CULTURE AS A BARRIER TO THE REALISATION OF SEXUAL MINORITY RIGHTS IN ZIMBABWE.

By

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DECLARATION

I, Tanaka Muganyi declare that the thesis that I herewith submit for the doctoral degree, Doctor of Philosophy, at the University of the Free State, is my independent work, and that I have not previously submitted it for a qualification at another institution of higher education.

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DEDICATION

I dedicate this research to my lovely family; Privilege my beautiful wife and our angels Unathi Jamila, Kimberly Makanaka, Emmanuel Tinemufaro (Nevanji), you are an amazing support system. To my mom and dad Simon and Angeline. To all the marginalised and ostracised human beings, facing different struggles of emancipation and yet they remain unaccepted because of values that have been misconstrued and misinterpreted by the political dispensation in pursuit of the struggle of power. To all who did not choose to be who they are but have faced reprisal for being who they actually are.

"Willing Spirit"

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ABSTRACT

Homophobia is a well-known problem in Zimbabwe, as homosexuality is believed not to be part of African culture. As a result, 10% of the estimated homosexual individuals in Zimbabwe, most of them face abuse, discrimination and exclusion in all spheres of life. The Zimbabwean legal system of human rights is completely silent on sexual minority rights despite the Constitutional non-discrimination clause and international human rights and instruments that call for the protection of such rights. This study aims to explore the cultural barrier to the realization of sexual minority rights in Zimbabwe, with hopes to promote and pave the way for the progressive realisation of such rights. This research is a desktop study and makes use of a combined research method. Firstly, a critical perspective research method will be utilised to analyse how cultural and traditional values of Zimbabwe are a barrier to the full realisation of sexual minority rights. Secondly, a deconstructive perspective research method will be used to examine how the existing laws regarding homosexuality are wrongly constructed, which calls for change. Lastly, an analysis on avenues that can be taken in an effort to protect and realize sexual minority rights in Zimbabwe will be carried out.

ACRONYMS

ACHPR- African Commission on Human and People's Rights

ACHPR- African Commission on Human and Peoples' Rights

AIDS- Acquired Immune Deficiency Syndrome

AU- African Union

CAR- Central African Republic

CEDAW- Convention on Elimination of Discrimination Against Women

CESCR- Committee on Economic, Social and Cultural Rights

CRC- Convention on the Rights of the Child

CSO- Civil Society Organisation

EACJ- East African Court of Justice

ECOSOC- Economic and Social Council

GALZ- Gays and Lesbians of Zimbabwe

GC- General Comments

HIV- Human Immunodeficiency Virus

HRC- Human Rights Committee

HRC- Human Rights Council

ICCPR- International Convention on Civil and Political Rights

IECSR- International Covenant on Economic, Social and Cultural Rights

LBTI- Lesbian, Bisexual, Transgender and Intersex

LEGABIBO- Lesbians, Gays and Bisexuals of Botswana

LGB- Lesbian, Gay and Bisexual

LGBTI- Lesbian, Gay, Bisexual, Transgender and Intersex

LGBTQI+- Lesbian, Gay, Bisexual, Transgender, Queer and Intersex

MSM- Men Sex with Men

NGO- Non-Governmental Organisations

OAU- Organisation of African Unity

PPP- Public Participation Programme

SADC- Southern African Development Community

SANDF- South African National Defence Force

SERAC- Social and Economic Rights Action Centre

SOGI- Sexual Orientation and Gender Identity

SOGIEC- Sexual Orientation, Gender Identity and Expression, and Sex Characteristics

UDHR- Universal Declaration on Human Rights

UN- United Nations

UNHRC- United Nations Human Rights Conventions

UPR- Universal Periodic Review

ZANU-PF- Zimbabwean African Nation Union-Patriotic Front

ZAOGA- Zimbabwe Assemblies of God Africa

ZBC- Zimbabwe Broadcasting Cooperation

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CHAPTER ONE

1. INTRODUCTION

In some African countries, the gay, lesbian and bisexual individuals are subjected to serious discrimination, stigmatisation and prejudice.[1] This study pays specific attention to Zimbabwe because it is my home country. I have seen how LGB persons are treated by society, the government and their families, and how their rights are constantly violated. The legal landscape surrounding sexual minority rights in Zimbabwe is profoundly shaped and constrained by deeply entrenched cultural, religious, and historical narratives that have long prescribed strict heteronormative ideals, systematically excluding and marginalising lesbian, gay and bisexual, (LGB) individuals. The main reason for opposing homosexuality is the argument that it is un-African[2] and against religious norms and values.[3] At the heart of this exclusion is the dominant societal perception of marriage as inherently heterosexual and geared toward procreation, rendering other sexualities not merely invisible but actively criminalised through both prevailing customs and the formal provisions of the Constitution and criminal law. The brutality of such exclusions is illuminated by harrowing data documenting widespread abuse, discrimination, and family rejection experienced by LGB Zimbabweans,[4] in stark contradiction to the nation's own constitutional commitments to non-discrimination and inherent human dignity.

Homosexuals are persecuted, given long prison sentences and in some countries death penalties. As citizens of their respective countries, LGB persons have the same rights to privacy, dignity and equality and health as other citizens despite their sexual orientation. States and state actors have a responsibility to enforce criminal laws equally and take steps to prevent discrimination and amend existing laws to ensure that everyone is treated equally. Mo one individual has more rights than another. The main focus of this dissertation is on culture as a barrier to the realisation of sexual minority rights in Zimbabwe.

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[1] Cameron 2001: 118
[2] Ngwena 2018: 181
[3] Epprecht 1998: 631
[4] Deutsche, Why is homosexuality still taboo in many African Countries? https://amp.dw.com/en/why-is-homosexuality-still-taboo-in-may-African-countries/a-51528737 (Accessed 10 October 2025)

In Zimbabwe, being gay has been illegal since 1981 as part of the British South African Company Rule of Rhodesia.[5] Sexual orientation is not included in the prohibited grounds of discrimination in section 56(3) of the Constitution.[6] In addition to that, section 78(3) of the Constitution prohibits 'persons of the same sex' from marrying each other. This criminalisation of homosexuality was adopted from the colonial English law, although however English law later transformed and now accepts homosexuality. In Zimbabwe, this discrimination is still persisting. There is no recognition of same-sex sexual activities, or same-sex marriages and same-sex couples are not allowed to adopt children. Zimbabwe still upholds anti-LGBTQ+ laws even after the stepping down of the former President Robert Mugabe, in 2017 who was well known for his hate speech against gay people saying that they are 'worse than pigs and dogs.' Furthermore, section 73 of the Zimbabwe Criminal Law Codification and Reform Act criminalises consenting sex between same-sex adults.[7] This treatment has contributed to the relocation of Zimbabwean gays and lesbians to other countries that protect LGB rights.

This study, therefore, embarks on a rigorous examination of culture as a formidable barrier to the realisation of sexual minority rights, interrogating how historical myths, religious dogma, and postcolonial legal frameworks converge to normalise violence and justify the denial of fundamental rights. By situating the analysis within the broader discourse of African traditions and their contested interpretations, the chapter exposes the fallacy that homosexuality is a Western import, revealing instead the erasure and reinterpretation of precolonial tolerances by colonial legal codes and their modern-day successors.

In dissecting Zimbabwe's constitutional silence and the persistence of anti-sodomy laws, the study critically explores the failure of both the judiciary and the legislature to translate universal human rights commitments into tangible protection for sexual minorities, and challenges the legitimacy of national narratives that exalt culture at the expense of lived realities of exclusion and harm. Ultimately, by analysing these interconnected socio-legal dynamics through the lenses of critical and deconstructive

[5] Tayo 2018, From near death to detention in USA, this is the study of LGBTQ+ activist Edafe Okporo, https://www,simonandschuster.com/books/Asylum/Edafe.Okporo/9781982183745 (Accessed 10 October 2025)

[6] Constitution of Zimbabwe Amendment No.20 of 2013 [Zimbabwe]

[7] Chapter 9:23 of Act 23/2004

legal theory, the chapter not only advances fresh insights into the continuing struggles of LGB citizens but also boldly advocates for a recalibration of legal interpretation and policy grounded in both human rights law and a fundamentally pluralistic and inclusive vision of African identity.

1.2. Research Problem

Zimbabwean society's perception of marriage as a heterogeneous union for procreation overtly excludes and criminalises sexualities other than homosexuality.[8] This has seen religious thoughts and the Constitution under section 78, protecting the family as the natural and fundamental unit of society.[9] However, it is estimated that 10 percent of the Zimbabwean population identify as lesbian and gay.[10] As a result of the perceptions around marriage, most homosexual individuals face abuse, discrimination and exclusion in all spheres of life. The Armed Conflict Location & Event Data Project (ACLED) reported in 2025 that mob violence and sexual attacks by police and armed groups against LGBT+ people continue across African countries such as Nigeria, Kenya, and Ghana.[11] Sexual violence by state forces represents over 80% of these attacks, highlighting a disproportionate burden on LGBT persons. Many victims continue to face discrimination, family rejection, and lack of adequate protection.[12] The Zimbabwean system of human rights is silent on sexual minority rights despite the Constitutional non-discrimination clause.[13] Therefore, this research aims to explore African culture as a barrier to the realisation of sexual minority rights in Zimbabwe in a bid to promote and pave the way for the progressive realisation of such rights.

1.3. Conceptual clarifications

This study's conceptual clarification centers on a precise understanding of key terms and frameworks critical to analysing sexual minority rights within the Zimbabwean socio-legal context. Sexual minorities are conceptualised broadly to include individuals whose sexual orientations, or characteristics diverge from dominant heterosexual and

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[8] Hahlo 1985:21, Graig 1995:481, See also Mosikatsana:550

[9] The Constitution of Zimbabwe Amendment No 20 of 2013:Section 78

[10] Badza G, https://www.dandc.eu/en/article/homophobia-zimbabwe-hurts-mental-health-lgbti-people (Accessed 24th July 2025)

[11] Itai D 2025, South African activists demand action to stop anti-LGBTQ violence, https://www.washingtonblade.com/2025/06/10/south-african-activists-demand-action-to-stop-anti-lgbtq-violence/ (Accessed 10 October 2025)

[12] Marchant Van Der Schyff 2025, Vulnerability and threat: describing gay male victimologies in South Africa by analysing online community reports, Gender, Sex and Sexualities, https://doi.org/10.3389/fsoc.2025.1539410 (Accessed 10 October 2025)

[13] Section 56 of The Constitution of Zimbabwe Amendment No. 20 of 2013

cisgender norms, encompassing lesbian, gay, and bisexual, transgender, and intersex persons. This inclusive conceptualisation acknowledges the diversity and complexity of identities within this group, allowing the study to address the varied forms of marginalisation they face. The concept of rights is anchored primarily in the human rights framework, emphasising rights as universal, inalienable entitlements inherent to all individuals by virtue of their humanity, irrespective of cultural, religious, or national particularities. This study adopts a critical human rights perspective that recognizes the tension between universal rights and local cultural norms, especially where the latter are mobilised to justify exclusion and discrimination.

Culture is conceptualised dynamically, as a system of values, beliefs, and practices that shape social meanings and norms but is neither static nor monolithic highlighting how cultural arguments frequently operate as mechanisms of power that sustain heteronormativity and silence dissenting sexual identities. The legal framework is viewed as both a reflection and an instrument of cultural and political power, with laws not merely codifying social facts but actively producing and entrenching normative hierarchies, including those based on sexuality. This conceptual foundation enables the study to move beyond surface-level descriptions, instead critically unpacking how categories of identity, culture, law, and rights interact dialectically within the Zimbabwean context, illuminating both the challenges to and possibilities for the realisation of sexual minority rights. By clarifying these core concepts, the study builds a robust framework for subsequent analysis, allowing for nuanced exploration of the intersectionality of discrimination, the contested terrain of cultural legitimacy, and the pressing need for legal and social transformation grounded in both national realities and international human rights standards.

1.4. Research Questions

In pursuit of this study, the following overarching research question will be addressed: How is culture a barrier to the realisation of rights of people belonging to sexual minority groups and, how are their rights perceived in Zimbabwe?

Consequently, the following questions are to be addressed:

RQ2. What is the historical background of homosexuality in the African context?

RQ3. What is the Zimbabwean legal framework with regards to LGB rights?

RQ4. How do international and regional human rights laws and instruments

establish protections the sexual minority groups in the face of African cultural impediments?

RQ5. What can be done to realise, protect, promote and legalise the rights of sexual minorities in Zimbabwe amid cultural barriers?

1.5. Assumptions

1.5.1 Zimbabwean society has a deeply-rooted conservative African culture that is resistant to change, deflecting efforts centred on the promotion, fulfilment and progressive realisation of sexual minority rights.

1.5.2 Conservative cultural norms and values have perpetuated homophobia and transphobia within Zimbabwean society.

1.5.3 The Zimbabwean criminal justice system and constitutional interpretation, particularly concerning sexual minorities, are profoundly shaped by cultural values and societal norms.[14]

1.5.4 Sexual minority groups are subjected to exclusion, discrimination, and physical and sexual abuse.

1.6. Motivation/Rationale

The protection of the rights of sexual minorities in many countries in Africa such as Nigeria is a controversial issue. It is not unusual to find legal reports and government statistics on gross violations suffered by homosexual individuals, who are victims of violence, sometimes resulting in death, mutilation and corrective rape.[15] This thesis reviews the situation of homosexual individuals in the context of Zimbabwe. For the past few years these individuals have been subjected to torture, abuse and discrimination in violation of the Constitution.[16]

LGBTQI+ is an abbreviation for Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex. It is an umbrella term that is used to refer to sexual and gender minority groups as a whole. This is often shortened to LGBTQ+, but this is not done as a means

[14] Chabata 2024 R.G. Mugabe and Zimbabwe's lesbian, gay, bisexual, transgender community: Homophobic leadership, HTS Teologiese Studies/Theological Studies, 80(3): a9839.https://hts.org.za/index.php/hts/article/view/9839/27195

[15] Arcus Foundation 2019, Data collection and violence reports from Botswana, Kenya, Malawi, South Africa, Uganda, 2020–2025; Lyons et al 2021:1417

[16] Marchant Van Der Schyff 2025

to exclude other identities. It acknowledges the diversity of identities, orientations and expressions of the LGBTQI+ community that are not named in the acronym. It is the purpose of this study to focus on lesbian and gay individuals in the context of Zimbabwe, how they are subjected to different forms of abuses in violation of the Constitution and international human rights laws and instruments. This is because these lesbian and gay individuals mostly face legal challenges that are not experienced by non-homosexual individuals. This is evidenced by the prohibition of same-sex sexual activities under the Criminal Law Act which criminalises acts of sodomy.[17] Homosexual individuals are regularly subjected to discrimination and denial of basic rights and services.[18]

The study hopes to contribute to the debate on sexual minority rights. In addition, what is gathered from this study could help with the understanding of and approaches towards such rights in Africa. It examines the contemporary cultural barriers towards the realisation of sexual minority rights in Zimbabwe. The main focus of this study will be Zimbabwe, as the country's system of human rights' jurisprudence is completely silent on sexual minority rights. The silence is as a result of social, cultural and religious values, despite the Constitutional non-discrimination clause.[19] This results in the denial of sexual minority rights, with homosexuality being treated with contempt, leading to social exclusion of homosexual individuals. The study will contribute to the literature on sexual minority rights in Zimbabwe, of which there is little, since the topic itself is treated as taboo. It then further analyses the Constitution, sodomy laws and the attitudes of the state and societies in Zimbabwe to sexual minority rights. This will be done in light of the State's international human rights obligations.

The thesis then contributes to the debate by making suggestions as to how to better protect these rights in the hopes of the realisation and legalisation of such rights in Zimbabwe. It further suggests avenues for synchronising the laws, policies and practices with international human rights obligations, standards and contemporary

[17] Section 73 of the Act. The provision carries a maximum penalty of one year imprisonment and a fine.

[18] This study focuses on lesbian and gay individuals in the Zimbabwean context, examining the various forms of abuse they face that violate both the Constitution and international human rights laws and instruments. It is important to note that this research does not specifically address the experiences of transgender people, as their challenges may differ from those of homosexual individuals. However, many of the issues discussed and insights gained from this study are also relevant to transgender people.

[19] The Constitution of Zimbabwe Amendment No. 20 of 2013:Section 56

practices if they are out of sync. The study therefore aims at clarifying a burning issue in Africa which has resulted in violence against homosexual individuals because of their sexual orientation. This study is unique as it shows the struggle that homosexual individuals face in Zimbabwe in a bid to extend their rights. The study advocates for homosexual inclusion, together with protection and recognition of their rights in Zimbabwe, to achieve policy change and to end homophobia at the community level. This study makes no pretence at settling the debate of sexual minority rights but hopes to contribute to it by unpacking the arguments and aiming for the recognition, protection and promotion of sexual minority rights in Zimbabwe. It will seek to advocate for judicial activism, and constitutional reform and amendment, and to promote legalisation and common acceptance of the said rights, both locally and internationally.

1.7. Background

Zimbabwe's history, both colonial and post-colonial, has been violent and fraught with human rights infractions and in this fraught context, the violation of the human rights of sexual minorities who identify as homosexual is unsurprising. The society's attitudes towards homosexual persons are characterised by ignorance and homophobia. Homosexual people living in Zimbabwe are confronted by systematic discrimination on a daily basis and this creates a culture of fear, hatred and exclusion.[20] A number of religious leaders have spoken out against homosexual persons' rights in Zimbabwe over the years.[21] Since both religion and culture are fundamental to the values and attitudes of Zimbabwean society, homosexual persons find themselves excluded socially, culturally and religiously. For lesbian, bisexual, transgender and intersex (LBTI) women, the situation is exacerbated further by the social structures within Zimbabwean society where family and marriage are central and often the site of discrimination, inequality and unequal power.[22]

Reflecting on the existential realities of the indigenous Zimbabwean in general, this study seeks to develop the thesis that same-sex sexual relationships and marriages are believed to be the epitome of unnatural sexual perversions, that are not only considered alien but also perceived as taboo within traditional and cultural Zimbabwean societies. Zimbabwean culture propounds that same-sex relationships

[20] Dunton & and Palmberg 1996
[21] Epprecht 2004
[22] Epprecht 2008

are unnatural deviations and hence a direct contradiction to the natural, normal and commonly expected inclination of human nature.[23] Thus, as an observation, the thesis will note that, despite the growing consensus on the tolerance of homosexuality among globalising, democratising and libertarian societies of the world[24], same sex relationships and marriages remain alien, unthinkable and difficult to justify from a Zimbabwean perspective. This is as a result of the country's value systems which are generally sacrosanct to the philosophies of *communitarianism* and *unhuism* among other values that formed the mainstay of traditional Zimbabwe and African communities at large.

Homosexual individuals are often viewed by many communities in Africa as deviant in that their sexual orientation differs from the norm and against what is considered natural.[25] This attracts prejudice and opprobrium in a way that is similar to the way in which race and gender characteristics were (in official policy and public discourse) treated in the past.[26] This attitude and behaviour is oppressive as it denies gay and lesbian persons their sexual rights, and because of culture, people belonging to sexual minorities are considered with disapproval and disgust.[27] For instance, in one of the most authoritative English textbooks on criminal law in South Africa, it is remarked that the real reason for the criminal prosecution of sodomy is the extreme disgust and abhorrence that such conduct arouses in traditional and cultural African societies and is considered contrary to what is termed natural.[28]

[23] Chemhuru 2012

[24] Many Western nations that are known to be anti- homosexual rights have been named tolerant towards homosexual people. Homosexual people have seen a rise in tolerance in almost every region of the world, for example Iceland which was named as the most tolerant country in a survey of 167 countries. However, the homosexual community as well as other given marginalised groups such as ethnic groups still face considerable persecution across certain parts of the world today.

[25]"The Johannesburg Statement on Sexual Orientation, Gender Identity", available at: http://hrw.org/lgbt/pdf/joburg_statement021304.htm (Accessed on 01 July 2022)

[26] Cameron 1993:452

[27] Human Rights Watch and International Gay and Lesbian Human Rights Commission More Than a Name: State-Sponsored Homophobia and its Consequences in Africa:2003:35

[28] Hunt 1982:271

Same-sex sexuality is portrayed by media and politicians as "un-African" and a "white disease" imported from the West[29] and it is criminalised in 31 African countries.[30] Enforcement varies in severity of sanctions, and ranges from the death penalty, to life imprisonment[31], public stoning, flogging, forced labour and fines.[32] A most famous illustration of this method at work is the allegation that Kabaka Mwanga of the Baganda Kingdom, was corrupted toward bisexuality by his Muslim advisors at court.[33] A proponent of this view, Apolo Kagwa, is quoted as having stated: "These Arabs introduced into our country along with numerous disorders, an abomination which we had never practised and which we had never heard spoken of."[34]

There are those who maintain that native traditions did not generally permit homosexual conduct. A writer on African religion, for instance, reported as follows,

> "Active homosexuality is morally intolerable because it frustrates the whole purpose of sexual pleasure and that of a human person's existence in the sight of the ancestors and God. Thus, homosexual or lesbian orientations cannot be allowed to surface, let alone be expressed actively. It is clear how such an expression would be directly antagonistic to what the ancestors and the preservation and transmission of life stand for."[35]

Proponents of this view normally consider homosexuality as a 'western invention' imposed upon native populations by remnants of colonising powers.[36] Being an imported concept, they hold that continental boundaries must shut it out.[37] For example, while advocating for an earlier version of the Anti-Homosexuality Bill,[38] Dr

[29] The then Kenyan President Daniel Arap Moi, held a view that homosexuality is a white importation to Africa. He claimed that words like Lesbianism and Homosexuality do not exist in African languages. In addition, former Tanzanian president Julius Nyerere, a politician who was admired for his progressive views on a range of issues, argued that homosexuality is a phenomenon alien to Africa and that in Africa there are no grounds for homosexuals and lesbians to be defended against discrimination.
[30] Van Hout et al 2022
[31] In 2020, two men in Zambia were imprisoned for 15 years for gay sex and were later pardoned.
[32] Hairsine(2019). "Why is homosexuality still taboo in many African countries"? 4 December 2019. Deutsche Welle (DW). Available from www.dw.com/en/why-is-homosexua lity-still-taboo-in-many-african-countries/a-51528737 (Accessed 23 September 2022).
[33] Epprecht M 2006:189
[34] Faupel 1984:18
[35] Magesa 1997:137
[36] Kretz 2012-2013:216
[37] Finerty 2013:431-436
[38] Bill Supplement No 18, Uganda Gazette No 47, Volume CII dated 25 September 2009. Available at: http://www.publiceye.org/publications/globalizing-the-culturewars/pdf/uganda-bill-september-09 .pdf (accessed 25 September 2022).

James Buturo, then Uganda's Minister for Ethics and Integrity, argued that homosexuality and homophobia are both products of the West.[39]

This view has, however, been contested by writers like Scott Long who argued that "there is no reason to suppose that white colonists brought same-sex behaviour to Africa for the first time."[40] Long's argument lends credence to the theory abundant in academic literature that homosexuality was generally tolerated, ignored, or incorporated into many societies in the world before colonialism.[41] Dlamini concluded that the existence of homosexuality in African societies is beyond doubt.[42] Sweet wrote about the Kwayama, an ethnic group of planters and herders in Angola, in which, male spiritual leaders cross-dressed, did "women's" work, and became secondary spouses to men whose other wives were biologically female.[43] An ethnographical study of the African tribes of Cameroon similarly confirmed that no tribe had punishment for homosexual conduct as no one felt harmed by it.[44]

Epprecht argued that there were practices of woman-to-woman marriages practiced in certain communities which were conceived to accommodate lesbianism. He pointed out that these institutions acted to provide cover for lesbian-like sexual practices, including kissing, general touching, and even oral sex.[45] Woman-to-woman marriages are also renowned as the traditional panacea for barrenness among widows or married women.[46] Under these customary marriages,[47] the practice of woman-to-woman marriage has been documented in many Nigerian communities, including the Yoruba, Igbo, Ijaw, Nupe and Esan tribes.[48] The institution of woman-to-woman marriage has been in existence at least as early as the eighteenth century.[49] There are many variants of the practice, which may take any of the following forms: (a) a married, but childless, woman marries another woman on her own behalf while her marriage is still

[39]Harris 2013
[40]Long S "Before the law: Criminalising sexual conduct in colonial and post-colonial southern African societie"' m.hrw.org/reports/2003/safrica (accessed 19 September 2022).
[41]Faucette 2010:417, Wilets 2010-2011:634
[42]Dlamini 2006:135
[43]Sweet 1996:191
[44]Tessman 1998:157
[45] Epprecht (n 22 above) 139
[46] Meribe v Egwu 1979 34 SC 23; 1976 NSCC 181 (Supreme Court of Nigeria). Helina Odigie v Iyere Aika, High Court of Bendel State of Nigeria, Ubiaja Judicial Division, Suit U/24A/79 (Unreported).
[47]Cotran 1968
[48] Dynes 1982:77 in Nwoko 2012
[49] Cadigan et al 1998:89

subsisting;[50] (b) a childless single woman marries another woman on her own behalf; and (c) a childless widowed or divorced woman marries another woman on her own behalf.[51]

This shows that historically, same-sex orientation and gender identity in Africa was not socially stigmatised or associated with ill-health. Murray et al. (2021) state; “There are no examples of traditional African belief systems that singled out same-sex relations as sinful or linked them to concepts of disease or mental health — except where Christianity and Islam have been adopted.” [52]

It is important to mention that pre-colonial African systems were predominated by religion, (Christianity) which permeated nearly all aspects of life to the extent of making the separation of faith from action illusory.[53] This is because religion in pre-colonial Africa was deeply rooted in social life and encompassed an ethical code that guided all social behaviours and interactions.[54] Traditional African concepts of reality and destiny are deeply rooted in the spirit world as the activities and the actions of the spirit beings govern all social and spiritual phenomena.[55] This then means that for safety and protection in a world dominated by religion, with belief in spirit beings and powers, one needed a spiritual compass for guidance and protection through religious rites, reverence to ancestors, symbolic totems and regulative taboos, rituals and customs. These religious beliefs beget corresponding religious practices and behaviour.

However, public discourse on sexual orientation and gender identity (SOGI) is influenced by conservative views on African tradition and culture articulated publicly by political and religious leaders, the politics of colonialism and its post-colonial residues along with narrow interpretations of Christianity.[56] These factors are used by the state and others to create the perception that same sex practices are alien to Zimbabwe despite documented, albeit little known, archival evidence to the contrary. The lesbian and gay human rights issues have had a high public profile in modern-day Zimbabwe, with former President, R.G Mugabe, condemning same-sex sexuality and

[50] SNC Obi The customary law manual: *A manual of customary laws obtaining in the Anambra and Imo States of Nigeria* (1977) 258.
[51]Otakpor 2005:69-70.
[52] Murray et al 2021
[53] Mbiti 1969
[54] Spencer 2004
[55] Oji 1988:17
[56] Muparamoto 2020

homosexual human rights for more than 25 years. This has left homosexual persons in Zimbabwe, particularly the poorest, abused and the most vulnerable, in a precarious position regarding their human rights.[57] In 1997, the first and former president of independent Zimbabwe, Canaan Banana, was arrested on eleven charges of sodomy, attempted sodomy and indecent assault and was sentenced to ten years of imprisonment with nine years suspended.[58] The Supreme Court regarded to the majority decision and proved conservative and delivered a value-based judgement which saw sodomy remaining a crime, as, according to them, it upsets culture at its roots.[59] It indicated that there was an appreciation of the dynamic change regarding sexual minority rights, but that the time was not right to acknowledge such, as it upsets long-rooted beliefs of African culture.

The study herein has been necessitated by the realisation that the much-anticipated 2013 Constitution is now in full force with regards to its implementation ushering in a new regime of rights in Zimbabwe. The conundrum is that people of different sexual orientations continue to be discriminated against regardless of the Constitutional non-discrimination clause[60] This is further highlighted by the attitude that is revealed by sodomy laws that criminalise same sex relations and engagements. It therefore seems to be equality predicated on the formalistic understanding of sameness only and not the substantial understanding which fosters actual non-discrimination to people who are not the same. The international community's stance on the rights of gays and lesbians is that anti-sodomy laws violate international human rights law and they violate the rights of homosexuals to non-discrimination and privacy as guaranteed in the international human rights instruments.[61]

Arguments for the justification of homosexual rights have been linked to the desire to protect and safeguard human rights, hence it is the contention of this human rights notion that the denial of human rights to sexual minorities is in all respects contrary to the safeguarding of human rights and human dignity. The notion of human rights seems to have, over the years, changed meaning more than once and in more than

[57] Muparamoto 2020: 2
[58] S v Banana 1998 2 ZLR 533 (H) S V Banana 2000 1 ZLR 607 (S)
[59] S v Banana
[60] The constitution of Zimbabwe: Section 56
[61] Communication 488/1992 Toonen v Australia, UNHR Committee (1992) UN Doc CCPR/C/50/D/488/1992 (1994) para 8.7.

one direction. Consequently, the view of human rights of homosexual people receives high intolerance regardless of the fact that it is contrary to the notions of human rights and human dignity enshrined in regional and international instruments.[62] Zimbabwe has ratified several United Nations Human Rights Conventions including the International Convention on Civil and Political Rights (ICCPR), the Convention on Elimination of Discrimination Against Women (CEDAW), the Economic and Social Council (ECOSOC), and the African Commission on Human and People's Rights (ACHPR), that are of relevance for homosexual rights. Organisations can report violations of specific human rights to United Nations Special Rapporteurs but, so far, Zimbabwe has not accepted any recommendations on sexual orientation, identity and sexual minority rights.[63] In the United Nations, Zimbabwe has actively voted against the amendment to reinsert sexual orientation into the convention of extrajudicial summary or arbitrary executions in 2008 and the declaration in the United Nations General Assembly of December 2008 which confirmed that international human rights protections include sexual orientation and gender identity. As signatory, to these instruments, Zimbabwe is obliged to conform to its provisions, despite the government's refusal to recognise homosexual human rights.

The binding international treaties to which Zimbabwe is a party requires states to take positive measures to meet their international obligations, and the Constitution requires state organs to enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms. Instead, anti-sodomy laws fuel an overall atmosphere of stigmatisation that promotes discrimination and human rights abuses against homosexuals. The Human Rights Council in Toonen[64] held that anti-sodomy laws violate the right to privacy of homosexuals as guaranteed under the ICCPR, regardless of whether the laws are enforced. As such, proponents of anti-sodomy laws cannot argue that sodomy laws do not have the same ramifications in the Zimbabwean context. For that reason, anti-sodomy laws constitute a direct violation of sexual minority rights as protected by international human rights legal frameworks. In criminalising homosexuality between consenting adults in private, anti-sodomy laws discriminate against homosexuals and render them unequal to

[62] Shaw 1997
[63] Sida 2014
[64] Toonen v Australia, UNHR Committee (1992) UN Doc CCPR/C/50/D/488/1992 (1994) para 1.7

heterosexual individuals in the society. Even if the laws did not contribute to stigmatisation and abuse, in preventing homosexuals from legally entering into relationships of their choice, anti-sodomy laws deprive them of one of the most fundamental aspects of being human. This study will seek to answer pertinent legal questions, and in conjunction with that, possibly inspire a legal regime that coincides with international human rights standards.

1.8. Overview of Literature

A great deal of scholarship has contributed to the debate of sexual minority rights in Africa as the subject of sexual minorities, defined comprehensively in the study, has evoked a considerable amount of comment in academic literature. The recognition of sexual minority rights as human rights remains controversial, sparking extensive debate and numerous publications on the topic. The utility of the existing literature, in terms of books, articles and Internet sources can however not be gainsaid. As a result, this research seeks to add a voice to the existing literature by looking at the Zimbabwean context.

1.8.1 What is the historical and cultural background of homosexuality in Africa?

The debate surrounding the issue of homosexuality in Africa has received varying views and opinions. Homosexuals have suffered persecution the world over, and especially in Africa. This is evidenced by how they have been viewed and treated in general. Many African scholars promote the idea that homosexuality is, in fact, not a Western import and has always been part of African cultures. According to Campbell,[65] colonialism did not introduce same sex relationships to Africa. Pre-colonial Africa contained a range of approaches to sexual behaviour, including many that accepted same-sex relationships to have existed without violating social norms and values. From this, it can be accepted that the phenomenon existed well before colonialism. Colonialism engineered a binary model of sexuality and systems of jurisprudence that identified and regulated sexual behaviour to conform to the already set norms of the colonisers. The current conception of homosexuality as something to be defined and regulated by a national legal system is a product of colonial policies largely imposed upon the African populace. [66]

[65] Campbell 2002
[66] Dhlamini 2006

1.8.2 Homosexuality in pre-colonial contexts

Literature seems to confirm and record instances of people with different sexual orientations. For example, Chizikani[67] places the oldest evidence of homosexuality in Africa and argues that in pre-colonial African societies, same sex relations were often constituted through informal rites of passage, which allowed same sex relations in their society to be ignored or surrounded with a sense of invisibility.

Further evidence is provided by Epprecht[68] who traces the history of homosexual practices in Zimbabwe. He argues that traditional healers regarded same sex relations as respectable if caused by certain types of spirit possession, rather than the offense and usurpation of the 'natural order' that they are deemed to be today.

Bertolt's[69] work emphasizes the practice of homosexuality during the pre-colonial period, although heterosexuality was the socially recognised and accepted sexual norm. He looks at how the virginity of girls was protected by allowing young boys to engage in sexual activities with each other, hence the argument that same-sex sexual relations have been instituted in some societies without suffering social repulsion. If this has been the case, one is compelled to want to find out the influence of culture on the sudden change of perception towards this phenomenon that has led to it being criminalised.

1.8.2.1 How colonialism contributed to homophobia and anti-homosexual sentiments

As the debate on homosexuality rages on, Bates[70] argues that homophobic legislation is a product of colonialism, which has brought about some extreme reactions in many African countries. Amongst these reactions is the homophobic rhetoric claiming that same sex relations are foreign to the continent, with homosexuality being viewed as un-African. On the contrary, the history of colonialism in Africa reveals that it was anti-homosexual legislation, rather than homosexuality, which was introduced by external forces.[71] Thus, it would appear that a combination of forces is behind criminalising homosexuality in Zimbabwe and Africa.

[67] Chizikane 2019
[68] Epprecht 2004
[69] Bertolt, 2019
[70] Bates 2005
[71] Bhebhe 1987

Bhebhe,[72] argues that homosexuality has a long history in Africa, contrary to the claims of politicians who consider it a recent Western concept. He argues that key elements in the debate of homosexuality in Africa came from the West. These are colonial laws against gays, lesbians and transgender individuals.

McNamarah[73] clearly explains that with the establishment of colonially-imposed laws, indigenous attitudes shifted from tolerance of queer sexualities, to intolerance. He concludes that in societies where colonially-imposed anti-queer laws were routinely enforced, modern post-colonial societies experience high levels of queer-phobia. In contrast, where such laws were not routinely enforced, post-colonial societies more readily accept homosexual persons as equal citizens. This explanation shows the complex nature of the phenomenon under study as different views towards its criminalisation are proffered. In this regard, Ossome's[74] work looks at how advocates of sexual colonialism deny the existence of homosexuality on the African continent and further pathologizes it as a perversion imposed upon and adopted by the African population during the era of imperial control.

Given the work of historians, anthropologists and some archaeologists, it is difficult to assert that homosexuality is a Western concept since it seems clear that there is a history of homosexual practices throughout the continent. Despite evidence of the history of homophobia, many African societies, including Zimbabwe, seem to regard homosexuality and homosexual practices as abominable.

1.8.3 Why are people from sexual minority groups discriminated against and how are their rights viewed in Zimbabwe?

Generally, for Africans, marriage is the focus of existence. It is the point where all the members of a given community meet: the departed, the living and those yet to be born. Hence, marriage and procreation are a source of unity. Without procreation, marriage is incomplete; a person with no descendants in effect quenches the fire of life.[75] Although largely undocumented, it is argued that Zimbabwean traditions and cultures

[72] Bhebhe 1987
[73] McNamarah 2019:51
[74] Ossome "Postcolonial Discourses of Queer Activism and Class in Africa" in Ekine S and Abbas, H (eds) 32
[75] Mbiti 1975

emphasize community life and social cohesion, with sex linked only to procreation. Hence, same-sex practices are considered taboo and unacceptable, lacking generative potential and angering the ancestors.[76] This is given as cause for individual and communal punishment. Based on such beliefs and values, it is hardly surprising that many Zimbabweans hold negative attitudes towards people with different sexualities. In other words, cultural practices may be behind national abhorrence of this phenomenon under study.

It then appears that homosexuality remains a deviation and a perverted form of sexual union that is, supposedly, unnatural. As a result, it is considered wrong, despite some modern attempts to look at it as an innate and biologically driven sexual orientation that needs full recognition. The basic assumption of this unnaturalness argument seems to stem from Zimbabwean cultural beliefs premised on the view that, the sole purpose of any sexual practice should be the procreation of the species. Outside that, sexual practice defeats its essence. Culturally, African peoples had limited control over nature, but whenever they believed they could influence it to enhance fertility, they did so to bring dignity and stability to marriage.[77] In Zimbabwe, a number of cultural practices attest to this, and little – if any – is known about cultural practices meant to prevent pregnancy (traditional contraceptives).[78]

As highlighted earlier, the position and existence of same-sex relationships in most African societies is the claim that it is 'unAfrican,' 'unnatural' and 'uncultural.'[79] It suffices to say as people differ in their conception of reality, the values of one individual may blinker the perspective of another. Depending on the manner in which we

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[76] Hahlo (n 1 above)

[77] Mosikatsana (47), cites Southey J (48) who he argues relies on this restrictive and formalistic conception of marriage. He argues that: 'One of the principal purposes of the institution of marriage is the founding and maintaining of families in which children will be produced and cared for, a procedure which is necessary for the continuance of the species… that principal purpose of marriage cannot, as a general rule be achieved in a homosexual union because of the biological limitations of such a union. It is this reality that is recognised in the limitation of marriage to persons of opposite sex.' Klausen, S. 2019 Reproductive Health, Fertility Control, and Childbirth in Africa. Oxford Research Encyclopedia of African History. Available at, https://oxfordre.com/africanhistory/view/10.1093/acrefore/9780190277734.001.0001/acrefore-9780190277734-e-564 (accessed 24 July 2025)

[78] For example, in many communities, rituals and ceremonies were performed to invoke fertility blessings, such as the use of fertility dances, the offering of libations to ancestral spirits, or the application of herbal remedies believed to promote conception. Traditional healers in South-western Nigeria treat infertility with herbs, sacrifices, and timing intercourse to coincide with fertile periods, while also addressing spiritual causes like curses or bewitchment through prayer and rituals. Obisesan K A, Adeyemo A A: 1998

[79] Hunt 1982:271

perceive things, we can praise and blame, declare actions right or wrong or even declare the scenes or objects before us as either beautiful or ugly. This contention holds in contemporary Zimbabwean cultures with regard to the realisation of sexual minority rights. This research, therefore, aims to examine whether contemporary values are regressive in their failure to recognise sexual minority rights.

1.8.4 Religious and cultural arguments

Religious beliefs constitute part of culture. As such, Henriet[80] provides the religious and cultural arguments that prescribe homosexual human rights. The author submits that marriage is the creation of God and as such is governed by natural law. This means that anything that deviates from this natural law is bound to be negatively labelled and punished. Douglas in his work, "The Procreative Argument for Proscribing Same Sex Marriage" [81] adds another dimension that suggests that marriage is based on the encouragement of procreation. In the English case of ***Corbett v Corbett***[82], it was held that marriage, as understood in Christendom, may be defined as the voluntary union for life of one man and one woman to the exclusion of all others. Such a definition has been supported by moral arguments that conceive marriage as being ordained by God since Biblical times. Consequently, any form of sexual activity between two males or two females is against the law of nature and against the will of God. Being largely a Christian nation due to colonialism, most Zimbabweans subscribe to this view, hence, perpetuating the ill-treatment of homosexuals.

Sloan[83] argues that based on this Old Testament approach to Christianity, the early Christian church believed that homosexuality was abnormal and should be severely punished. He further argues that the medieval Christian church also believed that "homosexuals should be put to death by burning alive or hanging".[84] This attitude towards homosexuality has characterised a greater section of the Christian church generally and specifically in Zimbabwe today.

Masuku[85] argues that the rejection of gays and lesbians in a society could be ascribed to various factors, amongst which is the socialisation of individuals. The author

[80] Henriet 2009:10-13, 2004-2005:635 32 Hastings Constitutional Law Quarterly
[81] Douglas W Kmiec, "The Procreative Argument for Proscribing Same Sex Marriage"
[82] Corbett v Corbett [1970] 2 ALL ER 99. See also the case of W v W 1976 2 SA 308, 310E.
[83]Sloan 1987:2
[84] Sloan (72 above)
[85]Masuku 2015:128-137

purports that young boys and girls are raised to understand that their destiny is to get married and bear children because unmarried people are stigmatised. The author further used socio-cultural theory to reinforce the argument that folklore in the form of folktales is used as a conduit to socialise growing minds to accept that everyone is destined to marry and bear children therefore anyone who deviates from this set of norms should be ostracised and punished. This further contributes to homophobia, and the abuse and violence against homosexual individuals.

Kenyon[86] looks at the aspect of religion and cultural beliefs in relation to homosexuality. He argues that in a domestic context where cultural consensus and belonging are highly valued, both human rights and homosexual individuals face critiques of being foreign and un-African, new, individualistic and threatening to tradition. He talks about the marginalisation and stigmatisation of homosexual individuals in relation to dominant religious and cultural beliefs, which can result in expulsion from family homes, loss of social support and job loss. He, however argues that the existence of non-heterosexual relationships in pre-colonial times indicates that the un-African argument may be based on "resentment of the Western cultural dimension of gayness" which has been depicted in media as decadent and anti-family.[87]

Taru and Basure[88] examined homosexuality in the pre-colonial and post-colonial eras. As a point of departure, this thesis takes a historical approach and chronicles the long history of homosexuality in many African societies and cultures, tracing the development trajectories from the pre-colonial era up to the post-colonial era. The development of the homophobic stance in African societies is dealt with, and reasons for the continuation of such a stance in postcolonial Africa are also examined.

Informed by Marxian and Foucauldian theorizing, the study argues that sexualities are socially and culturally constructed. The study concludes by examining the differences between pre-colonial homosexuality and the recent phenomena of same sex marriages and families. Michel Foucault's analysis of sexuality is important when discussing otherised and stigmatised sexualities. He articulates how understandings of sexuality can vary across time and space in an attempt to argue for the permissibility

[86] Kenyon 2019:257-273
[87] Kenyon (75 above)
[88] Taru & Basure 2014:5

of homosexuality.[89] Around the 17th century, there was a new discourse around sexuality which was based on scientific knowledge and created what Foucault terms *scietia sexualis,* which led to the creation of sexual minorities as a concept.

1.8.5 Criminalisation of homosexuality and consequences faced by homosexual individuals.

Homosexuality has been criminalised on the premise that it is unnatural. Milton argues that this is directed and intended to penalise homosexuality amongst homosexual people. The principal arguments advanced for criminalising homosexuality are that it subverts the institution of the family and that homosexuals corrupt and pervert young persons.[90] The author concludes that homophobia is based on nothing more than a moralistic prejudice against a particular form of sexual gratification and serves no rational object of culture and is demeaning and discriminatory.

Similar sentiments are aired by Yaw Ako[91] who purports that homosexuality is viewed as immoral and a religious abomination based on the Holy Bible's Old Testament. He further indicates that all these damning views argue that homosexuality is a choice but not a biological drive. Such views clearly reflect the attitudes of both the state and society, indicating a general lack of understanding or awareness of homosexuality.

The negative perceptions captured above are in tandem with Lake's[92] analysis of the challenges faced by homosexual individuals, showing the rising violence and homophobic attacks against sexual minorities and lesbian women. Such attacks often take the form of "corrective rape," which makes the tension between marginalised communities more visible as the victims engage in advocacy for their rights in the face of conservative backlash. This leads to the focus of this study, which addresses violence against sexual minorities and the search for ways to protect their rights through recognition and common acceptance.

The violence against the homosexual, as presented by Mavhandu-Mudzusi[93], includes ascription of a range of labels such as 'sinners', 'devils' and 'demon possessed'. These labels expose those labelled as such to discriminatory acts, including denial of financial and healthcare services and threats of and/or actual rape. This is common in

[89] Chemhuru 2012: 12
[90] J R L Milton 1996:249
[91] Yaw Ako 2010
[92] Lake 2021:22-34
[93] Mavhandu-Mudzusi et al 2015:1049-1056

Zimbabwe and as such, most homosexual individuals are unable to open up for fear of retribution. Mavhandu-Mudzusi recommends the development of policies that not only promote greater social inclusion and acceptance of homosexual persons but also clearly outline the steps and approaches to be taken in addressing discriminatory practices.

With regards to policies, Mandipa[94] talks about the inadequacy of Zimbabwe's legal framework to protect and promote homosexual individuals as reflected by the Constitution of Zimbabwe and the country's sodomy laws. Mandipa shows that continued criminalisation of homosexuality has hindered the protection of these rights in Zimbabwe. In light of this, the work further discusses these challenges and looks at the prospects of promoting, fulfilling and protecting homosexuals in Zimbabwe with specific recommendations to effectively realise sexual minority rights.

1.8.6. How and to what extent do regional and international human rights laws and instruments establish protections that lend to the invalidation of the constitution and sodomy laws?

