms of ensuring these rights a state is to take the necessary steps, in accordance with its constitutional process and provisions of the covenant to adopt such legislative or other measure which are necessary to give effect to these rights.²⁹⁴

In addition, examinations of international constitutional analysis have demonstrated that constitutional protections enforced by the judiciary are particularly necessary to protect the unpopular rights of minorities like gay, lesbian and bisexual people.²⁹⁵ At the same time, it is accepted that parliamentarians as the representatives of the majority, can in theory be trusted upon to pass laws based on the will and values of the majority.²⁹⁶

The right to equality, non-discrimination and privacy are the basis for repealing sodomy laws. While these rights are all present in the South African, Zambian and Namibian constitutions, they are interpreted differently. South Africa is a liberal country and this is reflected in the interpretation of its constitution. Although Namibia and Zambia have fairly progressive constitutions, it is clear that these societies are more conservative when it comes to private matters such as sexual activity. If anything, what this research concludes is that it is up to Zambian and Namibian courts and legislature to take action to bring the criminal law up to date with international norms and conceptions on private and sexual activity because they are part of a global human rights culture. On the one

²⁹¹The authoritative jurisprudence of these bodies is part of international law. International Commission of Jurists (2010) 12.

²⁹²Weiwei L ‘Equality and non-discrimination under International Human Rights Law’ 2004 available at <http://www.mittendriundaussenvor.de/fileadmin/bilder/0304.pdf>. (accessed on 24th May 2012).

²⁹³International Lesbian, Gay, Bisexual and Trans Association *Non-Discrimination in International Law: A handbook for Practitioners* (2011) 18-20.

²⁹⁴Human Rights Committee General Comment No.18 available at <http://www2.ohchr.org/english/bodies/hrc/comments.htm> (accessed on 24th May 2012)

²⁹⁵Hubbard (2007) 99.

²⁹⁶Hubbard (2007) 99.

hand, while globalisation is inevitable, one finds that cultural relativism has contributed to the acceptance of cultures as the basis for maintaining certain values in society.²⁹⁷

Ultimately, it is the domestic constitutions and the courts that should be the sources of protection for the rights of those who are most vulnerable, often because they want to express an opinion or engage in practice which departs from society's existing norms.²⁹⁸

Sections 155 to 157 of the Zambian Penal Code criminalise any form of consensual sexual conduct in private between two consenting males or females. Sections 155 to 157 of the Penal Code are contrary to the equality principle and anti-discrimination clause of the Zambian constitution and violate articles 2(1), 17 and 16 of the ICCPR.²⁹⁹ Similarly, Namibia criminalises consensual same-sex conduct under inherited Roman Dutch laws. In both cases the arguments are that homosexuality is not part of the moral values and cultures of their societies, and in both cases the laws are present but are rarely enforced.

Fradella contends that many legislators feel there is no need to take sodomy laws off the book "because they are so rarely enforced".³⁰⁰ Nonetheless even where sodomy laws are only rarely enforced, the continued legal prohibition of same-sex sexual relations under the criminal law of any jurisdiction has serious consequences, certainly the mere existence of these laws poses the danger of random and harsh prosecutions for gay, lesbian and bisexual people in Zambia and Namibia.³⁰¹

In addition, and although not fully explored in this paper, it is clear that sodomy laws preserve homophobia both legally and within society at large. To this end, Dan Kahan writes that "sodomy laws even when unenforced express contempt for certain classes of citizens."³⁰² The contempt Kahan alludes to is not simply symbolic, because even without direct enforcement, the presence of destructive sodomy laws on the books still

²⁹⁷Hinz (2009) 5.

²⁹⁸Hubbard (2007) 99.

²⁹⁹International Gay and Lesbian Human Rights Commission *The Violations of the Rights of Lesbian, Gay, Bisexual and Transgender Persons in Zambia* (2007) 5.

³⁰⁰Fradella (2002) 285.

³⁰¹The fact is that sodomy laws strengthen social stigma against gay, lesbian, bisexual and transgender individuals and expose them to risk of deprivation of liberty, life, physical integrity and health.Fradella (2002) 285.

³⁰²Kahan D "The secret ambition of Deterrence" (1999) *Harvard Law Review* 413.

announces inequality, increases vulnerability and reinforces second class status in all areas of life.³⁰³ Existing sodomy laws such as the ones found in Zambian and Namibian law empower social and cultural defenders to call the homosexual a criminal.

The historical development of sodomy as a crime, as described in sections three and four, explains how we came to have the criminal justice system involved in private consensual sexual activity in the first place. It is maintained that the colonial era sodomy laws in the long run became not punishments for particular acts, but broad instruments of social control.³⁰⁴ Today, years after colonialism and the attainment of independence, it is argued that states like Zambia and Namibia use inherited sodomy laws to implicitly separate and brutalise those who act contrary to postulated moral values and cultures.³⁰⁵ The real impact of sodomy laws is the way they single out people for legal retaliation.

In conclusion, sodomy laws contradict the principles of equality, non-discrimination, privacy and democracy, specifically as these principles are reflected in national and international laws. It is for these reasons that it is suggested that countries like Namibia and Zambia should abolish all laws that criminalise consensual sexual activity among adults of the same-sex.

³⁰³For instance sodomy laws “disempower lesbians and gays in a range of contexts far removed from their sexuality (for example, in disputes with a neighbour or as victims or burglary).” Goodman (2001) 643.

³⁰⁴These foreign anti-homosexual laws began as invaders’ impositions of a foreign framework to subdue subject populations and have morphed over time into alleged mirrors of a supposedly originally moral sense. Gupta and Long (2008) 69.

³⁰⁵These are terms of division and tools of power. International Commission of Jurists (2010) 12.

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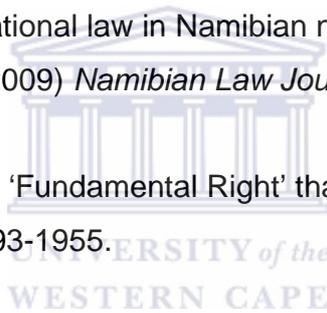
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