While the preceding discussion highlighted the absence of sexual minority rights within Zimbabwe, this subsequent section broadens the focus to encompass a wider, international context. Looking at the protection of sexual minority rights in regional and international human rights instruments, there is indubitable evidence suggesting the existence of a plethora of international human rights laws and mechanisms for the protection of all persons, including sexual minorities.[108] Thus, the continued criminalisation of same sex acts, and the violence perpetrated against sexual minorities, is a violation of their fundamental human rights. It is a contradiction of international human rights standards. This is premised on the provisions of the international bill of rights, which provides a basis for the recognition of the rights of all persons, because they are human beings.[109]

Donnelly focuses largely on the international framework with regard to sexual minority rights.[110] It looks at the problematisation of sexual minorities and the discrimination

[94] Mandipa: 2017

[108] For the purposes of this study the term international human rights instruments is used here to encompass treaties, declarations, resolutions, recommendations and concluding observations.

[109] The Universal Declaration, the ICCPR and the ICESCR are together classified as the International Bill of Rights, see UN human rights fact sheet no 30 6.

[110] Donnelly J: 2003 Universal Human Rights in Theory and Practice" Cornell University Press

they face in international law. Similarly, Robert Wintemute's[111] coverage of case studies in the United States Constitution, the European Convention on the protection of Human Rights and Fundamental Freedoms and the Canadian Charter context, though not quite reflective of the actual practice on the continent, points to the direction that the African human rights system should follow in the protection and realisation of sexual minority rights.

This debate is joined by Mujuzi's[112] analysis of the Ugandan High Court's decision to protect the rights of two women who were arrested, harassed and detained by the police on suspicion of being lesbians. The analysis centres on the reliance of the court on international human rights instruments to arrive at its decision by arguing that even if the accused were lesbians, which the court refused to admit, they were entitled to their privacy and dignity.

Further analysis of existing regional legal policy instruments and treaties for the opportunities they offer to tackle the exclusion of homosexual persons in Africa was done by Chimaradze and Bakare[113]. They identified key legal and policy instruments formulated and adopted between 1981 and 2018 by the African Union. From their observation, the treaties and instruments highlight the regions' challenges related to inclusion but most of them are binding and enforceable as all of them enshrine the responsibility of African Union member states to safeguard and ensure the inclusion and protection of citizens, their gender or sexual orientation notwithstanding. According to them, the instruments do not, however, explicitly mention homosexual persons, and lack clear and effective mechanisms for accountability among member states.

In line with the above, Huamusse[114], looked at the rights of sexual minorities under the African Charter and found that there is neither protection for sexual minorities explicitly accorded by the African Charter nor a decision by the African Commission (the body with the mandate to interpret the Charter) on human and people's rights. This means that the jurisprudence of the African system of Human Rights is completely silent on that. Huamusse provides some legal avenues in which the African Commission and

[111] Wintemute 1995
[112] Mujuzi 2009:441
[113] Chimaradze et al 2020:28
[114] Huamusse 2006

African Court can approach the problem by analysis of analogous practices and legal provisions that already exist in the African Charter and other international and regional law regimes on Human Rights.

To add to the above, Yaw Ako's[115] the work reveals international human rights obligations of African countries, including Zimbabwe, as against the laws and practices that are in conflict with international obligations. The work discusses the international human rights law and mechanisms that exist for the protection of all persons including sexual minorities. It advocates for the universal enjoyment of human rights without being subject to specific social and cultural differences. However, the work found a wide gap between what the international human rights framework espouses and its implementation in practice, especially in relation to sexual minority rights in Africa. Thus, there is a need to consider ways of addressing the legal anomalies.

1.8.7. What can be done to realise, protect, promote and legalize the rights of the sexual minorities in Zimbabwe?

Ways of addressing the absence of legal protection of the sexually different requires initial appreciation of the genesis of its absence in Africa. For instance, the work of Devji[116] shows that the African continent (including Zimbabwe) has struggled to accept its homosexual population, which has seen these individuals continue to struggle in pursuit of their rights. The author explores whether there is an African way and mechanism for realising sexual minority rights by appealing to the values and cultures that exist on the continent.

The major culprit in the above struggle is attitude. Thus, Quansah[117] compares the attitude of the judiciary towards sexual minority rights in African countries, including Zimbabwe, and asserts that while the judiciary in South Africa has protected the rights of sexual minorities, the judiciary in Zimbabwe has failed to do so. Quansah insists that a broader and more non-conservative culturalistic interpretation of the concepts of equality, dignity and privacy by the courts in Zimbabwe could achieve the same results as in South Africa. This is the position that this study takes and extends the debate further by urging judges to give effect to international human rights treaties as

[115] Yaw Ako 2010
[116] Devji 2016:343-363
[117] Quansah 2002:201

well. Hence, this work advocates for judicial activism towards the protection of sexual minority rights as a major way of realising the rights of sexually different.

Apart from advocacy, Chilisa[118] argues that criminalisation of homosexuality reinforces the societal prejudices and stigma against sexual minorities. Consequently, the judiciary in a constitutional democracy has to "vigorously protect constitutional rights without fear or favour."[119] In other words, the judiciary in a constitutional democracy should not pander to "popular subjective views" about legal issues before them but should interpret the bill of rights to protect the rights of sexual minorities. This is the position that this study takes to deal with the Zimbabwean situation, with the judiciary being guided by the international human rights treaties that Zimbabwe is a signatory to.

Another factor that influences biased views of homosexuality is culture. Thus, Swanepoel[120] proposed to position cultural intelligence as a means to promote the active, as opposed to reactive, nature of teaching sexuality within multicultural environments. This approach would help to establish a circular model of support which advocates for an interactive means of teaching about sex and sexuality in the classrooms in a multicultural Zimbabwe, for citizens to understand diversity in sexuality in order to appreciate sexual minority rights. This method challenges gender bias and subsequently addresses homophobia and heterosexist attitudes as envisaged by this study.

Another way of addressing the anomaly is proposed by Murray and Viljoen[121] when they discuss the possibility of using the procedures of the African Commission on Human and Peoples' Rights (African Commission) to bring the issue of sexual minority rights to the attention of the African Commission. They suggest innovative and strategic ways of bringing such a sensitive issue before the African Commission, for instance, by lobbying some of the Commissioners and non-governmental Organisations (NGO) forums to open up debate on sexual minority rights in Africa and demystify associated myths. This has the inescapable chance of having positive effects on the legal institutions that this work seeks to see happening in Zimbabwe.

[118] Chilisa 2007
[119] Chilisa (n 107 above)
[120] Swanepoel et al 2015:164-169
[121] Murray & Viljoen 2007:87

It is the strong conviction of this work that gays are human beings whose rights have to be respected. This is supported by De Vos[122] who argues that the importance of having legal protection for gays and lesbians cannot be overemphasised. In line with this, the law is an important tool around which gays and lesbians can organise to attain legal equality and protection which this study seeks to actualise.

1.9 Method and Theoretical Approach

This research will use a qualitative approach to explore the issues raised, aiming to answer the study's questions and describe the situation of sexual minority rights in Zimbabwe within a broader context. The study employs a desktop research methodology, incorporating historical, current, comparative, and prescriptive elements to comprehensively analyse human rights abuses against minority groups in Zimbabwe.

The study adopted a comparative analysis of foreign jurisdictions like South Africa and Botswana exploring lessons that Zimbabwe can learn from them. The Constitutional-textual difference between Zimbabwe on one hand and South Africa on the other hand is the express provision of sexual orientation as a prohibited ground of discrimination,[123] which is a case different for Zimbabwe. Zimbabwean Constitution does not list sexual orientation as a prohibited ground of discrimination. This difference is identified, examined and analysed in light of the rights of sexual minorities.

Primary sources form the backbone of this research, providing a solid legal foundation and authoritative insights. These sources include national statutes and legislation of Zimbabwe, which pertain to human rights and minority rights. Additionally, the study examines relevant international and regional legal instruments, such as the Universal Declaration of Human Rights and the African Charter on Human and Peoples' Rights, to which Zimbabwe is a signatory. Court judgments from Zimbabwean courts, South African courts and other foreign jurisdictions that address issues related to human rights abuses and minority protections, are also integral to the research. Furthermore, case law from international courts and tribunals that have adjudicated matters relevant to the study is considered to provide comparative legal perspectives.

[122] De Vos 1996:256

[123] Section 9(3) of the South African Constitution

Secondary sources offer interpretative analysis, scholarly commentary, and policy evaluations. These include academic books, journal articles, and papers authored by experts in the fields of human rights and minority rights. Theses and dissertations that provide in-depth research and analysis on related topics are also utilised. Policy documents, such as reports and publications from governmental bodies, non-governmental organizations (NGOs), and international agencies, are examined to discuss human rights conditions and minority issues in Zimbabwe. Position papers and advocacy materials from human rights organisations are included to highlight ongoing abuses and recommend policy changes.

To efficiently access both primary and secondary sources, the study relies on a range of internet databases. Key databases include Juta, Lexis Nexis, HeinOnline, SAFLII, ZIMLII, Google Scholar, Sabinet, and Butterworths Company Law Cases (BCLC). These databases provide a wealth of legal documents, scholarly writings, and policy papers essential for the research. There is also a strong reliance on international and regional conventions to provide a comprehensive legal context for the study.

1.9.1. Critical Legal Theory

Critical legal theory is underpinned on the premise of challenging and rebuking of the orthodoxy of law. It has sub-theories, each with its own course, and proceeds in some way, from a rejection of a view of law as a fully rational, technically fair and neutral body of rules to conceiving law in the first place as itself invested with the capacity to injure and oppress through framing law within a broader social and discursive context.[124] This theory will be essential to this work as it will show how cultural and traditional values of Zimbabwe and other African countries are a barrier to the full realisation of sexual minority rights.

The theory rejects what is generally regarded as the natural order of things, which, in this regard, is the argument that homosexuality is against nature as purported by many African societies who have deep rooted homophobic views. It challenges the laws put in place to criminalise sodomy laws and the views of the society, and political and religious leaders toward homosexuality. The theory will be used to criticize the status quo with regards to the rights of sexual minorities, with the hope of encouraging the majority to change for their benefit, whilst protecting human rights.

[124] Modiri 2014: 11

This theory serves as both a lens and a method for interrogating how law in Zimbabwe has been instrumentalised to produce, maintain, and justify the exclusion of sexual minorities. Rather than viewing law as a neutral and objective set of rules, critical legal theory encourages us to deconstruct how power dynamics, historical contingencies, and dominant cultural narratives have consciously shaped what is considered legally permissible or impermissible. For example, the study critically examines the colonial origins of laws criminalising same-sex conduct, revealing that these rules were imported and later naturalised as guardians of a narrowly defined moral and cultural order, rather than as genuine reflections of indigenous values.

By exposing how contemporary appeals to "African tradition" or "public morality" are often weaponised to rationalise ongoing discrimination, the analysis challenges the purported legitimacy and universality of such legal norms. The theory further enables a critique of Zimbabwe's constitutional framework, specifically highlighting how the deliberate exclusion of sexual orientation from anti-discrimination provisions, and the explicit prohibition of same-sex marriage, operate not as neutral policy decisions but as tools for perpetuating social hierarchies and silencing minority communities. Critical legal theory also invites us to scrutinise judicial tendencies, for instance, decisions like ***S v Banana*** where courts have privileged majoritarian prejudice over universal rights, refusing to extend interpretive tools from comparative and international law to protect the vulnerable.

In applying this approach, the study does not merely catalogue instances of legal exclusion; rather, it maps the interrelationship of law, culture, and power, showing how legal discourse both mirrors and magnifies existing societal biases, and asking whose interests are ultimately served by the prevailing legal order. Furthermore, the study deploys critical theory to advocate for a transformative and emancipatory use of law, one that resists the inertia of inherited and politicised frameworks, and instead pursues reform aligned with principles of equality and human dignity from both an African and universal human rights perspective. Taking this approach helps to surface hidden assumptions, reveal the contingent nature of Zimbabwe's sexual minority exclusion, and point the way toward legal strategies and activism that can subvert, challenge, and ultimately transform the status quo.

1.9.2. Deconstructive Legal Theory

Deconstruction is derived from the ideas of French philosopher, Jacques Derrida.[125] This theory is one of the critical legal theories which is used to expose and criticize some parts the law as being incoherent, contradictory, and unjust, thereby needing reforms.[126] Deconstruction has been used to show how arguments undo themselves, that is how a law states one thing but acts to the contrary.

The theory will look at how the current laws regarding homosexuality are wrongly constructed as they violate human rights which calls for change. It looks at how laws that criminalise homosexuality were constructed, looking at their origins, that is, how homophobia came be. The theory will be used when looking at the influencing factors that led to the creation of these current laws, by breaking them down.

Applying deconstructive legal theory to this study involves a rigorous and nuanced interrogation of the fundamental oppositions, underlying assumptions, and hierarchical structures embedded within the law's treatment of sexual minority rights in Zimbabwe. Deconstruction, rooted in the philosophical work of Jacques Derrida, functions as a method for unveiling how legal texts, doctrines, and discourses are inherently constructed through binary oppositions, such as presence/absence, normal/abnormal, and law/violence, that privilege certain terms over others while simultaneously concealing their instability and fluidity. In this context, deconstruction is employed to critically analyse how the law positions itself as the embodiment of morality and justice, yet paradoxically perpetuates discrimination by privileging heteronormative and traditional conceptions of family, gender, and sexuality. For instance, legal arguments that uphold sodomy laws often rest on the binary opposition between moral order and immoral acts; a deconstructive reading reveals how these oppositions are not fixed, but contingent, and that the emphasis on 'morality' functions as a cultural construct that suppresses alternative and marginalized sexual expressions.

Furthermore, deconstruction interrogates the very foundation of legal legitimacy, showing how notions of sovereignty and state authority are intertwined with principles of violence and force, often masked by the rhetoric of law and order, thus revealing the repression and marginalisation of sexual minorities as a consequence of these

[125] Derrida 1981, (translated by Barbara Johnson (ed.), Derrida 1998 (translated by Gayatri Chakravorty Spivak),); Culler 1982

[126] Balkin 2005:102-103

conflicted binaries. This approach also involves analysing the language and rhetorical strategies used in judicial decisions, legislative debates, and cultural narratives to expose how they produce meaning through différance, continuously deferring and diffusing clarity while reiterating dominant norms.

By deconstructing these texts, the study discloses the provisional and unstable nature of the concepts that sustain systemic discrimination, thereby opening space for alternative readings and progressive justice. Ultimately, deconstruction aids in revealing that law is not a neutral arbiter but a field of ongoing negotiation, where meaning is always contingent, and power is inscribed through language and structure. This method empowers scholars and activists to challenge the hierarchical hieroglyphics of law and to advocate for a more inclusive, multiplicitous understanding of justice that resists static binaries and embraces difference and multiplicity as core to genuine social transformation.

1.10 Structure/Outline (Chapters)

The study comprises of five chapters, with chapter one as the first chapter. The chapter is the general introduction to the study. Contained therein will be the research problem, research questions, background of study, motivation or rationale of the study, literature overview, and methodology. In principle, this chapter outlines the direction of the study and specifies the important areas that the study shall be dependent upon.

Chapter two looks at why and how homosexual individuals are discriminated against, paying particular attention to cultural barriers, which include religion, tradition and African values. It looks at the attitude of Zimbabweans and African societies towards sexual minority rights. It further analyses how homosexuality, homophobia and sodomy laws pre-date Zimbabwe's independence. A discussion of Zimbabwe's legislative framework and its inadequacy in protecting of homosexual individuals will be included here. Chapter three focuses on international and regional human rights protection of sexual minority rights. It examines the obligations that Zimbabwe assumed when it ratified international human rights treaties. It also examines the concluding observations and decisions of human rights monitoring bodies, and their impact on sexual minority rights in Africa.

The next chapter is chapter four which analyses the impediments to the realisation of sexual minority rights in Africa and examines the main arguments for and against such

realisation, and their contribution to the debate on sexual minority rights. It looks at what avenues can be taken in an effort to protect, promote, and realise sexual minority rights in Zimbabwe. The last chapter is chapter five, comprises of conclusions, a clear answer to the research questions, summary of the findings, significance and implications of the findings and summary of recommendations.

CHAPTER TWO

THE HISTORICAL AND CULTURAL BACKGROUND OF HOMOSEXUALITY IN AFRICA

2.1 Introduction

The landscape of sexual orientation in Africa has evolved, shaped by the complex and often challenging development of the continent's socio-political institutions.[127] This chapter will address the historical and cultural background of homosexuality in Africa. It will be traced back from its pre-colonial contexts, its development during colonialism, and its continued existence in post-colonial Africa, with a specific focus on Zimbabwe. The chapter then examines the reasons why homosexual individuals are discriminated against in Zimbabwe with specific reference to religious and cultural traditions. This is because most homophobic attitudes largely stem from religious and cultural beliefs. Studying sexual minority rights requires a historical approach that can situate the practice within the political economy of the state that accepted or repudiated the practice.[128]

In addition, this chapter will consider the Foucauldian approach to homosexuality through the examination of his works including The History of Sexuality. He wrote this book with the idea that various modern fields of knowledge about sexuality are associated with the power structures of modern society. He concluded that it is through this knowledge that homosexuality was constructed rather than discovered. His exploration of the discursive construction of sexuality in the Western world will be considered. He discussed how homosexualities were regarded as a 'species', defined by perverse sexuality, dangerous for society, which became a focus for a variety of studies through science. He also considered the problematisation of homosexuality.

Further, the attitudes of African societies towards sexual minority rights have been and is still hostile. Sexual minorities count among the largest minority groups sharing common patterns of discrimination worldwide and today their rights are an international issue.[129] Lastly, the chapter will review Zimbabwe's legal framework regarding homosexual individuals. There is indubitable evidence to suggest that Zimbabwe's legal framework with regards to the protection and promotion of the rights

[127] Ambani 2017: 14
[128] Taru & Basure 2014:976-1195
[129] Huamusse 2006

of lesbian and gay people is inadequate. This is due to a cultural denial of their rights as will be shown in the chapter.

2.2. The development of homosexuality in Africa.

It is suggested that homosexuality was present in African communities prior to the arrival of European settlers.[130] However, several thinkers are adamant that homosexuality was non-existent among indigenous Africa, terming the concept abhorrent, despite the availability of evidence to prove otherwise.[131] Prior to European colonisation, throughout the African continent, there were different, more relaxed attitudes towards sexual orientation and gender identity. In addition, in most African countries prior to colonization, there was less persecution of homosexual individuals because of their sexuality and tolerance of homosexual conduct.

2.2.1 Homosexuality in pre-colonial contexts.

Edward Evans-Pritchard is quoted as one of the earliest scholars to mention the existence of homosexuality in African communities in an academic paper.[132] He wrote that among the Azande people of the Central African Republic, (CAR), pederastic marriages among warriors were condoned in order to protect the loyalty of the men in the army.[133] Epprecht further provided that homosexual practices were used in pastoral, hunting or militarised societies where men were away from home for long periods of time.[134] An art historian, Peter Garlake, carried out research in Zimbabwe and claims to have discovered a rock painting presumably drawn by the San people.[135] Epprecht commenting on the rock painting wrote:

> "The most ancient depiction of homosexual practices in sub-Saharan Africa comes from the San (Bushmen)…one of the many paintings they left behind on rock faces shows a group of men apparently engaged in anal or intra-anal sex (between the thighs). The picture dates back at least 2000 years."[136]

Epprecht further purports that the painting like many Bushmen cave paintings is kept secret to protect it from vandalism.[137] The fact that the painting is in Zimbabwe marks its importance in disproving that homosexuality is un-African. The San are said to have

[130] Bertolt 2019:651-659
[131] Dlamini 2006:128-136
[132] Gunda 2010
[133][133] Evans-Pritchard 1970:1428-1434
[134] Epprecht 2008
[135] Garlake 1995:28.
[136] Epprecht 2004: xv
[137] Epprecht 2004

practiced sexual restraint in order to avoid overpopulation and hunger, and are thought to have engaged in same-sex sexual practices to avoid procreation.[138] This shows that homosexuality is believed to have existed before colonisation. In addition, the dating of the painting shows that it was painted during a time before the Europeans made contact with sub-Saharan Africa.

In the pre-colonial communities, it is suggested by Epprecht, that homosexuality was used as a form of socialisation. There were times where men and women were separate for long periods of time, for example during hunting expeditions where men could go on such expeditions for several months.[139] In addition, within the military, the Ndebele used to raid the Shona Communities known as wars of *Madzviti*[140] taking cattle, grain and women as spoils of war. Chances are that they would travel without women and would, thus, engage in same sex practices.[141] Epprecht further points out that some of the traditional friendships constituted under the term *chisahwira*[142] among the Shona communities could be presumed as covering up the existence of pederastic marriages.[143]

In most African societies, like in the sub-Saharan Africa, it is submitted that the boys learned their sexual vocation at a young age in homosexual environments where they were mostly with men. This was necessitated by the clear demarcation of masculine and feminine spaces in the Shona cosmology.[144] In this regard, homosexual experimentation among adolescents happened as a normal part of learning process.[145] This was said to have prepared boys for sexual relations with their future wives. These same-sex sexual practices could, hence, be understood as necessary heterosexual training for boys.[146]

[138]Gunda 2010: 118; Beach 1980:5
[139] Epprecht 2008
[140] A nickname for Ndebele raiders.
[141] Hungochani translated to Ndebele is ubunkotshani/izinkotsane; Douglas 2004:24
[142] Chisahwira is a traditional concept associated with close friendship and characterised by openness, friendliness, caring, togetherness, harmony, empathy and helping each other, and is directed at seeking social development. It is a special type of extra-kin relationship between people who usually confide in each other.
[143] Epprecht 2004; Gunda 2006:126
[144] Epprecht 2004:31; Gunda 2010: 119
[145] Epprecht 2004:31
[146] Gunda 2010:119

Epprecht attests to oral interviews which suggested that ritual male-male sexual acts continued to be practiced by some individuals after the fall of Zimbabwe's largest medieval states, which suggested that indeed homosexuality existed before colonial period.[147] Epprecht's interviews mentions the following:

> "I know the ngochani was traditionally done by chiefs and the leaders of soldiers here in Zimbabwe. The chiefs here were given strong medicines by the Ndebele and Zulu n'angas (traditional diviners and healers)…I also know that even the Ndebele and Shona, when they were fighting, the soldiers were made to have sex with other men for the whole group to be powerful"[148]

It then appears that homosexuality was present among the Zimbabwean indigenous people of Zimbabwe.

During the pre-colonial period, although heterosexuality was the socially accepted and recognised sexual norm like anywhere else in the world, same-sex sexual practices occurred on the continent and were practiced by several communities.[149] The Cameroon anthropologist Severin Cecile Abega argued that Negro-Africans associated homosexuality with a form of witchcraft.[150] Epprecht describe a troubled silence or strange consensus about same-sex relations on the continent.[151] This is because sexuality in Africa has been diverse and varied as elsewhere in the world.[152] This means that heterosexual relationships coexisted with same-sex practices. Even if heterosexuality was the dominant sexual norm in pre-colonial Africa, there is no doubt that same-sex practices were present on the continent and in some cases were features of social organisation.

In pre-colonial societies, young boys had to have sex with women at a certain age but in the socialisation process, older boys sometimes penetrated younger ones because they slept and played together.[153] This practice was done in order to protect the sexuality of girls so that they were virgins at the time of marriage, hence first sexual experiences of boys was happening between them.[154] However, these sexual

[147] Epprecht 2004
[148] Sekuru H quoted in: Epprecht 2004: 47
[149] Bertolt 2019:651-659
[150] Abega 2007
[151] Epprecht 2008
[152] Epprecht 2013
[153] This was practiced in the Bafia of Cameroon as the younger boys played a passive role with a senior brother.
[154] Murray 1998

behaviours were done in secrecy and the majority of them were not known by parents. It is important to note that this was not always the case in some societies as same-sex sexual relations were instituted and did not suffer from repulsion. One notable example is the "*amachicken*" or "*mummy-baby*" relationships observed in South African boarding schools. In these relationships, an older girl (*the "mummy*") helps a younger girl (*the "baby"*) adjust to school life. These bonds often included emotional and sometimes sexual intimacy, and were generally accepted within the school culture as legitimate practices, not constrained by homophobia unless reinterpreted through a Western lens as "lesbianism" or a fixed sexual identity.[155] This acceptance was rooted in the relationships being seen as part of homosocial bonding, kinship, and community, rather than as an expression of a sexual orientation. In central Africa, among the Patuins, young adults continued to have sexual relations with young boys without facing a social reprobation despite having wives. This was sometimes described as a game (‘*bia bo pfianga’* we have fun).[156]

Bertolt argued that age was also a factor that led to sexual relationships between men.[157] This is because young people were sometimes forced to have sexual relationships with older people. Among the Mossi of Burkina-Faso, young people named *Sorone* were chosen among the most beautiful between the age of seven and fifteen at the Royal court. These young boys would be dressed in women’s clothes, with women’s roles attributed to them, including having sex with the chiefs. This practice had a day allocated to it where heterosexual relationships were socially prohibited, which was on a Friday. Once the *Sorone* were of age, the chief would give them women to take as wives.[158]

It is widely accepted that when a young man is of age, he takes a wife, with the purpose of procreation. In this regard, among the Ashanti in Côte d’Ivoire, slaves captured during a conquest were taken by young men as concubines. However, in Senegal, due to the absence of female partners, more slaves had sexual relations with each other, which would stop when they came into contact with a female partner. The

[155] Frizelle. 2013, Foregrounding diverse African sexualities, Psychology in Society, (45), 73-76. Retrieved June 02, 2025, http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1015-60462013000200011&lng=en&tlng=en (accessed 01 June 2025)
[156] Kurt 1925:168
[157] Bertolt 2019:651-659
[158] Bertolt 2019: 654

women in northern Mozambique and Lesotho are examples of same-sex relationships and sexualities located outside of the heterosexual norms in Africa.[159] There was widespread practice of same-sex relationships between adolescent girls in Lesotho, known as 'mummy-baby' relationships. [160] This occurred in place of or concurrent with heterosexual relationships before marriage.[161]

In addition to this, the Fangs perceived same-sex sexual relationships as an essential strategy to acquire wealth, which is transmitted from the receptive partner (the pedicist) to the insertive partner (the pedican).[162] Same sex practices were also used for initiatory ritual purposes, for example in Togo. Women in Togo who did not want husbands socially attributed to them were forced to go through an initiation rite called *Kpankpankwondi.*[163] This occurred in cases where the girl refused to marry the husband chosen for her. This was an individual initiation with four months period of seclusion.[164] In Zambia, among the Mukanda[165] and the Kivai, sodomy was used for initiation purposes and later was considered to help men to be more vigorous.[166] In Angola, sodomy was accepted in the Quibanda ethnic group and the men involved in the practices were called *Quimbondas*.[167] The men dressed like women, with the prominent figure as the high priest called Ganga-Ya-Chibanda, who also dressed like a woman even during religious ceremonies.[168]

Young girls, just like young boys who took part in erotic games marked by touching, also played these games. The game was a manipulation of genitals through the elongation of the lips of the clitoris which provoked excitement which can lead to sexual interaction. It is further argued that the excitement would end up in seduction and sexual relations, and the phenomenon was termed as *ocecelana*.[169] Furthermore, instances where older women or widows married younger girls for inheritance purposes or as caregivers to their children were also practiced. Such practices were

[159] Kendall 1997: 3 "Looking for Lesbians in Lesotho" Scottsville: University of Natal Drama Department
[160] Kendall 1998
[161] Logie, Alschech, Guta, Ghabrial, Mothopeng, Ranotsi & Baral 2018
[162] Murray & Roscoe 2001-142, Bertolt 2019: 651-659
[163] Murray & Roscoe 2001:105- this was practiced among the Moda girls in Northern Togo
[164] Paulme 1963a: 115-18
[165] Murray & Roscoe 1998: 143
[166] Bataille 1983
[167] Bertolt 2019: 654
[168] Murray, Roscoe & Epprecht 2021. https://doi.org/10.1353/book.83859 (accessed 20 May 2024)
[169] Bagnol 1996:25

found in the South Sudan and South Africa in particular.[170] These practices were later banned by colonial and post-colonial administrations as they were considered to be destroying the gender norms brought in by colonialism. Anthropologists termed this practice women's marriages. These terms which describe these practices show the existence of same-sex sexual relations in African societies. The Shangaan of Southern Africa used words like *inkotshane* to describe relations among Basotho women. Among the Wolof in Senegal, they called it *gorjiggen*.[171] In Burundi, they used words like *kuswerana nk'imbwa* (make love like dogs), *kwitomba* (to make love), *kunonoka* (literally, be flexible) which is in Kirundi.[172] In Tanzania, anal sex was called *kufirwa* and female same-sex relations were expressed through the term *kulambana*, which comes from *kulamba*, which means to lick, licking each other and designates, by deduction, cunnilingus.[173]

This is evidence that female same-sex sexual practices were practiced in almost all African societies. Thus, again, even if heterosexuality was the dominant sexual norm in pre-colonial Africa, there is no doubt that same-sex sexual practices were present on the continent and in some cases were features of social organisation. While they were not accepted everywhere, they were often tolerated. Among the communities that knew of and condoned homosexuality, are the Zulu of South Africa.[174]

2.2.2 Homosexuality in colonial Africa

The San rock painting mentioned in the previous section is considered the earliest documentation of homosexual practices among indigenous Zimbabweans. However, it is submitted that homosexuality in Zimbabwe dates back to 1892, when crimes related to homosexuality were being presided over by magistrates' courts in the country.[175] There is no argument that Europeans had a huge influence on African societies during colonization.[176] For instance, there is evidence that the existence of the Western legal system increased the number of cases related to homosexuality. This is a result of the arrival of the Europeans in Zimbabwe. The law which was used

[170]Evans-Prtchard 1970:72, 1970:1428
[171] Epprecht 2008
[172] Bertolt 2019: 657
[173] Bertolt 2019: 657
[174] Epprecht 1998
[175] Gunda 2010:123; in 1892 cases were heard in Salisbury (now Harare) and Umtale (now Mutare) of the accused and victims, none were white; Epprecht 1998:114.
[176] Epprecht 2008:49

in African colonies, including Zimbabwe, was the English and Roman Dutch law, and this law considered heterosexuality as the proper sexuality. This remains the basis of Zimbabwean law today.[177] The acts that deviated from what the Europeans considered natural were despised and were termed *venus monstrosa* or monstrous lust.[178]

The arrival of Europeans saw the introduction of farms, mines and towns, which led to the movement of men in search of jobs and economic prosperity for everyone. This, however, meant that most women were not able to travel the same journey, which resulted in African populations in towns becoming overwhelmingly male.[179] As a result, some African men started having same-sex sexual relations for sexual pleasure, hence homosexual conduct was prevalent and was often similar to *mapoto*.[180]

Over the years, homosexual acts were reported around and in military camps especially between 1900 and 1902 when soldiers from the British Empire arrived in South Africa for the war against the Boer independence. James Stuart, a missionary received reports of homosexuality during the war where soldiers would commit sodomy by kneeling and presenting their buttocks (*dunuzaing*), and having intercourse through the anus.[181] In addition to this, the diamond rush and the booming of the minerals created conditions that gave rise to an African form of male-male sexual relationships. *Inkotshane* (or *izinkotshane,* meaning plural wives), originated in the closed compounds where the miners lived. Unemployed Africans lived in unregulated camps around the mines in the hopes of finding jobs. They passed the time and slept together in huge barrack-like buildings divided into small dormitories, in which women were not allowed. The old practice of unmarried men having sex with young boys who accompanied them as their servants emerged.[182] The men sought sexual release by sleeping with the young boys, which quickly became the norm.

As in male-female sexual relationships, the *inkotshane* had to always play the passive role and could not reciprocate the sex act, which meant that only the husband could enjoy an orgasm. The *inkotshane* also carried out, so called, feminine duties like

[177] Epprecht 2008:52
[178] Epprecht 2008
[179] Epprecht 2008:55
[180] Mapoto refers to marriages not approved by parents of the groom and where the husband normally has not paid lobola. This practice also existed before occupation; Jeater 1894-1930, 1993: 194-5
[181] Epprecht 2008:56
[182] Epprecht 2008:57

cooking, fetching water and firewood. In terms of appearance, they were made to dress like women, putting on fake breasts made of coconut shells and keeping well-shaven.[183] With time, there were complaints about these acts, as they were mainly done in secret. This encouraged missionaries to speak out about it. The government appointed two men to investigate and proffer solutions.[184] These men carried out interviews in the compounds and found out that homosexual practices were widespread among African workers.

It was not only in the mine compounds that homosexual practices were prevalent, but also in prisons amongst criminal gangs.[185] The gangsters in prisons forced men and boys to engage in this kind of sex, sometimes through gang rape. This was also the case with women. Epprecht argues that in Zimbabwe, articles have hinted that 'known lesbians in the city of Harare (Gays and Lesbians of Zimbabwe members (GALZ)) were victims of rape threats and sexual humiliation in prison.'[186] For men, in some cases, new arrivals were perceived as womanly in the eyes of other inmates and were taken as wives right away. This shows that sex in prisons is not something new but can be traced back to the beginning of prison systems in Africa, which is violent and dehumanizing.

In the towns, accommodation which was allocated to blacks was hostels like the famous Matapi hostels in Harare, Mbare. These hostels had no privacy whatsoever to the inhabitants, with women prohibited from visiting. This resulted in male-only communities, leading to sexual frustration and causing men to resort to different forms of sexual pleasure, with homosexual conduct as one of the practices. [187] It can clearly be argued that homosexuality has always been present during the pre-colonial, colonial and post-colonial eras in Zimbabwe.

In the post-1990 period, the existence of GALZ meant that homosexuals had gone public despite facing intolerance from the government and society.[188] This supports

[183] Epprecht 2008:58
[184] Epprecht 2008
[185] Epprecht 2008:72
[186] Eppretcht 2008
[187] Gunda 2010: 124
[188] GALZ (Gays and Lesbians of Zimbabwe) is one of the oldest and most prominent homosexual rights organizations in Zimbabwe, established in 1990. GALZ provides support, advocacy, and education focusing on the rights, health, and well-being of sexual minorities in Zimbabwe. It has played a key role in challenging discriminatory laws and societal attitudes while offering safe spaces and resources to homosexual individuals in a challenging socio-political context.

the position that homosexuality was and is present during pre-and post-colonial eras. The GALZ started to use the public media to publish information on the subject of homosexuality, advocating that sexual rights are human rights. The assumption underlying the agenda is that "all human beings are born free and equal in dignity and rights. All human rights are universal, interdependent, indivisible and interrelated."[189] This means that rights are not privileges but should be enjoyed by all. GALZ principal objective is:

> "To build an association in Zimbabwe which is democratic and accountable and which strives for all the attainment of full and equal human, social and economic rights in all aspects of life for LGBTI persons. GALZ will pursue this objective for all LGBTI persons regardless of their sexual orientation, sexual preference, gender identity, race, clad, sex, gender, religion or creed." [190]

The objective clearly shows that homosexuals want to be guaranteed all the rights guaranteed to other citizens by seeking protection against discrimination. The post-1990 period in Zimbabwe has seen different kinds of homosexuality emerge. These include circumstantial same-sex practices, preferential same-sex practices and medicinal same-sex practices.[191] This is evidenced by the Criminal trial of Canaan Banana, the first president of Zimbabwe after 1980 independence which showcased the changing of homosexuality in Zimbabwe.[192] He was convicted of sodomy and performing unnatural acts with men. The case however paved the way for stereotyping of homosexual persons in Zimbabwe. This goes against GALZ objectives, which aims at promoting and protecting homosexuals through the provision of safe spaces and empowerment. This is all in order to influence positive attitudes of the broader society.[193]

In the post-colonial era, there was more tolerance of homosexuality with fewer sanctions from traditionally powerful elders in urban areas. This meant that many

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[189] Gunda 2010:126; the Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to sexual Orientation in Gender Identity, Mark 2007, 6 www.yogyakartaprinciples.org, (accessed 05/09/2023)

[190] GALZ, I Think I Might Be, undated pamphlet, Appendix 4 in The Bible and Homosexuality in Zimbabwe, A socio-historical analysis of the political, cultural and Christian arguments in the homosexual public debat ewith special reference to the use of the Bible, Masiiwa Ragies Gunda, University of Bamberg Press 2010.

[191] Gunda 2010: 146

[192] S v Banana 2000 (3) SA 885 (ZS) SC 41/2000

[193] What is GALZ? At https://galz.org/about/what-is-galz/ (accessed 23 May 2024)

traditional practices like arranged marriages lost value as young men and women moved outside the influence of their families due to urban employment opportunities. This meant less help from families for marriage or any support whatsoever. In this regard, sexuality was now firmly placed in the hands of individuals.[194] These are all effects of European colonial expansion which disrupted traditional lifestyles.[195] Consequently, this explains why organised gay and lesbian clubs thrived and continue to thrive in urban centres and not in rural areas in Zimbabwe. The rise of GALZ showed the existence of homosexuality in Zimbabwe.

2.2.3 The development of homophobic stances in post-colonial Africa.

Africa is regularly perceived as a homophobic continent.[196] The recent emergence of homosexuality as a central issue in public debate, in various parts of Africa, has encouraged a stereotypical image of a homophobic Africa placed in opposition to a tolerant West.[197] This position is promoted by schools of thought that who are of the view that homosexuality is a Western practice. This is also evidenced among many African state leaders, for example, the late and former President of Zimbabwe, Robert Mugabe, who attacked homosexuality as an imported Western depravity in the 1990s.[198] Same-sex relationships continue to be condemned in almost 40 countries in Africa and frequently the media reports violence, harassment, assault, lynching and sometimes murder that homosexuals face on the continent.[199] Colonialism certainly appears to have set the stage for African homophobia because of the link between the anti-sodomy laws introduced by the British and the criminalisation of homosexuality in its former colonies.[200] However, the laws have been renewed or strengthened, particularly in countries where the revised legislation imposes a prison sentence for homosexual behaviour.

Pre-colonial African societies observed largely indigenous religious and cultural traditions which were fundamentally altered by early visitors, imperialists and

[194] Gunda 2010: 147
[195] Louw, Mkhumbane and New Traditions of (un)African Same-sex weddings, 294
[196] Awondo, Geschiere & G Reid 2012
[197] Awondo, Geschiere & Reid (n 184 above); In relation to this, there recently has been a rise in homophobic sentiments in the West, for example in the USA. However, historically, Africa has been juxtaposed with what has been considered the more progressive, liberal West.
[198] The Human Rights Watch World Report 2003
[199] Bertolt 2019:659
[200] Tielman 1993:249-342; Frank 2009:123-141

missionaries.[201] The visitors interacted with indigenous institutions and distorted the continental socio-cultural landscape.[202] The imperialists brought transformation through systematic imposition of foreign social, political and legal systems in which distinct western values were embedded.[203] The British imperialists were accompanied by Christian missionaries who saw their religion and civilization as superior thus bestowing upon themselves the responsibility to 'save' the native populations. Thus, most African jurisdictions have undergone a process of internal reflection where indigenous people have reasserted, modified or annulled some of the values learned during the course of colonialism. With regards specifically to sexual orientation, most African states like Kenya, Nigeria, Uganda and Zimbabwe appear to reaffirm the colonial heritage by expanding the scope of anti-homosexuality offences and prescribing harsher penal codes.[204] It is therefore accurate to say that colonialists did not introduce homosexuality in Africa but rather intolerance of it and systems of regulation for expressing it.[205]

A number of post-colonial African governments have inherited the colonial homophobic attitude and retained the penal codes introduced by the British at independence.[206] It is argued that post-colonial homophobia differs from that of colonial regimes.[207] Colonial regimes were homophobic because it reduced labour forces in colonies and it was against religious dictates. Post-colonial governments continued to be homophobic for political reasons and to glorify the traditional cultures of their society. A number of traditional leaders are on record arguing that homosexuality has never been part of African culture, yet there is evidence that proves otherwise. Through this, older citizens and conservatives are more likely to align with political parties that express homophobic sentiments, as such parties coincide with their ideological viewpoints.[208] Politically, in conservative societies, homosexuality has

[201] Thomas 2015:44-99
[202] Osogo Amboni 2017
[203] Amboni 2017:35; Lugard 1965: 7- (architect of colonialism in East, West and parts of Southern Africa) opined that the Europeans brought with them the mind and methods of Europe.
[204] Ebobrah 2012: 120. According to Solomon Ebobrah, the emerging legal regimes in Nigeria, Uganda and Zimbabwe represent the most aggressive and extreme forums of post-colonial legislative actions against homosexuality in Africa.
[205] Dlamini 2006:67
[206] M Kirby, The Sodomy Offence: England's Least Lovely Criminal Law Export? In: C Lennox & M Waites (eds) Human Rights Sexual Orientation and Gender Identity in the Common Wealth: Struggles for the Decriminalisation and Change 2013:62-63
[207] Taru & Basure: 2014
[208] Taru & Basure 2014

been used to blackmail or discredit opposition parties' leaders. A more global example, shows that in 1992 in Malaysia, Mohamad Mahatir used homosexuality to discredit Anwar Ibrahim, by labelling him homosexual. Due to these allegations, Ibrahim was made to go through a trial and, in turn, lost some electorates.[209] In Africa, nationalists Museveni, Nyerere, Mugabe and Tembo condemned homosexuality within their countries, with the church in support of these stances, for example, Zimbabwe Assemblies of God Africa (ZAOGA) marched in solidarity with the President on his anti-gay stance.

Globalisation has also added another dimension to the homophobic nature of post-colonial regimes. Homophobia, as a post-colonial stance, is used by many African political leaders as a defence against the threat of perceived Western cultural imperialism in the form of globalisation brought to the non-western world through technology and capital.[210] Homophobia is used to protect cultural, religious and national values as they assume that it preserves the indigenousness of the locals.[211] This shows that homophobic sentiments currently found in Africa were introduced by colonial powers, and have been further entrenched in post-colonial societies.

2.3. Why are homosexual individuals discriminated against?

Homosexuality has been criminalised in most African States including Zimbabwe and the arguments which have been put forward to justify such criminalisation of same-sex acts include the following: contemporary cultural barriers including religion, homosexuality as a choice and not as a result of biological makeup, the notion that same-sex acts are immoral and an abomination, and that homosexuality is against cultural values of African societies, thus un-African. However, there have been arguments to suggest that homosexuality is not a choice but is rather a result of a person's biological makeup. It has also been argued that morality must be distinguished from legality and should not be used as a basis for discrimination and violation of fundamental human rights.[212] There is also undeniable evidence as provided above, to prove that homosexuality existed in many African societies and

[209] Offord 1999:6-8
[210] Taru & Basure 2014:6
[211] Sanya 2004
[212] Yaw Ako 2010:39

communities; therefore any claims that homosexuality is foreign and a threat to African society and un-African are unfounded.[213]

2.3.1. Homosexuality as immoral and a religious abomination

The culture of people, which includes religion, social norms, taboos and values, is what marks them out distinctively from other human societies in the family of humanity. Values are to be understood as beliefs that are held about what is right and wrong and what is important in life.[214] Taylor saw culture as that complex whole which includes knowledge, belief, morals, law, customs and habits acquired by humans as members of society. Bello, in an attempt to capture the exhaustive nature of culture, posited that it is the totality of the way of life evolved by a people in their attempts to meet the challenges of living in their environments, which gives order and meaning to their social, political and economic, aesthetic and religious norms thus distinguishing people from their neighbours.[215]

With regards to homosexuality, there has been continued criminalisation and re-criminalisation of same-sex consensual sexual activity, based on the argument that it is against cultural values, immoral and religious abomination.[216] Dave Chikasi argues that homosexuality stems mainly from the fact that it is a reversal of natural sexuality.[217] Sloan argues that based on the Old Testament approach to Christianity, the early church believed that homosexuality was abominable and should be severely punished, with homosexuals put to death by burning or hanging.[218] This attitude has been seen in the Christian church today.

It must be noted however that despite the strong opposition to homosexuality by the Christian religion, there are some Christians that are not opposed to homosexuality. Kaoma, an Anglican pastor from Zambia, argued that the violence against homosexual people is an extension of a cultural war on homosexuality that started in the United

[213] S Tamale, 2003 Out of the Closet: Unveiling Sexuality Discourses in Uganda, Feminist Africa, 2 (Changing Cultures), the African Gender Institute, Cape Town
[214] Taylor 1958
[215] Bello 1991:181
[216] The Holy Bible in the Old Testament says, “Thou shall not lie with mankind as with womankind: it is an abomination, Leviticus 18:22. The Holy Bible, King James Version. Leviticus 20:13, “if a man also lie with mankind as with woman, both of them have committed an abomination, they shall be put to death, their blood shall be upon them”
[217] Pastor Dave Chikasi, What is Adam doing with Steve, asked Lot? The Bulawayo Chronicle 13/09/1995
[218] Sloan 1987:2

States, gradually spreading to Africa, causing Africans to become collateral damage of the United States cultural wars.[219] He argued for the respect of homosexual rights in Africa and to stop advocating for the spread of homophobia.[220]

In 2013, on the issue of inclusion of homosexual individuals, Pope Francis stated that,

> "If they accept the Lord and have goodwill, who am I to judge? They should not be marginalised. The tendency [same-sex attraction] is not the problem…they are our brothers." [221]

This was after being asked about gay priests during an exchange with the press. In 2015, during a luncheon with 90 prisons inmates in Naples, including 10 from the ward which houses homosexual individuals, the pope stated that,

> "Sometimes it happens that you feel disappointed, discouraged, abandoned by all: but God does not forget his children, he never abandons them! He is always at our side, especially in trying times…I ask you to pray for this intention so that Christ can take even what might seem to us impure, scandalous or threatening and turn it…into a miracle. Families today need miracles!"[222]

This shows that Pope Francis' tenure as the pope was considered notable by the homosexual community as he adopted a more conciliatory tone towards homosexual people than that of his predecessors.[223]

Dicastery (formerly Congregation) for the Doctrine of the Faith updated a 2021 Responsum (answer) to the question of offering blessings for same-sex unions. The "Fiducia Supplicans'," [224] rich theology on the pastoral meaning of blessings states that people in "irregular unions" as well as persons in same-sex relationships can receive non-liturgical blessings.[225] However, this does not officially validate the status of homosexual individuals or change in any way the church's perennial teaching on marriage. The doctrine regarding marriage does not change, and the blessing does

[219] Kaoma 2009:4
[220] Kaoma 2009:5
[221] http://ncronline.org/blog/nor-today/pope-homosexuals-who-am-i-to-judge. (accessed 23 May 2024)
[222] http://www.cnn.com/2015/07/06/world/pope-ecuador (accessed 23 May 2024)
[223] n 209 above
[224] Meaning suppliant confidence from the Dicastery for the Doctrine of Faith. It is a declaration by the Pope, in this case Pope Francis that allows Catholic priests to bless couples not considered to be married under church teachings which also includes same-sex couples.
[225] It is a blessing given as a token of God's love for the total well-being of the persons blessed, in response to an open-minded desire on the part of those who request or receive such blessings to draw closer to God and more fully experience His providential care; Dr. Mirus 2023 at https://www.catholicculture.org/commentary/blessings-for-same-sex-couples-elephant-in-the-room/ (accessed 23 May 2024)

not signify approval of the union.[226] Regis Martin, a professor at the Francis University of Steubenville in Ohio, called on the Pope to resign and to get himself "off to the nearest monastery for a life of prayer and penance."[227] On top of this, the then Bishop Joseph Strickland, who was recently elected by the Vatican as the bishop of Tyler, Tex, issued a video which called on other bishops to say no to the declaration.[228]

While homosexual persons argue for the recognition of sexual rights as human rights, thereby seeking legal assurances for their freedom, Murefu addresses this position by throwing a moral argument hence diverting from the legal framework. He states that,

> "All over the world, homosexuals are claiming constitutional rights to perpetrate this unnatural living style. This is more than just a constitutional issue, it is a moral issue. Morality cannot be legislated. Change has to take place from within the heart which the Bible describes as desperately wicked above all (Jeremiah 17:9)."[229]

Consequently, it is considered inappropriate for the Zimbabwean government to legalise homosexuality or decriminalise consensual adult same-sex relationships and practices. This is because it is not a legal issue, as Murefu and most Zimbabwean Christians have argued, but rather a moral issue. This shows that there is a clear association between morality and the Bible. This is supported by Nyilika who wrote that homosexuality is an immoral act because when God created man and woman, he had a special reason for doing so.[230] From this it appears to mean that what was created by God is the official morality based on natural law, taught to Christians in Africa, hence homosexuality is immoral.[231]

Regarding what is moral, Mavheko states:

> "It cannot be over-emphasised that such relationships apart from being an antithesis to Zimbabwean cultural being, defy God's spiritual law which approves of only two lifestyles - heterosexuality within marriage and celibacy - while at the same time expressly forbidding homosexual acts."[232]

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[226] Bretzke 2024 at https://outreach.faith/2024/01/reactions-to-the-vatican-declaration-on-blessing-same-sex-couples-show-that-culture-matters/ (accessed 23 May 2024)
[227] n 213 above
[228] n 213 above
[229] Murefu, Homosexuals: Pros and Cons, God's Natural Order is Being Violated, The Sunday Mail 05/02/1995
[230] Cecil Nyilika, Gays erode Culture. The Bulawayo Chronicle, 06/09/95
[231] Salla 2006:87
[232] Cuthbert Mavheko, Homosexuality has no place in Zimbabwe, The Bulawayo Chronicle 29/01/2000

This is further supported by Pashapa who argued and stated that:

> "From the cumulative teaching of the Bible there can be no form of Christian homosexuality, Christian adultery, bestiality and rape. There can be no respectable version of other violations of God's basic moral law known in all cultures such as rape or murder (Romans 1:18).[233]

Pashapa sees Christian and moral as synonymous where one can replace the other without distorting the meaning of his argument. He further states that, "obeying God's moral law and his purpose for our lives is the only way to achieve our highest welfare as human beings." Therefore, homosexual relationships that are 'loving relationships' are incompatible with true love because they are in revolt to God's law and purposes. Homosexuality is then considered immoral because it is condemned by God's law.[234]

As a result, heterosexuality is understood as moral and essentially discouraging promiscuity. It is considered as what was made by God and anything that falls outside of this view is labelled immoral. It is however submitted that the church and state should not wage war against homosexuals because of the human rights argument. This view recognises the respect for the rights of all persons because they are human beings with inherent inalienable rights and not because of sexual orientation.

2.3.2. Homosexuality as offensive to the African culture, tradition and values.

The value of a thing, be it an object or a belief, is normally defined as its worth. Hence just as an object is seen to be of high value that is treasured, people's beliefs and values about what is right or wrong, are equally treasured. Based on cultural considerations, some forms of behaviour, actions and conduct are approved while others are widely disapproved of.[235] As discussed, one obstacle that has blocked the recognition of sexual minority rights in Africa is the position and argument that homosexuality is un-African and alien to the African society.[236]

Quite a significant portion of the population in Zimbabwe believes that homosexuality is foreign. Homosexuality is considered un-African because it is understood to be replacing heterosexuality, hence homosexual persons in Zimbabwe must remain closeted. It is widely believed that heterosexual relationships must lead to marriage

[233] Noah Pashapa, Even The Bible Condemns, The Harare Sunday Mail 26/04/98
[234] Gunda 2010: 228
[235] Idong 2015: 97-111
[236] Yaw Ako 2010

with the aim of procreation.[237] African societies traditionally placed an extremely high and prodigiously over-determined value on heterosexual marriage and reproduction,[238] hence marriage climaxed once procreation had occurred. Procreation after marriage is so important that infertile women and impotent men tended to have very low, if not despised, social status, which was considered a societal curse.[239]

Caldwell and Caldwell argued that barren women would be subjected to demonising treatment, like isolation, so as not to contaminate others and were forced into divorcing their husbands.[240] Because of the high value placed on fruitful marriage institutions, Africans worked towards conformity with heterosexual norms.[241] However, in reality, this was sometimes a façade. As purported above, this façade was socially protected by, what Epprecht calls, a deeply embedded culture of silence, regarding the existence of homosexuality. The lack of procreative potential of homosexuality is then viewed as unnatural and, as such, the most common retort in opposition to homosexuality as noted previously, is that it is un-African.[242]

However, this claim is made without due consideration to historical facts about homosexuality in Africa. It disregards the appreciation of human dignity as a core and universal component of international human rights and States' obligations under the several human rights instruments they have ratified.[243] To sum up, the sexual preferences of homosexuals or their orientation are labelled un-African and deviant in order to justify discrimination, marginalisation and criminalisation.[244] It is argued that same-sex conduct has always existed in pre-colonial Africa. It is instead colonial laws that criminalised and punished homosexuality and introduced homophobic attitudes in their colonies, hence it is homophobia which is un-African.[245] This makes the argument that homosexuality is un-African only a charade.

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[237] Epprecht 2006:187,188
[238] Epprecht, 2005:138-139
[239] Epprecht 2005: 138; B Kisembo, African Christian Marriage, 105-106
[240] Caldwell & Caldwell 1987:418
[241] Epprecht 1998:635
[242] Epprecht 1998:635
[243] Namwase et al 2017:22
[244] Namwase et al 2017:24
[245] Sexual Minorities Uganda (SMUG) Expanded Criminalisation of Homosexuality in Uganda, A Flawed Narrative 2014: 3; Sylvie Namwase, Culture Versus Homosexuality: Can a Right From Culture be Claimed in Ugandsn Courts? 72

2.3.3. Homosexuality as a choice

A further reason why there is continued criminalisation of homosexuality is that it is a belief that people have chosen to adopt a homosexual life. This stems from state-sponsored homophobia and the attitude of Zimbabwe towards sexual minority rights. This position is, however misplaced, as it is a result of ignorance of what homosexuality is. There is overwhelming evidence to suggest that being homosexual is something that is a result of biological makeup and not something one chooses to become.[246] Goddard argues that homosexual orientation is determined before birth.[247] The argument is that:

> "Nature is unquestionably one of the main factors to play a role in determining a person's sexuality. It is almost certain for example that some people have a genetic pre-disposition to homosexual orientation or preference-they are born that way. The attraction to people of their own sex is in their case 'hard-wired' into their brain and cells."[248]

Gaudencia further argues that the struggle for homosexual tolerance and recognition is just one side of the coin. She writes that:

> "For gays and lesbians, homosexuality is a genuine state of being and not an optional lifestyle which they choose. Their sexuality is firstly a matter of biology and secondly, homosexuality is a matter of choice, in which case two persons of the same sex can enter into a relationship for pleasure."[249]

This shows the use of both biology and social factors in these arguments, therefore, homosexuality is a natural occurrence, while homophobia stems from social constructions around sexuality.[250] This supports the essentialists' argument, because, "they hold that the basic structures of sexuality and gender are independent of their social context, that people are born with their sexual orientation and not as social constructions."[251] The basis for this is the biological argument of the 1991 LeVay investigation, which claimed that sexual preferences and behaviour of homosexuals may be dictated by the structure of the brain. This is especially the case if the brain of

[246] Gloucester 1979:13
[247] Goddard 1996
[248] GALZ, Unspoken Facts: A History of Homosexualities in Africa, Harare: Gays and Lesbians of Zimbabwe 2008 7-8
[249] Mutema 1996
[250] Gunda 2010:132; Halpern 1990:51-2
[251] Nissinen 1998:8

homosexual men resembles that of heterosexual women more than that of heterosexual men.[252]

It is a fact supported by scientific evidence that, some people are just born that way by their biological makeup. Expecting them to suppress their nature or try to change it would be inhumane. Dean Hamer demonstrated a link between male homosexuality and 'DNA markers'.[253] He provided the most convincing evidence to date that sexual orientation is genetically influenced by using the linkage analysis to locate the gay gene.[254] Persons who share a gene are likely also to share a piece of DNA that is close to that gene. From the above, Mother in Arms, argued that homosexuality is not depraved nor is it a perverse choice, but is a natural orientation which has been repressed and condemned over the years for not being the norm as society would deem it.[255]

This clearly shows that homosexuality is viewed as natural as is heterosexuality. In this case, homosexuality cannot be seen as something a person chooses to be.[256] Mavheko writes that, "In light of psychological medical and biological research, the conclusion reached is that homosexual conduct is not a perverse, depraved choice, but a natural orientation…"[257] This aims to point out that homosexuality is beyond the control of the individual. It is then unjust for society to deny rights to such persons as if they chose their sexuality.[258] Regardless of whether sexual orientation is a choice or an inherent aspect of identity, it is fundamentally unjust for society to deny individuals their rights. Human rights are universal and inalienable, granted to all people simply by virtue of their humanity, and should not be contingent upon personal characteristics or identities.

In support of this, Gunda wrote that:

[252] LeVay 1991:1034-1037
[253] Spitko 1996: 579; Hamer & Capeland 1993:321-27
[254] Spitko 1996: 580
[255] Mother in Arms, Irresponsible Remarks, The Harare Herald, 17/01/1995
[256] Gunda 2010:133
[257] Cuthbert Mavheko, Homosexuality has n place in Zimbabwe, The Bulawayo Chronicle 29/01/2000
[258] Gunda 2010:134

> "If homosexuality was a choice, surely some of us would have quit-who would want to lose their family, prejudiced and be called a pervert? God created me to live and I shall live my life to the full"[259]

2.3.4. The Foucauldian approach to homosexuality.

Foucault was a philosopher, historian and activist and his work was generally categorised as poststructuralist. His work and life achievements have made him a model for many gay, lesbian and other intellectuals through his analysis of interrelationships of knowledge, power and sexuality. Foucault outlined the overall history of sexuality, with the idea that various modern fields of knowledge about sexuality are associated with the power structure of modern society. He shows how sexuality became an important construct in determining not only moral worth but also health, desire and identity. He looks at how homosexuality has been historically constructed and socially constituted.[260] He explains how sexuality became understood as a particular form of discourse that is a science, with confession as a producer of knowledge. Further, he explains how homosexuality was medicalised and was implanted in bodies. This means that homosexuality was classified as a medical disorder and homosexuals were subjected to various invasive and harmful medical treatments aimed at "curing" homosexuality. Foucault was highly acclaimed and received public prominence for his clinical studies of medicine, psychiatry and the prison system (especially disciplinary practices).[261] This equipped him with the necessary information needed to trace the formulation of knowledge regarding sexuality in The History of Sexuality.[262]

In The History of Sexuality Volume 1, Foucault makes three interrelated descriptive claims about sexuality. Firstly, he stated that in the West, during the 19th century, sexuality functioned as the foundation of subjectivity. Second, he points out that this power that pervades us, this truth of our subjectivity, is not under our control. This is so because we do not choose our sexuality, but it chooses us, shapes us and makes us who we are, while still co-existing with our rationality and civility, which on the other hand, it also poses a danger. This means that one must protect their sexuality but also

[259] Dumisane Dube & Jack, Homosexuals like Heterosexuals are God's creation, The Harare Daily News, 02/02/2004
[260] Foucault 1990
[261] Taylor 2017: 113–134.
[262] The History of Sexuality is not a history of sexuality but is a history of how sex became to be known, as its French subtitle, *La volonté de savoir*; Foucault 1990: 113.

beware of it as a force capable of destroying that which it enables us to create.[263] Third, he stated that sexuality as our truth, which both endangers and enables, must be understood. It must be known and submitted to managerial judgment. Sexuality in the person of the sexual subject must be brought to confess.[264] This highlights the historical practice, especially in Christian pastoral power, where individuals are compelled to confess their sexual desires and acts. This confession is a means of both self-knowledge and social control, making sexuality a matter of discourse and surveillance rather than just private experience. In summary, sexuality is the name of who we are, what most threatens us and what we most need to know. The greater danger is then silence, as repressed sexuality is self-destructive and unhealthy, with confession being the opposite and liberating. [265]

Foucault committed himself to the struggle of minorities, those who had been classified as others, excluded and lived lives that were removed from what was thought to be 'normal'.[266] Throughout his work, he was of the view that what needed to be overcome was not homosexuality but the repression that impeded living homosexually. To overcome this repression, it was important to conceptualise the way in which human beings had been historically governed and limited.[267] What he did was describe a manner of interrogating culture to determine when and under which circumstances homosexuality was problematised, that is, how it became a problem.[268] He wanted to determine the conditions under which the human being problematises what he or she is, the way they behave the ways they do and the world they live in.

Foucault used the method of genealogy to construct the history of sexuality, because through history, he was able to analyse the relations of an order in which knowledge and power are thoroughly complicit.[269] He wanted to determine the mechanisms that resulted in the treatment of homosexuality as an abnormality or a pathology which led homosexual individuals to be considered dangerous. For him, the birth of homosexuality as a problem can be found in the modern conscience of the West from

[263] Foucault 1990: 69
[264] Foucault 1990: 69
[265] Foucault 1990: 69
[266] Foucault 1999, Estrategias de poder. Barcelona: Paido`s
[267] Foucault 1999
[268] Foucault 2003 Por si mismo. Available at http://www.youtube.com/watch?v=_wEsYlr5DQM (accessed 29 May 2024)
[269] Sondra, Crespo, Arcieri, Hassan 2016: 111-130

the 18th to 20th centuries, which was a period of repression.[270] During this period, in the 18th century, hermaphroditism (as intersexuality was then termed) and homosexuality were illegal because they were considered to go against nature. This was specifically a feature of legal systems like English common law and its colonial offshoots during the 18th century. They were regarded as an attack against the regular functioning of the natural sphere, attacks that could be sanctioned by the law.[271] Homosexuals were categorised as dangerous social types and sent to prison.

His analysis of sexuality is important when discussing stigmatised sexualities. In the introduction of the first volume of The History of Sexuality, the central issue regarding sexuality was to acknowledge the fact that it is spoken about. It is then important to discover who does the speaking, the positions and viewpoints from which they speak and the institutions which prompt people to speak about it.[272] The overall issue was the way in which sex is put into discourse.[273] The analysis of how sex was constructed and negotiated into discourse was done through locating forms of power, the channels it took and the discourse it pervaded in order to reach individual modes of behaviour.[274] Foucault explains;

> "Discursive practices are not simply ways of producing discourse. They are embodied in technical processes, in institutions, in patterns for general behaviour, in forms of transmissions and diffusion, and pedagogical forms which, at once, impose and maintain them."[275]

Foucault describes discursive practices as, 'a body of anonymous historical rules, always determined in time and space that have defined a given period.'[276] He then suggests that contemporary sexual discourses were rapidly developing and multiplying during the modern period[277], in the 18th and 19th centuries, during the

[270] Foucault 2007: 11
[271] Sondra 2016: 111
[272] Drazenovich 2010
[273] Discourse in Foucault's method means social, political and cultural arrangements of ideas and concepts through which the world is communicated and constructed, observed in terms of the elements of knowledge and power inherent in them. It is about the production of language and practices by systems, producing existential meanings which shape individual lives.
[274] Foucault 1990: 11
[275] Foucault 1980: 200
[276] Foucault 1972: 117
[277] The term modern is a historical period which refers to the era of Enlightenment that is the 18th century and 19th century, where there was social change, concerned with social philosophy, from social premises, social ends and viewing religion and art in social terms.

period termed the 'sexually repressive Victorian era.' The Victorian era is believed to have lasted between 1825 and 1920.

2.3.5. The Repressive Hypothesis.

The theory of repression posits a negative relationship between sex and power, suggesting that power seeks to prohibit sex, deny its existence in various forms, and suppress or silence it. In The History of Sexuality, Foucault was strongly opposed to the sexual repression hypothesis.[278] The basic viewpoint of the hypothesis is that, due to the influence of Victorian society in the Western world, in the mid-19th century, sexuality was silenced and viewed as taboo. This was reflected in Puritan social etiquette. [279] During this period, society permitted the expression of sexuality in brothels and mental institutions but restricted it in the public domain. It was only restricted to the parents' bedroom, and shrouded in duty and obligation.[280]

On this repressive hypothesis of the Victorian era, Foucault showed that sexuality, far from being a forbidden topic of speech during the last two centuries, has been the reason for the explosion of discourses in the West.[281] He was determined to prove that sexuality is indeed spoken about and wanted to discover who does the speaking, the viewpoints from which they speak about it and what is distributed about the things that were said.[282]

By opposing the repressive hypothesis, Foucault argued that one should not analyse the history of sexuality by making the prohibitions the central element of sexuality.[283] Scholars and theorists, especially before and during Foucault's time, accepted the repressive hypothesis as a given framework to understand sexuality's history. They viewed sexuality as being largely suppressed by societal power structures. By critically examining the repressive hypothesis, which is a dominant idea that Western society has historically suppressed sexuality through censorship and prohibition, Foucault's survey reveals that sexuality has instead been subject to mechanisms that incite discourse about it. Rather than simply silencing sexual expression, the discussion, classification, and regulation of sexuality have been actively promoted through various

[278] Foucault 1986: 156
[279] Foucault 1986: 156
[280] Foucault 1986: 156
[281] Callis 2009: 213-233
[282] Foucault 1978: 11
[283] Foucault 1990: 75

power structures and social institutions such as medicine, law, and education. This incitement to discourse involves producing knowledge about sexuality, shaping how individuals understand and express themselves sexually. [284] Thus, sexuality is not merely repressed but is rather a central focus of the systems and strategies used to govern behaviour and identity.

This incitement to discourse was necessitated by the development or the use of a variety of institutions like schools, clinics and psychiatric associations. With these institutions having the knowledge and power to incite them, it meant the multiplication of discourses as they emerged.[285] This demonstrates that sexual repression in Western civilisation was intertwined with a drive to uncover and systematise knowledge about sexuality, effectively shaping sexuality through scientific and discursive practices. This was described by Foucault through the development of a *scientia sexualis.*

2.3.6. The Science of Sexuality (Scientia Sexualis) and the Medicalisation of Sex

By the late 1860s, psychiatrists started analysing homosexuality from a medical perspective. This marked the dawn of a series of new sexual interventions and controls.[286] Sexual behaviour and practice were not analysed in isolation; instead, studies focused on individuals in the context of their unique personal characteristics and experiences. Scientists thought that the pathological sphere could be discovered and known, and therefore homosexuals were imprisoned in asylums and attempts were made to 'heal' them.[287] From this period, homosexuals were related to the insane and both groups were seen as being ill in terms of their sexual instincts.[288]

Foucault pointed out that the modern system of sexuality was based on the medicalisation of sex and pleasure and the creation of sexual species.[289] Sex was then understood as *scientia sexualis* rather than *ars erotica* (as a matter of science rather than a matter of pleasure).[290] Sex was approached by developing a science, as

[284] Incitement to discourse refers to multiple of heterogeneous social, political and cultural forces that agitated for increased knowledge and control of a particular area of life and in this case sex.
[285] Foucault 1990: 33
[286] Sondra 2016
[287] Sondra 2016
[288] Foucault 1995:152
[289] Foucault 1978: 58
[290] Foucault 1978: 58

opposed to an art, of sexuality, which enabled its dissatisfaction, constraining and categorising.[291] Sexuality came under the scrutiny and regulation of scientific disciplines such as biology, psychology, and medicine, whose knowledge-producing practices exercised power by defining and controlling sexual behaviour and identities. Foucault argued that during the 19th century, medicine and science "created an entire organic, functional, or mental pathology arising out of 'incomplete' sexual practices."[292] The said incomplete sexual practices were those that fell outside of, the so-called legitimate sexual relations or sex for procreation. Sex and sexuality became a matter of science, leading to the stigmatisation of the practices that catered to pleasure rather than biology.[293]

In the process of labelling sexual perversions, science did not rid society of the 'sexual perversions', rather, they were creating a new type of person that is the sexual deviant.[294] Regarding homosexuality, Foucault stated that;

> "The 19th century homosexual became a personage, a past, a case history, a childhood, in addition to being a type of life, a life form, and a morphology, with an indiscreet anatomy and possibly a mysterious physiology. Nothing that went into his total composition was unaffected by his sexuality…The sodomite had been a temporary aberration, the homosexual was now a species."[295]

Thus, the medical discourse turned sex into a type of person and a medical identity where a sexual act could stand on its own. Foucault pointed out that the homosexual along with other individuals labelled as 'perverts', was now seen as a type of person who was different from the non-deviant in a host of ways that culminated in same-sex sexuality.[296] This was supported by Karl Ulrichs, who was of the view that homosexuality was the result of some men being born with strong female souls and vice versa.[297]

The medicalisation and speciation required the population of the West to confess their sexual acts and desires. This led to the handing over of the power of labeling the

[291] Foucault 1990
[292] Foucault 1990: 41
[293] Callis 2009: 213-233
[294] Callis 2009: 213-233
[295] Foucault 1990a: 43
[296] Foucault 1990: 222
[297] Sullivan 2003: 4

confessed desires to another.[298] This leads to Foucault's second point of power, truth and confession. In this regard, he pointed out that Western societies established confession as a ritual, which was relied on for the production of truth.[299] Although confession originated in the Catholic Church in Europe, it continued to be significant even as the church became less so.[300] Through confessions, medical judicial, pedagogical and familial practices and the science of psychoanalysis, men and women, boys and girls scrutinised their desires, emotions and thoughts, telling someone about them. They would tell the priest about their sins, describe their symptoms to the doctor, and undergo the talking cure (confessing sins, diseases, crimes and the truth). The truth was sexual. It was then used as medical therapy.[301]

Confessions of sexual perversions and labeling of this confession by a professional resulted in sexual discourse.[302] The scientific expert was thus empowered to give truths of sexuality to the confessor by telling them what species of pervert they belonged to.[303] Since the Middle Ages, confession has been employed as a key technique and highly valued method for the development and regulation of sexuality. Foucault notes;

> "The confession was and still remains the general standard governing the true discourse on sex. It has undergone a considerable transformation, however ... it gradually lost its ritualistic and exclusive localization; it spread; it has been employed in a whole series of relationships: children and parents, students and educators, patients and psychiatrists, delinquents and experts."[304]

However, it was known that if one confesses their homosexuality, they stand to lose their job, home, children, civil rights, physical self-determination and physiological integrity. Foucault then critiques and questions the meaning and function of confession. He argues that general repression indicated an expansion of discourses and a proliferation of discursive centers.

The structure of confession gave power not to the one who spoke but to the one who listened. This constituted the knowledge concerning sex as a result of the listening

[298] Callis 2009: 223
[299] Foucault 1978: 58
[300] Foucault 1978: 63
[301] Foucault 1978: 68
[302] Foucault 1978: 61
[303] Spongo 1999: 15
[304] Foucault 1990: 63

that happened over the years. The knowledge became solidified when medicine and psychiatry developed it as a science in the 19th century.[305] Medicine then created a functional and mental pathology arising from 'unnatural' sexual practices such as homosexuality. It further classified all forms of sex, incorporated them into notions of developmental and institutional disturbances and set about to manage them.[306] Developments in the discursive practices of medicine, psychiatry and law regarding sexuality changed the way in which individuals were led to assign meaning to their conduct. Individuals began to see themselves as subjects of sexuality, accessible to diverse fields of knowledge and linked to rules and constraints.[307]

It is in the 19th century that an entire population of people who were previously scarcely noticed, began to be categorised and interpreted in terms of their sexuality. This included the sexuality of homosexual individuals. Populations that were largely inchoate before the 19th century began to emerge and became subject to more subtle yet stricter systems of regulation, distinguishing between what was considered natural and unnatural.[308] Norms of self-regulation were established by formulating new 'species' of individuals and by discovering and categorising perversions. These processes elaborated a more subtle and pervasive form of social control.[309] This led to the development of a medical category of the homosexual. Foucault pointed out that;

> "We must not forget that the psychological, psychiatric medical category of homosexuality was constituted from the moment it was characterised – Wesphal's famous Article of 1870 on 'Contrary Sensations' can stand as its date of birth – less by a type of sexual relationship than by a certain quality of sexual sensibility, a certain way of inverting the masculine and feminine in oneself. Homosexuality appeared as one of the forms of sexuality when it was transposed from the practice of sodomy onto a kind of interior androgyny, and hermaphrodism of the soul. The sodomite had been temporary aberration; the homosexual was now a species."[310]

The highlighting of Westphal by Foucault was emblematic of the way in which homosexuality began to be categorised. The effect of medicalising homosexuality made it visible as a pathology, an anomaly and an inverted nature. It was made to

[305] Foucault 1990a: 41
[306] Foucault 1990a: 41
[307] Foucault 1990b: 4
[308] Halperin 1998: 98
[309] Halperin 1998: 98
[310] Foucault 1990a: 43

provide a principle of scientific intelligibility which could be managed under a psychiatric mandate. This resulted in Foucault's third point, where he outlined that once people have internalised a discourse and accepted a label, they are able to locate each other. This reverse discourse created self-identities, thus in the 20th century homosexuality began to demand its legitimacy and acknowledgement of its naturality.[311] This reverse discourse allowed gays and lesbians to label themselves through the power of coming-out.

2.3.7. The Construction of Homosexuality

Foucault argued that homosexuality grew out of a particular context in the 1870s. He pointed out that it must be viewed as a constructed category of knowledge rather than a discovered identity like sexuality. In the 19th century, homosexuals were called a 'species', an aberrant type of human being defined by perverse sexuality. While in the early centuries (16th) men and women confessed their indulgence in shameful sexual practices against the law of God and the land, in the late 19th century, men having sexual relationships with other men were encouraged to see themselves as 'homosexual'.[312] Homosexuality became a focus for a variety of studies and strategies.

The technologies of sex were designed to protect and preserve a productive and procreative population that met the needs of a developing capitalist system, for the bourgeois family. Given this background, same sex practices were regarded as a problem to be dealt with as they were termed aberrations from the procreative norm.[313] Homosexuality was systematically examined within various discursive domains such as law and education, which focused on safeguarding the health and moral integrity of the population.[314]

2.3.8. Foucault on the care of self

The second and third volumes of the History of Sexuality are focused on the arts of existence, the ethical formation of the person as subject, and the care of self. Foucault's work involved examining how historical cultures fashioned different sorts of links between sexual acts and forms of identity. He did this by turning to Greek

[311] Foucault 1978: 101
[312] Spongo 1999: 18
[313] Spongo 1999: 19
[314] Spongo 1999:19

conceptions of the self because Greek culture linked sexuality not to confession but to the art of existence.[315] Foucault describes the art of existence as,

> "Those intentional and voluntary actions by which individuals not only set themselves rules of conduct, but also seek to transform themselves, to change themselves in their singular being, and to make their life into an oeuvre that carries certain aesthetic values and meets certain stylistic criteria"[316]

To make this possible, the Greeks focused on cultivation of the self, characterised by the principle that one must take care of oneself, the principle of care of self.[317] Ancient Greeks viewed sexuality as formed around the notion of aphrodisia. Foucault defines aphrodisia as the acts, gestures and contact that produces certain forms of pleasure.[318] The use of pleasure was formulated around four axes for the Greek. These were, the relation to one's body, the relation to one's wife, the relation to boys and the relation to truth.[319] This meant that there was no one single system of sexuality that imposed itself on all people in the same way nor classified acts in terms of their being natural or unnatural.

Foucault then asked whether given the prevalence of accepted homosexual practice in the Greek culture, the were Greek bisexual or not[320] His reply was that, what made it possible to desire a man or a woman from their perspective, was the appetite that nature had implanted in one's heart for beautiful human beings, regardless of their sex.[321] Amongst the Greeks, there was no distinction between heterosexual and homosexual, but only the force of aphrodisia. This force involved sexual desire, and relationship between the self, other people and beauty. Given this background, a Foucauldian analysis of homosexuality is not about homosexuality as an identity that needs to be affirmed, rejected, changed, celebrated or denigrated. It is the forms of relations with the self, methods and techniques by which one works them out and the practices that enable one to transform their own being.[322]

[315] Feder 2009: 113
[316] Foucault 1990: 10
[317] Foucault 1988: 43
[318] Foucault 1990b: 40
[319] Foucault 1990b: 32
[320] Foucault 1990b: 188
[321] Foucault 1990b: 188
[322] Foucault 1990b: 30

2.3.9. The Problematisation of Homosexuality

Foucault defined problematisation as a process by which an aspect of reality, of one's experience, is brought into focus as a problem in need of a response.[323] Through problematisation, people became concerned about something. In Foucault's words, "people begin to take care of something…they become anxious about this and that – for example about madness, about crime, about sex, about themselves or about the truth." [324] Edward Mcgunshin interpreted that "this caring-about something is a way of disclosing the world in light of the problem and is therefore a response to that problem." [325] Problematisation then opens up a door to a power that creates subjectivity.[326]

In the problematisation of sexuality, Foucault also identified friendship as the real problem of homosexuality and makes more explicit the resistance to the repression discourses of sexuality. He says,

> "The more it is written by young people, the more it concerns young people. But the problem is not to make room for one age group alongside another but to find out what can be done in relation to quasi identification between homosexuality and the love among young people. Another thing to distrust is the tendency to relate the question of homosexuality to the problem of 'who am I?' and 'what is the secret to my desire'. Perhaps it would be better to ask oneself, 'what relations through homosexuality can be established, inverted, multiplied, and modulated?' the problem is not to discover in oneself the truth of one's sex but rather to use one's sexuality henceforth to arrive at a multiplicity of relationships. And no doubt, that is the real reason why homosexuality is not a form of desire but something desirable. Therefore, we have to work at becoming homosexuals and not to obstinate in recognising that we are. The development toward which the problem of homosexuality tends is the one of friendship."[327]

He then declares that homosexuality is a 19th century construct arising from the proliferation of discourses of sexuality;

> "This new persecution of the peripheral sexualities entailed an incorporation of perversions and new specifications of individuals. As defined by the ancient civil and conical codes, sodomy was a category of forbidden acts, their perpetrator was nothing more than the juridical subject of them. The 19th century homosexual became a personage, a past, a case history and a childhood…"[328]

[323] Mcgunshin 2007: 16
[324] Foucault 2001: 74
[325] Mcgunshin 2007
[326] Todd May 2006: 106
[327] Foucault 1994: 135-136
[328] Foucault 1990: 71

In this regard, Foucault's theorizing is important in analysing post-colonial governments' reactions to homosexuality. Most African states, including Zimbabwe, criminalise supposedly unnatural sexual acts and, in many, any behaviour that can be interpreted as homosexual is punishable. This goes against most constitutional rights and international human rights. This is a clear indication that the political elite have the power to define acceptable sexualities within their jurisdictions. In Zimbabwe, the constitution provisionally grants citizens their liberties while the interpretation of the law leaves no room for tolerating homosexuals.[329] This confirms Marx and Engel's position that:

> "The ideas of the ruling class are in every epoch the ruling ideas, that is, the class which is the ruling material force of society, is at the same time, its ruling intellectual force. The class which has the means of material production at its disposal has control at the same time over the means of mental production, so that, thereby, generally speaking, the ideas of those who lack the means of mental production are subject to it…"[330]

It is further argued that the unity of prevailing groups is usually created through the state and, institutions like churches, schools, police and the media. This is evident in most post-colonial states where citizens engage in homosexuality while leadership simultaneously condemns it.[331] Foucault supports this view by pointing out that sex and the body have been under the gaze, be it medical, legal or religious, and constructed through varying and different viewpoints, according to society, social group and period.[332]

2.4. The attitude of African Societies towards sexual minority rights

Homosexual individuals experience difficulties in fitting into the heteronormative communities. As a result of their orientation, they are faced with social exclusion, judgments and sometimes attacked.[333] Sexual minorities count among the largest group of minorities sharing common patterns of discrimination worldwide,[334] which makes their rights an international issue today.[335] The idea of human rights rests on the basic assumption that all human beings have certain basic rights simply because

[329] Taru & Basure 2014:9
[330] Marx & Engels 1970: 44-48
[331] Joseph 1992
[332] Taru & Basure 1014:10
[333] Mamba 2020
[334] Huamusse 2006.
[335] Heinze 1995:58

they are human. The Universal Declaration on Human Rights says that "all human beings are born free and equal in dignity and rights, and recognises equal treatment."[336] In its preamble, the African Charter on Human and Peoples' Rights states that freedom, equality, justices and dignity are essential objectives for the achievement of the legitimate aspiration of the African people.[337]

The provision means that sexual minorities are also entitled to the same enjoyment of fundamental rights and freedoms as are other human beings. However, there is no extension of the protection to all victims of systematic discrimination, especially sexual minorities by the said provisions and principles. With the human rights argument having failed to work in Zimbabwe, homosexuality is made illegal and criminal.[338] As discussed, this criminalisation is influenced by colonial laws adopted from European penal codes. The offense of sodomy in the legal framework meant discrimination by governments against sexual minorities, with political statements promoting homophobia.[339] Contemporary African political leaders have consistently denied or overlooked the existence of same-sex relationships, claiming that it is un-African. Hood pointed out that:

> "Mugabe remarked 'they can demonstrate, but if they come here (to Zimbabwe) we will throw them in jail.' The difference between 'here' and 'there' suggests that tolerance of homosexuality is becoming among other things, a strategy for mocking national and civilizational specificity. Zimbabwe has anti-sodomy laws on its statute books from its colonial past. ('here' and 'there' were once closer).[340]

In 1995, former President Robert Mugabe denounced gays and lesbians as 'sexual perverts' who are 'lower than dogs and pigs.' He also rejected calls for gay human rights, denying that they have rights at all. He regarded homosexuality as unnatural and un-African, claiming that it is a culture only practiced by a few whites.[341] It is against this background that the subject of homosexuality is not to be discussed in the public media as it is considered to be against traditional culture and is illegal. In the same vein, Kenyan former president Daniel Arap Moi once asserted that Kenya did

[336] Article 1 of the Universal Declaration on Human Rights, adopted and proclaimed by the United Nations Assembly in Resolution 217 A (III) of 1948 in Paris
[337] African Charter on Human and People's Rights preamble paragraph 3-4
[338] Donnelly 2003:230
[339] Human Rights Watch and International Gay and Lesbian Human Rights Commission, More Than a Name: State Sponsored Homophobia and its Consequences in Southern Africa 2003:2
[340] Hoad 2007:xii
[341] Huamusse 2019: 17

not have room for homosexuals and lesbians. In addition to this, immorality and child abuse is also employed in criminalising homosexuality. Garykai Mara wrote:

> "Zimbabwe is our country, our heritage and future and subsequently our destiny should be in our hands, we must not make compromises on such issues that involve the ethics and morality of the nation, more so when our children are the targets."[342]

In this regard, homosexuality between consenting adults is seen as immoral. Its culpability is increased as homosexuals, supposedly, seek to extend their immorality to children, also referred to as the 'proselytizing of the young.'[343]

Robert Mugabe also supported this and is quoted by Dunton and Palmberg as saying;

> "…if we accept homosexuality as a right, as is being argued by the association of sodomists and sexual perverts, what moral fibre shall our society ever have to deny organised drug addicts or even those given to bestiality, the rights they might claim?"[344]

Further, Epprecht examined court records which showcase the criminalisation of homosexuality in Zimbabwe, liable to prosecution in the post-independence era. This includes the famous trial of Canaan Banana who was charged with eleven counts of homosexual crimes.[345] Another high-profile person to be implicated is the former Chief Executive Officer of Zimbabwe Broadcasting Cooperation (ZBC) Alum Mpofu, who was found in a compromising position with another man at a club in Harare.[346]

In addition to this, homosexuality has been viewed as an illness and a mental challenge, viewing homosexuals as sick persons. Mabhumbo states that:

> "…biological science has revealed that every individual has a bit of both male and female hormones kept in a delicate balance in favour of one's sex…However, miscarriages of this balance do manifest themselves in various forms (including homosexuality)…It seems now the homosexuals themselves are saying they have a right to be sick while the other side is saying they have no right to be that sick."[347]

Homosexual individuals are robbed of their dignity because homosexuality is reduced to a disease and something of which they should be ashamed.[348] Homosexuality is

[342] Garykai Mazara, Ban them From Book Fair, The Harare Herald, 24/07/1996
[343] Gunda 2010: 188
[344] Mugabe cited in: Dunton & Palmberg 1996:10
[345] Guri 2002:50
[346] Epprecht 2004:181-2
[347] Mabhumbo C, A Case that cries for Treatment, The Herald Sunday Mail 05/02/1995
[348] Gunda 2010: 189

also portrayed as a mental health problem that can be cured with traditional therapies.[349] In this regard, it is argued that homosexuality is seen as a form of psychological disorder, requiring medical correctional procedures. This implied a denial of sexual rights, based on the belief that no one is entitled to such rights if they are considered that unwell.[350] In this context, some families with a gay child suggest consulting *sangomas* (traditional divine healers) to get treatment of the 'illness.'[351]

2.5. Conclusion

In conclusion, the labelling of homosexuality as un-African has created the impression that it was non-existent in pre-colonial African Communities. This is because of the argument by most African state leaders that homosexuality is a western practice introduced by Europeans. This is a huge misunderstanding as there is clear evidence of the existence of homosexuality and practices of homosexual acts in pre-colonial Zimbabwe. The existence of homosexuality in pre-colonial Zimbabwe is evidenced by the discovery of San rock painting. This has been interpreted as showing a group of men engaging in homosexual conduct.[393] The existence of GALZ, an organisation that represents sexual minorities in Zimbabwe, is evidence of the ongoing existence of homosexuality in Zimbabwe.

The existence of homosexuality in colonial and post-colonial eras in Zimbabwe is supported by different sources, which includes court records and scholarly writings.[394] Epprecht wrote about homosexuality in the mine compounds, prisons, and urban centres, which were fertile grounds for homosexuality.[395] The barring of women from urban centres and mine compounds in order to maintain productive work led to the forced separation of families for long periods of time.[396] One can then conclude that homosexuality is a reality in Zimbabwe and has been for over a century now as its existence is a historical fact.

Homosexual persons have been seeking recognition of their rights for a long time. They have been seeking publicity and the right to engage in consensual adult same-

[349] Chavhunduka C quoted in: The Harare Sunday Mirror, Homosexuality: Are Sodom and Gomorrah Suddenly Permissible? 03/03/2006
[350] Gunda 2010: 189
[351] Mutema 1996
[393] Epprecht 2008:42
[394] Gunda 2010:372
[395] Epprecht 2008:72
[396] Epprecht 1998

sex relations and practices without the fear of being discriminated against. However, this has been seen as breaching the boundaries set by the community, and against African values and cultures. Religious and moralistic arguments promoted prohibition of same-sex marriages. The community views heterosexual marriages as the natural practice, with the sole purpose of sexual relationships being that of procreation. The traditional conception of marriage seems to discriminate against homosexuals on the basis of sexual orientation which calls for a human rights based approach. This is because homosexual orientation is argued to be a choice when, in reality, it is an immutable characteristic which is inherent to some individuals.

CHAPTER THREE

THE PROTECTION OF SEXUAL MINORITY RIGHTS UNDER THE INTERNATIONAL HUMAN RIGHTS FRAMEWORK AMIDST CULTURAL IMPEDIMENTS.

3.1. Introduction

Sexual minorities comprise one of the largest minority groups experiencing widespread discrimination, which makes protection of their rights an international human rights issue.[397] There is no explicit international instrument on sexual minority rights, as stated by Lau:

> "Recognition of sexual orientation is still developing. The contours of sexual orientation are unclear. There is no human rights treaty with the words, 'sexual orientation', in its title, nor any such treaty that specifically delineates sexual orientation rights."[398]

However, it is important to take note of the fundamental premise that all human beings are entitled to basic human rights by the simple fact of their being human.[399] This obligates state parties with the duty to respect, protect and fulfill the rights of all.[400] This includes obligations to refrain from activity that may interfere with the enjoyment of rights, ensure that third parties do not violate rights and create conducive circumstances for the realisation of rights.[401]

International human rights legislation lays down obligations for states to comply with. Through ratification, international human right treaties require governments to implement domestic legislation that aligns with their obligations and duties. The human rights framework aims to uphold the dignity of all individuals, regardless of their circumstances and condition of life.[402] There is undeniable evidence to prove the existence of international human rights laws and mechanisms that provide protection for all persons including sexual minorities.[403] The protection of sexual minority rights should align with international and regional systems due to the similarity in circumstances and legal requirements. This theoretical view stems from the interdependence and interrelation of regional and international human rights

[397] Heinze 1995: 58
[398] Viljoen 2011
[399] Heinze 1995: 58
[400] Sepulveda et al 2004:16
[401] Sepulveda et al 2004: 14
[402] MC Nussbaum 1998:273
[403] The international human rights instruments include treaties, resolutions, concluding observations and declarations.

systems.[404] This chapter examines international and regional human rights jurisprudence on sexual orientation and its relevance to the protection of sexual minority rights. The purpose is to evaluate the relevance of these instruments to the protection of sexual minority rights in Africa.

At the international level, the chapter looks at international human rights protections which are enshrined in the Universal Declaration on Human Rights (Universal Declaration)[405], The International Covenant on Economic, Social and Cultural Rights,[406] and the International Covenant on Civil and Political Rights (ICCPR).[407] The chapter further looks at monitoring mechanisms used by treaty bodies, which are committees of independent experts that monitor the effectiveness of international human rights treaties. The chapter also looks at the special procedures together with the Universal Periodic Review (UPR) of the Human Rights Council. In addition, the chapter examines soft laws with regard to sexual minority rights.[408]

At the regional level, the chapter looks at the African human rights system,[409] while outlining some of the human rights protections that the system offers to sexual minorities.[410] Further, the African Commission on Human and Peoples' Rights (African Commission) together with the African Charter on Human and Peoples' Rights (ACHPR) are looked at. This is done while examining how the Commission and the Charter allow some protection for the rights of sexual minorities.[411] Lastly, the chapter will make a conclusion with regards to the discussed protection of sexual minority rights in the international human rights system.

The international and regional bodies have treated homosexuals as a sexual minority group in need of special protection under international human rights law. Under this

[404] Article 60 and 61 of the African Charter on Human and People's Rights (ACHPR) obligates the African Commission to interpret the Charter in accordance with international human rights law. Article 3 and 7 of the Protocol to the ACHPR on the establishment of an African Court provides for the same approach.
[405] It was adopted in 1948 by UN member states and contains *jus cogen* rights. Sepulveda et al 2004: 14
[406] Was signed and ratified in 1966 on the General Assembly resolution 2200 A (XXI)
[407] It has 166 state parties which was signed and ratified in 1966 by the General Assembly resolution 2200 A (XXI) and entered into force by 1976 in relation to sexual minority rights.
[408] Soft laws are declarations and statements which are not treaties.
[409] Which includes the African Commission, the African Charter on Human and People's Rights (ACHPR)
[410] Viljoen 2007; Ankumah 1996
[411] Huamusse 2006

approach, the right to non-discrimination and the right to privacy are extended to homosexuals and their sexual activities on the basis of the fact that they are disadvantaged and socially and politically underrepresented. There should be substantive limitations to state regulation of same-sex sexual activity between consenting adults in private. This is so because the sexual preferences and practices do not pose any harm to other people. This is called "the harm principle" to invalidate state preferences and discrimination against homosexuals. This section discusses the international practices in interpreting and applying the right to non-discrimination and the right to privacy to attack the penal laws that criminalise same-sex sexual conduct.

3.2. Universalism as against cultural relativism

When interpreting and applying human rights standards to sexual minorities, most African states exemplify the perennial conflict between cultural relativism and universalism. Cultural relativism maintains that human rights standards must be construed in the context of a particular socio-political environment. The cultural relativism argument states that the enjoyment of human rights is contingent on the culture of the people and varies as cultures vary, hence there can be no enjoyment of the same human rights everywhere. Different people have different beliefs and understandings of right and wrong across societies. Therefore, sometimes ignoring these differences when crafting an international instrument will cause violations once imposed on people.[412]

However, this is said to upset the principle of universalism in respect of some human rights, and also acts as an impediment to the progressive evolution of societies.[413] Sexual minority individuals in conservative countries, Zimbabwe included, are discriminated against on the basis of being different which is clothed with cultural relativism.[414] Addo, while acknowledging the tension between universalism and cultural relativism says that:

> "The traditional scholarly narrative on the relativism between cultural diversity and universal respect for human rights suggests a tension which must at best be managed. There is however

[412] An-Na'im 1992
[413] Donnelly 1984:400-419
[414] In S v Banana, the Court was guided by cultural values and held that discrimination on the basis of sexual orientation was constitutional taking into account the cultural regime which is largely conservative.

> no consensus among scholars as to the best way to reconcile or manage this tension and so creating an intellectual gap between Universalist and cultural relativist schools of thought."[415]

Universalism holds that human beings, wherever they are, are entitled to certain fundamental rights and freedoms. These are inherent to them purely by reason of being human. The universal enjoyment is traceable to the Universal Declaration.[416] African states often view universal application of human rights as a Western idea intended to interfere with the internal affairs of states and impose the "ideological patrimony of Western civilisation"[417] while western states view the cultural context as a ruse for the denial of rights.[418] Laws and legal concepts do not function in a vacuum and it is recognised that moral or social factors inevitably come up when granting homosexual people recognised rights. Human rights players must therefore utilise creative approaches to deal with minority protections.[419] Courts must then be raised to their role as custodians of justice and not mere rubber stamps for majority positions. They must uphold their duty to the popularity of their decisions.[420] In doing so, they can refer to inspiration from local scholarship, as Lau stated:

> "Human rights definitions are still compatible with their native philosophies despite their origin in Western liberalism. For instance…the Koran may be interpreted either to further their agendas of oppressive regimes or to support a Universalist understanding of human rights…Confucian scholars have used Confucian texts to support universalism: they argue that there is a substantial convergence between Confucianism and political liberalism"[421]

Similar strategies can be used to address the argument that extending human rights protections to sexual minorities runs counter to religious edicts and African cultural norms.[422] United Nations human rights bodies have received periodic reports which challenge specific cultural practices that they consider to be harmful or contrary to human rights guarantees.[423] This shows that the scales tilt in favour of the universalism argument.

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[415] Addo 2010:601
[416] Cerna 1994: 16
[417] Cerna 1994: 33
[418] Cerna 1994: 33
[419] Gondi 2007: 16
[420] Gondi 2007: 36
[421] Lau 2004: 1689
[422] Gondi 2006: 36
[423] Addo 2010: 601

3.2.1. The problem of Universality vs Cultural Relativism

To external dilemma of the human rights mantra is the universality relativism debate. Individuals who accept the universality of certain standards are faced with the difficult task of implementing those standards within divergent societies.[424] Universality is one of the essential characteristics of human rights and by definition, human rights apply to all human beings and are therefore universal. All human beings are holders of human rights, independent from what they do, where they come from, where they live and from their national citizenship, among others.[425] Universality of human rights is also influenced by other characteristics of human rights, for example, human rights are categorical, egalitarian, individual and indivisible.[426] Cultural relativism is put forward to try and give a voice to marginalised peoples and to combat the threat of Western moral imperialism, although it may have the opposite effect:

> "Discrediting of indigenous aspirations for social change as nothing more than Western contamination or as an aberrant foreign import, merely because these aspirations run counter to some entrenched cultural practices of the majority in power, seems to show singularly bad judgement"[427]

This shows that cultural relativism has been used several times, to the detriment of sexual minorities. This further suggests that when those in power reject progressive social movements by branding them as "foreign" or "Western impositions," simply because they clash with traditional majority norms, they are making a flawed and narrow-minded judgment. Such dismissal ignores the fact that these aspirations often arise from genuine local needs and struggles, they are not necessarily imports from outside but can be deeply rooted in the society's own quest for justice and equality.

3.3. Sexual minorities' protection at United Nations Level: Communications, State Reporting and General Comments.

According to the UN Office of the High Commissioner in 2012:

> "The protection of people on the basis of sexual orientation and gender identity does not require the creation of new rights or special rights for LGBTI people. Rather, it requires enforcement of the universally applicable guarantee of non-discrimination in the enjoyment of all rights… (T)he

[424] Maguire 2004
[425] Makokha Baraza 2012: 227
[426] An-Naim 1999: 147-168
[427] Zechenter in Maguire 2004: 334

> principle of non-discrimination is cross-cutting and the obligation on the part of States is immediate. Simply put, people may not be discriminated against in the enjoyment of rights on the basis of sexual orientation or gender identity. As the High Commissioner has stated, 'The principle of universality admits no exception. Human rights truly are the birth-right of all human beings.'"[428]

Decriminalisation of same-sex sexual conduct has received so much attention by the HRC, a monitoring body under the ICCPR.[429] Under the aegis of the United Nations, different human rights treaties have been adopted to protect fundamental human rights for all.[430] The treaty bodies use mechanisms like communications, state reporting and general comments to ensure that member states carry out their obligations in protecting human rights for all.

3.3.1. Communications

For a communication to be admissible, the individual must be a victim of a violation of any of the rights under the ICCPR. It should be brought against a State party to the ICCPR and the Optional Protocol to the ICCPR.[431] In order to identify new trends and patterns of injustice and discriminatory practices against discriminated individuals for the purpose of policy formulation, strategy development, and for the advancement of sexual minority rights, the HRC takes these communications into consideration as part of its yearly programme of work.

The Human Rights Committee has received communications on issues including violations of the rights of sexual minorities. It is important to note that the committee has not considered any communication in respect of any African country in relation to sexual minority rights. However, important lessons can be drawn from the concluding observations on matters having an effect on other countries, especially with regard to sexual minority rights.[432] In the case of ***Nicholas Toonen v Australia***, the Committee made a pronouncement that Article 2 of the ICCPR, which provides for non-

[428] UN Office of the High Commission, 'Born free and equal: Sexual orientation and gender identity in international human rights law', 2012, 10-11 http://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf (accessed 15 December 2024).
[429] Mittelstaedt 2009:364
[430] Which includes 8 core treaties like the ICCPR, International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention on the Right of the Child (CRC), Committee on the Elimination of Racial Discrimination (CERD), CEDAW
[431] Article 1 of the Optional Protocol to the ICCPR
[432] Yaw Ako 2010:14

discrimination on the grounds of sex, included sexual orientation.[433] The case was about a Tasmanian law that prohibited all private male same-sex activity, which was considered to be violating the right to privacy enshrined in the ICCPR.[434] Nicholas Toonen challenged the compliance of Sections 122 and 123 of the Tasmanian Criminal Code, outlawing "unnatural sexual intercourse or intercourse against nature" and "indecent practice between male persons" with Articles 2(1), 17 and 26 of the ICCPR.[435] The court considered that the word 'sex' in articles 2(1) and 26 has to be interpreted to include sexual orientation.[436] The HRC then decided that sexual orientation-related discrimination is a category in terms of enjoyment of the rights as guaranteed in the Covenant.

The same position was taken by the Committee in the case of ***Joslin v New Zealand***. The Committee stated that the prohibition against discrimination based on sex as per Article 26 included discrimination on the basis of sexual orientation.[437] It has been argued that sexual discrimination has a higher status in the ICCPR on the basis that Article 3 addresses equality between men and women in its application. In this regard, the reliance on sex appears to elevate sexual orientation-related discrimination. This has been however argued to be a radical and proactive approach used by the HRC as it has avoided reliance on 'other status' in prohibited grounds of discrimination.[438] In this regard, the Committee protected sexual minorities and fills the gap previously identified in the ICCPR.

However, although communications is a useful procedure, it has rarely been used by African countries as no communications have been brought against any of them. It is very unlikely that the procedure may be invoked by victims of human rights violations. It is also time-consuming as it takes a long time for a communication to be received and considered, which might impose time and resource constraints on potential users from Africa. Another challenge is that domestic remedies must be exhausted first before the procedure can be used.[439] Although communications is a useful

[433] Communication 488/92, HRC, U.N Doc. CCPR/c/50/D/488/1992 (March 1994)
[434] Article 17 of the ICCPR
[435] Toonen v Australia paragraph 1-2.2
[436] Toonen v Australia para 8.5
[437] Joslin v New Zealand UN DOC CCPR/C/75/D/002/1999 Communication No. 902/1999 (2003); 10/HRR 40 (2003)+
[438] Donnelly 78
[439] Article 2 of the Optional Protocol to the ICCPR

mechanism, access to the Human Rights Communications is often not accessible for those from Africa.

3.3.2. State Reporting

In reviewing reports, the HRC has raised the issue of discrimination on the basis of sexual orientation and has criticised the criminalisation of same-sex sexual conduct between consenting adults in private. The HRC has called on States to decriminalise same-sex sexual conduct by reviewing statutory provisions that provide for sodomy laws.[440] State reporting is a requirement under the ICCPR and is a feature of the United Nations aimed at making sure that member states of the United Nations fulfill their human rights obligations in order to advance global human rights.[441] State reporting is a mechanism for ensuring that human rights are observed at the international level as well as ensuring a government's accountability to its own people and the international community.[442] In the examination of reports of African countries, the Committee observed and urged state parties to bring their legislation in conformity with the ICCPR.[443]

However, this process has been said to be ineffective because state parties default in submitting their reports as expected of them under the treaty. The fact that there are no sanctions applied for not reporting means that state parties are at liberty not to report. In order to ensure compliance on state reporting, the Human Rights Commission must be proactive and be consistent in reminding states that are not submitting reports that are due to do so. The international media can be used as a tool through which state parties are urged to submit their reports. This is also to be done together with giving reasons for failure to report. To top this off, the reporting guidelines should specifically contain a section that states and asks state parties to report on the measures they have taken to protect sexual minority rights.

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[440] Concluding observations of the Human Rights Committee regarding Kenya CCPR/CO/83/KENY on 29 April 2005 at paragraph 27

[441] All international treaties have a reporting system which requires state parties to submit periodic reports in conformity with their obligations under the treaty, for example Article 40(1) of the ICCPR, Article 16-23 of the IECSCR AND Article 44 of the CRC. The UN resolution of 1 August 1956 required UN members to submit periodic reports in advancement of human rights, which was then adopted by treaty bodies.

[442] Quastigah 2002:261

[443] The concluding observations on Namibia's report and Zambia's 3rd report in 2007 UN DOC CCPR/C/ZMB/CO/3

3.3.3. General comments

Another integral part of the mechanisms used by the UN treaty bodies to secure compliance of state parties to their obligations is the use of general comments.[444] General comments outline and clarify the various treaties and obligations required to be performed by state parties. This includes recapitulating the meaning and scope of various provisions under treaties and obligations states have undertaken and the relevant steps they ought to take in achieving aims and objectives of the treaty. In general comments 14,[445] 15[446] and 18,[447] the Economic, Social and Cultural Council (ECOSOC) made important proclamations in relation to sexual minority rights. These included the right to non-discrimination in relation to access to health care, provision of water and access to maintenance of employment as the centre of the general comments.

In general comment 14, the ECOSOC observed and emphasized the importance of state parties' obligations to provide access to health care and educational information on health care. It stated that this is to be made available to all without discrimination of any kind, including sexual orientation.[448] This means that education on health issues and access to health care services must be provided on a non-discriminatory basis especially for marginalised groups.[449] In general comment 18, the Committee emphasized its commitment to ensuring protection for sexual minorities by providing that discrimination in access to maintenance of employment on the grounds of sexual orientation was prohibited.[450] The Human Rights Council emphasized the need for the respect of the principle of non-discrimination as a general human rights protection clause. It stated that it was important that state parties respect this provision as part of their obligations under the covenant. In addition to this, in general comment 16,[451] the Human Rights Committee gave confidence to Article 17 of the ICCPR, which

[444] Yaw Ako 2010
[445] Compilation of General Comments and general recommendations adopted by the human rights treaty bodies HRI/GEN/1 Rev. 9 (Vol 1) 2008:78
[446] Compilation of General Comments and general recommendations adopted by the human rights treaty bodies HRI/GEN/1 Rev. 9 (Vol 1) 2008:97
[447] Compilation of General Comments and general recommendations adopted by the human rights treaty bodies HRI/GEN/1 Rev. 9 (Vol 1) 2008:139
[448] Article 12(1) of the ICESCR states that, "the state parties to the present covenant to recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
[449] General comment 14:19.
[450] General comment no. 18 paragraph 12 (b)(i)
[451] Compilation of General Comments and general recommendations adopted by the human rights treaty bodies HRI/GEN/1 Rev. 9 (Vol 1) 2008:191

provides and protects the right to privacy. It stressed that in guaranteeing the right to privacy of citizens, states were obligated to take administrative, legislative and judicial measures to give effect to the purpose of the provision.[452]

The issue of discrimination on the basis of sexual orientation was also dealt with by the CESCR in its general comments, the interpretive texts it issues to explicate the full meaning of the provisions of the Covenant.[453] It has been stated that sexual orientation is a prohibited ground of discrimination under the Covenant.[454] It argued that Article 2(2) of the Covenant containing 'other status' as a prohibited ground of discrimination is an open-ended clause which should be interpreted to include sexual orientation. In the general comment 20 of 2009 on non-discrimination the Committee stated that 'other status' included sexual orientation and obligated States to ensure that an individual's sexual orientation is not used as a barrier to the enjoyment of rights as guaranteed in the Covenant.[455] Based on these general comments, sexual orientation is a prohibited ground of discrimination in the Covenant under the use of 'other status'.

The Committee on CRC has also dealt with the issue of discrimination based on sexual orientation in its general comments. General Comment 4 of 2003 provided that state parties are obligated to ensure that all human beings below the age of 18 enjoy all rights as guaranteed in the Covenant without discrimination of any kind as provided for under Article 2.[456] The committee held the position that these grounds included sexual orientation. It further stated that States are then mandated to ensure that children enjoy the rights as guaranteed in the Convention without discrimination based on the child's homosexuality or the parents' sexual orientation.[457] The CRC adopts the

[452] The Committee was of the view that state parties were not complying with their obligations in their state reports under the treaty.
[453]General comments are authoritative interpretations of the individual human rights or of the legal nature of human rights obligations. They provide orientation for the practical implementation of the human rights and form a set of criteria for evaluating the progress of states in their implementation of these rights.
[454] UN DOC E7C. 1272000/4 General Comment No.14 of 2000 on the right to highest attainable standard of health paragraph 18; E/C:12/2002/11 General Comment No 15 of 2002 on the right to water paragraph 13
[455] UN DOC E7C.R/GC/20 (2009), non-discrimination in economic, social and cultural rights (Article 2 of the ICESCR)
[456] UN DOC. HRI/GEN/1/Reve. 7 G.C No 4 of 2003 on adolescent health and development in the context of the convention on the rights of the child paragraph 2. The same was reaffirmed in General comment No 3 of 2003 on HIV/AIDs on the rights of the child paragraph 6
[457] Tatah 2014:45

position taken by the ICESCR of placing sexual orientation within the brackets of 'other status'.

3.4. International Human Rights Framework

The international human rights framework has evolved over several decades as a result of treaties, declarations and other instruments enacted by the United Nations and other International Organisations. States are obligated to adhere to the obligations laid down in international treaties. When states become parties to these treaties, they undertake responsibilities under international law to uphold, safeguard and fulfil human rights.[458] The prohibition of discrimination in the enjoyment of fundamental human rights is a cardinal principle that is a feature of human rights treaties.[459] According to Article 2 of the Universal Declaration, everyone, regardless of status, has the right to enjoy the rights as outlined in the Declaration.[460] Another core principle of the enjoyment of fundamental human rights is that of equality.[461] All people are entitled to equal treatment before the law and all individuals must be treated equally and without discrimination. Such would be a violation of the law.[462] In this regard, the continued criminalisation of same sex relationships and the violence against sexual minorities is a violation of their fundamental human rights.[463] It is, however, argued that there is a wide gap between what the international human rights framework advocates for and its implementation of such.

International human rights mechanisms also provide for the right to privacy, which includes the right to privacy related to sexual orientation, and the right not to have one's phone tapped.[464] The right is recognised as central to human beings by instruments like the ICCPR. The instruments propound that what consenting adults do out of public view does not become the subject of legislation and is protected as long as it does not harm the public.

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[458] OHCHR https://www.-ohchr.org-instruments-and-mechanisms/international-human-rights-law (accessed 15 May 2024)
[459] Sepulveda et al 2004: 16
[460] The Universal Declaration was adopted in 1948 by the United Nations member states which contains jus cogen rights. Article 2 outlines that "everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind.
[461] Article 2 of the ICCPR
[462] Sepulveda et al 2004:307
[463] The International Bill of Rights posits that there must be recognition of the rights of all persons by virtue of being human beings. Universal Declaration, ICCPR, ICESCR, as categorised as International Bill of Rights, UN Human Rights Fact Sheet No. 30, 6.
[464] Yaw Ako 2010:21, Sepulveda et al 2004:249

3.4.1. The right-based approach to homosexuality

The human rights framework aims to protect the dignity of all individuals regardless of their circumstances or status. Different communities implement these principles in different ways and at different times. Proponents of the human-rights-based approach define rights as entitlements that apply to all individuals regardless of gender, race, ethnicity or socio-economic class.[465] This means that all humans are rights holders, which gives the duty bearers the obligation to give these rights. In 1948 the United Nations adopted the Universal Declaration of Human Rights (UDHR), where Article 1 states that everyone is born free and equal in dignity and rights without any discrimination or prejudice. These rights are interdependent, interrelated, indivisible and universal. They are also God given, which makes the principle of universality of human rights the cornerstone of international human rights law.[466] In 2011, the UN passed a historic resolution denouncing discrimination based on sexual orientation by a vote of 23 to 19. South Africa presented the resolution, which underlines member nations' commitments to human rights, including combating discrimination based on sexual orientation.[467]

International human rights mechanisms provide for the right to dignity and bodily integrity. This is provided for by the Universal Declaration and the ICCPR, which assert that no person shall be subjected to forced experiments or medical examinations. This prevents forced experiments or medical examinations to determine homosexuality through the anus.[468] International human rights mechanisms emphasise universal entitlements for all individuals, regardless of race, gender, religion, or other status. Sexual minorities are likewise entitled to these rights as they are considered rights bearers in these documents. It is however important to note that the international human rights treaties mentioned above do not specifically protect individuals based on their sexual orientation. However, denying sexual minorities the rights as discussed above while heterosexuals enjoy them violates the principle of non-discrimination and equality.

[465] Nussbaum 1998; Chimininge & Makamure: 88
[466] Awondo 2010
[467] Klinken and Chitando 2016:1-7
[468] Sepulveda et al 2004:307

3.4.2. Sexual minority rights protection under the ICCPR

The ICCPR is the international treaty under the United Nations human rights system, which sets out civil and political rights for all people.[469] It was adopted to give binding force to the provisions that were provided in the non-binding UDHR.[470] It was adopted and crafted to regulate states in their administration of citizens in order to protect the civil and political rights of individuals or groups of individuals. The states that are parties to the treaty are bound to fulfil all obligations under the terms of the Covenant. This includes the obligation to promote equal protection before the law.[471] Article 2 of the ICCPR states that;

> "Each state party to the present covenant undertakes to respect and to ensure to all individuals within his territory and subject to its jurisdiction the rights recognised and 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."

The state parties to the covenant also have an obligation to protect the freedom from invasion of privacy as enshrined under Articles 17.1 and 17.2. It provides that;

> "1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks."[472]

The collective jurisprudence of the ICCPR is considered to provide the strongest explicit protections against discrimination on the basis of sexual orientation.[473] This is because ICCPR is the most ratified treaty that covers the broadest range of rights relevant to the homosexual community.[474] The ICCPR is then considered as the most applicable binding international agreement that has been directly applied in the emerging consensus on homosexual rights.[475]

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[469] Adopted by the United Nations General Assembly in Resolution 2000 A(XXI) 16 Dec 1996 at New York and into force March 1996
[470] Robertson 1996: 35
[471] Robertson & Merrills 1996:35
[472] Submitted shadow report to UNHRC on the occasion of the second and third periodic report of the United States of America pursuant to Article 40 of the ICCPR by the program in International Human Rights Law of the Indiana University School of Law and Indianapolis in co-operation from Stetson University College of Law in Gulfport, Florida. 15
[473] Kukara 2006: 186.
[474] First Optional Protocol to the International Convection on Civil and Political Rights, 999 UNTS, 19 December 1966.
[475] Xavier 2010: 147.

3.4.3. Privacy under the International Covenant on Civil and Political Rights

The UN Human Rights Committee in the case of ***Toonen v Australia***, looked at the interpretation of Article 17 of the International Covenant on Civil and Political Rights (ICCPR).[476] Federal laws prohibited amendments to Tasmanian law by the Australian government although sodomy laws were repealed in all other Australian states.[477] Toonen argued that the invasion of his home and arrest by the police on suspicion of violating the criminal code arbitrarily and unlawfully interfered with his right to privacy. This also discriminated against homosexual men, as they could not exercise their privacy rights in the same way as heterosexuals.[478] The Tasmanian government argued that the infringement of Toonen's rights was necessary to stop the spread of HIV/AIDs. However, the Australian government maintained that no one should suffer discrimination on the basis of their sexual orientation and made clear its support for the invalidation of the laws.[479]

In this regard, the Human Rights Committee was of the view that undisputed adult consensual sexual activity in private is protected by the concept of privacy. Mr. Toonen was then negatively impacted by the continued existence of the provisions of the Australian Criminal code which prohibited such activity.[480] The Committee held that criminalising consensual homosexual activity between men was neither reasonable nor proportionate to the aim of preventing the spread of HIV/AIDs. It was rather a hindrance to public health and educational programmes.[481] The Human Rights Committee opined that the international human rights framework protected consensual sexual activity in private and the private sexual conduct of sexual minorities stemming from sexual orientation. This means that people are allowed to exercise their right to privacy and any limitation of such right must be reasonable.[482] Any interference must be justifiable by being necessary and proportional to the ends sought.

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[476]Communication No 488/1992, Toonen v Australia, UNHR Committee (31 March 1994) UN Doc No. CCPR/C50/D/488/1992,1 IRR97

[477] Toonen v Australia paras 4.2 and 6.6. as at the date of communication, discrimination based on sexual orientation was unlawful in half of Australia's territories. Such discrimination could be submitted to the Australian Human Rights and Equal Opportunity Commission under International Labour Organisation Convention No.III.

[478] Toonen v Australia paragraph 3.1.

[479] Toonen v Australia paragraph 6.7

[480] Toonen v Australia paragraph 8.2

[481] Toonen v Australia paragraph 8.5

[482] Mittelstaedt 2008: 61

In addition to this, the right to privacy also applies to a wide spectrum ranging from phone tapping to sexual orientation,[483] which is recognised in the ICCPR. It recognises this right as central to human beings.[484] The provisions put to the effect that what two consenting adults do in private does not become the subject of legislation and is protected as long as no harm is brought to the public. The theme cementing international human rights treaties is that they are entitlements that every human being may claim regardless of his or her race, colour, sex, religion or other status. This includes sexual minorities as well since they fall into the category of right bearers, as mentioned in the documents. It is crucial to outline that the international human rights treaties mentioned do not specifically provide protections for persons on the grounds of their sexual orientation. They are, however, entitled to the rights of non-discrimination, equality, dignity and bodily integrity and privacy.

The provisions of Article 2(1) provide for the universality of rights that are contained therein and place an obligation on every state party to ensure that the provisions of ICCPR are followed and met. The covenant provides for the prohibition of any kind of discrimination on the basis of race, clan, sex, language, religion, or political opinion.[485] The inclusion of 'sex' has been said to include sexual orientation.[486] The rights of transgender people, who transform their sex to another and make that sex their identity, are greatly impacted by this. To discriminate against them will be an interference with the rights under Article 2(1).[487] The South African case of ***Attorney General v Transgender Education and Advocacy & Ors*** used Article 2(1) to argue its condemnation of discrimination on the grounds of sex. It was upheld that denial to register a transgender organisation equals discrimination on the basis of gender or sex which denotes unreasonable exercise of discrimination.[488]

The ICCPR acknowledges diversity amongst people of different nations which can be evidenced under Article 27 of the Covenant. It reads;

[483] Sepulveda et al 2004:249
[484] Sepulveda et al 2004:249
[485] Article 2(1) of the ICCPR
[486] B Cusson Interpreting "because of sex" The History of LGBT Workplace Discrimination Claim Under Title VII https://www.ramapo.edu/law-journal/thesis/interpreting-because-of-sex-the-history-of-lgbt-workplace-discrimination-claims-under-title-vii (accessed 25 May 2024)
[487] Muganyi 2017: 15
[488] JR Miscellanious Application No 308 A of 2013 (HC)

> "In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right in community with other members of their group to enjoy their own culture, to progress and to practice their own religion or to use their own language."[489]

In such diversity, the Covenant provides for the protection of minority groups and marginalised persons who may be suffering from discrimination on a daily basis, and cannot protect their own interests.

3.4.4. Equality under the International Covenant on Civil and Political Rights

Article 26 of the ICCPR has two forms of application, the first being that all persons are entitled to equal treatment before the law. This means that all people are treated equally in respect without any distinction, for such distinction will be a violation of the law.[490] In ***Young v Australia***,[491] the Human Rights Committee stated that the Australian government was in violation of Article 26 of the ICCPR by denying Mr. Young a pension on the basis of his sexual orientation. It is a noteworthy case from the Human Rights Committee. While Toonen recognised sexual orientation rights by decriminalising same-sex activity, Young elevated sexual orientation from an issue of criminality to an issue of equal opportunity. In this case, the Committee held that Young was entitled to a government pension because of his status as the same-sex partner of an Australian veteran.[492]

The Committee upheld that pursuant to Article 26 of the ICCPR, Australia had no legitimate reason to deny same-sex domestic partners government benefits that were provided to heterosexual partners.[493] It then held that the Australian government was in violation of Article 26 of the ICCPR by denying Mr. Young a pension on the basis of his sexual orientation. It had discriminated against him on the basis of his sexuality, which was in disregard of the equality principle. Further, the Committee was of the reasoned opinion that the State had failed to show the difference between same-sex and heterosexual couples. Excluding same-sex partners from pension benefits was neither reasonable nor objective.[494] It was held that sexual orientation cannot be used

[489] Article 27 of the ICCPR
[490] Sepulveda et al 2004:307
[491] UN GAOR Hum Rts Comm 78th sess, UN Doc CCPR/ C/78/D/Communication No. 941/2000 (2000)
[492] Young v Australia paragraph 10-12
[493] Young v Australia paragraph 10-12
[494] Yound v Australia paragraph 10.4

to determine lack of entitlement therefore, no one can be discriminated against on the basis of their sexual orientation.

3.4.5. ICCPR obligations on African State Parties: Non-discrimination on basis of sexual orientation

The decision and interpretations of the above cases by the Human Rights Committee obligate countries that are state parties to the ICCPR and Optional Protocol to the Covenant to advance the right against discrimination based on sexual orientation.[495] Same sex partners can invoke these decisions when they want to challenge the violation of their privacy or discrimination against them based on sexual orientation.[496] Article 2(1) of the ICCPR obligates all African states that are parties to the Covenant to guarantee all rights protected under the ICCPR, without distinction of any kind, including non-discrimination against anyone on the basis of sexual orientation or any other basis. This is supported by Article 26 of the ICCPR that prohibits any discrimination under the laws of all African states which are party to the ICCPR. The state parties are obligated to guarantee that all persons are equal and provide effective protection against discrimination on any ground based on sexual orientation and other categories.[497] However, it is important to note that although some have ratified the ICCPR they may not have ratified the Optional Protocol. In the same breath, it should be stressed that this should not be used as justification for discrimination based on sexual orientation.

3.4.6. Protection of sexual minority rights under the International Covenant on Economic, Social and Cultural Rights

After the UNHRC decided in Toonen that the ICCPR protects sexual minorities, other UN Committees stated that they also interpret their respective treaties to protect sexual minorities. This includes the International Covenant on Economic, Social and Cultural Rights (ICESCR). This Covenant was adopted to safeguard socio-economic and cultural rights also regarded as third-generation rights.[498] It is important to note that while the Covenant ensures the rights of individuals and their enjoyment of them,

[495] Article 1 of the Optional Protocol to the ICCPR which provides that "a state party to the protocol should recognise the competencies of the Committee to consider claims from individuals subject to its jurisdiction who claim to be victims of a violation by that state party of any of the rights set forth in the Covenant."
[496] Wintemute 1995:5
[497] Toonen v Australia pararaph 8
[498] Muganyi 2017: 17; ICESCR, General Assembly Res No. 2200 A (XXI), UN Doc A/6316 (1996)

it is centered on obligating states to provide necessities to citizens progressively.[499] Zimbabwe as a party to the Covenant, as ratified in 1991 is bound by the principles and edicts of the treaty and should uphold it religiously.[500] The rights that are provided in the Covenant include the right to health,[501] participation in cultural life,[502] and the enjoyment of just and favourable conditions of work.[503]

The most important of these is the non-discrimination clause under Article 2(2) of the Covenant. The UN Committee on Economic and Social Council (ECOSOC) Rights declared that Article 2(2) of the ICESCR prescribes discrimination on the basis of sexual orientation. The Article confers the right to non-discrimination, which reads;

> "State parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national, or social origin, property, birth or other status."[504]

The interpretation of this provision is that all the rights provided for in the ICESCR are to be enjoyed by every individual without any distinction. The wording of Article 2(2) through the use of "other status" as prohibited grounds for discrimination can be construed to allow sexual orientation to be read into the provision as a prohibited ground for discrimination.[505]

It is important to note that the ICESCR does not explicitly prohibit discrimination on the grounds of sexual orientation just like the ICCPR. However, the UN Committee on the ECOSOC rights has, through its general comments, stated that discrimination on the grounds of sexual orientation is prohibited by the "other status" classification under Article 2(2) of the Covenant which may be seen to include sexual orientation.

3.4.7. Economic and Social Council general comments on International Covenant on Economic, Social and Cultural Rights

ECOSOC is the body that oversees the ICESCR and it made general comments in relation to sexual minorities. General comments 14, 15 and 18, of ECOSOC made

[499] Article 2(1) of the ICESCR; Progressive realization involves taking positive steps towards achieving the fundamentals of the Covenant from the available resources.
[500] Muganyi 2017: 17
[501] Article 12 of the ICESCR
[502] Article 15 of the ICESCR
[503] Article 6 of the ICESCR
[504] Article 2(2) of the ICESCR
[505] General comment No. 20 paragraph 15

some poignant statements in relation to the rights of sexual minorities and the crux of these general comments is the prohibition of discrimination in relation to access to health care, provision of water and access to and maintenance of employment.

In General Comment 14,[506] ECOSOC examined the scope and meaning of Article 12 of the ICESCR on the right to the highest attainable standard of health.[507] The Committee observed that it is the obligation of the state parties to provide access to health care and educational information on health care to all persons without distinction of any kind including race, colour, sex, language, as well as sexual orientation. This means that education on health issues and access to health care services should be provided for on a non-discriminatory basis, especially for vulnerable and marginalised groups.[508]

General Comment 15 commented on Articles 11 of the ICESCR. Article 11 guarantees an adequate standard of living for everyone including the right to food. The Committee observed that the obligation of non-discrimination on any grounds supersedes all Covenant obligations of states. No discrimination in the provision of water to all persons, especially marginalised persons, must ever be tolerated.[509] In general comment No. 18, the Committee buttressed the commitment of ensuring protection of sexual minorities by stating that discrimination "in access to and maintenance of employment" on grounds of sexual orientation was prohibited.[510]

The Committee on ECOSOC in its general comment No. 20 on non-discrimination in economic, social and cultural rights declared that the non-discrimination must be read into the category provided for in Article 2(2).[511] In addition to this, the Committee opined that sexual orientation at law must not be a barrier to violating one's right as provided for in the ICESCR.[512] More importantly, General Comment No. 20 clarified that Article 2(2) provides for sexual orientation as a prohibited ground for

[506] CESCR general comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12) 11 August 2000, E/C.12/2000/4 paragraph 18
[507] Article 12(1) of the ICESCR states that "the state parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."
[508] General comment 14 paragraph 19
[509] General comment No. 15 paragraph 12©(iii)
[510] General comment N. 18 paragraph 12 (b)(i)
[511] General comment No. 20 Non-discrimination in Economic, Social and Cultural Rights 2009
[512] General comment No. 20 paragraph 32

discrimination in international law. This then places an obligation on state parties to formulate mechanisms in order to realise the rights provided for in the Covenant.[513]

Over a decade and a half later, in general comment 22, the Committee provided that state parties must ensure access to and dissemination of information on sexual and reproductive health. This is to be done taking into account the needs and considerations of sexual orientation, gender identity and intersex status.[514] The comment states that criminalising consensual same-sex activity, gender identity expression, the pathologising of SOGIEC diversity and homophobia and transphobia are violations of human rights. This emphasised that sexual and reproductive health entails respect for sexual orientation, gender identity and intersex status.[515] Although general comments have a non-binding nature on state parties, the recommendations provided for are given due regard as interpretative guidelines to the ICESCR in order to promote the protection of sexual minority rights.

3.4.8. Protection of sexual minority rights under the Convention on the Elimination of All Forms of Discrimination Against Women.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was adopted unanimously by the General Assembly and after the state ratified it, the CEDAW was entered into force in 1981. The Commission on the Status of Women recognised the inadequacy of mechanisms addressing the gross inequalities women face in their daily lives, which led to the formation of CEDAW.[516] This reinforced the need to eliminate discrimination on the basis of sex and emphasised the need to transform traditional stereotyped roles of men and women.[517] One of these stereotypes whose transformation would benefit sexual minorities is that men and women have delineated gender roles governing their sexual conduct and expression.[518]

The CEDAW remains the most cited potential treaty from which homosexual human rights protection can be inferred, and is deemed one of the most successful human

[513] Muganyi 2017: 19
[514] CESCR General Comment No. 22 (2016) on the right to sexual and reproductive health (Article 12 of the ICESCR) 2 May 2016, E/C:12/GC/22 paragraphs 9 and 19
[515] General comment No. 22 paragraph 23
[516] Maguire 2003
[517] The preamble to the Covenant para 14; Article 5(a); 10(c)
[518] Maguire 2003:36

rights treaties.[519] Enshrined in CEDAW are three major principles which are, the elimination of discrimination against women, equality between men and women and state responsiveness to achieve both goals.[520] The Convention specifically addresses discrimination against 'women' but does not categorically prohibit discrimination based on 'sex' or 'gender'.[521] It has been argued that the document's definition of 'discrimination' could mean to include all individuals discriminated against based on their sexual orientation or gender identity.[522]

Article 2 of the Convention deals with equality and legal policy measures to fulfil women's rights to equality. This resulted in two General Recommendations, these are Recommendation No.27 and No. 28. General Recommendation No. 28 talks about the core obligations of state parties under Article 2 on discrimination. This affirmed that the discrimination of women based on gender and sex is linked with sexual orientation and gender identity.[523] General recommendation No 28 clarified the meaning of Article 2 by reading that

> "Intersectionality is a basic concept for understanding the scope of the general obligations of state parties contained in Article 2. The discrimination of women based on sex and gender is inextricably linked with other factors that affect women such as race, ethnicity, religion or belief, health, status, age, class and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways than men. State parties must legally recognise and prohibit such intersecting forms of discrimination and their compounded negative impact on the women concerned. They also need to adopt and pursue policies and programs designed to eliminate such occurrences, including where appropriate, temporary special measures in accordance with Article 4 paragraph 1 of the Convention and General Recommendation No. 25 paragraph 18." [524]

This equally entitles transwomen and transmen their human rights and the Recommendation can guide CEDAW Committee and state parties in interpreting the

[519] Lenora M Lapidus, 30 Years of fighting Discrimination Against Women- Its Time the United States Stepped up, ACLU 2009 https://www.adu.org/blog/human-rights-and-women-rights/30years-fighting-discrimination-against-women-its-time-the-united-states-stepped-up (accessed 30 May 2024)
[520] Zwingel 2014:219
[521] Holtmaat and Post 2015:319-22
[522] Clavier 2012:390-94
[523] GLHRC at http:// www.lglhrc.org/cgi (accessed 3 June 20224)
[524] General Recommendation No. 28 of the Committee on Elimination of All Forms of Discrimination Against Women, 2010

Articles of CEDAW to respect, protect, promote and fulfil human rights to gender identity, gender expression and sexual orientation. [525]

In addition to this, the Committee on the Elimination of All Forms of Discrimination Against Women, which interprets and monitors compliance with CEDAW condemns the criminalisation of homosexuality in a variety of contexts.[526] The Committee recommends that lesbianism should be considered as a sexual orientation and that any penalties related to this sexual orientation should be abolished. It further called on state parties to condemn forms of discrimination whether explicitly stated in the Convention or not.[527]

CEDAW explicitly protects women's access to education and employment opportunities which are available to men, without discrimination. These are considered to be two fundamental principles of the Convention.[528] Proponents of reinterpretation argue that discrimination based on sexual orientation or gender identity constitutes a barrier to the enjoyment of Articles 10 and 11. They posit that there is evidence of discrimination preventing employees and students alike from acquiring said equal opportunities.[529] To prevent such discrimination on the basis of sex, state parties should interpret 'sex' to include sexual orientation and gender identity.[530]

CEDAW as the only international treaty to mention family planning, requires member states to enable women to have access to specific educational information for family planning purposes.[531] This affirms women's rights to reproductive choices.[532] Proponents of reinterpreting CEDAW argue that linking reproductive rights and sexuality suggests the Convention includes the right to non-discrimination based on sexual orientation.[533] The argument is based on the premise that reproductive rights

[525] UN CEDAW, Concluding Observations of the Committee on the Elimination of All Forms of Discrimination Against Women: Sweden, UN Doc A/56/38 at 344 2001
[526] UN CEDAW Concluding Observations of the Committee on the Elimination of All Forms of Discrimination Against Women. 127-28
[527] Muganyi 2017: 20
[528] Articles 10 and 11 of CEDAW
[529] Gallaghe 2020:637
[530] Generally International Gay and Lesbian Human Rights Commission Report, "Why Sexual Orientation and CEDAW Recommendations on Girls' and Women's Access to Education 3(2014) https://www.ohchr.org/Documents/humanrightsbodies/CEDAW/womensRightsEducation/IGLHRCContribution.pdf (accessed 1 June 2024)
[531] Significance of the Convention, United Nations 2018 http://www.un.org/womewatch/law/cedaw/text/econvention.htm (accessed 1 June 2014)
[532] Article 16 of CEDAW
[533] Gallagher 2020: 649

are inextricably linked to sexuality. An individual's choice of sexual partners and preferences then falls under reproductive freedom.[534] This could arguably be extended to prohibit discrimination on the basis of sexual orientation. This could mean that the international community would be strengthening women's rights to self-determination by providing them with the freedom to dictate their sexuality.[535]

3.5. United Nations Charter-Based System

3.5.1. The Special Rapporteur on the Right of Everyone to the enjoyment of the highest attainable standard of physical and mental health (The UN Special Rapporteur on Health)

A Special Rapporteur is an independent expert appointed to monitor, examine and report on specific human rights issues or the human rights situation in a country or territory.[536] The UN special rapporteur on health as a mechanism, focuses on health as a thematic area that the UN thinks needs special protection. The Rapporteur submitted a report to the Human Rights Council at the 14th session held on 27 April 2010.[537] The report looked at the right of everyone to the highest attainable standard to health and the relationship and criminalising of consensual same-sex conduct.[538] The report recognised the relationship between the concepts of privacy, equality and dignity, which have effects on the enjoyment of the right to health. The report observed that criminalisation of same-sex conduct had contributed to non-access to health care services, lack of self-worth and dignity, stigma, violence and abuse against same-sex practicing individuals.[539] This has an effect on the enjoyment of the right to health.

The Special Rapporteur recommended the decriminalisation of same-sex consensual conduct. It also called for the repeal of laws that discriminate in regards to sexual orientation and gender identity, for the enjoyment of the right to health.[540] This is because criminal laws concerning consensual same-sex conduct, sexual orientation and gender identity infringe on human rights like the right to health. These laws are inherently discriminatory and breach the requirements of the right to health, which

[534] Kershin 2014:890
[535] Jonsen 2007:311,313,337
[536] Hunt and Bueno De Mesquita 2007
[537] Report on the Special Rapporteur on health to the Human Rights Council at its 14th session, AHRC/14/20 available at http://www2.ohchr.org/english/issues/health/right/annual.htm (accessed 6 June 2024)
[538] The special rapporteur 2010 at para 4
[539] Yaw Ako 2010:17
[540] The Special Rapporteur at paragraph 26

requires equality for all.[541] This discrimination prevents affected individuals from gaining access to other economic, social and cultural rights, which in turn impacts on the realisation of the right to health. [542]

The report noted the European Court of Human Rights which held that discrimination based on sexual orientation or gender identity is in violation of human rights.[543] This was considered in the ***Dudgeon v United Kingdom 1981***.[544] The report further noted the United Nations Human Rights Committee in ***Toonen v Australia***,[545] which held that sex discrimination included discrimination based on sexual orientation. It considered the right to health in light of the criminalisation of certain forms of sexual conduct, including consensual same-sex relations. It was observed that criminalising same-sex conduct contributes to a lack of access to health-care services with a debilitating effect on the attainment of the right to health. In this regard, criminalising same-sex sexual conduct was not a reasonable measure to prevent the spread of HIV/AIDs.

The report recommended the repeal of laws that discriminate on the basis of sexual orientation or criminalise same-sex conduct in order to create an environment favourable for the attainment of the right to health. This resulted in a number of states prohibiting discrimination on the basis of sexual orientation following these judicial decisions. For example, in the landmark 1988 case of ***National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others,*** the South African Constitutional Court struck down three separate sodomy laws taking into account the right of all people to dignity and equality.

However, the report observed that it is important to note that despite the recent developments in the decriminalisation of same-sex sexual conduct, it is not easy to bring all states into conformity with international human rights obligations. A significant number of countries maintain their criminal penalties for consensual same-sex sexual conduct, including Zimbabwe. Some countries have gone further to impose harsher penalties for same-sex sexual conduct.[546] The report further observed that

[541] Committee on ECOSOC Rights general comment No. 14
[542] O'Flahety and Fisher 2008:211
[543] The Special Rapporteur at paragraph 11
[544] Judgement of 22 October 1981, Ser. A, No. 45
[545] Views adopted on 31 March 1994, para 8.7
[546] The Special Rapporteur at paragraph 15

criminalisation has adverse consequences on the enjoyment of the right to health of sexual minorities through the creation of societal perceptions that they are abnormal and criminals. This affects not just their pursuit of health but also their mental well-being.[547] The report suggests the right to health approach, which requires states to respect, protect and fulfill such right as with all human rights.[548] This calls for the repealing of laws that discriminate against sexual minorities.[549]

3.5.2. The Universal Periodic Review

The universal periodic review (UPR) is a unique mechanism established by the UN General Assembly in 2006. It reviews the obligations and commitments of UN member states in fulfilling and protecting human rights with the aim of improving human rights on the ground.[550] It is conducted by the Human Rights Committee where reports of state parties are reviewed on a periodic basis. The report provides recommendations to the state under review. The state under review will respond to each recommendation together with voluntary commitments made during the review. The state under review will then have the responsibility to implement the review outcome. Of importance is the initial report of Botswana, which was submitted to the council.[551] It called for the repeal of sodomy laws and adopted the necessary measures to combat discrimination of all kinds including sexual orientation.[552]

The UPR is a valuable mechanism for challenging and encouraging member states to do more to protect the rights of gays and lesbians.[553] It provides an avenue for the engagement on the rights of sexual minorities through the review of state reports at intervals.[554] The question of the rights of homosexuality as part of the review process has been put to various states. The decriminalisation of the same-sex sexual conduct between consenting adults has been recommended to these states. In reviewing the state report from Kenya in 2010, the panel requested that the state repeal its sodomy laws and recommended the decriminalisation of same-sex sexual acts and an end to the social stigmatization of homosexuals. Although Kenya refused multiple times, it

[547] The Special Rapporteur at paragraph 12
[548] The Special Rapporteur at paragraph 24
[549] The Special Rapporteur at paragraph 26
[550] Lessons From the First Cycle of the Universal Periodic Review: From Commitment to Action on Sexual and Reproductive Health and Rights, UNFPA at 3
[551] A/HRC/WG.6/3/BWA/15 September 2008 and 2 October 2008 paragraph 26
[552] A/HRC/10/69 13 January 2009 paragraph 8
[553] Nyarang'o 2011:16
[554] Nyarang'o 2011:16

did however accept the recommendations by Sweden which advocated for Kenya to adopt comprehensive anti-discrimination laws, affording protection to all individuals irrespective of their sexual orientation. The Kenyan government recommended the undertaking of civic education initiatives to raise awareness on anti-discrimination and sexual orientation issues.

In my opinion, the rejection of the recommendations to decriminalise same-sex sexual acts by Kenya buttresses the view by most African countries that homosexuality is a foreign and Western phenomenon that goes against African culture which should not be accepted and tolerated in Africa.

3.5.3. The use of Soft law towards the protection of sexual minority rights

Gernsen and Posner define soft law as a rule issued by a law-making authority that does not comply with formalities or understandings necessary for the rule to be legally binding.[555] It refers to a process where norms contained within resolutions, though not legally binding, can come to acquire legal force.[556] This is particularly so when they are adopted by the larger or more authoritative bodies for example, the Universal Declaration on Human Rights.[557] Although soft laws unlike treaties, have no binding effect, they call on international communities to respect certain conduct which will improve the evolution of international law.[558] The discussion of soft law's role in protecting sexual minority rights serves as an introduction and will be examined more comprehensively in the following section, where its practical effects and implications will be further analysed.

3.5.4. The Yogyakarta Principles

The Yogyakarta principle is a statement of intent which puts together in one document the international treaties that protect sexual minorities together with provisions that focus on the rights of sexual minorities.[559] The principle presents a statement of global human rights related to sexual orientation and gender identity that already exist in international human rights law. They reflect the urgency of focusing on the human

[555] Gernsen and Posner 2008:537
[556] Heinze, Sexual Orientation and International Law: A Study in Manufacture of Cross-Culture "sensitivity" 22 MICH J. INT'L L 283 2001 available at https://repository.law.unich.edu/mjil/vol22/iss2/2 (accessed 15 June 2024)
[557] Malanczuk and Akehurst's 1997
[558] Steiner et al 2007:161
[559] Yaw Ako 2004:18

rights of people with diverse sexual orientations in international human rights law.[560] The principle puts forward that sexual minority individuals must be afforded core fundamental human rights that are afforded to all persons like dignity, privacy and equality.

The principles are intended to form a coherent and comprehensive identification of the obligation of states to respect, protect and fulfill the human rights of all persons regardless of their sexual orientation.[561] They were developed in response to patterns of abuse targeting people because of their actual or perceived sexual orientation. Access to justice, privacy, non-discrimination, freedom of expression and assembly, extrajudicial executions, torture and other violence, rights to employment, health, education, public participation, immigration and refugee issues are some of the human rights dealt with in the Principles.[562] These rights are more often violated in relation to marginalised individuals, including lesbian and gay persons, which calls for more protection.

Louise Arbour, the High Commissioner for human rights expressed concern about the inconsistency of approach in law and practice with regard to the protection of sexual minority rights globally.[563] She recommended the formulation of a more comprehensive articulation of sexual minority rights in international law. It is in this context of varied approaches, gaps and inconsistencies that the Yogyakarta Principles on the application of international human rights law in relation to sexual orientation were formulated. The principles were to serve three functions. Firstly, they should constitute a comprehensive account of the experiences of human rights violations experienced by people of different sexual orientations.[564] It should take into account the distinctive ways in which human rights violations may be experienced in different places. Secondly, they should look at the application of international human rights law

[560] Weggen 2009
[561] Weggen 2009:5
[562] Farrior 2009:88
[563] She addressed this during her international conference on Lesbian, Gay, Bisexual and Transgender rights held in Montreal on 26 July 2007. Presentation of the United Nations High Commissioner for human rights, Ms Louise Arbour to the International Conference on Lesbian, Gay, Bisexual and Transgender Rights Montereal on 26th July 2006 available at UNHCR Overview UNHCR, the UN Refugee http://www.unhcr.ch/huricane/huricane.nsf/view01391AE52651D33FODC12571BE002F172 (accessed 16 December 2024)
[564] O'Flaherty and Fisher 2008: 217

to such experiences in an unambiguous manner.[565] Lastly, the principles should spell out the nature of obligation on states for the effective implementation of their human rights obligations.[566]

Principle 2 provides for the enjoyment of human rights by all without discrimination on the basis of sexual orientation or gender identity. This is supported by the South African Constitutional Court in 2005 which held that,

> "A democratic, universalistic, caring and aspirationally egalitarian society embraces everyone and accepts people for who they are…Respect for human rights requires the affirmation of self, not the denial of self…At issue is a need to affirm the very character of our society as one based on tolerance and mutual respect."[567]

Through this, the Constitutional Court was mandating equal recognition of lesbian and gay relationships in law and the country's Constitution was the first to include sexual orientation as a protected status.

Principle number 3 states that:

> "Everyone has the right to recognition everywhere as a person before the law…Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom."[568]

This is supported by the 2003 Supreme Court decision that overturned laws against consensual homosexual conduct by citing that 'an autonomy of self includes freedom of thought, belief, expression and certain intimate conduct.'[569] The Yogyakarta principles attempt to treat sexuality and gender not as embarrassments better left alone but as places where human beings can be themselves, subject to human rights.[570]

Principle 22 and 23 consider the rights of persons seeking asylum from persecution based on sexual orientation.[571] The former UN High Commissioner for Refugees provided opportunities to establish refugee status for those fleeing persecution on the

[565] O'Flaherty and Fisher 2008:217
[566] O'Flahert and Fisher 2008:217
[567] Minister of Home Affairs and Others v Fourie and Bonthuys and Others, Constitutional Court of South Africa, CT 10/05 at paragraph 60 and 61
[568] Principle 3 of The Yogyakarta Principles
[569] Lawrence and Garner v Texas, Supreme Court of the United States 539 US (2003)
[570] Scott Long 1992
[571] Principles 22 and 23 of the Yogyakarta Principles

basis of their sexual orientation and gender identity. This was done in the Guidance Note on Claims for Refugee Status in November 2008.[572] The document recognises gays and lesbians as a group eligible for refugee status whilst quoting the Yogyakarta principles several times. It concludes by saying,

> "International and national developments in sexual orientation case law clearly shows that LGBT persons may be recognised as a 'particular social group' and as such, are entitled to protection under the 1951 Convention. These developments, however, also indicate that ill-treatment of persons due to their sexual orientation and gender identity continues to be seen as a highly personal or hidden form of persecution. As a result, LGBT persons who seek asylum have been expected by adjudications to avoid persecution by concealing their sexual orientation while similar expectations are not applied to the same extent in claims concerning political opinion or religious belief."[573]

This shows that there is protection provided to homosexual individuals, even to those fleeing and seeking refuge. Although the Principles are regarded as soft law and not binding, they are significant as they are simply a restatement of existing law and not an attempt to formulate a new doctrine. In other words, they are a combination of modest 'demands', 'stable foundations', and 'strategic deployment.'[574] The principles provide a commendable guide for assessing or measuring whether there is progress or regression in individual countries. Application of these Principles would mean accepting Western understandings of concepts of sexual orientation. This is what most African States including Zimbabwe that have criminalised same-sex sexual conduct, would be reluctant to accept.

3.6. Regional Human Rights Law

The question of decriminalisation has become a prominent subject of discussion not only at the global level but also at regional level. This section discusses relevant provisions for the various regional human rights treaties together with approaches taken by regional human rights bodies in addressing sexual orientation as a prohibited ground of discrimination. This is important as it shows the convergence of the United Nations human rights system and human rights norms applied at regional level with regards to the protection of rights of homosexuals.

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[572] UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity 2008 at 18

[573] UNHCR Guidance Note 2008:18

[574] Thoreson 2009: 323-339

3.6.1. The African Human Rights System

As a mechanism for the protection of human rights on the African continent, the African Human Rights system has several inter-connected parts that work together to protect the human rights for all Africans. Three bodies under the African human rights system and their impact on sexual minority rights in Africa are looked at in this section. It is based primarily on the African Charter, which lays down the rights recognised in the African system. The African Charter establishes the African Commission as a body that promotes and protects human rights in Africa.[575] The continent-wide African human rights system operates under the African Union or Organisation of African Unity.[576]

The system is supported by sub-regional systems which exist at economic bloc levels. They are based on treaties among different states in different sub-regions.[577] These have human rights as founding principles and have bodies mandated to enforcing states' conformity with the founding principles.[578]

3.6.2. The African Charter on Human and Peoples' Rights

The African Charter on Human and People's Rights (ACHPR) was created to safeguard and promote basic freedoms. ACHPR pioneered African countries to supra national accountability by creating a basis for individuals to claim rights in the international forum and establishing a basis for the protection and promotion of rights. [579] It opened Africa up to supra national accountability hence human rights violations cannot be swept under the carpet of internal affairs.

The African Charter on Human and Peoples' Rights is one of the constituents of the African human rights system. It is the first and only regional human rights instrument to embody peoples' rights and individual and state duties.[580] The primary duty created by the African Charter is the mandate on member states to recognise and give effect to the rights in the Charter. This mandate has four components which are to respect,

[575] The African Charter on Human and Peoples' Rights CAB/LEG/67/3 Article 30
[576] 55 African countries except Morocco are members.
[577] Jjuuko 2017:260
[578] The treaties include, the Treaty Establishing the East African Community, The Treaty Establishing the Southern Africa Development Community with the court under these treaties including the Economic Community of West Africa (ECOWAS Court) and the Southern African Development Community Tribunal for the SADC region.
[579] African Charter on Human and People's Rights, 1st June 1981, UNTS 26363
[580] Viljoen 1997:47

protect, promote and fulfill the rights recognised.[581]It is the main human rights instrument in the African human rights system, to which all other instruments refer.

It was adopted by the Assembly of Head of States and Governments of the Organisation of African Unity (OAU) in 1981 and entered into force in 1986.[582] This was after the colonial struggle.[583] This was also the era of the struggle against apartheid in South Africa. This shows that the Charter was born out of the need to protect the rights of individuals and peoples especially the marginalised. This is reflected in the preamble of the Charter of the Organisation of the African Unity (OAU), which states that "freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples."[584] It would therefore be unreasonable to imply that homosexual individuals were excluded from this scheme. A life free from persecution on the basis of one's sexual orientation is important to the enjoyment of freedom, equality, justice and dignity. These cannot be enjoyed where there is discrimination, inequality and persecution.[585]

The African Charter covers a wider range of rights when compared to other regional human rights instruments like the European and Inter-American human rights systems.[586] It lays down the rights that are recognised within the African system. The African Charter is designed to reflect the history, values, traditions and development of Africa by joining collective rights and individual duties.[587]

However, like any other international instrument, the ACHPR does not mention homosexual rights, which does not however mean that it omits these rights.[588] The ACHPR does not explicitly provide for sexual orientation in its forbidden grounds for discrimination even though it recognises universally accepted political and civil rights. These rights include but are not limited to non-discrimination,[589] equality[590] and

[581] Heyns 2002:138
[582] Murray 2000:10
[583] Mozambique, Angola and Zimbabwe had gained their independence, the first two in 1975 and the latter in 1980 after a long armed struggle where many lives were lost.
[584] The preamble to the African Union Constitutive Act, which replaced the OAU Charter buttresses this need to protect human and peoples' rights, democratic principles, good governance and rule of law. AU Constitutive Act of the AU 2001 preamble.
[585] Jjuuko 2017: 268
[586] Viljoen 2007:237
[587] Naldi 2006 in Evans and Murray 1996-2000
[588] Jjuuko 2017:267
[589] Article 2, African Charter on Human and People's Rights
[590] Article 3, African Charter on Human and People's Rights

freedom from cruel degrading treatment.[591] To the contrary, it is an indication that all rights apply to homosexual people like any other person.

Even though sexual orientation is not a clear-cut ground for protection against discrimination, the ACHPR held in Zimbabwe NGO Human Rights Forum v Zimbabwe that sexual orientation was a class of protection under the African Charter. The instrument has been interpreted as a living instrument therefore, the provision on equal treatment before the law extends to this category. Article 2 and 3 of the African Charter offer the strongest argument against Zimbabwe's anti sodomy laws.[592] The provision on equal treatment before the law extends to this category hence, when taken together, Article 2 and 3 of the African Charter offer the strongest argument against Zimbabwe's anti-sodomy laws.

The African Charter uses universalist language, which is all inclusive. The general scheme of language used in the Charter shows that human rights are universal and apply to all regardless of difference. It uses the language of 'every person', 'every individual', 'every human being', 'every citizen', in prescribing rights. For negative rights, it uses, 'no one and in plural form it uses, 'all peoples'. The inclusive language does not allow exclusion of particular individuals or groups.

Article 2 of the Charter and its subsequent interpretation by the African Commission puts all doubts to rest when it declares that the rights recognised in the Charter apply to 'every individual…without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.' The mention of 'sex' and other status' shows that sexual orientation and gender identity can be included in light of the developments in the United Nations human rights system.[593] This is buttressed by the fact that there is no explicit rejection of inclusion of sexual orientation as a ground for non-discrimination during the drafting process of the Charter.[594] In addition, the import of the Article is that from the onset, it reflects its condemnation of discrimination hence discrimination

[591] Article 5, African Charter on human and People's Rights
[592] Zimbabwe NGO Human Rights Forum v Zimbabwe, ACmHPR Comm 73/ 245/ (2002) Activity Report. 2006.
[593] This was recognised in the Human Rights Committee's decision in Toonen v Australia, Communication 488/1992, para 8.7
[594] Murray and Viljoen 2007:4

against homosexual individuals is unjustified as it violates the founding principles of the Charter.[595]

Christoff Heyns also argued that the grounds on which discrimination is prohibited in Article 2 of the Charter is not exhaustive. He emphasized that discrimination prohibited on the specified grounds serves merely as examples of the types of discrimination that are covered. The open-ended nature of the list is reinforced by the words 'other status' at the end of the article.[596] The provision also mirrors that of Article 2 of the ICCPR and, as such, the interpretation of the Article by the Human Rights Council in ***Toonen v Australia*** should carry substantive weight when interpreted by the African Commission on Human and Peoples' Rights on Article 2 of the Charter.[597] It is hoped that the African Commission interprets Article 2 of the Charter in light of the international human rights jurisprudence as required by Articles 60 and 61 of the Charter. This is because when interpreting the Charter, the Commission is required to consider international human rights instruments.[598]

The African Charter also values the same rights equally as those that are key rights in other systems in respect of homosexual persons. This includes the right to equality and dignity.[599] The only right that can be said to be missing from the Charter is the right to privacy. It is however argued that it is an implied right under the right to dignity, the right to life and integrity of the person and the right to liberty and security of the person.[600] This is seen through the use of the concept of implied rights by ***the African Commission in Social and Economic Rights Action Centre, (SERAC) and Another v Nigeria***.[601] In this case, the Commission argued that the right to food and shelter is implicit in the African Social and Cultural development. It may in a similar vein be contended that the right to privacy flows from the cumulative effect of the right to respect of his life and integrity of his person,[602] the right to respect the dignity

[595] Muganyi 2017:22
[596] Heyns 1997:145
[597] McGoldrick 1996:269; Toonen v Australia para 8.7. the respect of dignity inherent in a human being and the freedom and security of a person pointed out that the meaning of 'sex' in the listed grounds of non-discrimination under Article 2 of the ICCPR includes sexual orientation.
[598] The African Charter, articles 60 and 61
[599] Articles 3 and 19 of the African Charter respectively.
[600] Murray and Viljoen 2009:86-111
[601] Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (2001) AHRLR 60 (ACHPR2001)
[602] The African Charter, Article 4

inherent in a human being[603] and to the freedom and security of a person.[604] Respect and dignity require that state parties to the African Charter stop interfering with the most intimate domain of sexual attraction, thus implying the right to privacy.[605]

The African Charter imposes individual rights which are subject to internal limitations through claw-back clauses. The limitation clause in Article 27(2) is to the effect that all the individuals' rights and freedoms recognised shall be exercised 'with due regard to the rights of others, collective security, and morality'. It also pointed out that the limitation must be in the form of a law of general application.[606] The Commission to this effect however indicated that popular will does not necessarily define what is moral and what is in the public's interest.[607] This therefore means that public opinion in Africa being against homosexuality does not automatically mean that the rights of homosexual persons are not protected in the African Charter.

The Charter further imposes duties on individuals, towards their family, society, the State, other legally recognised communities and the international community. They have a duty not to discriminate and to exercise respect and tolerance towards each other.[608] These duties apply to all persons, including homosexual persons. This shows that the Charter does not exclude these individuals from enjoying their rights.[609] Accordingly, it can be concluded that the absence of express mention of homosexual rights in the Charter cannot be interpreted as meaning that these individuals and their rights are not protected in the Charter. All rights in the Charter apply to all persons regardless of their status including sexual orientation.

3.6.3. Limitations on the Rights of Sexual Minority Rights

The Charter contains claw-back clauses that have allowed signatories to avoid their obligations under the treaty. A claw-back clause is one that allows a party to avoid its treaty obligations under a wide variety of unspecified circumstances. They are contrasted with derogation clauses which allow for deviation from treaty obligations under limited exigent circumstances.[610] This, according to Makau, is significant

[603] The African Charter Article 5
[604] The African Charter Article 6
[605] Murray and Viljoen 2009:3
[606] Constitutional Rights Project and Others v Nigeria (2000) AHRLR 227 (ACHPR 1999) para 44
[607] Legal Resource Foundation v Zambia (2001) AHRLR 84 (ACHPR 2001) paragrapgh 69
[608] The African Charter, Article 28
[609] Murray and Viljoen 2009:86-111
[610] Nsonguma Udombona 2000; Mutua 1993: 5, 7

because most domestic laws in Africa date from the colonial period and are therefore highly repressive and draconian.[611] This is true of oppressive anti-sodomy laws that remain in statute books such as the Criminal Code of Zimbabwe. Further the Charter does not have a general derogation clause and this omission is all the more serious because the Charter in effect, permits states, through the "claw back" clauses to suspend, de facto, many fundamental rights in their municipal laws.[612]

Article 6 provides that 'no one may be deprived of his freedom except for reasons already set down by law'.[613] States have attempted to use Article 6 and other claw-back clauses in the Charter to circumvent its human rights provisions in favour of pre-existing discriminatory domestic laws.[614]

Article 27 (2) of the Charter plays the role of a general limitation clause in respect of all rights, with the Charter containing internal limitations in some of the provisions.[615]

Article 27(2) provides that: -

> "The rights and freedoms of each individual shall be exercised with due regards to the rights of others, collective security, morality and common interest"

In dealing with this clause, the Commission applied a proportionality test. It stated that the only legitimate reason for limitation to the rights and freedoms of the Charter, is to be found in this article, [616] and that the onus is on the state to provide the justification for limiting rights.[617] The Commission required that the limitation be 'necessary' and not just reasonable. Limitations must be strictly proportionate to and absolutely necessary for the advantages to be obtained.[618] This means that when limiting the rights of sexual minorities, a state has to show that it falls within the grounds provided under Article 27(2) and that it adheres to the reasonableness and necessity as provided by the Commission.

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[611] Arthur 1977: 518.
[612] Makau Mutua, The African Human Rights System: A Critical Evaluation, available at hdr.undp.org/sites/default/files/mutual.pdf (accessed 18 December 2024) page 4
[613] The African Charter Article 6 1986 21 ILM 58 (1982)
[614] Wright 2006:463, 470
[615] Heyns 1997: 138
[616] Communications 105/93, 128/94, 152/96, Media Rights Agenda and Constitutional Rights Project v Nigeria, Twelfth Activity Report 1998-1999 712 para 68
[617] Communications 105/93, 128/94, 130/ 94 and 152/96, Media Rights Agenda and Constitutional Rights Project v Nigeria, Twelfth Activity Report 1998 para 73 and 77
[618] Communications 105/93, 128/94, 130/ 94 and 152/96, Media Rights Agenda and Constitutional Rights Project v Nigeria AHRLR paras 69 and 70

There is little doubt that progress in the recognition and protection of sexual minorities since the adoption of the UDHR has been impressive, but there is also little doubt that the implementation of international human rights standards and principles is characterised by many problems. These have witnessed several drawbacks in the protection of sexual minorities from discrimination and oppression. However, international human rights law provides a reasonable framework within which protection options for sexual minorities can be further interrogated and renegotiated.

3.6.4. The African Commission on Human and Peoples' Rights

The African Commission on Human and Peoples' Rights is a body established by Article 30 of the African Charter to promote and ensure the protection of human and peoples' rights. The Commission has two obligations which are promotional and protective. Under the protective mandate, it receives and considers communications to it by individuals and groups of individuals. Article 45 of the Charter grants the African Commission on Human and Peoples' Rights (the Commission) broad powers to promote and ensure the protection of human and peoples' rights as set forth in the Charter. Promotional activities are at the core of the Commission's mandate and individual members report at each session on the measures taken to promote human rights.

In ***La Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia***,[619] the Commission held that Article 2 obligates contracting states to secure rights protected in the Charter to "all persons" within their jurisdiction. In ***Union interafricaine des droits de l'Homme, et al v Angola,*** the Commission emphasized that Article 2 obligates states to ensure that persons living within their territory enjoy rights and freedoms as guaranteed in the Charter.[620] According to Matshekga, the two decisions indicate that the Commission's understanding of the meaning and content of Article 2 is that it applies to all human beings.

In its resolution on the protection against violence and other human rights violations against persons on the basis of their real or imputed sexual or gender identity, it made

[619] A case brought before the Commission by a Senegalese NGO on behalf of 517 West Africans expelled from Zambia as being in the country illegally

[620] Matshekga 2003:118; 159/96 : Union interafricaine des droits de l'Homme, Fédération internationale des ligues des droits de l'Homme, Rencontre africaine des droits de l'Homme, Organisation nationale des droits de l'Homme au Sénégal and Association malienne des droits de l'Homme v Angola

reference to various articles of the Charter. This was used as the basis of its resolution and the premise on which the violence and human rights violations suffered by homosexual persons cannot be accepted.[621] The citing of these provisions as the backdrop of the resolution and the authority that gives the resolution legitimacy and legality is evidence of the Commission taking a step further in reading homosexual rights into the rights enshrined in the Charter. By protecting lesbian and gay rights, as done by the Commission and the Charter, the resolution combats the argument that lesbian and gay rights are not covered by these provisions.

Further, in resolution 275, the Commission regarding violence against homosexual persons, referred directly to articles 2, 3 and 5 of the Charter. The Commission strongly urged states to endorse and effectively apply,

> "Appropriate laws prohibiting and punishing all forms of violence including those targeting persons on the basis of their imputed or real sexual orientation or gender identities, ensuring proper investigation and diligent prosecution of perpetrators, and establishing judicial procedures responsive to the needs of victims."[622]

This clearly shows that the Commission has accepted that violence on the basis of sexual orientation results in discrimination and violates the rights to equality, integrity and dignity. This however does not mean that the Commission has accepted sexual orientation as a prohibited ground of discrimination in the African Charter.

With regards to equality and non-discrimination, in the case of ***Zimbabwe Human Rights NGO Forum v Zimbabwe***, the Commission pointed out that the aim of the principle of equality and non-discrimination is to ensure equality of treatment for individuals. This is to be done irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age or sexual orientation.[623]

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[621] The Commission made reference to Article 2 (freedom form non-discrimination) 3, (equality before the law and the right to equal protection of the law) 4, (respect to life and integrity of the person) and 5 (the right to respect of dignity and prohibition of torture, degrading, cruel or inhumane treatment or punishment)

[622] Resolution 275 'On Protection against Violence and other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity', African Commission on Human and Peoples' Rights, meeting at its 55th ordinary session held in Luanda, Angola, from 28 April to 12 May 2014, http:// www.achpr.org/sessions/55th/resolutions/275/ (accessed 3 February 2015) (Resolution 275) para 4

[623] Zimbabwe Human Rights NGO Forum para 169

In November 2010, the Commission adopted the guidelines and principles on Economic, Social and Cultural Right in the African Charter.[624] The guideline's intention was to close the implementation gap of the Charter which was created by the failure of Charter to outline the contents of the ECOSOC rights protected therein.[625] In these guidelines, the Commission defined the term prohibited grounds of discrimination to include the ground of sexual orientation.[626] It also defines vulnerable and disadvantaged groups to include homosexual persons.[627] This shows that the Commission intends for the African Charter to be interpreted to include homosexual rights.

During the 55th Ordinary Session of the African Commission on Human and Peoples' Rights held in 2014, the Commission passed its first-ever resolution on the issue of sexual orientation and gender identity.[628] In the resolution, the Commission condemned violence against individuals based on their sexual orientation and called on states to end this violence. This is yet another indication that the African Commission is getting bolder with regard to the protection of the rights of homosexual persons.

The African Commission has already reacted to questions regarding sexual orientation as a ground for non-discrimination. In 1994, a communication reached the Commission asking it to consider the legal status of homosexuals in Zimbabwe.[629] According to the complainant, the prohibition of sexual conduct between consenting adult homosexual men in private was enforced in Zimbabwe. It was further encouraged by the Minister of Home Affairs. The complainant argued that criminalising same-sex sexual conduct in Zimbabwe and utterances of senior political officials amounted to a violation of the African Charter. The complaint was however withdrawn

[624] The African Commission Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights http://www.achpr.org/files/instruments/economic-social-cultural/achpr-instr-guide-draft-esc-rights-eng.pdf (accessed 17 June 2024)
[625] Jjuuko 2017:270
[626] The African Commission Guidelines paragraph 1(d)
[627] The African Commission Guidelines paragraph 1(e)
[628] The Resolution on the Protection against Violence and Other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation and Gender Identity, Adopted at the Commission's 55th Ordinary Session held in Luanda, Angola from 28 April to 12 May 2014 http://www.achpr.org/sessions/55th/resolutions/275 (Accessed 17 June 2024)
[629] C Courson v Zimbabwe (2000) AHRLR 335 (ACHPR 1995)

by the applicant. The Commission acting as the rapporteur in the case has been quoted as stating that

> "Because of the deleterious nature of homosexuality, the Commission seizes the opportunity to make a pronouncement on it. Although homosexuality and lesbianism are gaining recognition in certain parts of the world, this is not the case in Africa. Homosexuality offends the African sense of dignity and morality and is inconsistent with positive African values".[630]

The statement by the Commission's rapporteur, which describes homosexuality as "deleterious" and inconsistent with "positive African values," exemplifies a prevalent but deeply problematic narrative that frames sexual minority identities as foreign to the African context. This perspective not only contradicts constitutional and international human rights protections, including those enshrined in the African Charter, which guarantees rights without distinction of any kind, but also perpetuates the harmful myth that homosexuality is a Western import rather than a legitimate part of African social realities. Such a view invalidates indigenous aspirations for social change by dismissing them as alien or aberrant, thereby sustaining stigma, discrimination, and violence against homosexual individuals.

Furthermore, the claim that homosexuality offends African dignity and morality overlooks the historical and cultural diversity within African societies, many of which have recognised same-sex relationships in various forms. It also illustrates how dominant cultural norms can be mobilized by those in power to resist the enforcement of rights, underscoring the ongoing tension between entrenched societal prejudices and progressive legal frameworks. Understanding this tension is vital to addressing the discrepancies between constitutional protections and the lived experiences of sexual minorities in Africa.

The African Commission has been applauded for having a robust jurisprudence in interpreting the Charter. It has gone beyond what is expressly written in the Charter and formulated innovative ways of redressing human rights violations. One of the notable innovative approaches is interpretation of Article 1 of the Charter in a way that requires domestic law to be in tandem with the Charter.[631] Another notable innovative approach is that of implying rights which were first adopted in the ***SERAC case***.[632] In

[630] Ankumah 2012:265
[631] Lawyers for Human Rights v Swaziland (2005) AHRLR 66 (ACHPR 2005) para 51
[632] The SERAC case

addition to this, the protection of minority rights without express provisions as was done in the ***Endorois case***, is commendable.[633]

The sub-regional systems have also made notable progressive and innovative decisions like the ***Katabazi*** decision[634] in the East African Court of Justice (EACJ) and the Campbell decision[635] in the SADC Tribunal. The court in ***Katabazi*** established that the court has jurisdiction where there is a violation of the East African Community Treaty provisions. This opened the way for the human rights litigation before the EACJ, within limited circumstances. This enabled a number of human rights cases to be entertained by the court. In the ***Campbell case***, the SADC Tribunal declared that it had the power and competency to adjudicate human rights cases.[636] The decision showed a tribunal that was willing to withstand the political pressure and make a decision in favour of the protection of human rights. This shows a tenacious system that evolved and can survive to even deal with issues of sexual orientation.

3.6.5. The African Women's Protocol

The African Women's Protocol directly flows out of the African Charter and is based on it. It points out in articles 2 and 18 that the rights and protections contained therein are applicable to all without discrimination. It obligates the protection of women from discrimination of any kind.[637] Like other human rights instruments, the protocol does not expressly mention homosexual persons or their rights. However, the interpretation and implementation of the Protocol by the Commission have included the ground of sexual orientation on the list of grounds on which women are discriminated against which should be prohibited. This has been done in general comment on Article 14(1)(d) and (e) of Maputo Protocol and general comment number 2 on Article 14(1)(a), (b),(c) and (f) and paragraph 14(2)(a) and (c) of the Protocol of the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.[638] The general comments provide guidance and clarify state obligations and show that the

[633] Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of the Endorois Welfare Council v Kenya Communication 276/2003, 27th Activity Report
[634] Katabazi & Others v Secretary General of the East African Community and Another (Uganda) (2007) AHRLR 119 (EAC 2007)
[635] Mike Campbell (Pvt) Ltd v The Republic of Zimbabwe, Case 2 of 2007
[636] Campbell 2007
[637] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2013 Preamble.
[638] Paragraph 14 http://www.achpr.org/instruments/general-comments-rights-women/ ;paragraph 12 http://www.achpr.org/instruments/general-comment-two-rights-women/ (accessed 5 July 2024)

provisions have to be interpreted in a way that extends protection and relevance to homosexual individuals, in this case especially lesbian and transgender individuals.

3.7. Zimbabwe's Legal Framework on Sexual Minorities

The LGB community faces serious discrimination and stigmatisation, threats of violence and other human rights violations. Many African countries, Zimbabwe included seem to suggest that homosexuality is un-African and against the teachings of the Christian and Muslim religions which seems to be a reason why they are intolerant of freedom of sexual orientation and LGB rights. It is important to however note that the rationale behind accepting same-sex sexual orientation is based on the notion that all human beings are equal despite their different sexual orientations and should be treated as such.[639] In Zimbabwe, the violation of human rights by sexual minorities who are identified as LGB is increasing. Religion (Christianity and the African Traditional Religion) views homosexuality as a sin, and the criminalisation of same-sex relation creates a hostile environment for LGB individuals. The mere existence of laws criminalising homosexuality acts negatively and affects societal perceptions about homosexuality, puts gays and lesbians at risk of torture and discrimination and allows homophobic behaviours that prevent the LGB community from living openly. In Zimbabwe, not only are the rights of LGB individuals not recognised but violations of these individuals' rights often go unpunished as the government argues that they are protecting the public order.

The Constitution of Zimbabwe recognises all citizens' inherent dignity and guarantees the respect for that right. However, homosexual people have suffered state-sponsored homophobia and harassment for a long time due to the culture of denying them their rights. The Constitution which was adopted in 2013 prohibits same-sex marriages which has been used as a constitutional basis for denying the rights of homosexual people.[640] Further, the Criminal Law (Codification & Reform) Act (Chapter 9:23) of Zimbabwe (the Criminal Law Act) still penalises sodomy.[641] The ongoing criminalisation of homosexuality in Zimbabwe, along with the lack of protection and promotion of sexual minority rights, contributes to the perpetuation of homophobia.

[639] United Nations, Human Rights Office of the High Commissioner, 'Born Free and Equal' Sexual Orientation and Gender Identity in International Human Rights Law.
[640] The Constitution of Zimbabwe Amendment No 20 of 2013, Section 78
[641] The Criminal Law (Codification & Reform) Act (Chapter 9:23) Section 73

This is evidenced in church leaders, politicians and court officials who regard homosexuality as un-cultural and a threat to nationhood.[642]

3.7.1. The Constitution

In 2013, through a referendum, Zimbabwe adopted a new Constitution that acknowledges all citizens' inherent dignity and guarantees the right to respect of that dignity.[643] The Constitution incorporated a non-discrimination clause in the first draft, which provided for non-discrimination on the basis of 'circumstances of birth,' 'natural differences or condition,' and 'other status.' However, the Zimbabwean African National Union-Patriotic Front (ZANU-PF)[644] rejected the drafts on the premise that the provision could be read as including non-discrimination based on sexual orientation.[645] The accepted and final provision on equality and non-discrimination in the Constitution provides:

> "Every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race, colour, tribe, place of birth, ethnic or social origin, language, class, religious belief, political affiliation, opinion, custom, culture, sex, gender, marital status, age, pregnancy, disability or economic or social status, or whether they were born in or out of wedlock."[646]

The intended exclusion of sexual orientation as a prohibited ground of discrimination shows the suppression of sexual minority rights. [647] This shows that the constitution making process disregards homosexual people and their rights.[648]

In addition to this, the fact that the constitution is self-contained, which does not admit analogous grounds, worsens the situation.[649] A situational dimension of an equality or non-discrimination norm which will affect its scope is whether it is open-ended or self-contained. This means that the Constitution does not admit grounds that are not explicitly listed. It would have been different for homosexual individuals if the non-discrimination clause was not exhaustive. The Constitution further prohibits marriage

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[642] More 2009:29
[643] Chapter 4 Part 2 of the Constitution
[644] ZANU-PF is a political party which has been in power from Zimbabwe's independence.
[645] Epprecht , The Constitution Making Process and Sexual Minority Rights in Zimbabwe: Solidarity Peace Trust http://www.solidaritypeacetrust.or/1226/the-constitution-making-process-and-sexual -minority-rights-in-zimbabwe/ (accessed 20 September 2023)
[646] The Constitution of Zimbabwe Section 56(3)
[647] Mandipa 2017: 173
[648] Epprecht (n 344 above)
[649] Bayefsky 1990: 5

between persons of the same-sex,[650] which places the main problem on the definition of marriage, which is understood as excluding same-sex marriages.

The Marriages Act is clear with regards to marriage. It contains two clear sections that relate to the existence of homosexual individuals in the country. It outlaws same-sex marriages in the definitional section of the terms by defining the term marriage. Marriage is defined as a marriage solemnised, registered or recognised as such in terms of the Act.[651] This being a union between persons of the opposite sex.[652] This is in line with section 78(3) of the Constitution which clearly states that, "persons of the same sex are prohibited from marrying each other."[653] As a result, this is a clear denial of sexual minority rights in Zimbabwe. It can however be argued that the constitution prohibits same-sex marriages but does not prohibit same-sex relationships.

However, homosexual individuals can find some protection under certain human rights provisions of the Constitution included under the founding values and principles, which recognise fundamental human rights and freedoms.[654] Section 51 of the Constitution provides for the inherent dignity of every person in their private and public life which is respected and protected, and somehow extends to homosexual people.[655] Further, the right to privacy[656] also extends to homosexual people, together with the right to freedom of assembly and association.[657] Privacy includes one's sexual behaviour and orientation.[658] It recognises that there is an area in every person's life which ought to remain free from government intrusion. Sexuality is the most private area of a person's life and it must not be interfered with, unless there are legitimate reasons to do so.[659] International jurisprudence reveals that public morality alone is an insufficient basis to interfere in private sexual acts that cause no harm to others. This means that there is no legitimate basis for the government to interfere in gay and lesbian sexual acts where they take place in private between consenting adults.

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[650] The Constitution of Zimbabwe, Section 78(3)
[651] Marriages Act Chapter 5:15 section 2
[652] Marriages Act section 41
[653] The Constitution Section 73(3); Masimirembwa 2019
[654] The Constitution of Zimbabwe: Section 3(1)(c)
[655] Mandipa 2017: 174
[656] The Constitution of Zimbabwe, Section 57
[657] The constitution of Zimbabwe: Section 58
[658] Mandipa 2017:174
[659] Sexual Orientation and Zimbabwe's Constitution: A Case for Inclusion, Uwazi 2019 https://ntjwg.uwazi.io/api/file/15504998471715sfmgmx03bb.pds (accessed 01 June 2025)

However, neither the right to privacy alone nor a right to equity is sufficient to protect the dignity of gay and lesbian persons nor to prevent discrimination against them. Sexual orientation is a ground upon which discrimination is prescribed that should receive specific mention.[660] A right to privacy alone is then inadequate to protect gay and lesbian rights as such individuals are not only discriminated against on the basis of what they are perceived to do but also on the basis of who they are. Consequently, the Zimbabwean Constitution requires rights to privacy and equality, where sexual orientation receives specific mention.[661]

Moreover, when interpreting the Constitution, international law and all conventions that Zimbabwe is a party to, have to be considered,[662] together with relevant foreign law.[663] The Zimbabwean Constitution treats different types of international law differently with regard to their legal position in the realm of domestic law.[664] Section 326(1) of the Constitution stipulates that customary international law shall form part of the law of Zimbabwe unless it is inconsistent with the Constitution or an Act of Parliament.[665] This follows that as long as a rule on international customary law is not in contradistinction with any Constitutional provision or Act of Parliament, it becomes incorporated into national law without any further enabling enactment.[666]This however is different when it comes to international conventions, treaties and agreements. Section 327 of the Constitution states that the international conventions, treaties and agreements do not bind Zimbabwe until they have been approved by the President.[667] They do not form part of Zimbabwean law unless an Act of Parliament transforms the said conventions, treaties or agreements into national law.

In cases of conflict between domestic legislation and international law, the principle of consistent interpretation is taken into account. This principle stipulates that decision makers must interpret domestic law in a manner consistent with customary

[660] International Declaration of Human Rights declares a general right to equality and lists specific grounds upon which discrimination is prescribed
[661] Heinze E 1995:68
[662] The Constitution of Zimbabwe: Section 46(1)(c)
[663] The Constitution of Zimbabwe: Section 46(1)(e)
[664] The interface between International and National Human Rights Law under the Zimbabwean Constitution, Admark Moyo at 109
[665] The Constitution of Zimbabwe section 326(1); Dixon 2013: 108; Mann v Republic of Equatorial Guinea Case No CA507/07 [2008] ZWHHC; Barker McCarmac Pvt Ltd v Government of Kenya, 68 1983 (1) ZLR 137
[666] Heinze E 1995:68
[667] The Constitution of Zimbabwe section 327

international law, general principles and international law and treaties as opposed to any other alternative interpretation that is inconsistent.[668] The principle encourages considerable reliance on international law, regardless of whether or not international treaties have been signed by the states in question. There is also an interpretative presumption that statutes should be construed in conformity with the state's international legal obligations derived from both treaties and customary international law. This is sometimes called the presumption of conformity.[669]

Our constitution instructs local courts to construe domestic law in a manner that is consistent with the country's international obligations. If conflict between an international treaty and a rule of domestic law is inevitable, the state must amend the latter as quickly as possible in order to bring it into line with its international obligations.[670] Mandipa submits that such provisions are important in that developments made at the international level concerning the promotion and protection of sexual minority rights are guiding principles to be applied in Zimbabwe.[671] This shows that to some extent, the constitution enshrines the protection and promotion of sexual minority rights in Zimbabwe.

Notwithstanding the above, one can submit that although the Constitution has some favourable provisions for homosexual people, it is important to note that the interpretation of those provisions depends on the purposive interpretation by the judges and magistrates of the day who are mostly conservative and lack independence.[672] As a result, there seems to be little hope for the improved protection and promotion of homosexual people's rights in Zimbabwe.

3.7.2. The Criminal Law (Codification & Reform)

The most obvious area of discrimination against sexual minorities in Zimbabwe is in criminal law. Zimbabwean law is derived from Roman-Dutch law, which has never treated perceived sexual deviance with tolerance. Zimbabwe inherited sodomy laws from the colonial past, and this includes the Criminal Law Codification Act. Initially, if

[668] Heinze E 1995: 119
[669] Sloss 2012
[670] Professor Economides: 1993: 13
[671] Mandipa 2017:174
[672] Madhuku 2006:345

a sexual act was not directed at procreation, it was regarded as deviant and any such act was regarded as sodomy.

The law then evolved so that sodomy meant sex per anum between two males.[673] Early Roman-Dutch law contained an offense or a complex of offenses, termed *sodmie*, *orikuisheid tegen de natuur* (lewdness against nature) or in Latin, *venus monstrosa.* The 1987 Zimbabwean High Court defined the word 'sodomy', reflecting on the development of the term:

> "…the word used in early Roman-Dutch law was 'sodomy' and this term, at that time encompassed virtually any form of abhorrent 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. Some jurists even regarded normal coitus between a Jew and a Christian as 'sodomy.'"[674] This definition displays both the breadth and the bloodthirstiness of early European law.[675]

The Criminal Law Act has now returned the law to a position which resembles the original Roman-Dutch law in its definition of sodomy. The Act regulates criminal conduct. It does not extend any protection to lesbian and gay people, although there is no specific mention of homosexuality. The Act criminalises sodomy and provides that:

> "Any male person who, with the consent of another male person, knowingly performs with that other person anal sexual intercourse, or any act involving physical contact other than anal sexual intercourse that would be regarded by a reasonable person to be an indecent act, shall be guilty of sodomy and liable to a fine up to or exceeding level fourteen or imprisonment for a period not exceeding one year or both."[676]

This provision has been used to harass homosexual individuals in Zimbabwe. It provided a means to arrest and imprison these individuals and subject discrimination and denial of rights. These sodomy laws also make homosexual men more vulnerable to other kinds of legal repression. Makwele however argues that:

> "There is no law that states that one cannot be gay. It only becomes a crime once you start committing homosexual acts in public…If you take a look at the Constitution in Zimbabwe, it is

[673] Propotkin Peter, Getting to the Bottom of Sodomy in Zimbabwe, Unpublished paper, University of Zimbabwe
[674] S v Chikore, 1987 (2) Zimbabwe Law Reports 48 HC
[675]Scott Long, Before the Law: Criminalising Sexual Conduct in Colonial and Post-colonial Southern African Societies
[676][676] The Criminal Codification Act: Section 73(1)

> not a crime to stand in the streets and publicly state that he or she is homosexual. It is not illegal to be gay in Zimbabwe. Being homosexual is only regarded criminal in Zimbabwe once you publicly commit homosexual acts."[677]

The Avert website relating to men who have sex with men (MSM) stated that, "homosexual acts are illegal in Zimbabwe for men who have sex with men, but legal for women who have sex with women. As a consequence of this punitive law, national statistics are rarely available."[678] In addition, section 136 of the code finds a person guilty of fraud if they misrepresent themselves to another person which is used against transgender people and other gender non-conforming people for misrepresenting themselves.[679]

While the country's Constitution protects freedom of expressions, this freedom is not extended to LGB persons who are particularly vulnerable if they present themselves in gender non-conforming ways. Chapter 10:04 of the Censorship and Entertainment Control Act prohibits importing, producing and disseminating "undesirable publications" such as pictures, statues and others.[680] This Law has been used to consfisticate GALZ's pamphlets and publication. With all these laws and stigmatisation from society, it is ironic that the government of Zimbabwe states that being homosexual is only regarded as criminal in Zimbabwe once you publicly commit homosexual acts because sexual acts done in private are also criminalised.[681]

In addition to this, the joint submission by the Sexual Rights Centre noted that transgender individuals are not protected by any law in Zimbabwe, as they are not legally recognised in court proceedings or law enforcement. This dehumanises them, leaving transgender women likely to be prosecuted under sodomy law.[682] Further, it has been noted that Zimbabwe does not have any law that allows transgender individuals to change their gender markers on personal documents, and there are no

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[677] Majalifa Makwele cited in: Voice od America (VOA) USSD Report 2017 (section 6) 20 April 2018 https://www.state.gov/j/drl/rls/hrrpt/humanrights report/index.htm (accessed 15 September 2023)
[678] Avert, HIV and AIDS in Zimbabwe 2018 https://www,avert.org/professionals/hiv-around-world/sub-saharan-africa/zimbabwe (accessed 29 October 2023)
[679] An analysis of spaces for LGBTI activism in Zimbabwe, http://theotherfoundation.org/wp-content/uploads/2017/02/Canaries_Zimbabwe/pdf (Accessed 10 October 2025)
[680] Act No. 37 0f 1967
[681] Voice of America, (VOA), Gay Zimbabweans Fight Stigma, Harsh Laws. 12 January 2017. http://www.voanews.com/a/zimbabwe-gay-right-lgbt/3673999.html (Accessed 10 October 2025)
[682] United Nations Human Rights Council, Universal Periodic Review of Zimbabwe 26th Session 2016 Joint Submission by Sexual Rights Centre, GALZ and COC Netherlands

laws that provides for hormonal treatment or gender-affirming healthcare for these individuals.[683]

3.7.3. How Zimbabwean Laws are Consistent with its International Obligations

Zimbabwe ratified the ACHPR in 1986 and the ICCPR on May 13 1991. Under Article 4 of the African Charter, citizens of Zimbabwe have the right to respect for life and integrity of the person, which may be explained as a type of privacy for gay and lesbians. This means that the LGB community has the right to be free from unwarranted publicity, unwarranted appropriation of their personality and unlawful interference in their private business. Any sexual activity that they engage in privately should be respected the same way that the sexual activities of heterosexual persons are respected.

Article 12 of the UDHR specifically prohibits arbitrary interference with privacy. In addition, Article 17 of the ICCPR ensures the right to privacy and its full enjoyment without any arbitrary and unlawful interference. Article 17(2) provides for protection against interference and attacks. In 1996, Section 11 of the Zimbabwean Constitution was amended to limit the right to privacy where such right may prejudice the public interests. In my view, homosexuality does not in any way prejudice the public interest because it is between two consenting adults and is done in private, so many discrimination and criminalisation towards LGB individuals are unjustifiable.

Article 6 of the ICCPR (The right to life), proclaims that every human being has the inherent right to life and the right shall be protected by law. No one shall be arbitrarily deprived of his life.[684] Article 7 declares that nobody can be subjected to torture or to cruel, inhumane, or degrading treatment or punishment.[685] The Human Rights Committee's General Comment No. 20 established that the purpose of the prohibition against torture and cruel, inhumane or degrading treatment is to "protect both the dignity, physical and mental integrity of a person.[686]

[683] Southern African Litigation Centre, Laws and Policies Affecting Transgender Person in Southern Africa 50-51 2016
[684] The ICCPR 1966
[685] ibid
[686] Human Rights Committee General Comment No. 20, Art 7 (Forty-fourth Session 1992), compilation of general comments and general recommendations adopted by human rights treaty bodies, 2 UN. Doc. HRI/GEN/1/Rev.1 at 30 (1994)

Article 9 of the ICCPR protect the right to liberty and security of the person. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by the law. In Zimbabwe as mentioned above, there is no specific legislation enacted that prohibits torture and violence hence the reason why the LGB community suffers at the hands of the police and society at large. Zimbabwe is in violation of the ICCPR and their constitutional provisions that prohibit discrimination and unfair treatment, encourage equality of all before, and protect their rights to health, privacy, dignity, personal liberty, freedom of expression and association, and the right to form a family by criminalising same-sex acts between consenting adults and not implementing laws that protect these individuals.

The right not to be discriminated against, the right to equality and equal protection, and the obligation to respect, protect, and guarantee human rights without discrimination lie at the heart of the ICCPR. The ICCPR imposes obligations on State Parties to ensure that they respect these rights and comply with these obligations. Article 2(2) stipulates that State Parties must enact the necessary laws or other measures to give effect to the rights recognised in this Covenant. Persons belonging to the LGB community find it difficult to seek redress from the relevant government agencies for fear of stigma, state violence and discrimination. This is in direct contradiction of Article 26 of the ICCPR which state that all people are equal before the law and must enjoy the same level of protection before the law.[687]

The existence of discriminatory laws creates an atmosphere in which violations are rampant. It creates a sense of innocence in the perpetrator and fear in the victim. Religious and traditional sentiments, discriminatory laws and a hostile social environment instil fear in the LBG community and they suffer from a life of limited justice. Zimbabwean laws criminalising same-sex conduct violate privacy rights according to the HRC case of ***Toonen v Australia***.[688]Denial of transgender identity including but not limited deprivation of the right to change name of gender is the violation of the right to privacy. Similarly, Human Rights Commission in ***G v Australia***, ruled in favour of a female transgender in Australia that the refusal to change the

[687] The African (Banjul) Charter on Human and Peoples' Rights Article 3 CAB/LEG/67/3rev.5, 21I.L.M58 (1982)
[688] Toonen v Australia 1994

gender on a birth certificate unless divorced from the spouse is claimed to be direct and arbitrary interference with her right to privacy under Article 17 of the ICCPR. [689]

3.8. Chapter Summary

It has been argued in the discussion above that there is a plethora of international human rights treaties and mechanisms that recognise and protect sexual minority rights. These treaties and mechanisms provide a legal basis for challenging discriminatory practices and advocating for the rights of sexual minorities, even in the midst of cultural impediments. However, these treaties and mechanisms become meaningful only when they are implemented at the domestic level. Thus, the relevance of international human rights treaties in protecting the rights of all persons at the domestic level cannot be overemphasised.

It is for the implementation and observance of the tenets of these rights at the domestic level that these treaties are opened for signature to all countries of the world. The essence of signing and ratifying international treaties is to ensure that treaties adopted at the international level are implemented at the domestic level to provide meaningful human rights protection for the ordinary citizen. It is therefore incumbent on African states, including Zimbabwe, that have ratified these relevant international treaties that protect sexual minority rights, to give effect to these rights.

The UN Charter recognises human rights as one of its principles.[690] The UN Charter creates many bodies with different mandates, all of which have a role to play in the protection of human rights. There is still little consensus among the UN member states as to whether homosexual rights are indeed human rights duly recognised by the UN. Nevertheless, the General Assembly, which is made up of all member states, has so far adopted six resolutions that regard sexual orientation as protected.[691] Therefore, despite the contention that still exists among States on the status of homosexual rights, the tide is clearly in favour of homosexual individuals.

Various treaty-based bodies have been established by human rights treaties ratified by member states, and these bodies are responsible for interpreting the treaties.

[689] G v Australia, Communication No. 2172/2012. U.N.Doc. CCPR/C/119/D/2172/2012 (2017)
[690] United Nations 'Charter of the United Nations' 1945, art 1(3)
[691] These are Resolutions: A/RES/69/182; A/RES/67/168; A/RES/65/208; A/RES/ 63/182; A/RES/61/173; A/RES/59/197 and A/RES/57/214, which all concern extra judicial, summary or arbitrary executions.

These bodies have the powers to interpret the treaties through the issuance of General Comments, examining periodic state reports and issuing Concluding Observations and through the receipt and handling of complaints arising from violations of a treaty. These various treaty bodies have dealt with homosexual issues, and the protection of their rights thereof.

These include the Human Rights Committee (HRC or the Committee), which is the monitoring body established under the ICCPR. In hearing communications, the Committee has dealt with issues concerning homosexual rights under the right to equality and non-discrimination and the right to privacy. Under non-discrimination, the Committee has dealt with four aspects: criminalisation of same sex relations, rights of partners in same-sex relations, same-sex marriages and freedom of expression. [692] In addition to this, there is the Committee on Economic, Social and Cultural Rights (ESCR Committee) established under the International Covenant on Economic, Social and Cultural Rights (CESCR), which has considered issues of sexual orientation in its General Comments[693] and in Concluding Remarks. Furthermore, there is the CEDAW Committee established under the International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). The CEDAW Committee interprets the CEDAW, reviews states' reports, and receives complaints. It has dealt with issues of sexual orientation in general Comments and Concluding Observations.[694]

Under the Regional system, there is the African Charter that has dealt with issues of sexual orientation and offers for the protection of sexual minority rights.[695] The African Charter lays down the rights recognised in the African system. It establishes the African Commission as the body with the mandate to promote and protect human

[692] Toonen v Australia paragraph 8.7, the Committee interpreted the reference to sex in articles 2(1) and 26 as including sexual orientation and found that criminalisation of same-sex relations was inconsistent with the ICCPR. It found that criminalisation of same-sex relations without criminalising opposite sex relations was discriminatory.
[693] General Comment No 20, UN Doc E/C.12/GC/20 10 June 2009; Committee on Economic, Social and Cultural Rights, General Comment No 18: The right to work, E/C.12/GC/18, 24 November 2005; Committee on Economic, Social and Cultural Rights, General Comment No 15: The right to water, E/C.12/2002/11, 26 November 2002.
[694] Concluding Observations of the Committee on the Elimination of Discrimination Against Women regarding Kyrgyzstan, dated 5 February1999, A/54/38 para 128.
[695] Karen Atala v Chile, IAm Comm of HR (24 February 2012) OEA/Ser.L/V/II.130 Doc 22 rev 1; Marta Lucía Álvarez Giraldo v Colombia, IAm Comm of HR (4 May 1999) OEA/Ser.L/ V/II.106 Doc 3 rev 211.

rights in Africa.[696] It has human rights as a founding principle and established bodies mandated to enforce states' conformity with the founding principles, including human rights. Just like most other international instruments, there is no mention of homosexual rights in the African Charter. This, however, does not mean that the African Charter omits these rights. It recognises the rights to equality; freedom from discrimination; life and integrity of the person; dignity; liberty and security of the person; to be heard; conscience, profession and religion; receive information; free association; assembly; movement and residence within the borders of a state; civic participation; property; work; the highest standard of physical and mental health; education; and family, which apply to every individual including sexual minorities.[697]

There is clearly enough evidence to be able to conclude that 'sex and other grounds' include discrimination based on sexual orientation and/or gender identity and that unjust differentiation based on these criteria is deemed discrimination by the UN. It then becomes clear that any law criminalising consensual same-sex sexual acts violates the right to dignity.[698] Human dignity is an inherent basic right which all human beings are entitled to without discrimination of any kind.

Ingrained in the right to dignity, under the international human rights system, is also the right to privacy. The right to privacy has been one of the most important rights in the process of declaring national anti-sodomy laws contrary to basic human rights.[699] In the African Charter, the right to privacy is not explicitly spelled out but, as discussed by Viljoen and Murray,[700] it can be understood as an implied right under the right to dignity in line with the arguments in the case of ***SERAC***.[701] This was furthermore highlighted in the ***Atala case***, where the Inter-American Court established that privacy fell under the ambit of the protection of dignity. It further concluded that privacy was an ample concept that was not subject to exhaustive definitions and includes, among other protected realms, the sex life and the right to establish and develop relationships with other human beings.[702] Therefore, privacy includes the way in which the individual

[696] African Charter on Human and Peoples' Rights CAB/LEG/67/3 art 30.
[697] The African Charter Article 2-7
[698] Purohit (2003) AHRLR 96 (ACHPR 2003) paragraph 57
[699] Lawrence v Texas 539 US 558 (2003); Croome v Tasmania 191 CLR 119 (1997).
[700] Murray and Viljoen 2009:89-90
[701] SERAC case
[702] Atala case

views him/herself and to what extent and how he or she decide to project this view to others.[703]

The issue of privacy is, however, a double-edged sword. On the one hand, it is the path of least resistance in that it would not force other African States like Zimbabwe to explicitly 'accept' homosexuality. Privacy can be used to encapsulate a 'derogatory' behaviour, while at the same time arguing that as long as it is hidden, it would not be accepted but rather just ignored. On the other hand, the use of privacy would leave the stigma completely untouched and the state without any positive obligations towards homosexual persons. Furthermore, some of the acts criminalised in the discriminatory laws are by their nature public acts. Same-sex amorous expression and advocating for gay rights are amongst the acts that are criminalised and, in this context, the right to privacy would arguably have very little effect.

The concept of cultural relativism is usually raised to support the argument that homosexual rights are not within the realm of rights recognised by African states. This ties in with the common myth that homosexuality is an import from Europe,[704] and its sister myth that Western countries are intent on promoting homosexuality in Africa in order to destroy the 'traditional African family.'[705] As such, most African states do not consider themselves bound to recognise or respect homosexual rights. As a result, homosexual persons are usually subjected to abuse, encouraged to keep their sexual orientation or gender identity secret or else risk the wrath of the people or the government or both. Common abuses against homosexual persons in Africa include: rape, denial of education, denial of access to justice, denial of appropriate health services, exclusion from social circles, family denials, exclusion from succession, hate speech, and in extreme cases; murder.[706] Unfortunately none of these are seen as serious violations of human rights, which they would have been if they had been committed against any other category of persons.

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[703] Atala case paragraph 162

[704] Binta Bajaha 'Post colonial amnesia: The construction of Homosexuality as 'un-African' http://www.lse.ac.uk/genderInstitute/pdf/graduateWorkingPapers/bintaBajaha.pdf. (accessed 3 July 2024)

[705] This was specifically included in Uganda's Anti-Homosexuality Bill as one of the justifications for the Bill. See Anti-Homosexuality Bill, 2009 (Uganda) preamble.

[706] Human Rights Campaign Foundation & Human Rights First 'The state of human rights of LGBTI persons in Africa' July 2014 http://www.humanrightsfirst.org/sites/default/files/HRF-HRC-Africa-Report.pdf (accessed 4 July 2024).

In the context of discriminatory laws, three main arguments have been used to justify these laws: moral values (mainly based either on religion or traditional African values); the threat to the heterosexual family; and the dangers presented to the welfare of children and the youth. However, discriminatory laws violate a number of freedoms as set out in regional instruments like the African Charter, and the African Women's Protocol. These freedoms include, freedom of expression, association and assembly. Discriminatory laws prohibit gay clubs, societies, organisations, processions and meetings and, additionally, any person or organisation that funds these types of bodies.[707] These restrictions are only based on sexuality, that is, the laws refer to 'gay' clubs or 'a person who abets homosexuality', clearly indicating a violation of the rights set out, based on sexual orientation.

In this regard, the laws that criminalise same sex relationships in Africa are colonial relics that have persisted beyond their original context. These laws have been overtaken by the human rights provisions in the constitutions of several African states. Many African countries are state parties to international treaties whose monitoring bodies have a body of jurisprudence, which imposes an obligation on state parties to respect sexual minority rights, which cannot be ignored. The essence of signing and ratifying international treaties is to ensure that treaties adopted at the international level are implemented at the domestic level to provide meaningful human rights protection for the ordinary citizen. It is therefore incumbent on African states that have ratified these relevant international treaties that protect sexual minority rights to give effect to these rights. However, in spite of these laws and mechanisms and in apparent disregard of their international obligations, many African countries continue to disregard sexual minority rights.

Across Africa, there is a new growth of Pan Africanism. Many Africans are standing up to protect and preserve African values and identities and to challenge foreign dominance. This is even seen at the African Union level, where heads of state always talk about the need to revive Africa and for Africa to claim its place in the world.[708] However, there is the adoption of a conservative trend in certain respects which simply drags the continent back and which is bad for the progress of human rights. In many

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[708] This Pan-Africanism has led to strengthening of the AU, and regional blocs and led to the introduction of progressive mechanisms like the African Peer Review Mechanism and the New Partnership for Africa's Development (NEPAD).

African countries, homosexuality is seen as a foreign import,[709] and therefore the rhetoric goes that Western countries seeking to dominate Africa are using homosexuality as one of the ways to erode African culture and values.

This conservative group of people who regard homosexuality as un-African, seeks to protect African values and culture through fighting same-sex sexual conduct. This is done through further criminalisation, preaching of hate against homosexual people, and denouncing them as agents of the west and denigrating them. This causes more prejudice as homosexual people are exposed to further violations of their rights. Also, when taken on by leaders, abuses and violence are given a cloak of legitimacy in the name of Pan-Africanism. Behind all recriminalising efforts is a group claiming to be protecting African values or morals or cultures. This shows that although many states claim to be democratic and to care about human rights, the facts on the ground do not seem to support that.

This has not always been the situation in Africa, however. Despite evidence to the effect that homosexuality was practised in Africa from time immemorial, there is no evidence of systematic or society-sanctioned discrimination or criminalisation of same-sex conduct.[710] What existed was tolerance of difference and rituals to cleanse those who were suspected of being engaged in these practices, but certainly not criminalisation even in the traditional or customary sense.

3.9. Conclusion

The above discussion has shown that there are several human rights instruments and mechanisms that provide for the protection of all persons including sexual minorities. To begin with, there is no binding international human rights treaty that provides for the specific protection of sexual minority rights. However, the international bill of rights provides for human rights guarantees like the right to equality, non-discrimination, privacy, dignity and bodily integrity, which could be interpreted to provide protection for sexual minorities. The Human Rights Council has also defined sex to include sexual orientation which provides direct protection for sexual minorities.

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[709] Binta and Bajaha

[710] Interestingly, President Yoweri Museveni of Uganda who signed the oppressive Anti-Homosexuality Act into law is also of this view. Yoweri Museveni 'Homosexual Bill' 28th December 2014, 3-5. Available at http://www.patheos.com/blogs/warrenthrockmorton/2014/01/17/full-text-of-letter-from-ugandas-president-museve ni-to-speaker-of-parliament-kadaga/ (accessed 29 July 2024).

However, the reporting mechanism under the United Nations system and as well as the African human rights system is filled with difficulties. This is because the various state parties to some instruments have not done their reporting as obligated under the treaties. Where some have reported, they have failed to report on sexual minority rights. Taking for example, Botswana's initial report to the Human Rights Council which was due in 2001 but was only submitted to the Council in 2006 and failed to report on sexual minority rights.[711] It is then argued that the Human Rights Council should give a specific reporting requirement for states to report on measures taken to respect, protect and promote sexual minority rights.[712]

As regards the African Human Rights System, it is argued that there is a need to present the African Commission with the opportunity to determine the rights of sexual minorities. A definitive pronouncement is needed to ensure the protection of sexual minorities in Africa.[713] In addition to this, the interpretation of Article 2 of the African Charter of and that of the African Commission includes sex and sexual orientation. It is then time for the African Charter to determine the rights of sexual minorities in the context of the African Charter.[714] Additionally, the fact that individual rights of sexual minorities have been violated, on the basis of their sexual orientation justifies the fight for the protection of their human rights.[715] The protection of sexual minorities calls for general protection as in the words of the African Charter, "every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the Charter without distinction of any kind".[716] Beside the Charter not referring explicitly to sexual orientation as a ground for non-discrimination, it should be regarded as a living instrument, where interpretation develops over time.[717]

[711] Malawi and South Africa's initial reports were due in 1995 and 2000 respectively but failed to report. Uganda reported in 2003, when it was supposed to report in 1996, http://www.unhcr.ch/tbs/doc.nsf (Accessed 27 June 2024)
[712] Yaw Ako 2010: 22
[713] Murray and Viljoen 2009
[714] Zimbabwe Human Rights NGO Forum v Zimbabwe para 169
[715] Heinze 1995: 57
[716] Article 2 of the African Charter on Human and Peoples' Rights
[717] General Comment, No.8 (2006) The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (articles 19, 28(2) and 37 inter alia) para 20. Committee on the Rights of the Child Forty-second session Geneva, 15 May-2 June 2006.CRC/C/GC/8

The LGB individuals do not claim any special rights but adhere to the same rights as any other human being. They claim basic rights that are perceived in the 1948 Universal Declaration of Human Rights. By ratifying the ICCPR and other human rights treaties, Zimbabwe assumed positive obligations to address violence against these individuals. Zimbabwe has ratified various human rights treaties, including the ACHPR and the ICCPR. The ICCPR provides for equality before the law and the right to non-discrimination based on sex. Implicitly, any law criminalising consensual sexual relations between adults is in violation of the Covenant. As a party state to the ICCPR and other human rights instruments, Zimbabwe is obligated to conform to its provisions, despite the government's refusal to recognise sexual minority rights. The country is obliged to enact domestic laws that give effect to the provisions of all the international treaties the country has ratified.

CHAPTER FOUR

REALISING, PROTECTING, PROMOTING AND LEGALISING THE RIGHTS OF SEXUAL MINORITIES IN ZIMBABWE AMID CULTURAL BARRIERS?

4.1. Introduction

The debate around the discrimination of sexual minorities in Zimbabwe has intensified in recent years, largely fuelled by societal attitudes that frame homosexuality and gender diversity as "un-African." This perception, deeply rooted in cultural, religious, and political rhetoric, continues to shape public policy and everyday life for lesbian, and gay individuals.[718] Even though Zimbabwe has adopted a Constitution that incorporates international human rights standards and principles, including a non-discrimination clause, sexual minorities continue to face systemic, institutional, and interpersonal discrimination. The Constitution guarantees equality and protection from unfair discrimination, but it does not explicitly include sexual orientation as protected grounds, and same-sex marriage remains constitutionally banned. Consequently, homosexual individuals remain vulnerable to legal penalties, social stigma, violence, and marginalization, reflecting a gap between formal legal protections and lived realities.[719] This situation underscores that legal recognition alone does not eliminate discrimination or guarantee substantive protection for sexual minorities in Zimbabwe. This study set out to explore the cultural barriers impacting on the realisation of sexual minority rights. The study also sought to know how international human rights standards and principles have been used to address discrimination against sexual minorities and hence improve their protection. It looked at how Zimbabwe can benefit from international human rights principles to improve the protection of sexual minorities.

This chapter underscores the complexities of advancing sexual minority rights in Zimbabwe amid entrenched cultural and legal barriers. It highlights the urgent need for systemic reforms and inclusive advocacy to align national laws and practices with international human rights standards. The chapter is particularly interested in finding out what legal and non-legal strategies may be derived from these norms and

[718] Ssekasamba, 2023

[719] Unseen and Unheard: LGBTQIA+ Struggles for Equality in Zimbabwe, Friedrich Naumann Foundation For Freedom, Human Rights Hub 2025

principles to combat discrimination against sexual minorities in the country. Zimbabwe has a progressive constitution in place that not only embraces international human rights standards and principles but also creates institutions of parliament and the judiciary that can be used to improve the human rights of sexual minorities. In this regard, legal and non-legal mechanisms are needed to address marginalisation and oppression of sexual minorities in Zimbabwe. Conditions that guarantee that sexual minority individuals are respected and have access to the rights guaranteed by the Constitution are necessary for the actualisation of their rights. These conditions must protect minorities from oppression by the majority in order to preserve and protect the substantive equality of persons.

The chapter will first examine the best practices from other jurisdictions that offer protections to sexual minority individuals and their rights. This means that reference to other jurisdictions that have protected sexual minority rights will be looked at. This chapter further evaluates the strategies that can be taken to protect, promote and realise the rights of sexual minority groups. This includes policy recommendations, legal reforms and protections, public awareness campaigns, inclusive education and advocacy. The chapter examines the place of international law in the struggle against the criminalisation of same-sex sexual conduct and how international law instruments and decisions could be relied on to advocate for the decriminalisation of same-sex sexual conduct in Zimbabwe. It also analyses the role of the courts, political and legal culture, parliament and Civil Society Organisations (CSOs) in protecting rights for gays and lesbians. The Chapter also assesses the extent to which the rights to privacy and human dignity can be applied towards the decriminalisation of same-sex sexual conduct in Zimbabwe. The role of the courts, political and legal culture, parliament and CSOs in protecting and fighting against the criminalisation of same-sex sexual conduct in Zimbabwe. There is little chance of substantial change unless the existing culture is confronted directly, and policy efforts to change the status quo will not succeed at all unless there is a careful reading of the dynamics of informal cultural practices.

4.2. Deconstructing cultural myths

Pre-colonial Zimbabwean societies, like many African cultures, maintained complex gender and spiritual systems that colonial frameworks often misrepresented or suppressed. By examining the roles of *n'anga* (spirit mediums) and pre-colonial gender fluidity, the myth of a monolithic, heteronormative African past can be

dismantled and challenge contemporary claims that homosexuality is "un-African." In Shona tradition, *n'anga* served as intermediaries between the physical and spiritual worlds, wielding influence that transcended rigid gender binaries. These mediums, often women, directed communal decisions, mediated conflicts, and led anti-colonial resistance. For example, during the 1896–97 Chimurenga uprising, *n'anga* crafted military strategies and mobilized communities against British rule, leveraging their spiritual authority to legitimise dissent.[720] Figures like VaZarira, a female spirit medium, advised guerrilla fighters during Zimbabwe's liberation struggle, providing medicinal protections and ethical guidance.[721] Colonial authorities, however, misread this spiritual-political role, preferring to negotiate with male chiefs while criminalising *n'anga*. This erasure obscured the pre-colonial reality where women and gender-nonconforming individuals held sacred power.

Contrary to colonial-era myths, pre-colonial Zimbabwe and broader Africa recognised diverse gender and sexual expressions. Spirit mediums often embodied "flexible gender," a concept where women could occupy traditionally male roles, for instance, military leadership, without losing social legitimacy. Beyond Zimbabwe, societies like Kenya's Nandi and Kisii practiced female-to-female marriages, allowing women to head households and inherit property.[722] In Angola, 17th-century Portuguese accounts documented *quimbandas*, gender-nonconforming individuals, assigned male at birth who lived as women and engaged in same-sex relationships.[723] Writing in 1938, the anthropologist Melville Jean Herskovits imputed assumptions on woman-to-woman marriages that were, in the words of the anthropologist Eileen Jensen Krige, "foreign to the institution." He insisted that "it is not to be doubted that occasionally homosexual women who have inherited wealth… utilize this relationship to the women they marry to satisfy themselves." Although he was operating on pure conjecture, and while

[720] Kaoma, 2016 African Religion and Colonial Rebellion: The Contestation of Power in Colonial Zimbabwe's Chimurenga of 1896-1897. Journal for the Study of Religion, 29(1), 57-84. Retrieved June 06, 2025, from http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1011760120160001000003&lng=en&tlng=en (accessed 13 May 2025)
[721] Dabale, 2024 Women as Healers in Shona Traditional Religion and African Independent Churches https://hdl.handle.net/10520/ejc-atjack_v1_nse3_a9 (accessed 13 May 2025)
[722] Ntshinga and Sejake 2017, #Goals: Re-Imagining an Africa Where Gender and Sexuality Is Fluid https://www.okayafrica.com/re-imagining-an-africa-where-gender-and-sexuality-is-fluid/ (accessed 13 May 2025)
[723] Mohammed 2017, The "Deviant" African Genders That Colonialism Condemned https://daily.jstor.org/the-deviant-african-genders-that-colonialism-condemned/ (accessed 13 May 2025)

heterosexuality was certainly the dominant form of sexuality in pre-colonial Africa, Tamale notes that “there is no doubt that same-sex copulation was also practised.”[724] These practices were integrated into spiritual and social systems, reflecting a worldview where gender and sexuality existed on spectrums rather than binaries.[725]

European colonisers weaponised ethnocentric moral codes to dismantle African social structures. By enforcing patriarchal hierarchies and criminalising same-sex relationships through anti-sodomy laws, colonial regimes pathologised pre-colonial gender diversity and sexuality.[726] In Zimbabwe, the suppression of *n'anga* and the elevation of male chiefs disrupted traditional balances of power, sidelining women and spiritually authoritative figures. This cultural violence created the false dichotomy of "tradition vs. modernity," where homosexuality and female leadership were framed as foreign imports rather than indigenous practices.

The claim that homosexual identities are "un-African" relies on colonial-era fabrications, not pre-colonial realities. By recentering figures like *VaZarira* and acknowledging the spiritual legitimacy of gender-fluid roles, there is a confrontation of the historical amnesia imposed by colonialism. Homosexual African narratives must move beyond Western dichotomies to recognise local practices erased by imperial violence. Reclaiming these histories is not merely academic, but is a decolonial act that restores agency to marginalised communities and dismantles oppressive myths.

4.3. Best practices from other jurisdictions in protecting the rights of sexual minority groups

References to other jurisdictions that have safeguarded the rights of sexual minorities and set a strong example by recognising sexual minority rights while actively working to eliminate discrimination will be made. One good example is the jurisdiction of South Africa. This is because South Africa experienced the most rapid transformation on the issue of sexual minority rights. One of the primary philosophical achievements that has been hailed by many was the inclusion of sexual orientation among the listed grounds on which unfair discrimination is prohibited.[727] South Africa became the first country in Africa to include the prohibition in its national Constitution. This inclusion

[724] Dabale 2024 (n 657 above)
[725] Casteleyn, 2019 Challenging queer African narratives: A case study of LGBTIQ activism in Nairobi as a local nuance to (trans)national queer narratives: Dissertation, Ghent University
[726] Mohammed 2017 (n 659 above)
[727] Mubangizi, Twinomungisha and John, 2011

incorporated the host of rights commonly sought by gays and lesbians in other countries, which could now be enforced under the South African Constitution.

The South African Constitutional Court made a landmark decision in the case of ***National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others***.[728] The court was called to decide whether the common law offence of sodomy and several statutory provisions dealing with the criminalisation of homosexuality were inconsistent with section 9(3) of the South African Constitution. The court declared the law prohibiting homosexual conduct between two consenting adults in private unconstitutional.[729] While South Africa has made significant progress in protecting the rights of homosexuals, Zimbabwe still enforces sodomy laws that criminalise homosexuality, thereby infringing upon several fundamental human rights. This shows a different picture on the perception and treatment of same-sex relations from other African countries. It is important to note that South Africa went through a great transition on the rights of sexual minorities. The homosexual community had no legal protection until the decade of 1994-2004. Prior to this, sexual acts between two consenting adults were criminalised.[730] One groundbreaking change is seen in the Constitution which now guarantees the right to be free from discrimination by the State, legal and natural persons on the basis of sexual orientation. This meant that the Constitution places sexual orientation on a par with gender and race as protected categories, which is seen as a benchmark in Africa.[731] It is important to note that South Africa legalised same-sex marriages, which was premised on that very foundation.[732]

However, although the legalisation of same-sex marriages in South Africa represents a landmark achievement rooted in the constitutional commitment to substantive equality and non-discrimination based on sexual orientation, it is crucial to recognise that the inclusion of sexual orientation rights in the Constitution was fiercely contested, particularly through the Public Participation Programme and opposition from religious groups. This was a clear reflection of deep societal divisions on the issue. Despite

[728] CCT11/98 (1998) 1998
[729] South African Court ends sodomy laws, New York Times (8 May 1998) http://www.nytimes.com/1998/10/10/south-africa-strikes-down-sodomylaws-on-gay-sex.html (accessed 14 October 2024)
[730] Robinson and BA "End of the World Predictions, Ontario Consultants on Religious Tolerance" http://www.religioustolerance.org/endwrld.htm (accessed 14 October 2024)
[731] The Constitution of South Africa Article 9; Mubangizi and Twinomungisha (n 663 above)
[732] National Coalition for Gay and Lesbian Equality and Anor v Minister of Justice and Others case

constitutional protection, widespread public disapproval and societal resistance to homosexuality persisted, reflecting a complex tension between progressive legal frameworks and prevailing social attitudes.[733] This underscores that constitutional recognition, while foundational, is only one step in the broader struggle for social acceptance and equality.[734]

The protection of sexual minorities is also seen as extending and gaining the support of some religious leaders in South Africa. Religious leaders have showed their support for homosexuals in South Africa. Archbishop Desmond Tutu and Dr Allan Boesak are vocal supporters of homosexual rights in South Africa. Even the conservative Dutch Reformed Church ruled that gay members should not be discriminated against and could hold positions in the church.[735] This kind of support should be adopted in Zimbabwe as well so as to enable the realisation of the right to freedom of religion.[736]

South Africa has also sought to curb the problem of discrimination against sexual minorities in employment. It is important to note that despite South Africa's progressive legal framework aimed at curbing discrimination against sexual minorities in employment, the persistence of workplace prejudice and exclusion reveals a significant disconnect between formal rights and everyday realities. This disparity underscores the need for not only robust enforcement mechanisms but also cultural and institutional change to ensure that the protections on paper translate into genuine equality and inclusion for sexual minority individuals in practice.

The South African parliament passed the Employment Equity Act in 1998 which protects its citizens from labour discrimination based on sexual orientation among other categories. This, for example, means that homosexuals are allowed to serve openly in the South African National Defence Force (SANDF). In 1996, the

[733] While South Africa's Constitution and legal framework explicitly protect the rights of lesbian, gay, bisexual, and other sexual minority individuals, widespread public disapproval, discrimination, and violence persist. Numerous studies and reports highlight ongoing social stigma, hate crimes, and institutional barriers that continue to affect the lived experiences of homosexual people. This discrepancy between legal protections and social realities underscores the complex challenges in advancing true equality beyond legislative measures.
[734] Christiansen, 2016:565-615 Substantive equality and sexual orientation: Twenty years of gay and lesbian rights adjudication under the South African Constitution. Cornell International Law Journal, 49, 565-615. https://doi.org/10.2139/ssrn.3040966 (accessed 14 October 2024)
[735] Jack Rogers, Review of Jesus, the Bible and Homosexuality by David G Myers, A Journal of Reformed Thought 2010 Perspective Magazine http://www.drjackrogers.com.html (accessed 14 October 2024)
[736] Section 60 of the Constitution of Zimbabwe

government adopted the white paper on National Defence which was to the effect that in accordance with the Constitution, the SANDF shall not discriminate against any of its members on the grounds of sexual orientation.[737] The Department of Defence Forces adopted a Policy on Equal Opportunity and Affirmative Action in 1998 under which recruits may not be questioned about sexual orientation and the Defence Force officially takes no interest in the lawful sexual behaviour of its members.[738]

South African courts have also pronounced themselves on the issue of labour discrimination based on sexual orientation. In the case of ***Satchwell v President of Republic of South Africa***, the court held that same sex partners should not be denied pension and other benefits given to spouses of judges.[739] In the case of ***Langemaat v Minister of Safety and Security***, the court found that the regulations and rules of the Police and Medical Aid Scheme, which did not include same-sex couples, unfairly discriminated against lesbian and gay people. On that basis, the court declared the rules and regulations to be unconstitutional. Such practice needs to be adopted by Zimbabwe to enable the full realisation of rights for sexual minority groups or individuals in the country.

In addition to this, South Africa has the Promotion of Equality and Prevention of Unfair Discrimination Act which prohibits hate speech and harassment based on any of the prohibited grounds of discrimination.[740] The South African Constitution outlaws hate speech. In Zimbabwe, hate speech against homosexuals has been notably severe, with former President Robert Mugabe infamously describing lesbian and gay people as "worse than dogs and pigs."[741] This derogatory comparison was made publicly during his election campaign and in various speeches, including at the United Nations General Assembly in 2015, where he rejected gay rights as foreign impositions contrary to Zimbabwean values and warned of severe punishment for homosexual

[737] White paper on National Defense for the Republic of South Africa: Defense in a Democracy' https://www.palmcenter.org/assessing-intergration-gays-and-lesbians-south-african-national-defense-force.htm> (accessed 14 October 2024)
[738] Beikin and Canaday, 2011
[739] Furie
[740] Act 4 of 2000 section 6
[741] Jeffery Moyo, 2017, Worse than Dogs and Pigs: Life of a Gay Man in Zimbabwe https://www.reuters.com/article/world/worse-than-dogs-and-pigs-life-as-a-gay-man-in-zimbabwe-idUSKCN1BF03Z/

behaviour. The Zimbabwean government should therefore adopt such practices in a move to realise the rights of sexual minorities.

On 14 November 2006, a bill legalising same-sex marriages was adopted in South Africa. The Civil Unions Act 17 of 2006 established the South African legal stance on same-sex marriages. In ***Minister of Home Affairs v Fourie***, the Constitutional Court declared a constitutional right to same-sex marriages.[742] The court's decision was based on Section 9 of the Constitution of South Africa and the explicit prohibition of discrimination was on the basis of sexual orientation.[743] The court in reaching its decision considered that the country has a multitude of family formulations that are evolving rapidly as society develops so it is inappropriate to entrench any particular form as the only socially and legally acceptable one. This resulted in the adoption and promulgation of the Civil Unions Act by the South African Parliament in 2006. In this regard, Zimbabwe has to follow suit and adopt this crucial step taken by the South African Parliament.

In Kenya, the Supreme Court held that the homosexual community has the right to freedom of association, including the right to form an association of any kind.[744] Among the five judges, three held that it would be unconstitutional to limit the right to form association purely on the basis of the sexual orientation of the applicants. Such practice can be borrowed by Zimbabwe in order to register Non-governmental Organisations that advocate for the rights of sexual minorities. It is therefore argued that sexual minorities have experienced discrimination in various spheres, resulting in significant and wide-ranging impacts on their lives. Despite the legal and policy protections against discrimination outlined in Section 56 of the Constitution of Zimbabwe, cultural prejudices against homosexual individuals continue to persist strongly. This explains why sexual minority groups still face discrimination and are victims of violence and crimes.

4.4. Equality clauses as a tool for the decriminalisation of homosexuality

It is important to note how foreign domestic jurisdictions functioned to construct a constitutional argument for the decriminalisation of same-sex sexual conduct. This can be borrowed in the advancement for decriminalisation in Zimbabwe. For instance,

[742] (2005) ZACC 19
[743] The Constitution of South Africa Section 9 (1) (3)
[744] NGO Coordination Board v Eric Gitori, Petition No.16 of 2019. Decided 21/02/23

Botswana like Zimbabwe, has a democratic Constitution which is a living embodiment of progressive rights, founded on the values of equality, dignity and inclusiveness and capable of adapting to the evolving needs of its people. This much was propounded by the Court of Appeal, in the case of ***Attorney-General v Dow***, where it was acknowledged that

> "The Constitution ... cannot be allowed to be a lifeless museum piece ... the courts must continue to breathe growth and development of the state through it ... I conceive it that the primary duty of judges is to make the Constitution grow and develop in order to meet the just demands and aspirations of an ever developing society, which is part of the wider and larger human society governed by some acceptable concept of human dignity."[745]

Consistent with the approach in Dow, the Botswana High Court became only the second African court, after the South African Constitutional Court, to decriminalise same-sex sexual conduct or acts among consenting adults, in a landmark unanimous decision in the case of ***Letsweletse Motshidiemong v The Attorney-General***.[746] From the judgment, it is apparent that the High Court consistently adopted and applied the approach in ***Dow*** and interpreted the scope and contents of rights in a way that promotes and gives expression to the underlying constitutional values and aspirations of an open and democratic society, founded on basic human dignity, equality, non-discrimination and, inclusivity. The High Court's approach is captured by Leburu J as follows:

> "Our Constitution is a dynamic, enduring and living character of progressive rights; which reflect the values of pluralism, tolerance and inclusivity. Minorities, who are by the majority perceived as deviants or outcast are not to be excluded and ostracised. Discrimination has no place in this world."

The Court's purposive approach to the interpretation of constitutional provisions gives expression to the underlying values of the Constitution; among others democracy, equality, pluralism, inclusivity, tolerance and diversity. The Court determines the scope of the rights in a way that upholds and relies upon constitutional values. The judgment makes a significant contribution to the discourse about consensual anal sexual intercourse being merely a variant of human sexuality.[747] It unambiguously dispels the myth that homosexuality is in any way 'un-African'. The judgment should serve as a

[745] (1992) BLR 119 CA para 166 (A-E)
[746] 591/19
[747] Satchwell v President of Republic of South Africa 21 above para 190

highly persuasive precedent to courts across the African region that the rights of homosexual people must be recognised, respected and protected, and that archaic, colonial and discriminatory laws cannot persist in societies, founded on dignity, equality, tolerance and diversity, and should be relegated to the archive.

Equality is not simply a question of similarity but a question of difference.[748] This means that the substantive equality requires the law to ensure equality of outcomes and must tolerate disparity of treatment to achieve the goal.[749] It requires an assessment of the actual social and economic situations of groups and individuals in order to determine whether the Constitution's commitment to equality is achieved. This leads to the highlight of the particular legal provision rather than the mere form.[750] Substantive equality calls for a distinction between individuals and groups to be made in order to accommodate their different needs and interests.[751]

In the South African Constitutional Court, Sachs J has articulately stated within the context of homosexuality in ***Minister of Home Affairs and Anor v Fourie and Others*** that:

> "Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour or extolling one form as supreme and another as inferior, but an acknowledgement and acceptance of difference. At the very least it affirms that difference should not be the basis for exclusion, marginalisation and stigma. At best, it celebrates the vitality that difference brings to any society.[752]

In the context of decriminalisation of same-sex sexual acts between consenting adults in private, it is clear that a formal understanding of equality neglects the social conditions of gays and lesbians facing discrimination, humiliation and marginalisation by society on the basis of sexual orientation. Substantive equality on the other hand supports the protection of the rights of gays and lesbians. It expects the law to protect them regardless of their sexual orientation and treat them differently based on their circumstances.

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[748] Currie and De Waal, 2005: 230-231
[749] Loenen, 1997: 405
[750] Currie and De Waal 2005:233
[751] Loenen 1997:410, Currie and De Waal 2005:231
[752] 2006(1) SA 524 (CC) Paragraph 38

For the realisation of equality for gays and lesbians, the law is required to treat them differently according to their different circumstances to enable them to assert their equal worth and enhance their capabilities to participate in society as equals.[753] This calls for the adoption of the purposive approach to Constitutional interpretation of the equality clauses in the Zimbabwean Constitution. This should be read as grounded on a substantive conception of equality to ensure full and equal enjoyment of rights for homosexual individuals in Zimbabwe.

Laws criminalising sodomy must be declared unconstitutional. This is because the issue of equality for sexual minorities has been the basis for declaring sodomy laws unconstitutional in a number of jurisdictions. For example, South Africa has interpreted and applied the right to equality and non-discrimination in its constitution to decriminalise same-sex sexual conduct between consenting adults.[754] This constitutes the best practices example of how the equality clauses in the Zimbabwean Constitution could be interpreted and applied to decriminalise homosexuality.

In the ***South African case of National Coalition***, the Constitutional Court struck down sodomy laws by stating that their existence violates the right to equality as guaranteed in section 9 of the Constitution.[755] It pointed out the negative impact of sodomy laws on gay men by stating that:

> "Gay men are a permanent minority in society and have suffered in the past from patterns of disadvantage. The impact is severe, affecting the dignity, personhood and identity of gay men at a deep level. It occurs at many levels and in many ways and it is often difficult to eradicate."[756]

The court further pointed out that differential treatment of different cases is at the core of equality. Sachs J said

> "Equality should not be confused with uniformity, in fact, uniformity can be the enemy of equality. Equality means equal concern and respect across differences. It does not presuppose the elimination or suppression of difference. Respect for the human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour but an acknowledgement and acceptance of difference. At the

[753] Muchuma Wekesa , 2016: 234
[754] Muchuma Wekesa 2016:234
[755] National Coalition case paragraph 25. Section 9 of the Constitution provides for the equality and non-discrimination clause.
[756] National Coalition Case paragraph 25

> very least, it affirms that difference should not be the basis for inclusion, marginalisation, stigma and punishment. At best, it celebrates the vitality that difference brings to any society."[757]

The Constitutional Court also stated that discrimination on the basis of sexual orientation violates and degrades the dignity of gay men in an intolerable way in contravention of section 10 of the South African Constitution. It stated that;

> "Just like apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offense builds insecurity and vulnerability into the daily lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is palpable of their dignity and a breach of section 10 of the constitution."[758]

The Supreme Court made it clear that although homosexuals are a vulnerable and marginalised group in South Africa, it is the purpose of the right to equality and human dignity to address such vulnerability and marginalisation.[759] In other words, the court meant that the purpose of the right to equality is to end discrimination, marginalisation and oppression suffered by socially vulnerable groups.

In Angola, Angola's Parliament relied on the Constitutional protection of the right to equality and non-discrimination to strike down sodomy laws. Angola used to criminalise "vices against nature."[760] The law was repealed in 2019, aiming at inclusiveness, and now Angola prohibits discrimination on the grounds of sexual orientation.[761] The change of leadership in September 2017 and activism by CSOs brought change in Angola which is significant at a political level.[762] This reform was explicitly grounded in the constitutional principles of equality and non-discrimination. A key legislative statement comes from Hon. Kilamba Kiuyima Van-Dúnem, Member of Parliament from Angola, who said:

> "The archaic criminalisation of same-sex conduct was discriminatory in nature and contravened the inherent dignity and right to privacy of LGBTI people in Angola, contributing to stigma and ill-treatment against this community. I applaud the decision of Angola's Parliament to modernize

[757] National Coalition case paragraph 15
[758] National Coalition Case paragraph 30
[759] Muchuma Wekesa 2016:237; Petrova 2013:487
[760] Reid, 'Angola Decriminalises Same Sex Conduct', Human Rights Watch, 23 January 2019, www.hrw.org/news/2019/01/23/angola-decriminalizes-same-sex-conduct (accessed 19 May 2025)
[761] Reid (n 696 above)
[762] Viljoen, 'Abolition of Angola's anti-gay laws may pave the way for regional reform', The Conversation, 14 February 2019, www.theconversation.com/abolition-of-angolas-anti-gay-laws-may-pave-the-way-for-regional-reform-111432 (accessed 19 May 2025)

> our penal code by removing this harmful relic from our books. This is an important step towards equality and inclusion for all people in my country."[763]

In 2019, Botswana's Court of Appeal, following the steps of South African jurisdiction, struck down sections 164,165 and 167 of Botswana's Penal Code which outlawed 'carnal knowledge of any person against the order of nature,' attempts to commit carnal knowledge and acts of 'gross indecency', respectively.[764] Section 167 was updated in 1998 to apply to same-sex acts between women as well as those between men. These provisions have been interpreted to outlaw or criminalise sexual intercourse and/or attempts at such intercourse between persons of the same sex.[765] The provisions carried with them the threat of up to seven years' imprisonment for those found to have contravened them. The Botswana High Court found that those provisions perpetuate social and structural stigma and that they fuel intolerance, discrimination and persecution on the basis of sexual orientation and were in breach of the rights to equality and non-discrimination as in the Constitution of the country.[766]

These cases show how courts have relied on equality and non-discrimination provisions in the constitutions in striking down sodomy laws. These decisions have been handed down, declaring sodomy laws in violation of the constitutional right to equality. Borrowing from the above jurisprudence can be a basis for advocating for the decriminalisation of same-sex sexual acts in Zimbabwe.

Zimbabwe, as a country that adopted the closed list approach in its equality and non-discrimination clause, interprets the right to equality narrowly. This approach limits protection to a specific range of grounds or classes, focusing particularly on personal characteristics such as race, sex, or disability. These are expressly set out in a clarified list.[767] Some countries like Kenya and South Africa have adopted the open list approach by using the words 'on any ground including' and words like 'one or more grounds including'.

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[763] Parliamentarians For Global Action, 26 January 2019,:Angola becomes the latest country to decriminalise same-sex conduct https://www.pgaction.org/news/angola-decriminalizes-same-sex-conduct.html (accessed 19 May 2025)
[764] Letsweletse Motshidiemong v The Attorney-General 591/19
[765] The Court of Appeal in Kanane v The State 2003 (2) BLR 67 (CA) (Kanane).
[766] Section 15 of the Constitution of Botswana
[767] Petrova 2013: 494

The Constitution of Zimbabwe couches the closed list approach by explicitly enumerating specific grounds on which equality and non-discrimination are guaranteed. This means the right to equality is interpreted narrowly, limited to a defined set of protected personal characteristics such as race, sex, and disability, rather than allowing for an open-ended or expansive list of grounds. This approach is reflected in the constitutional text that sets out these specific categories, thereby restricting the scope of non-discrimination protections to those enumerated grounds.[768]

This has resulted in discrimination and marginalisation against individuals who possesses these characteristics. A closed list approach can be seen as too restrictive and rigid in its application although it permits greater legal certainty by ensuring that the right to equality is not misused.[769] The fact that it is impossible to offer protection from discrimination based on an emerging or new ground undermines the objective and purpose of the Constitutional guarantees of equality and non-discrimination. This results in many legitimate claims of discrimination being disregarded on the basis that they cannot be argued in reference to an explicitly prohibited ground.

The open list approach expressly lists grounds of discrimination but in addition opens up the list through terms like 'other status', or 'any other ground including', which allows new or emerging grounds of discrimination to be prohibited by law.[770] It can be argued that an open list approach recognises that grounds for discrimination are subject to historical and societal change, and that individuals are often victims of discrimination on new and emerging grounds.[771] Consequently, courts must expand the list of prohibited grounds of discrimination to analogous cases in which persons can experience similar unfair discrimination. International human rights instruments like the UDHR, ICCPR and ICESCR have adopted an open list approach in their equality and non-discrimination provisions.[772] The Human Rights Committee has concluded

[768] Moyo, 2022
[769] Muchuma Wekesa 2016:239
[770] For example, equality clauses in South Africa and Kenya
[771] Muchuma Wekesa 2016:240
[772] Article 2 of the UDHR states that everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 2(1) of the ICCPR provides that each state party to the present Covenant undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognised 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.

that discrimination on the basis of sexual orientation is covered by Article 2 of the ICCPR because it is analogous to the expressly prohibited grounds for discrimination.

Zimbabwe has ratified these key international human rights instruments including the International Covenant on Civil and Political Rights (ICCPR)[773] and the International Covenant on Economic, Social and Cultural Rights (ICESCR), both of which adopt an open list approach to prohibited grounds of discrimination. It has also ratified the ICESCR, as indicated by its status in the UN Treaty Body Database on 13 May 1991. Zimbabwe has committed to these instruments and submitted reports on its implementation of the ICCPR, demonstrating its engagement with the treaty obligations. Regarding the Universal Declaration of Human Rights (UDHR), it is a foundational UN General Assembly resolution adopted in 1948 and is universally accepted as customary international law. While it is not a treaty requiring ratification, Zimbabwe is bound by its principles as a UN member state. This shows that ratification affirms Zimbabwe's commitment to the principles of equality and non-discrimination as outlined in these international human rights instruments.

The question that arises, then, is how courts can prevent abuse of the open list approach while maintaining its flexibility and inclusiveness to incorporate new and emerging grounds, such as sexual orientation. Section 1 of the South African Promotion of Equality and Prevention of Unfair Discrimination Act, and Principle 5 of the Declaration of Principles of Equality has provided for an independent criteria to be used to determine whether sexual orientation constitute a prohibited ground of discrimination.[774] One must show that discrimination on the basis of sexual orientation perpetuates systematic disadvantage; or undermines human dignity; or adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner comparable to discrimination on a prohibited ground.[775]

For a new ground to receive protection against discrimination, one of these criteria needs to be satisfied. The criteria seek to advance the exercise of equal rights for marginalised groups, like homosexuals, who require protection in international and

[773]Zimbabwe ratified the ICCPR on April 10, 19913

[774] The Declaration of Principle of Equality is a document it addresses the complex and complementary relationship between different types of discrimination, which was drafted by 128 human rights and equality experts in 2008

[775] Principle 5 of the Declaration of Principles of Equality, and section 1 of the Promotion of Equality and Prevention of Unfair Discrimination Act No.4 of 2000

national human rights instruments. In 2009, the Declaration formed part of the decision of the Delhi High Court in the ***Naz Foundation case*** which decriminalised same-sex sexual conduct. The legal definition of equality in the Declaration was used. It described equality as the current international understanding of principles of equality which reflects a moral and professional consensus among human rights and equality experts.[776]

How then can the open list approach be utilised in the Zimbabwean context in order to decriminalise same-sex sexual conduct in the country? The closed list approach adopted by Zimbabwe means that no argument can be advanced based on any additional grounds to those listed in section 56 as being prohibited grounds of discrimination. It can be argued that the grounds emanated from the equality clause, where sex is on the prohibited grounds of discrimination listed in section 56 of the Constitution. The fight for decriminalisation of same-sex sexual conduct can then be made through the argument that discrimination on grounds of 'sex' includes 'sexual orientation'. The approach is known as the 'sex discrimination argument.' This approach was adopted by the human rights committee in ***Toonen v Australia***.[777] The general idea of the sex discrimination argument is that any law that discriminates on the basis of sexual orientation will also discriminate on the basis of sex.[778]

According to the sex discrimination argument, sodomy laws in Zimbabwe discriminate on the basis of sex. This is because Zimbabwe's sodomy laws criminalise sexual acts between men while allowing similar acts between a man and a woman, thereby treating men differently based solely on the sex of their sexual partner. This means a man can legally have sex with a woman but not with another man, which constitutes discrimination based on sex.[779] The law's specific focus on male same-sex conduct highlights its gender-specific nature rather than neutrality. Since Zimbabwe's Constitution prohibits discrimination on the basis of sex, these sodomy laws can be challenged as violating constitutional protections. In this way, sodomy laws that target

[776] Naz Foundation case paragraph 83
[777] Communication No. 488/1992, UN HR Committee (31 March 1994) UN DOC NO. CCPR C50/D/488/1992,IRR 97
[778] Stein 1999: 304
[779] Sexual Orientation and Zimbabwe's Constitution: A case for inclusion, Human Rights Archives, Zimbabwe 2013

same-sex conduct can be understood as sex discrimination because they impose different legal standards depending on the sex of the individuals involved.

4.5. The right to privacy as a tool for the decriminalisation of same-sex sexual conduct

The right has been an important subject of litigation in different jurisdictions. In ***Bernstein and Others v Bester and Others NNO***, the South African Constitution stated that the English common law recognises the right to privacy as an independent personality right that the courts consider to be an aspect of ***'dignitas'***.[780] The right to privacy was also referred to as the 'right to be let alone'.[781] Violating the right to privacy assumes two forms which are, (1) unlawful intrusion on personal privacy of another or (2) unlawful publication of private facts about a person.[782] In the case of ***Sara Diau v Botswana Building Society***, Dingake J, in determining violation of the right to privacy, adopted a two pronged stage inquiry. Firstly, it is necessary to determine whether the alleged act constitutes a violation. If it does, the next step is to assess whether such a violation can be reasonably justified within the context of a democratic society.[783]

Decisions about intimate relationships are personal and private and should be left up to the individuals to determine their sexual destiny.[784] Intimate relationships belong to the 'realm of personal liberty which the government must not enter'.[785] This means that it is not permissible for governments to regulate or legislate matters of sex between two consenting adults. In support of the United States Supreme Court position, the South African Constitutional Court in the ***National Coalition Case*** stated that criminalisation of private conduct between consenting adults which causes no harm to anyone else is not allowed.[786] The intrusion on the 'intimate sphere of human life violates the constitutional right to privacy.[787] The court, interweaving rights to equality and dignity, pointed out that:

[780] BCLR 1996 (2) 751 paragraph 68; Muchuma Wekesa 2016: 251
[781] Grisworld v Connecticut US 1965 381 paragraph 10
[782] Bernstein case paragraph 69
[783] Sarah Diau v Botswana Building Society (2003) 2 BLR 334
[784] Lawrence and Romer v Evans (US, 1996:620); Lawrence, 1957; Lawrence v Texas 539 US 558 (2003) paragraph 22.
[785] Lawrence paragrapgh 22
[786] National Coalition Case paragraph 36
[787] National Coalition Case paragraph 36

> "The criminalisation of sodomy in private between consenting males is a severe limitation of a gay man's right to equality in relation to sexual orientation, because it hits at one of the ways in which gays give expression to their sexual orientation. It is at the same time a severe limitation of the gay man's rights to privacy, dignity and freedom. The harm caused by the provision can and often does affect his ability to achieve self-identification and self-fulfilment. The harm also radiates out into society generally and gives rise to a wide variety of other discriminations, which collectively unfairly prevent a fair distribution of social goods and services and the award of social opportunities for gays"[788]

In ***Letsweletse Motshidiemong v The Attorney-General***, based its decision on the general notion that the question of private morality and decency between consenting adults should not be the concern of the law.[789] The court went on to claim that the state has no business in regulating consensual sexual activity between two consenting adults and that when his conduct is not harmful to any person the applicant is entitled to a sphere of private intimacy and autonomy. Drawing on historical sources and scholarly works, the Court defined privacy as a multi-faceted fundamental right that includes the right to be left alone, the right to privacy of one's body and the right to choose one's intimate partner.[790] Citing comparative jurisprudence from South Africa, the Court held that the right to privacy also protected personal autonomy, decisional autonomy and the liberty to make certain crucial decisions regarding one's life and well-being without coercion or interference from state or non-state actors.[791] This protection includes the right to make personal choices relating to intimate sexual conduct and to engage in such consensual intimacy based on one's sexual orientation without interference by the state.[792]

The international human rights framework through human rights bodies have also relied on the right to privacy to prohibit sodomy laws. In ***Dudgeon v The United Kingdom***, the European Court of Human Rights stated that criminalisation of same-sex sexual conduct constituted an unjustified interference with one's right to respect for his private life. Statutes that prohibit same-sex sexual conduct between consenting adults in private violates rights to privacy and to non-discrimination.[793] In ***Toonen v Australia***, the HRC did not accept the position that criminalising same-sex sexual

[788] National Coalition case paragraph 36
[789] Motshidiemang para 21 7.
[790] Motshidiemang paras 108-114.
[791] Motshidiemang para 122.
[792] Motshidiemang paras 122-124.
[793] Dudgeon v The UK App No. 7525/76 4 Eur HR Rep 149 (1982) paragraph 45

conduct may be considered as 'justified and reasonable' on grounds of protection of public health or morals. The Council held that the use of criminal law in such circumstances is unnecessary and disproportionate, which amounted to breach of the right to privacy as guaranteed in the ICCPR.[794]

The right to privacy protects people and not places.[795] In ***National Coalition***, the privacy argument was observed. It was held that privacy must be regarded as "suggesting at least some responsibility of the state to promote conditions in which personal self-realisation can take place." That is not to say that people should be allowed to do anything they like in private; rather, states are obliged to act to prevent harm.[796] This meant that it is not for the state to choose or arrange the choice of partner but instead that it is an individual's right to choose and decide how to conduct their private lives with a partner of their choice.[797]

Privacy can co-exist with moral disapproval or mere tolerance.[798] In the private domain, individuals are able to express themselves without facing direct public condemnation or social sanctions, which provides a protective buffer against societal judgment. However, this coexistence is conditional: moral disapproval or tolerance persists publicly, but privacy shields individuals from active persecution. While this arrangement allows for a fragile peace between personal authenticity and social norms, it also imposes psychological and social costs by enforcing silence and invisibility, potentially hindering broader acceptance and social progress. Thus, privacy serves as both a refuge and a constraint within societies that disapprove or only tolerate certain identities or behaviours.

According to Fellmeth, 'the right to privacy is not merely as the freedom to maintain secrecy, but as freedom of intimate conduct association and expression without fear of arbitrary state interference.[799] The question then is, if criminal laws aim to protect society, what harm does an act that happens behind closed doors between adults

[794] Toonen v Australia paragraph 8.3-8.7
[795] Stewart J in Katz v United States 389 US 347, 351 (1967)
[796] National Coalition paragraph 68
[797] Muchuma Wekesa 2016:255
[798] Saiz, 2005:12
[799] Fellmeth, 2008:802

have to do with society? In ***Rolling Stone and Others v Rolling Stone Publications Ltd and Giles Muhame***, the Court held that;

> "With regard to the right of privacy of the homes and persons under Article 27 of the Constitution, court has no doubt, again using the objective test, that the exposure of the identities of the persons and homes of the applicants for the purposes of fighting gayism and the activities of gays, as can easily be seen from the general public outlook for the impugned publication, threated the rights of applicant to privacy of the persons and their homes. They are entitled to that right."[800]

It can then be argued that applying the constitutional guarantee of privacy, the court was ensuring protection of the right to privacy which applies equally to individuals regardless of their sexual orientation. This shows a link between the right to privacy and equality of gays and lesbians.

The question of whether the right to privacy extends to sexual intimacy has not been decided in Zimbabwean courts. For the Constitution to be interpreted as protecting the right to privacy which affords rights to sexual intimacy for homosexuals, the courts have to adopt comparative constitutional law. The American decisions extended the right to privacy to include sexual intimacy.[801] This established proposition for what privacy means and its scope. This was borrowed and applied by the Delhi High Court and the South African Constitutional Court respectively. Zimbabwean judges should also apply these propositions when interpreting the right to privacy keeping in mind that these decisions were used to interpret a different Bill of Rights. Consequently, they must justify the use of comparative constitutional law in interpretation of the right to privacy.

Achieving the decriminalisation of same-sex sexual acts, the courts have to interpret and apply the right to privacy in a way that is willing to rise above moral and political values as well as cultural and traditional values on the subject of homosexuality. The courts have to interpret the right with an aim to promote constitutional values of human dignity and equality for homosexuals, as enshrined in the constitution as a guide in

[800] Rolling Stone Kasha Jacquilibe, Davod Kato and Oriziema Patience v Rolling Stone Publications Ltd and Giles Muhame Misc Appl No. 163 of 2010 paragraph 10
[801] Lawrence v Texas, Goodridge v Department of Health US 2003

interpreting the Bill of Rights.[802] This is because criminalisation of homosexuality has a direct bearing on the right to privacy and right to dignity of homosexuals.

4.6. How the right to dignity can be used as a tool for the inclusion of the rights of sexual minorities.

There is no explicit definition for the phrase 'human dignity'; hence no fixed definition. Schachter opined that;

> "We do not find an explicit definition of the expression 'dignity of the human person' in international instruments or (as far as I know) in national law. Its intrinsic meaning has been left to intuitive understanding, conditioned in large measure by cultural factors. When it has been invoked in concrete situations, it has been generally assumed that a violation of human dignity can be recognised even if the abstract term cannot be defined"[803]

In the case of ***National Coalition***, it was pointed out that dignity is a difficult concept to capture in precise terms.[804] It was further emphasized that the fact that the right is protected under various laws and international instrument, 'requires us to acknowledge the value and worth of all individuals as members of society.[805] The court further stated that the criminalisation of homosexual acts degraded and devalued gay men and undermined their dignity.

The concept of human dignity can be traced back to Kantian moral philosophy in which human dignity is considered to be what gives a person their intrinsic worth.[806] In ***S v Makwanyane***, the Constitutional Court of South Africa as per O'Reagan J, observed that 'recognising the right to dignity is an acknowledgement of the intrinsic worth of all other rights.'[807] This means that human dignity is the basis upon which all other human rights like rights to liberty, privacy, equality and non-discrimination are embedded.[808] In this regard, discriminating, marginalising, victimising and persecuting homosexuals undermines their dignity. Cameron J in ***Minister of Home Affairs v Fourie*** stated that:

> "The sting of past and continuing discrimination against both gays and lesbians lives in the message it conveys, namely that, viewed as individuals or in their same-sex relationships, they do not have the inherent dignity and are not worthy of the human respect possessed by and accorded to heterosexuals and their relationships. This denies to gays and lesbians that which

[802] Muchuma Wekecha 2016: 260
[803] Schachter, 1983: 849
[804] The judgment of L'Heureux-Dube J in Egan v Canada (1995) 29 CRR (2d) 79 at 106.
[805] National Coalition paragraph 28.
[806] Currie and DeWaal paragrapgh 272
[807] 1995(3) SA 391 (CC)
[808] Currie and DeWaal at 272

> is foundational to our Constitution and the concepts of equality and dignity namely that 'all persons have the same inherent worth and dignity', whatever their other difference may be"[809]

In other jurisdictions, courts have used human dignity to advance the rights of homosexuals. In ***Rammoge & Others v The Attorney General***,[810] the Court of Appeal stated that the protection of dignity was the foundation and core of all other rights in the Constitution: *'To deny any person his or her humanity is to deny such person human dignity and the protection and upholding of personal dignity is one of the core objectives of Chapter 3 of the Constitution.*'[811] The main issue was about the registration of Botswana's first ever homosexual organisation under the name Lesbians, Gays and Bisexuals (LEGABIBO). The government of Botswana for several years had refused to register LEGABIBO as the first homosexual organisation in Botswana. The government sought to justify its refusal essentially on three bases.

First, the Constitution of Botswana does not recognise 'homosexual persons' and, therefore, they are excluded from the definition of a 'person' in the Constitution. Because of this assertion, the government argued that homosexual individuals were not recognised under the protective rights provisions in the Constitution.[812] Second, they argued that the objectives of LEGABIBO were incompatible with peace, welfare and good order in Botswana. Third, the government asserted that LEGABIBO's intended advocacy, which included reforming the Penal Code to decriminalise consensual same-sex sexual conduct, in effect would popularise criminal offences or consensual same-sex sexual acts and encourage members of LEGABIBO to break the law.[813] Thus, essentially, the government's assertions were founded on the (misconceived) premise that the official recognition of an organisation that protects and promotes the rights of the homosexual community was incongruous in light of the criminalisation of consensual same-sex sexual acts.

In rejecting the government's assertions as unlawful and irrational, the Court of Appeal emphasised that "an individual human being, regardless of his or her gender or sexual orientation, is 'a person' for the purposes of the Constitution".[814] It further held that

[809] Minister of Home Affairs v Fourie and Others 2006 (1) SA 524 (CC) paragraph 17
[810] Court of Appeal of Republic of Botswana, Civil Appeal, CACGB-128-14 (2016) Rammoge & Others v The Attorney General
[811] Rammoge paragraph 51.
[812] Rammoge v The Attorney-General paragraph 21(4)
[813] Rammoge v The Attorney-General paragraph 21(3)
[814] Rammoge v The Attorney-General paragraph 58

"once we [as a society] recognise that persons who are gay, lesbian, bisexual, transgender or intersex are human beings ... we must accord them the human rights which are guaranteed by the constitution to all persons, by virtue of their being human, in order to protect their dignity".[815] The Court of Appeal found that the government's refusal to register LEGABIBO was unlawful and violated homosexual persons' rights to associate freely and participate in democracy. The Court of Appeal said that it did not matter that the views of the organisation are unpopular or unacceptable to the majority.[816] The Court of Appeal further highlighted the fact that Botswana is a 'compassionate, just and caring nation' and that;

> "Members of the gay, lesbian and transgender community, although no doubt a small minority, and unacceptable to some on religious or other grounds, form part of the rich diversity of any nation and are fully entitled in Botswana, as in any other progressive state, to the constitutional protection of their dignity."[817]

The Court further held that;

> "The applicant's sexual orientation lies at the heart of his fundamental right to dignity. It is his way of expressing his feelings, by the only mode available to him. His dignity ought to be respected, unless lawfully restricted."[818]

Undoubtedly, this decision advanced the realisation of fundamental rights and contributed to the social recognition and inclusion of homosexual persons in Botswana. Addressing the nature of the impact that the laws criminalising consensual same-sex sexual acts have on the applicant's right to dignity, the Court referred to a body of domestic and foreign jurisprudence that emphasises that human dignity is grounded in one's feeling of self-respect and self-worth, as well as in physical and psychological well-being.[819] Adopting a similar line of reasoning, the High Court held that denying the applicant the right to sexual expression with his preferred adult partner 'violates his inherent dignity and self-worth'.[820]

Further, in ***ND v Attorney-General***, the Botswana High Court emphasised that the *'state has a duty to uphold the fundamental human rights of every person and to*

[815] Rammoge v The Attorney-General paragraph 60
[816] Schachter 1983 (n 739 above)
[817] Schachter 1983 (n 739 above)
[818] Motshidiemang paragraph 153
[819] Motshidiemang paragraphs 147-149
[820] Motshidiemang paragraph 151

promote tolerance, acceptance and diversity within our constitutional democracy'.[821] Judge Nthomiwa went on to state that;

> "The recognition of the applicant's gender identity lies at the heart of his fundamental right to dignity ... Legal recognition of the applicant's gender identity is therefore part of the right to dignity and freedom to express himself in a manner he feels psychologically comfortable with."[822]

This shows that gays and lesbians should be included in the category of full citizens who are able to rely on all the protections and benefits of the law as they also have dignity. Homosexuals are human beings with an inherent dignity that deserves respect from laws and social institutions.[823]This means that humanity is enough for homosexuals to be treated like other humans, in this case, heterosexuals, and benefit from the same rights. It is then unacceptable to exclude them from the benefits of equal rights, which deprives them of their right to human dignity. The function of the right to dignity as a tool of inclusion of gay rights, would be to repair indignity, renounce humiliation and degradation and enable homosexuals to enjoy the full benefits of citizenship.

The application of human dignity to protect homosexuals by a number of jurisdictions can be seen as a legal doctrine that is transactional. It shows similar things across different systems which can travel through a range of jurisdictions.[824] This doctrine has been utilised in different jurisdictions as a tool for inclusion of homosexuals who were previously excluded from enjoying equal rights. Zimbabwe should not be an exception of the appreciation and application of the doctrine in protecting the rights of homosexuals as the right to human dignity is expressly guaranteed in the Zimbabwean Constitution.[825] There can therefore be no doubt that the prejudicial practices against gays and lesbians in Zimbabwe undermine their human dignity. It should be kept in mind that the right to dignity is the matrix of all rights including the rights to equality and privacy. Courts should therefore extend the right to dignity to the protection of gays and lesbians in Zimbabwe.

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[821] MMAAHGB-000449-11 Unreported, delivered on 29 September 2017
[822] Motshidiemang paragraphs 151-152.
[823] Nussbaukm, 1999:13
[824] Muchuma Wekesa 2016: 263
[825] Section 51 of the Constitution

4.7. The impact of international human rights instruments, decisions and foreign law in the fight against criminalisation of homosexuality in Zimbabwe.

It has been argued that sodomy laws violate international human rights laws.[826] Can international human rights instruments and or decisions then be relied on in fighting against criminalisation of same-sex conduct in Zimbabwe? The Constitution of Zimbabwe made it an obligation to consider international law as a guiding tool in constitutional interpretation. International law advocates for the decriminalisation of consensual same-sex sexual conduct. This proffers a guide to decriminalising homosexuality in Zimbabwe, in the spirit of respecting fundamental rights.[827] Zimbabwe is party to several international law instruments including the ICCPR, African Charter on Human and Peoples' Rights. The UN system focuses on the rights of sexual minorities and has shown that the criminalisation of homosexuality is a violation of basic human rights.

Section 327 of the Zimbabwean Constitution provides that when interpreting legislature, every court and tribunal must adopt any reasonable interpretation of the legislature that is consistent with any international convention, treaty or agreement which is binding on Zimbabwe, in preference to an alternative international instrument inconsistent with that Convention, treaty or agreement. Section 46 also states that, when interpreting the Bill of Rights, a court, tribunal, forum or body must take into account international law and all treaties and conventions to which Zimbabwe is a party and may consider relevant foreign law. This shows that there is the incorporation of international law into Zimbabwean domestic laws. Under the Zimbabwean Constitution, it is then essential for the courts to interpret local statutes in a manner that, whenever a conflict with international law arises, precedence is given to international law-unless the local statute explicitly indicates otherwise.

This would favour the protection of homosexual rights since international human rights law recognises the rights of gays and lesbians. In this regard, any interpretation that allows it to prevail over local statutory provisions supports equal rights for homosexuals and heterosexuals. This is because international law is viewed as not being above local statute. Judges must also consider relying on foreign case law from other jurisdictions like South Africa in interpreting the socio-economic rights

[826] Narayon, 2006: 369
[827] Viljoen, 2012:216

guaranteed in the Constitution. This reliance on foreign law as enshrined in the Constitution is understood that courts rely on foreign judicial decisions when adjudicating on a question of the rights of homosexuals in the country. Comparative constitutionalism provides guidance, inspiration, reassurance and perspective for courts in determining similar issues.[828] It is however important to be cautious when applying foreign law. It is important to note that the context may not be similar for fruitful comparison of judicial authority. In this regard, judges then invoke judicial decisions from other countries only when it supports the reasoning they prefer and does not consider any if it is at odds with the conclusion they make.[829]

The Constitution provides that courts must consider international law and may consider foreign law. This means that international law is turned into a mandatory canon of constitutional interpretation. It obligates the courts to consider international law when interpreting human rights and bear similar interpretative duty when interpreting any legislation. Section 327 of the Constitution provides that,

> "When interpreting legislation, every court and tribunal must adopt any reasonable interpretation of the legislation that is consistent with any international convention, treaty or agreement which is binding on Zimbabwe, in preference to an alternative interpretation inconsistent with that convention, treaty or agreement."[830]

In addition to this, section 46(c) and (e) recognises differences between international and foreign law.[831] This means that courts are only obliged to consider but not to follow foreign law. This means mandatory consideration of international law does not extend to foreign law. In ***S v Makwanyane***, the Constitutional Court made it clear that comparative human rights jurisprudence was being developed. This is because judges should know the difference in the contexts.

Decisions made by international tribunals and foreign courts must have a significant impact on gay rights jurisprudence in Zimbabwe. In addition to this, the courts should not avoid relying on foreign case law in supporting their reasoning and conclusions when interpreting the Bill of Rights to protect the rights of homosexuals. Courts should rely on decisions from human rights treaty bodies and foreign jurisdictions to protect

[828] Jackson, 2001:267
[829] Landau, 2010
[830] Section 327 (6) of the Constitution of Zimbabwe.
[831] Mudzuru and Another v Minister of Justice, Legal and Parliamentary Affairs NO and Others CC2 12/2015 paragraph 26

the equality of gays and lesbians and affirm fundamental rights to equality and human dignity.

Drawing lessons from international law and comparative law, it can be argued that the offence of sodomy can be successfully challenged on the basis that it is unconstitutional. Incremental strategic litigation can be used, which is a cautious approach. In Botswana, for instance, the decriminalisation of homosexuality was the result of incremental strategic litigation. In ***Kanane v The State***, the court tested the constitutionality of the criminalisation of homosexual conduct. The court concluded that the justification of criminalisation was to protect morality.[832] On appeal, it was held that public opinion was not in favour of decriminalisation. Consequently, in 2010, the Labour Laws of Botswana added sexual orientation as a ground for unfair discrimination.[833] This shows that the argument for decriminalisation of homosexuality is centred on the right to equality and non-discrimination. Criminalisation results in the subordination and exclusion of sexual minorities.

This shows that courts, Parliament and civil society play a crucial role in the realisation of the rights of gays and lesbians in the country. Each has a role when it comes to the protection of homosexual people and their rights. The courts can interpret the Bill of Rights in a progressive way, which is in favour of the decriminalisation of same-sex sexual acts. Parliament can amend the criminal code to remove the unnatural offences provisions, while civil society can challenge the constitutionality of sodomy laws in court through public interest litigation.

4.8. The role of courts in the realisation of sexual minority rights.

The judiciary, as a government arm, has the constitutional duty to safeguard the integrity of democracy, in particular, through protecting rights and fundamental freedoms, while protecting constitutionalism and respect for the rule of law.[834] In a constitutional democracy, the functions of the court are clearly set out in the Constitution, which also establishes and outlines the functions of a Constitutional Court. The Constitutional Court interprets the constitution and makes decisions on the constitutionality of legislation. Beyond this, the Constitutional Court has a role to play in guarding Constitutional values as well as protecting the rights enshrined in the

[832] 2003 2 BLR 64 (CA)
[833] Olebide, 2017: 196
[834] Twinomungisha, 2001: 3

Constitution.[835] The Constitutional Court is expected to build a constitutional jurisdiction and human rights culture and protect the weak members of society from abuse of power and infringement of their rights.[836]

Judicial review must be undertaken by an independent judiciary with constitutional powers to do so. However, this on its own is not adequate to protect the rights of homosexuality in Zimbabwe. Gay and lesbian rights can only be protected and promoted with courts that are ready to use their powers to hand down judgements that are going to deal with continuous discrimination and marginalisation of gays and lesbians in the society.[837] This calls for judges with a judicial mandate to adopt a broader and more progressive approach to the interpretation of the Bill of Rights in the Constitution. This is because judges are the ultimate arbiter in constitutional rights and need to take on an activist role in adjudication.[838] A progressive and broader interpretation of the Constitution is required because a Constitution is regarded as a living document enacted to serve both the current and future generations.[839] The Constitution also enshrines and reflects the desires, hopes, aspirations and fears of the people. This means that judges have a duty to infuse the values and principles of the Constitution into the governance process.

The notion of judicial activism has played a pivotal role in the realisation of the rights of homosexuals in other jurisdictions. Judges interpret the Constitution creatively to reflect modern-day social situations and values in those countries. Judicial activism has contributed to the realisation of rights of homosexuals in South Africa. The judges have adopted for progressive interpretive approaches to its Constitution, in order to extend its protection to homosexual individuals. Judges felt less restraint and more innovative and progressive in dealing with the rights of gays and lesbians considering the history of South Africa and the discrimination against homosexuals. The court has emphasized the transformative constitutional values of equality and dignity which prohibit the state from denying homosexual individuals full and equal citizenship based on their sexual orientation.[840]

[835] Twinomungisha 2001: 7
[836] Nyarang'o, 2011:49
[837] Finerty, 2012: 45
[838] Twinomungisha 2001: 7
[839] McConnell, 1998: 1127
[840] Muchuma Wekesa 2016:222

In ***National Coalition case***, the Constitutional Court declared the common law offence of sodomy unconstitutional for breaching the rights to equality, dignity and privacy. This was considered as discriminatory against homosexuality on the basis of sexual orientation. In the ***Fourie case***, the Supreme Court of Appeal agreed that it was the Parliament's duty to change the law regarding the union of two women in a stable domestic relationship. The Constitutional Court then declared the common law definition of marriage and relevant section of the Marriage Act unconstitutional.[841]

In Zimbabwe, the Constitution mandates courts to interpret the provisions of the Constitution in a manner promoting a just, free and democratic society. The interpretation of the Constitution shall be determined by the Court of Appeal sitting as the Constitutional Court. For homosexual individuals to enjoy their rights in Zimbabwe, like in South Africa, judges have to embrace the concept of judicial activism. They should be willing and ready to depart from strict adherence to precedent in favour of progressive and new social policies that reflect the contemporary social reality. Judicial activism would allow judges to creatively and purposely interpret the quality provisions and rights to human dignity and privacy in order to strike down the sodomy laws. This can only be possible where the interpretation of equality clause, right to privacy and human dignity goes beyond mere words and matters mentioned in the relevant constitutional provisions. Judges are obliged to uphold the values and principles enshrined in the Constitution in order to enhance the promotion of human rights and fundamental freedoms.[842]

There are instances in which Zimbabwean Courts have progressively interpreted the Constitution and other legal provisions to protect human rights. The court has creatively interpreted the right to freedom from cruel, inhumane and degrading treatment. In ***S v Chokuramba***, the Constitutional Court declared corporal punishment unconstitutional on the basis that it violated the right to freedom from cruel, inhumane and degrading treatment.[843] The court struck down section 353 of the Criminal Procedure and Evidence Act which allowed for corporal punishment for male juveniles under 18 years of age. However, it is important to note that judges have not had a

[841] Fourie case paragraph 88
[842] Muchuma Wekesa 2016:273
[843] S v Chokuramba (CCZ 10-2019)

chance to pronounce themselves on a matter challenging the rights to equality, human dignity or privacy of gays and lesbians.

Judges should not attach determination value to public opinion in determining the constitutionality of sodomy laws in Zimbabwe. This is because it contradicts their duty to uphold the constitutional values of human dignity and equality and to protect those unable to influence the democratic process. In South Africa, the courts brushed the issue of public opinion aside and considered what the Constitution allowed and did not allow. In ***S v Makwanyane***, the South African Constitutional Court determined the constitutionality of death penalty. It held that it violated the right to life.[844] The court did not consider public opinion and stated that the question before the court was not whether the majority of South Africans believed that the death sentence is the proper punishment for murder. That is, the court did not disregard public opinion entirely, but stated that public opinion must not prevail over the duty of the courts to adjudicate constitutional issues. This means that the court should not be diverted from its duty to interpret the Constitution by making decisions based on majority or public opinion.

With regard to homosexuals being minorities in society, the decisions regarding their rights should not be left to majority views in society. In the Botswana case of ***Kanane v The State***[845] and in the Zimbabwean case of ***S v Banana,***[846] the High Court held that same-sex sexual conduct was unconstitutional since the majority have not changed to support same-sex sexual relations. The court ruled that, given society's conservative values and widespread outrage toward same-sex sexual acts, the criminalisation of sodomy was not deemed unconstitutional. In ***S v Kanane, Mwaikasu J,*** a long, detailed judgment pointed out that the sections of the Penal Code that prohibit same-sex sexual conduct did not violate any provisions of the Constitution. The judge expressed that the matter fundamentally involves determining the role and scope of public morality or societal moral values within the framework of criminal law.

This shows that both courts were presented with chances to determine the constitutionality of sodomy laws in both countries. They had chances to draw lessons from foreign jurisdictions in interpreting the rights to equality and non-discrimination as

[844] S V Makwanyane 1995(3) SA 391 (CC)
[845] Kanane v The State HCC NO 9 Of 2003 (unreported)
[846] S v Banana (2000) (2) SACR 1 (ZSC)

guaranteed in their Constitutions. The courts showed the weight placed on public opinion in reaching decisions on questions of the rights of gays and lesbians in Africa, keeping in mind that homosexuality is viewed as un-African. The determinative factor in both cases was the majority view. However, since Zimbabwe is governed by a constitutional democracy, a judge should not be guided by values and views of the people when dealing with sodomy as a crime but rather by the values and principles enshrined in the Constitution. The courts are obliged to uphold the Constitution as a societal compact, which by virtue of the equality clause includes protection of individual rights.

As illustrated in the case of ***Hoffman v South African Airways***, the majority opinion often treats minorities harshly.[847] In ***Hoffmann v South African Airways (2000)***, Jacques Hoffmann was denied employment as a cabin attendant after a medical exam revealed he was HIV-positive. South African Airways justified its refusal based on concerns about health risks and passenger perceptions, applying a blanket policy against hiring HIV-positive individuals. However, the Constitutional Court found this policy discriminatory and unconstitutional, as it was based on stereotypes rather than individualised medical evidence-Hoffmann was not immunosuppressed and posed no greater risk than others. The Court ruled that such discrimination against minorities, like people living with HIV, is unfair and violates the right to equality. This case highlights how the majority institutions can harshly treat minorities through unfounded prejudice, and it underscores the importance of protecting vulnerable groups from discrimination under the Constitution.

Courts must promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom, in particular the values of the Constitution.[848] The constitutional values include supremacy, rule of law, fundamental rights and freedoms, the inherent dignity of each human being and the equality for all.[849] Courts must further take into account international law and all treaties and conventions to which Zimbabwe is a party.[850] In ***Smyth v Ushewokunze and Another***, Gubbay CJ stated that;

[847] 2000(2) SA 628;2001 (10) BHRC 571:(2000) 3 CHRLD 146 paragraph 35
[848] Section 46(1)(b) of the Constitution of Zimbabwe
[849] Section 3 of the Constitution of Zimbabwe
[850] Section 46(1)(c)

> "What is to be accorded is a generous and purposive interpretation with an eye to the spirit as well as to the letter of the provision: one that takes full account of changing conditions, social norms and values, so that the provision remains flexible enough to keep pace with and meet the newly emerging problems and challenges. The aim must be to move away from formalism and make human rights provisions a practical reality for the people."[851]

The approach that the courts must take is to move away from formalism and give constitutional provisions a generous and purposive interpretation. In constitutional interpretation, the courts must aim to 'always expand the reach of a fundamental right rather than to attenuate its meaning and content. In Rattigan and Others v Chief Immigration Officer, Zimbabwe and Others, Gubbay CJ pointed out that;

> "What is to be avoided is the importing of a narrow, artificial, rigid and pedantic interpretation, to be preferred is one which serves the interest of the Constitution and best comes out its objects and promotes its purpose. All relevant provisions are to be considered as a whole and where rights and freedoms are conferred on persons, derogations, therefrom as far as the language permits, should be narrowly or strictly construed."[852]

The court should strive for an approach that leans in favour of human rights and derogation from such rights must be narrowly interpreted. The Constitution is a living creature which should be flexible enough to adapt to the changing environment in favour of human rights.

However, progressive court decisions are not sufficient to change people's opinions towards tolerance and acceptance of gays and lesbians. Dialogue and understanding needs to be utilised. Public engagements can be used to necessitate critics of gay rights to understand the impact of their views and maybe appreciate that equality will not affect their own rights and interests.[853] This can lead to natural conversations about inclusive and diverse citizenship. Effective forums for discussion of sexual minority rights issues should be provided by the government. It is the State's ethical and constitutional duty to educate its citizens on sexual minority rights and promote a more cohesive society.

4.9. The role of political and legal culture in protecting sexual minority rights.

The political culture plays a critical role in shaping the protection of or resistance to sexual minority rights. In many contexts, political culture is characterised by a strong

[851] 1997 (2) ZLR 544 (SC)
[852] 1994 (2) ZLR 54 (CS)
[853] Muchuma Wekesa 2016: 282

adherence to traditional values, national sovereignty, and conventional notions of "nature," which are often leveraged by illiberal and authoritarian regimes to resist homosexual rights. These governments weaponise homophobia as tools to mobilise political constituencies by framing sexual minority rights as threats to the stability and moral fabric of the nation.[854] This resistance is frequently rooted in conservative religious teachings that emphasise traditional gender roles, which are translated into laws criminalising or discriminating against sexual minorities in various African countries.[855] Political actors often portray homosexual rights as incompatible with the nation's cultural identity, arguing that recognising diverse sexual orientations and gender identities undermines minority rights as a Western imposition or neo-colonialism, thus linking tolerance to a loss of domestic sovereignty and moral decay.[856]

In most African states, political culture often uses the rhetoric of culture and tradition to justify laws that violate sexual minority rights, despite international and regional human rights obligations that protect these groups' rights to culture, expression, and equality.[857] The dominant cultural narrative, supported by majoritarian political and religious voices, delegitimises alternative sexualities and fosters environments where sexual minorities face legal discrimination, social stigma, and exclusion. The political culture of resistance is also evident in the rise of conservative and populist governments that actively seek to criminalise same-sex relationships and restrict the activities of homosexual organisations, further marginalising sexual minorities socially, economically, and politically.[858] This opposition is well-organised and funded, often resulting in legislation such as "anti-homosexuality" laws that legitimise discrimination and violence against sexual minorities

Given the existing legal framework, which is not responsive to the protection of homosexual rights, judicial activism plays a pivotal role in protecting rights of sexual

[854] AyoubKristina Stoeckl,2024 The Global Resistance to LGBTIQ Rights Vol 35 (1) 59-73
[855] Tyler Walton, 2018 Sexual Minorities and the Right to Culture in African States, NYU Journal of International Law and Politics.
[856] Stoeckl,2024
[857] Mute 2023 Sexual minorities and African human rights mechanisms: reflections on contexts and considerations for addressing discrimination AHRY vol.7 Pretoria
[858] Social inclusion and human rights for sexual or gender minorities in Sub-Saharan Africa: A strategic framework for Agenda 2030, UNDP 2020 https://www.undp.org/sites/g/files/zskgke326/files/migration/africa/UNDP-social-inclusion-and-human-rights-sexual-gender-minorities.pdf (accessed 21 May 2025)

minorities. It is however important to note that, the extent of judicial activism depends on the prevailing political and legal culture in the country since courts operate within a certain political and societal context. Arguably, the political and legal culture in Zimbabwe does not favour the decriminalisation of same-sex sexual acts. The Constitution does not allow same-sex marriages and the criminal law code criminalises sodomy.

From this, there is no doubt that the legal culture is extremely disinterested in granting gays and lesbians equal enjoyment of their rights and fundamental freedoms as guaranteed in the Constitution. Despite constitutional protections against discrimination in most African countries, legal systems often reflect prevailing social prejudices. For example, Kenya's Supreme Court ruled that discrimination based on sexual orientation is unconstitutional, yet widespread legal and social resistance persists. Courts have become key defenders of sexual minorities, but political and legal cultures frequently resist fully implementing such rulings, reflecting deep-rooted stigma and legal inertia.[859] Zimbabwe's Criminal Code explicitly criminalises same-sex sexual activity between men under the "sodomy" and "indecent acts" clauses, punishable by up to 14 years imprisonment or fines.[860] The Constitution bans same-sex marriage outright, denying any legal recognition or family rights to sexual minorities. Zimbabwe's ruling party has recently reaffirmed its hostile stance, proposing laws to criminalise the promotion of homosexual activities and restrict foreign funding for homosexual organisations, tightening legal constraints on the community.[861]

This shows that many African countries maintain colonial-era sodomy laws criminalising same-sex relations, reflecting a legal culture that prioritises conservative social norms over constitutional equality. Courts and human rights bodies sometimes push back against discrimination, but political and legal resistance remains strong, often justified by appeals to culture, religion, and national sovereignty.

[859] Mute, 2023
[860] The Criminal Law Codification and Reform Act Section 73
[861] Denya, 2024 Zimbabwe tightens its grip on the LGBT community https://www.developmentaid.org/news-stream/post/188997/zimbabwe-lgbt-community (accessed 21 May 2025)

Apart from the courts, Parliament can also play a vital role in the decriminalisation of same-sex sexual acts. This is because the constitution gives Parliament legislative powers.[862] The Parliament has power to amend or repeal the relevant provisions to remove sodomy laws without judicial decision, consequently decriminalising same-sex sexual conduct. For instance, the South African Parliament is the only Parliament in Africa that approved a Constitution which recognised sexual orientation as a prohibited ground of discrimination. The provision helped the Constitutional Court to deliver a judgement that declared sodomy laws unconstitutional and invalid. The Constitutional Court held that the criminal law offence of sodomy violated the rights to equality, dignity and privacy, and was thus unconstitutional. The Parliament played its role of repealing the relevant provisions in the Sexual Offences Act 1957 that were considered unconstitutional. This ultimately decriminalised same-sex sexual conduct in South Africa. This shows that the South African Parliament amended the law by giving effect to the ruling of the Constitutional Court. Canada also decriminalised same-sex sexual conducts through a legislative process. It passed an omnibus Bill in 1969 to change its criminal laws which included a repeal of provisions criminalising same-sex sexual conduct between consenting adults.[863] In Fiji, a new Penal Code was adopted in February 2010 that included a repeal of sodomy laws.[864]

Consequently, the decriminalisation of same-sex sexual conduct through Parliament in Zimbabwe cannot be said to be impossible. Decriminalisation can be achieved in two ways. The initial strategy would involve requiring Parliament, at its own discretion, to introduce and enact an amendment bill targeting the relevant sections of the criminal code, with the specific aim of repealing section 73, which criminalises sodomy. This can only happen if members of the Parliament ignore the opinions of the majority of Zimbabweans on the subject. The second way would be to require Parliament to give effect to judicial decisions. The Zimbabwean Constitution acknowledges the judicial role to review legislation in order for it to be consistent with the provisions of the Constitution. This gives courts power to interpret the Constitution and other laws and

[862] Section 116 and 119 of the Constitution of Zimbabwe. It vests its legislative powers in Parliament
[863] Trudeau's Omnibus Bill: Challenging Canadian Taboos Les Archive De Radio Canada http://archives.radio-canada-ca/pour-les-profs/642/ (accessed 8 October 2024)
[864] Same sex law in Fiji decriminalised, UNAIDS http://www.unaids.org/en/resources/presscentre/featurestones/2010/march/20100304fiji (accessed 8 October 2024

declare the invalidation of legislation that is found to be inconsistent with the Constitution.[865]

Zimbabwe's judiciary derives its authority to review legislation from the Constitution, which embodies the collective will of the people who participated in the constitutional-making process. This constitutional supremacy empowers judges to invalidate laws and state actions that conflict with fundamental rights such as human dignity, privacy, and equality. Although the Constitution does not explicitly mention sexual orientation, courts have increasingly interpreted broad rights provisions to protect marginalized groups, including sexual minorities. For instance, in ***Ricky Nathanson v. Mteliso & Others (2019)[866]***, the High Court ruled that forcibly examining a transgender woman's genitalia and detaining her violated her constitutional rights to dignity[867] and humane treatment.[868] This case illustrates the judiciary's role in enforcing constitutional protections derived from the people's sovereignty, even when legislative or societal attitudes remain conservative.

Despite this progressive potential, challenges persist. The Supreme Court's decision in ***State v Banana (2000)[869]*** upheld sodomy laws, reflecting societal conservatism and highlighting tensions between entrenched biases and constitutional principles. However, the judiciary's mandate to uphold equality (Section 56) and consider international human rights law (Section 46) offers pathways to advance protections for sexual minorities. Judicial enforcement of these rights is crucial to counter institutional discrimination, such as police harassment, and to align Zimbabwe's legal framework with regional human rights standards. Ultimately, Zimbabwean judges are constitutionally empowered and obligated to protect sexual minorities' rights as an extension of the people's sovereignty, ensuring that dignity, privacy, and equality are respected and enforced in line with the transformative vision of the Constitution. Where the courts have invalidated sodomy laws for violating rights to human dignity, privacy and equality, Parliament has to give effect to these court decisions.

[865] Section 2 of the Constitution of Zimbabwe provides for the supremacy of the Constitution and any law that is inconsistent shall be declared void to the extent of its inconsistency.
[866] Nathanson v Mteliso & Ors. (HB 176 of 2019; HC 1873 of 2014) [2019] ZWBHC 135 (14 November 2019)
[867] Section 53 of the Constitution of Zimbabwe
[868] Section 50 of the Constitution of Zimbabwe
[869] S v Banana 2000

4.10. The role of civil society in fighting against the criminalisation of same-sex sexual acts.

Civil society plays an important role in the promotion, implementation and enforcement of human rights norms.[870] They hold the state to account to ensure that it protects, realises and protects the rights of its citizens as guaranteed in the Constitution while simultaneously empowering citizens to demand their rights.[871] They play the role of the voice of the voiceless, vulnerable and marginalised in society.[872] Strategic litigation, promotional work through human rights education and human rights advocacy can be used as mechanisms in order to attain these objectives.[873]

In South Africa, the National Coalition for Gay and Lesbian Equality played a pivotal role in the realisation of the rights of gays and lesbians. They lobbied for the inclusion of sexual orientation in the list of prohibited grounds of discrimination in the equality clause.[874] They argued that equality and non-discrimination are the fundamental and overriding principles of the South African Constitution. They purported that discrimination against gays and lesbians was similar to discrimination on the grounds of race and gender.[875] This meant that they formulated a nexus between race, gender and homosexuality.[876] From this they gained support from other groups of civil society like anti-racist and feminist groups. They also argued that sexual orientation was natural and, hence like, heterosexuality, homosexuality was a legitimate expression of human sexuality.[877]

The Zimbabwean Constitution explicitly prohibits discrimination on grounds including race and gender, establishing equality and non-discrimination as fundamental principles. Section 56 of the Constitution guarantees that all persons are equal before the law and have the right to equal protection and benefit of the law, and it prohibits unfair discrimination on grounds such as nationality, race, colour, tribe, place of birth, ethnic or social origin, language, class, religion, political affiliation, opinion, custom, culture, sex, gender, marital status, age, pregnancy, disability, and economic or social

[870] Steiner and Alston, 2000:10
[871] Wiseberg, 1991: 529 at 44
[872] Steiner and Alston 2000:9
[873] Steiner and Alston 2000:11
[874] De Ru 2013: 229
[875] Christiansen, 2000: 12
[876] De Ru 2013:229
[877] De Ru 1013: 229

status.[878] This constitutional commitment to equality and non-discrimination closely parallels the argument made by South Africa's National Coalition for Gay and Lesbian Equality, which linked discrimination on the grounds of sexual orientation to discrimination on the grounds of race and gender. South Africa's Constitution was pioneering in explicitly prohibiting discrimination based on sexual orientation, thereby recognising homosexuality as a legitimate expression of human sexuality and deserving of protection as a minority group.[879]

In Zimbabwe, while the Constitution robustly protects against discrimination based on race and gender, it does not explicitly include sexual orientation as a protected ground. This omission means that, despite Zimbabwe's constitutional commitment to human rights and equality, homosexual individuals remain vulnerable to discrimination and lack explicit constitutional protection.[880] The nexus drawn in South Africa between race and sexual orientation discrimination highlights a broader principle: that all forms of discrimination that undermine human dignity and equality should be addressed equally.

Given Zimbabwe's constitutional guarantees against discrimination on race and gender grounds, a stronger claim can be made that the Constitution should be interpreted or amended to extend similar protections to sexual orientation. Recognising sexual orientation as a protected ground would align Zimbabwe's human rights commitments with the principles of substantive equality and non-discrimination that underpin its constitutional framework. It would also promote the dignity and rights of sexual minorities, consistent with the broader constitutional values of equality and respect for human dignity.[881] The Zimbabwean Constitution should then recognise and

[878] Mhuru, 2023 Gender justice, law and religion in Zimbabwe: An evaluation of the role of sacred texts. HTS Theological Studies, 79(3), 1-8. https://doi.org/10.4102/hts.v79i3.8160 (accessed 22 May 2025)
[879] Christiansen, Substantive Equality and Sexual Orientation: Twenty Years of Gay and Lesbian Rights Adjudication Under the South African Constitution (May 1, 2017). Available at SSRN: https://ssrn.com/abstract=3040966 or http://dx.doi.org/10.2139/ssrn.3040966 (accessed 22 May 2025)

[880] Introduction (Discrimination & Equal Protection under the Law) pdf https://upr info.org/sites/default/files/documents/2016-10/galz_upr26_zwe_e_main.pdf (accessed 22 May 2025)
[881] Mhuru 2023 (n 814 above)

protect the rights of homosexuals as a minority group from discrimination in society since its commitment is to promote human rights.[882]

The National Coalition for Gay and Lesbian Equality also engaged in strategic litigation to secure pro-gay court decisions in order to realise equal rights for homosexuals.[883] They litigate for the strike down of sodomy laws and laws around same-sex marriage. In the National Coalition, they petitioned the Constitutional Court to declare the common law offence of sodomy unconstitutional for violating rights to equality, dignity and privacy.[884] The court agreed with them and declared sodomy laws unconstitutional thus decriminalising same-sex sexual conduct between consenting adults. This shows that the National Coalition for Gay and Lesbian Equality in South Africa successfully used strategic litigation to challenge and overturn sodomy laws that criminalised consensual same-sex sexual conduct. This legal victory was a significant step toward realising equal rights for homosexuals and set a precedent for using the courts to advance homosexual rights through constitutional claims.

In Zimbabwe, groups similar to this exist, such as GALZ, Gays and Lesbians of Zimbabwe, which actively engage in advocacy and legal challenges despite a hostile environment. Zimbabwe criminalises homosexuality under the Criminal Law Codification and Reform Act, with penalties including imprisonment and fines. This legal framework, combined with strong governmental hostility exemplified by former President Robert Mugabe's inflammatory anti- homosexual rhetoric creates a challenging context for activism.[885] GALZ and other emerging homosexual organizations have faced arrests, confiscation of materials, and police intimidation but have grown more organized and resilient over time. They have legally challenged government attempts to suppress their activities, such as successfully contesting the confiscation of their materials and the arrest of members.[886] Activists like Robert M Chipazaure have worked tirelessly to raise awareness, protect rights, and provide

[882] Christiansen, 2000: 12
[883] Christiansen 2000: 12
[884] Santos 2011:44, National Coalition case
[885] Melody Chironda (2024) Zimbabwe: Despite Hostility, LGBTQI+ Activists in Zimbabwe Push for Equality https://allafrica.com/stories/202407300097.html (accessed 22 May 2025) ; Tabona Shoko and Lilly Phiri, The Other Foundation 2017, Canaries in the Coal Mines: An analysis of spaces for LGBTI activism in Zimbabwe http://theotherfoundation.org/wpcontent/uploads/2017/02/Canaries_Zimbabwe.pdf (accessed 22 May 2025)
[886] Shoko and Phiri 2017 (n 821 above)

healthcare access for sexual minorities, often collaborating with other civil society groups to build intersectional alliances.[887]

While Zimbabwean homosexual activists have not yet achieved a legal ruling comparable to South Africa's decriminalisation of sodomy, their persistent activism has led to some reduction in state harassment and increased visibility. The movement has also fostered community education on human rights and safety, and established clinics and partnerships to improve healthcare access for homosexual individuals.[888] However, the legal environment remains hostile, and discrimination, stigma, and violence against sexual minorities continue to be widespread.[889]

The South African experience demonstrates that strategic litigation can be a powerful tool for advancing homosexual rights by framing equality claims within constitutional protections.[890] In Zimbabwe, despite harsher legal and political conditions sustained, activism by groups like GALZ contributes to gradual social change by challenging discriminatory laws and practices through legal and public advocacy; building community resilience and visibility; forming alliances with broader human rights and health organizations and educating the public and policymakers about sexual minority rights. This activism is crucial in laying the groundwork for eventual legal reforms and greater social acceptance, even if immediate legal victories are elusive. It highlights that litigation, combined with grassroots organizing and coalition-building, plays a vital role in advancing equality for sexual minority groups in difficult contexts.

4.11. Current legal gaps in Zimbabwe

Zimbabwe's legal framework presents stark contradictions and significant gaps regarding the rights of sexual minorities, especially when contrasted with progressive regional rulings such as the Botswana case of ***Letsweletse Motshidiemong v The Attorney-General***. These contradictions are most evident when examining Zimbabwe's constitutional equality clause under Section 56 alongside its criminalisation of same-sex sexual activity. Section 56 of Zimbabwe's Constitution guarantees equality and non-discrimination on various grounds, including race, colour, political opinions, or sex. However, the clause notably omits explicit protection based

[887] Chironda 2024 (n 821 above)
[888] Chironda 2024 (n 821 above)
[889] UNDP (2022). Inclusive Governance Initiative: Zimbabwe Baseline Report. Lead author: Innocent Yekeye.
[890] The National Coalition case

on sexual orientation, leaving sexual minorities vulnerable to discrimination and legal persecution. This omission creates a legal paradox; while the Constitution enshrines broad equality rights, the ***Criminal Law Codification and Reform Act of 2006*** under Section 73 explicitly criminalises consensual same-sex, sexual activity between men, punishable by up to one year in prison and fines.

Furthermore, section 78(3) constitutionally bans same-sex marriage, reinforcing exclusionary definitions of family and citizenship. This legal framework institutionalizes discrimination and contradicts the spirit of equality promised under Section 56. The constitutional prohibition of same sex marriages serves no useful purpose. Rather, it perpetuates the stigmatisation of sexual minorities. This is one of the examples that demonstrates how the inequality and the exclusion of sexual minorities is politicised. One of the contentious issues during the Constitution-making process was "whether to outlaw homosexuality".[891] Zimbabwe's perennially dominant political party, Zimbabwe African National Union (Patriotic Front) (ZANU-PF), sought a constitutional "prohibition of homosexuality".[892] The compromise resulted in the prohibition of same-sex marriages. The criminalisation of consensual same-sex sexual conduct creates a complex ground for human rights violations against sexual minorities. But, according to the Constitution the "[s]tate and every person, including juristic persons, and every institution and agency of the government at every level must respect, protect, promote and fulfil the rights and freedoms".[893]

The Constitution provides for equality for all. The preamble of the Constitution proclaims that the people of Zimbabwe in their diversity are united in a common "desire for freedom, justice and equality". Equality is also one of the values upon which Zimbabwe is founded.[894] The inclusion of equality as part of the principles and values that Zimbabwe is founded on is of importance. The Constitution must be interpreted in a manner that promotes the values that underlie a democratic society, which include

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[891] Vollan, 'The Constitutional History and the 2013 Referendum of Zimbabwe: A NORDEM Special Report
2013' The Norwegian Centre for Human Right
www.jus.uio.no/smr/english/about/programmes/nordem/publications/docs/zimbabwe_constitution_2013.pdf (accessed 22 May 2025)

[892] P. Makova, 'Mugabe Holds Key to Conference Success' The Standard, 30 September 2012
www.thestandard.co.zw/2012/09/30/mugabe-holds-key-to-conference-success/ (accessed 29 May 2025)

[893] Section 44 of the Constitution.

[894] Section 3 (1) (f) of the Constitution.

equality.[895] The right to equality in the Constitution is more concise than the equivalent provision in the former Lancaster House Constitution.[896] The equality and non-discrimination clause provides that;

> "[e]very person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race, colour, tribe, place of birth, ethnic or social origin, language, class, religious belief, political affiliation, opinion, custom, culture, sex, gender, marital status, age, pregnancy, disability or economic or social status, or whether they were born in or out of wedlock."[897]

The right to equality should not be interpreted restrictively. Grounds not listed under the equality and non-discrimination clause can still be successfully raised just as the African Commission included sexual orientation as a ground for non-discrimination in a dictum in the ***Zimbabwe Human Rights NGO Forum case***. The criminalisation of consensual same-sex sexual conduct violates the right to equality. There is no rational purpose for criminalising consensual sexual acts between adults. The absence of explicit anti-discrimination protections means that sexual minorities face systemic barriers in accessing justice, healthcare, and social services. This shows that absence of legal protection of sexual minority rights perpetuates social marginalisation and violates fundamental human rights.

Botswana's 2019 High Court ruling in ***Letsweletse Motshidiemong v The Attorney-General*** decriminalising same-sex relations marks a landmark regional precedent affirming homosexual rights as human rights. The Botswana court recognised that criminalisation violates constitutional guarantees of dignity, privacy, and equality. The court opined that;

> "Any discrimination against a member of the society is a discrimination against all. Any discrimination against a minority or class of people is discrimination against the majority. Plurality, diversity, inclusivity and tolerance are quadrants of a mature and enlightened democratic society"

The High Court's acknowledgment of the negative effects of and the social and structural stigma associated with criminalisation undoubtedly was an important pillar

[895] Section 46(1) (b) of the Constitution.
[896] See the right to "Protection from discrimination on the grounds of race, etc." under section 23 of the former
LHC Constitution.
[897] Section 56 (3) of the Constitution.

in the judgment. This decision attempted to engage substantively with the lived experiences and realities of homosexual persons in Botswana. By adopting an expansive approach to the word 'sex' to include 'sexual orientation', the Court aligned itself with the country's international obligations. This ruling contrasts sharply with Zimbabwe's continued criminalisation and constitutional bans, underscoring Zimbabwe's lag in aligning its laws with evolving regional human rights norms, highlighting Zimbabwe's isolation in upholding regressive laws.

Zimbabwe must then amend its Constitution to explicitly include sexual orientation as protected grounds under Section 56. Additionally, repealing Section 73 of the Criminal Law Act and removing the constitutional ban on same-sex marriage are essential steps toward legal equality. Such reforms would not only harmonize Zimbabwe's laws with its constitutional commitments but also align the country with regional human rights developments and international human rights standards.

4.12. Policy Imperatives and Strategic Recommendations

All human beings irrespective of their gender, religion, culture or ethnicity must enjoy basic freedoms. The UDHR and the ICESCR enshrine a variety of these rights and freedoms, including, but not limited to the right to liberty, life, education, equality before the law, and cultural rights.[898] There are many gaps in these human rights instruments, mainly on the notion of limitations or restrictions on rights in certain situations. However, the United Nations Human Rights Committee outlines that such limitations must be prescribed by law, necessity, proportionality and non-discriminatory undertakings.[899]

Certain cultural practices may conflict with universal human rights norms which leads to tensions between cultural relativism and universalism under same-sex marriages in Africa. This is where policy recommendations come in. Neither relativism nor universalism should be oversold when it comes to policy formulations regarding same-sex versus heterosexual marriages.

As previously mentioned, cultural relativism is the perspective that moral values and concepts should be understood within their own cultural context rather than judged by external standards. It holds that all cultural beliefs and practices have equal validity

[898] Carmara, 2003
[899] Leeuwen, 2010

relative to their cultural backgrounds, emphasizing that truth and morality are not absolute but culturally bound.[900] This view originated with anthropologist Franz Boas in the late 19th century and gained prominence as a response to ethnocentrism and colonialism.[901] In practice, cultural relativism means that behaviours or practices—such as attitudes toward same-sex marriage, are seen as legitimate within their own cultural framework, even if they conflict with values held elsewhere.[902]

Universalism in human rights is the belief that certain rights are inherent and apply to all human beings regardless of culture, nationality, or other differences. It asserts that rights such as equality, freedom from discrimination, and dignity are universal and inalienable. This principle is enshrined in key international documents like the Universal Declaration of Human Rights (UDHR), which states that all people are born free and equal in dignity and rights.[903] Universalism is grounded in theories such as natural law, rationalism, and positivism, which argue that human rights exist above cultural differences and are part of international law, not contingent on cultural norms.

In many African countries, cultural practices and beliefs deeply rooted in traditional values often conflict with the universal human rights norm of recognising same-sex marriage. For example, most African states criminalise homosexual practices, reflecting strong cultural opposition to homosexuality.[904] This creates a tension: cultural relativism supports respecting these local cultural norms and traditions, while universalism insists on applying human rights standards equally, including rights related to sexual orientation and marriage equality.[905] Thus, the debate involves balancing respect for cultural diversity with the enforcement of universal human rights, a challenge that is particularly pronounced in the context of same-sex marriage in Africa.[906]

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[900] Herskovits, 1972
[901] Cherry, MSEd 2023 Understanding Cultural Relativism and Its Importance https://www.verywellmind.com/understanding-cultural-relativism-7549709 (accessed 29 May 2025)
[902] Benedict, 1989
[903] "Universalism and Cultural Relativism in Human Rights." LawTeacher. LawTeacher.net, November 2013. Web. 28 May 2025. https://www.lawteacher.net/free-law-essays/international-law/universalism-and-cultural-relativism-in-human-rights-international-law-essay.php?vref=1 (accessed 29 May 2025)
[904] Tan 2019 Universalism vs. relativism: human rights for homosexuals in Africa https://www.maastrichtuniversity.nl/blog/2019/03/universalism-vs-relativism-human-rights-homosexuals-africa (accessed 30 May 2025)
[905] Tan 2019 (n 840 above)
[906] Chimakonam & Agada, 2020

There should then be emphasis on the need for policy recommendations through culturally sensitive approaches to human rights promotions and protections. The tensions between same-sex marriages and cultural values require careful consideration of the context as well as dialogue and engagement with diverse perspectives. This careful consideration involves promoting human rights while respecting cultural diversity and local contexts, ultimately striving for a more inclusive and equitable world.

Nevertheless, disobedience or violation of human rights is not justifiable in cases where fundamental principles of dignity and equality are at stake. In these cases, social, legal and political reform is called for. This will help in addressing systemic issues like same-sex marriages and ensure compliance with the standards of universal human rights. Consequently, reform is essential for the need of legal accountability. This can include strengthening legal frameworks, establishing independent oversight mechanisms and giving victims of abuse access to justice. It also prevents recurrence of negative societal incidents by assisting in identifying and addressing the root causes of human rights violations. In addition, structural inequalities, discriminatory practices or inefficiencies in government and accountability mechanisms should be addressed.

Policy reforms to protect sexual minority rights are essential to uphold fundamental human rights, eliminate systemic discrimination, and promote social inclusion and well-being. These reforms should specifically target legal frameworks, healthcare access, education, housing, and public accommodations to ensure comprehensive protection and equality for sexual minorities. These are as discussed below.

4.12.2. Legal reforms and protections.

The gaps between the law and its application call for legal reforms to protect sexual orientation minorities. Sodomy and same-sex marriages have been illegal in Zimbabwe as the government does not recognise relationships between people of the same gender. Protection is only permissible for heterosexual couples. While progress has been made in some jurisdictions to recognise and protect the rights of same-sex couples, there is still significant variation in legal frameworks and protections globally just like in Zimbabwe. This is because of the legal cultural and political determinants in play which limit the rights of same-sex minorities. Zimbabwe's legal system requires change because of the gaps in the criminal code criminalising same-sex intimate relationships, which leads to harassment, violence and discrimination against

homosexuals. This discrimination spills over to other sectors like education, healthcare and employment.[907] To initiate reforms on same-sex legal protections, it is essential to repeal laws that criminalise consensual same-sex relationships and other discriminatory statutes targeting sexual and gender minorities.

The Constitution of Zimbabwe is a promising framework for the protection and promotion of sexual minority rights. However, there are pieces of legislation that are discriminatory to sexual minorities and are at a variance with the spirit and letter of the Constitution. They pose the biggest impediment to the protection, promotion and realisation of sexual minority rights. There is a need to repeal section 73 of the Criminal Codification and Reform Act which criminalises sodomy and align such law with the constitutional provisions. Repealing the criminalising provision in the Code will signal Zimbabwe's affirmation of human rights and human dignity. It will also confirm the fact that the legacy of colonialism should no longer be confused with cultural authenticity or national freedom. As previously mentioned, same-sex sexual relations did exist in pre-colonial Africa without the discrimination that is occasioned by anti-sodomy laws.

There are growing numbers of psychological effects on homosexuals which calls for legal reforms and protections.[908] There are high rates of depression, anxiety and suicides due to constant threats of legal persecution and societal rejection. At times, homosexual individuals may hide their identities, leading to feelings of loneliness and alienation. Such a polarised society creates a lack of support networks and affirming relationships, which, in turn, can worsen feelings of despair and hopelessness. Without proper legal reforms, support and resources, individuals may struggle to cope with the emotional toll of discrimination.

Safe and supportive legal reforms are essential in averting the aforementioned mental health challenges. With safe and supportive laws, homosexual individuals could feel accepted, valued and affirmed by the Constitution. It requires not only the repealing of discriminatory laws but also confronting societal attitudes to promote empathy and understanding. Further, recommendations for mental health support services tailored to the needs of homosexual individuals are put forward to augment reforms and protections.

[907] Singal Singhal and Rogers, 2012
[908] Thirikwa and Wandere, 2018: 95-111

Legal reforms and protections are also important to reclaim society's economic status. Talent and abilities that are underutilised due to discriminatory laws in employment hinder the socio-economic advancement of homosexual communities. Limiting their access to opportunities and resources affects the global economy.[909] Employment discrimination can then force individuals into lower-paying jobs or unemployment, leading to poverty, marginalisation and societal polarisation. Legally sanctioning discrimination restricts access to opportunities and resources. This impedes the ability of homosexual individuals and society more generally to thrive economically.

Reforms addressing discrimination in housing and healthcare are also crucial. Housing discrimination, driven by biased laws, creates significant obstacles for same-sex families.[910] Reforms and protections on healthcare are required in combatting global issues like the Human Immunodeficiency Virus (HIV). There are increasing barriers and fear among same-sex minorities to accessing HIV healthcare services.[911] To address these consequences and promote equality, repealing discriminatory laws is the first step. This will foster a more inclusive and just society where governments must offer minority citizens protections in all areas of life.[912] Reforms and protections in combating discriminatory laws require a concerted effort. This means that Zimbabwe's administrations, civil society groups and people must champion equality, justice and human rights for all. This is a future where homosexual individuals are truly free to live without fear of discrimination and persecution.

Reforms and protections against discriminatory laws in Zimbabwe require a collaborative effort involving the government, civil society, and the broader public. To effectively champion equality, justice, and human rights for all, including same-sex individuals, it is essential that stakeholders such as government bodies, civil society organizations, community leaders, and media outlets actively use awareness campaigns as a strategic tool. These campaigns play a crucial role in educating the public, challenging prejudices, mobilizing support for legal reforms, and empowering marginalised groups. By deliberately employing awareness campaigns, stakeholders can foster greater acceptance, reduce stigma, and build the necessary momentum for

[909] Green, 2018: 634-648
[910] Raeburn, 2004
[911] Thirikwa, 2018
[912] Pasirayi, Fennell and Follmer 2023: 704-744

both legal and social change, ultimately creating a future where everyone is free from discrimination and persecution.

4.12.3. Amending other discriminatory legislation

The family laws specifically the Marriage Act, assume heteronormative genders in its definition of marriage, which is a consensual union between a man and a woman. This fails to recognise same-sex unions and is therefore discriminatory and unconstitutional. It should be reviewed to include non-heterosexual marriages. Additionally, under the ***Children's Act, Chapter 5:06***, prospective adoptive parents must be married. This refers to a heterosexual relationship between a man and a woman, because the Constitution prohibits same-sex marriages. This has implications on the rights of same-sex oriented persons. This means that the adoption of children by lesbian and gay couples is prohibited even when there is proof that such couples can be suitable and loving parents. The Act is therefore discriminatory and unconstitutional to that extent and should be reviewed.

4.12.4. The need to adopt a comprehensive equality legislation

The implementation of a single, comprehensive equality legislation is necessary to ensure the adoption of a thorough Equality Act. This Act should prohibit discrimination on a conditionally open list of protected grounds which should incorporate at least all of the grounds set out in section 56 of the Constitution. The Act should prohibit all forms of discrimination and should cover all areas of life, while providing for the development and improvement of positive action measures. In addition to this, there should be an implementation for the screening of national legislation to detect and correct possible inconsistencies with non-discrimination legislation in force. This is to prevent discrimination on the grounds of sexual orientation and to eliminate the discriminatory criminalisation of same-sex sexual conduct.

The incarnation of legislation that is anti-discriminatory explicitly shelters homosexuals from discrimination in all spheres of life. This includes in areas like employment, housing and healthcare. This will help in not only challenging stigma but also dispelling myths and championing cumulative acceptance of homosexual individuals within the global village. The Zimbabwean judiciary, law enforcement agencies and the establishment of specialised mechanisms are key. These address hate crimes and violence based on sexual orientation. The ongoing struggles for same-sex rights need

comprehensive legal reforms along with efforts to promote awareness and foster the acceptance of minorities.

4.12.5. Empowering the Judiciary

The judiciary, more than any other organ of government, has an immense constitutional duty to safeguard the integrity of democracy, especially through the protection of fundamental rights and freedoms.[913] In a constitutional democracy, the judiciary is empowered to determine whether the executive and the legislature conduct their duties in compliance with the Constitution.[914] The judiciary must employ the power granted to it to stop excess by the executive and legislature in order to promote fundamental human rights in a democratic, free and just society.[915] This, is done through judicial review where it evaluates laws, legislation and executive acts for compliance with the Constitution. This is important in the protection of minority rights including those of homosexual individuals. Lesbian and gay individuals in most African countries are an invisible, vulnerable and voiceless minority.[916]

Their invisibility and silence are not because of shame but rather an attempt at avoiding the social stigma and prejudice perpetuated and reinforced by the criminalisation of same-sex activity, which has ensured that sexual minorities stay marginalised in society.[917] Like other minorities in constitutional democracies, homosexual persons must rely on the courts to protect their rights. The courts provide protection to minorities through the enforcement of the Bill of Rights which invariably contains guarantees and protections relating to the right to non-discrimination and equality. In this regard, it shows that in a constitutional democracy, courts are the custodians of constitutional rights. Through the power of the judicial review, they are mandated with protecting citizens from having their rights trampled upon by other arms of government. They have independence so that they can uphold constitutional rights without interruption of any kind or being hostage to popular sentiment.[918]

The decriminalisation of same-sex conduct through judicial review of anti-homosexuality legislation represents a typical resort to this power. In the ***National***

[913] Twinomungisha 2000: 7
[914] Twinomungisha 2001:7
[915] Digard, 2007: 20
[916] Chiisa, 2007: 45
[917] Ackerman J in National Coalition of Gays and Lesbians Equality and Another v Minister of Home Affairs and Others 2000 2 SA (CC)
[918] Chiisa 2007

Coalition case, the South African Constitutional Court decriminalised the common law offense of sodomy and struck down as unconstitutional section 20A of the Sexual Offenses Act as well as sections of the Criminal Procedure Act and Security Offenses Act. These outlawed sexual conduct between men. The court explored the possibility of more than one orientation and relied on section 9 of the South African Constitution which prohibits discrimination on the basis of, among other grounds, sexual orientation. It held that criminalisation of homosexuality amounts to unfair discrimination.[919]

The decriminalisation of same-sex conduct through judicial review, as demonstrated in the South African National Coalition for Gay and Lesbian Equality case, provides a vital framework for protecting sexual minority rights. The South African Constitutional Court struck down laws criminalising consensual sexual acts between men, ruling that such laws amounted to unfair discrimination under the constitutional prohibition against discrimination based on sexual orientation. By recognising the legitimacy of diverse sexual orientations and affirming constitutional guarantees of equality, dignity, and privacy, the court set a powerful precedent for using constitutional interpretation to advance homosexual rights.[920] This approach highlights the judiciary's role in dismantling oppressive laws that violate fundamental human rights and in promoting legal recognition and protection for sexual minorities.

In the context of Zimbabwe, where same-sex conduct remains criminalised and homosexual individuals face widespread discrimination and social exclusion, judicial review offers a critical avenue for legal reform. Zimbabwe's courts could similarly interpret constitutional protections on equality and human dignity to include sexual orientation, thereby invalidating laws that criminalise consensual same-sex conduct and perpetuate discrimination. Beyond decriminalisation, such judicial activism could encourage positive legal reforms that ensure access to employment, family rights, and protection from violence for sexual minorities. However, legal change must be

[919] Justice Ackerman found that the above offenses, all of which are aimed at prohibiting sexual intimacy between gay men, violate the right to equality in that they unfairly discriminate against gay men on the basis of sexual orientation. Such discrimination is presumed to be unfair since the Constitution expressly includes sexual orientation as a prohibited ground of discrimination.

[920] Gomes da Costa Santos, Gustavo (2013) Decriminalising homosexuality in Africa: lessons from the South African experience. In: Human Rights, Sexual Orientation and Gender Identity in The Commonwealth: Struggles for Decriminalisation and Change. Institute of Commonwealth Studies, School of Advanced Study, University of London, pp. 313-337. ISBN 978-0-9573548-8-3

complemented by social advocacy to challenge stigma and foster acceptance within cultural and religious communities.[921] By drawing on regional and international human rights norms, Zimbabwe can follow South Africa's example to protect, realise, promote, and legalise sexual minority rights, affirming homosexual persons as equal citizens deserving of dignity and inclusion.

4.12.6. Scale up public interest litigation

Litigation on human rights is important because it affirms the legal nature of the rights and the right to an effective remedy as enshrined in the UDHR. Zimbabwe's constitution being revolutionary, introduces socio-economic rights which destroys the dilemma of locus standi by extending it beyond just the persons directly affected by the threat, violation, denial or infringement of the rights. In the interest of justice, the rules of procedure for cases that touch on human rights require minimal formalities, even allowing for informal documentation, proceedings to commence without payment of a fee and encouraging expertise through appearance of individuals or organisations as friends of the court. Individuals and human rights organisations can take advantage of this, and bring public interest litigation on behalf of sexual minorities who are afraid to expose themselves for fear of social reprisals.

Public interest litigation will bring about protection through broad judicial interpretation of the Constitution. This allows courts to overcome the handicap of non-justiciability of socio-economic safeguards and the rights to health, food, water, shelter, education and social security will be regularly litigated.

4.13. Non-legal mechanisms

As much at it is important to target the law, putting in place legal mechanisms is not sufficient. This section will outline non-legal mechanisms that can be used towards the protection, realisation and promotion of sexual minority rights in Zimbabwe.

4.13.1. Recognise the role of religious leaders in reforms

Religious leaders are at the forefront of issues concerning sexual minorities, a phenomenon that is not exclusive to Zimbabwe. The church can be a catalyst for reforms in matters of sexual freedom.[922] The Anglican Church of England separated

[921] Sida: 2014 The Rights of LGBT people in Zimbabwe https://cdn.sida.se/app/uploads/2021/05/07085244/rights-of-lgbt-persons-zimbabwe.pdf (accessed 30 May 2025)

[922] Baraza, 2016

matters of morality from matters of the law to give the much-needed impetus to reforms.[923] It played a significant role in separating matters of morality from matters of law to advance legal reforms, particularly in the mid-20th century. Senior Anglicans advocated for the distinction between crime and sin, promoting the secularisation of criminal law. This was notably evident in their involvement with the Wolfenden Committee in 1954, which led to campaigns culminating in the 1967 ***Sexual Offences Act*** that decriminalised homosexuality.[924] By supporting this separation, the Church helped shift the basis of law from strictly moral grounds to a more secular legal framework, providing the necessary impetus for reform. However, this stance was controversial within the Church, with many members opposing the reorientation of Church and State relations.

This approach by the Church of England indicated a recognition that moral consensus was no longer a sufficient or acceptable basis for legal regulation, thereby enabling reforms that reflected changing societal attitudes while maintaining core moral principles as understood by the Church. Thus, the Church of England's separation of morality from law was instrumental in fostering legal reforms by allowing law to evolve independently from strictly religious moral judgments, especially in areas such as sexual offences. Reforms then need to target this sector of society and through reasoning and education, Christians could be an important avenue through which reforms can be affected. Zimbabwean religious leaders should be involved as change agents for any reforms in the country to support protection of the human rights of sexual minorities.

4.13.3. Public awareness campaigns and public education and sensitisation about sexual minorities.

A society soaked in strict adherence to traditional conservative perceptions regarding same-sex marriages requires transformation. Public awareness campaigns emerged as vital components of societal harmonisations. Public awareness campaigns related to same-sex marriage and homosexual rights generally emerge within a broader struggle against deep-rooted legal and social discrimination fuelled by conservative cultural and religious norms. Many African countries criminalise same-sex relationships, with harsh penalties and widespread societal stigma, making marriage

[923] Ramsay, 2018: 108-137
[924] Grimely, 2009: 725-741

equality a highly sensitive and often taboo subject.[925] Activists and organizations primarily focus on decriminalisation, combating violence, and reducing discrimination through grassroots mobilisation, social media, and legal challenges. Countries like South Africa, which legalised same-sex marriages, serve as regional exceptions, but even there, traditional communities often resist full acceptance. In more repressive environments such as Uganda, and Malawi, public awareness efforts aim to humanize homosexual individuals and foster dialogue, despite facing strong opposition from political and religious leaders.[926]

These campaigns are vital for gradually transforming societal attitudes by increasing visibility and sensitising the public to homosexual experiences within a framework of universal human rights and dignity. They often emphasise shared values like love, family, and freedom to counteract entrenched prejudice. While marriage equality remains a distant goal in most African countries, public awareness initiatives lay the groundwork for legal and social change by challenging stereotypes and encouraging empathy. By leveraging international human rights discourse and local grassroots activism, these campaigns work to create safer, more inclusive environments, even amid significant resistance and ongoing criminalisation.

An informed society is more likely to show acceptance and inclusivity towards same-sex individuals and families. Challenging societal prejudices and promoting acceptance calls for sharing current and refined perceptions regarding sexual orientation. In addition, this facilitates a clear understanding of diverse sexual minorities. Empathy and respect result in a space where same-sex individuals and families feel safe, valued and empowered to live openly and authentically.[927] While such campaigns should focus on dispelling myths surrounding same-sex relationships, they should also promote understanding and encourage harmonious coexistence between homosexual individuals and heterosexual families, fostering mutual respect and support.

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[925] Joselow 2013 Gay Rights in Africa Move Slowly, Cautiously Forward https://www.voanews.com/a/gay_rights_in_africa_moving_slowly_cautiously_forward/1630496.html (accessed 30 May 2025)

[926] Amnesty International: Pride ends with mixed feelings in southern Africa as LGBTI people register wins and setbacks 2024 https://www.amnesty.org/en/latest/campaigns/2024/07/pride-ends-with-mixed-feelings-in-southern-africa-as-lgbti-people-register-wins-and-setbacks/ (accessed 01 June 2025)

[927] Okesola 2024: 225-245

There are misconceptions and myths surrounding same-sex marriages, including that they undermine heterosexual marriages. Such perceptions hinder understanding and acceptance of homosexual people. It is important to address these myths with accurate information supported by evidence through public awareness campaigns. It is important to let the public know that legalistic same-sex marriages do not diminish the institution of marriage but rather affirm the principles of love, commitment and mutual respect regardless of gender.[928] Legalising same-sex marriages fosters social cohesion and promotes equality, leading to a more inclusive and just society.[929] From this perspective, marriages serve as a cornerstone of societal structure, aimed at promoting the well-being of future generations. Clearly, public awareness campaigns are required to demystify the divergent views on marriage. The traditional views about marriage and children, the sole intention of marriage and the religious views need to be harmonised.

It is clear that most Zimbabweans, including the government itself are not privy to what sexuality is about in general and what sexual minorities in particular are. Homophobic attitudes in the country are fuelled by ignorance based mainly on a lack of information and disinformation. As much as vast research has been undertaken to understand non-heterosexual sex elsewhere, such information is lacking from the public domain in Zimbabwe. There is a need for intensified public education by the government as part of its international human rights obligations to sexual minorities. The country has to take the initiative to put in place programmes that will educate Zimbabwe on issues of sexual minorities and the implications of international human rights law and the Constitution of Zimbabwe on the human rights of Zimbabwe.

4.13.4. Inclusive education and advocacy

Inclusivity programs within educational institutions have shown promise in shaping more tolerant attitudes towards same-sex sexual conduct. There should be the introduction of specific initiatives that integrate homosexual perspectives into curricula, promoting empathy and reducing prejudice among students. These initiatives contribute to the long-term goal of reshaping societal views from an early age. There is a need for an inclusive curriculum that educates students about diversity, tolerance

[928] Andrabi 2020: 264-271; Alozie, Thomas and Akpon-Obang 2017: 120-131
[929] Motter, 2017

and respect for human rights, which includes homosexual rights.[930] The integration of these initiatives at various educational levels has the potential to challenge stereotypes and prejudices. History, literature, social studies and health education are potential and relevant subjects into which same-sex perspectives can be incorporated.[931]

Schools can also implement anti-bullying programs that specifically address homosexual bullying. This promotes a culture of inclusivity and acceptance. To augment content, student discussions, role-playing activities and guest speakers who share their experiences as homosexual individuals could be helpful. When done with utmost sensitivity and effectively the classroom is prepared for the diverse future and the students can make their own rational choices when they grow up. Although integrating homosexual topics into the curriculum may conflict with some parents' religious, moral and cultural beliefs, schools should focus on facts and evidence rather than beliefs and opinions.[932]

4.13.5. Collaborative efforts: NGOs, the government and community collaboration

Collaborative approaches combine local insights with broader advocacy strategies. Collaborations between non-governmental organisations, the government and community groups have emerged as a powerful force for change. NGOs focusing on human rights and homosexual advocacy have partnered with local organisations to implement joint initiatives. Leveraging NGOs' respective strengths and resources enhances awareness, advocacy and support for homosexual individuals thereby preventing and reducing violence and discrimination.[933] NGOs offer expertise and advocacy as they often possess specialised expertise in addressing homosexual rights issues and they tend to advocate for policy change. Through research, advocacy campaigns, legal support, and raising necessary awareness, violence and discrimination against sexual minorities can be addressed.

Through the government support and policy change, the importance of enacting and implementing laws and policies is achieved and the rights of sexual minorities are

[930] Payne and Smith 2011: 174-200
[931] History can feature hey events in homosexual history like Stonewall Riots as a civil Rights movement.
[932] Payne and Smith 2018: 183-215
[933] Payne and Smith 2011 174-200

protected. Through partnerships with NGOs and community groups, the government can develop and implement comprehensive anti-discriminatory laws. Community engagements and support comes into play when community groups act to assistance and solidarity.[934] Homosexual persons affected by violence should be offered counselling, peer support and safe spaces where survivors can access resources and connect with others who share similar experiences. Community groups can advocate for the needs of lesbian and gay communities at local, national and international levels by collaborating with NGOs and government agencies.[935]

4.14. Conclusion

In conclusion, the current review on social polarisation, same-sex sexual conduct and human rights in Zimbabwe offers significant insights. The challenges and complexities surrounding societal attitudes and efforts towards harmonisation have been illuminated. It has been revealed that traditional cultural values, religious beliefs, political discourses, economic disparities and educational background contribute to varying attitudes across Zimbabwean regions with restrictive laws, fear, discrimination and a lack of legal recognition and protection for homosexual individuals being evident.

Despite constitutional guarantees of equality and non-discrimination, there is still a need for comprehensive legal reforms to align with human rights principles. This study serves as a valuable resource to inform policy decisions, advocacy strategies and community-driven initiatives aimed at fostering societal harmonisation and promoting human rights for all individuals in Zimbabwe. In examining the rights of sexual minorities, the study started with the premise that all people, irrespective of sexual preferences, ought to enjoy their individual rights and fundamental freedoms. From the overall explanation of how society and the law treat sexual minorities, what emerged is that sexual minorities are marginalised, discriminated against and their enjoyment of individual rights and fundamental freedoms is compromised. By acknowledging the interconnected relationship between humans, nature, and society, marginalized identities can be made visible, revealing their struggles with neglect, poverty, insecurity, and vulnerability.

[934] Agama, 2001: 44
[935] Thoreson, 2014

The chapter started with an analysis of equality clauses and the rights to privacy and human dignity and how they can be used as tools to advance decriminalisation of same-sex sexual conduct in Zimbabwe. It also discussed the role of courts, legal and political culture, Parliament and civil society in the fight for decriminalisation of homosexuality. The rights in the Bill of Rights, which are equality, human dignity and privacy are important in the fight against the criminalising of homosexuality. Judicial decisions from foreign courts and international human rights tribunals pointed out that sodomy laws violate these same rights. The South African Constitution clearly and expressly prohibits discrimination on the basis of sexual orientation, thus, giving effect to judicial decisions that have invalidated sodomy laws.

As shown in Chapter 3, international human rights law clearly provides a forum through which Zimbabwean laws could be challenged. Zimbabwe ratified the ICCPR and the Human Rights Council clearly stated that sodomy laws violate the ICCPR. Bringing a claim would be a great and clear approach to attack Zimbabwe's sodomy laws in the international arena. In addition, advocates for the rights of homosexuality could use the existing prohibited grounds of discrimination to make their arguments. The equality clause provided for sex as a prohibited ground of discrimination. This has been significant in the fight for decriminalisation of same-sex sexual conduct since it provides for a provision on which discrimination is not allowed.

It has been pointed out that Zimbabwe should adopt an open list approach. This is because it adopted a closed list approach in the equality provision making it difficult to include sexual orientation as a prohibited ground. At the same time, the equality clause prohibits discrimination on the basis of sex. To interpret the provision in favour of sexual minorities, the equality clause must be given a dynamic and progressive interpretation that incorporates sexual orientation within the category of sex. This approach is often referred to as the 'sex discrimination argument,' although it differs in its application and reasoning.

The role of the judiciary was covered, which has a constitutional responsibility to secure the protection of the rights of gays and lesbians. The courts can achieve this by embracing the concept of judicial activism hence interpreting the equality clauses in the Constitution creatively and progressively. The judiciary must exercise its constitutional powers to ensure the protection of human rights and fundamental

freedoms. Reliance on public opinion must be avoided as a determining factor in constitutional human rights issues, especially for controversial cases like those related to homosexuality. Judges must embrace the notion of judicial activism. Parliament can promote the rights of sexual minorities and decriminalise same-sex sexual conduct through amending the relevant provisions of the code or giving effect to judicial decisions that have invalidated sodomy laws. In addition, international human rights law clearly provides a forum through which Zimbabwe's sodomy laws could be challenged. Zimbabwe ratified the ICCPR and other international treaties. Bringing a claim would be a clear approach to attack Zimbabwe's sodomy laws.

CHAPTER FIVE

5. CONCLUSION AND RECOMMENDATIONS

This research aimed to critically analyse why people belonging to sexual minority groups are discriminated against and how their rights are perceived in Zimbabwe. The study sought to explore the historical background of homosexuality in the African context and examined the Zimbabwean legal framework with regard to sexual minority rights. It further examined the role of international and regional human rights laws and instruments, in the protection of sexual minorities in the face of cultural impediments. The study explored the avenues that can be taken to realise, protect, promote and legalise the rights of sexual minorities in Zimbabwe amid cultural barriers.

It is submitted that laws that prohibit same-sex marriages and that criminalise sodomy discriminate against homosexual persons based on their sexual orientation. Consequently, they should be declared unconstitutional and void because they subject the homosexual community to human rights violations that are based on their actual minority sexual orientation. Zimbabwe is a step behind in implementing the international human rights instruments at a domestic level which delays the realisation of meaningful human rights protections for every citizen regardless of their sexual orientation.

5.1. Clear answer to the research questions/ hypothesis

The research questions in the study focus on understanding why sexual minority groups face discrimination in Zimbabwe, how their rights are perceived, and what legal, cultural, and international frameworks affect and could protect their rights. The main research question asks how culture is a barrier to the realisation of rights of people belonging to sexual minority groups, and how they are viewed in Zimbabwe. The sub-questions examine the historical background of homosexuality in Africa, Zimbabwe's legal framework concerning sexual minority rights, the role of international and regional human rights instruments in protecting these rights amid cultural barriers, and potential pathways to realizing, protecting, promoting, and legalizing such rights in Zimbabwe.

An analysis to these questions reveal that discrimination against sexual minorities in Zimbabwe is deeply rooted in conservative cultural and religious beliefs that emphasize heterosexual marriage for procreation as the natural and fundamental unit of society.[936] This cultural framework excludes and criminalises non-heterosexual orientations, despite the constitutional non-discrimination clause. Extensive evidence shows that a significant portion of the LGB population in Zimbabwe faces violence, abuse, discrimination, and social exclusion.[937] The cultural barriers, including entrenched homophobic attitudes propagated by religious and societal norms, are the main drivers of this discrimination. These norms are intertwined with Zimbabwe's colonial history, where anti-homosexual legislation was introduced by colonisers, aligning with conservative Christian morality, reinforcing cultural stigmatization of sexual minorities.[938] Hence, the perception that homosexuality is "un-African" or a "Western import" fuels the resistance to recognizing sexual minority rights.

Historically, homosexuality existed in African societies with varying degrees of tolerance before colonial laws criminalized it. Some pre-colonial practices, such as woman-to-woman marriages and recognition of same-sex relationships under certain spiritual contexts, indicate that sexual diversity was acknowledged to some extent.[939] However, the imposition of colonial legal systems and Christian moral values altered indigenous perceptions, solidifying homophobia in law and custom.

Legally, Zimbabwe's 2013 Constitution includes a non-discrimination clause but explicitly excludes sexual orientation as a protected ground and prohibits same-sex marriages. The Criminal Law Act criminalizes sodomy, which perpetuates state-sponsored homophobia. Courts tend to be conservative and reluctant to enforce sexual minority rights, limiting the protective potential of constitutional provisions. This legal framework stands in contradiction to Zimbabwe's international human rights obligations under treaties such as the ICCPR and CEDAW, which advocate for non-discrimination and privacy rights inclusive of sexual minorities.[940] Despite this, Zimbabwe has resisted aligning domestic laws with international protections, actively

[936] Mabvurira et al, 2012; Epprecht 2008.
[937] Gays and Lesbians Association of Zimbabwe (GALZ). "Sexual Orientation and Zimbabwe's Constitution – A case for inclusion," submission to Zimbabwe's Constitutional Parliamentary Committee (COPAC), 2018.
[938] Currier 2013:109-139
[939] Tamale 2011:50-60
[940] Sexual Orientation and Zimbabwe's Constitution: A Case for Inclusion, Gays and Lesbians of Zimbabwe (GALZ) The Law Society of Zimbabwe Magazine, 1999:5-12 and 26

opposing the recognition of sexual orientation in UN and regional human rights mechanisms.

International and regional human rights instruments provide a robust framework for the protection of sexual minorities, emphasizing universal human rights, dignity, and privacy. Regional bodies like the African Commission and instruments such as the African Charter provide avenues, though not explicitly covering sexual orientation, for advocacy and legal challenges to discriminatory laws. Strategic litigation and active engagement with these institutions are crucial pathways for advancing sexual minority rights in Zimbabwe.[941]

To realize, protect, and promote sexual minority rights amid existing cultural barriers in Zimbabwe, the study advocates several measures. Judicial activism is critical, urging courts to adopt purposive and non-conservative interpretations of constitutional rights to safeguard sexual minorities.[942] Legal reforms are essential, repealing anti-sodomy laws and explicitly including sexual orientation as a protected ground in the Constitution. Public education and cultural intelligence in schools and society can challenge homophobic attitudes and promote tolerance.[943] Engagement with international and regional human rights bodies to pressure the government and create legal precedents is also vital. The study emphasizes the need for legal and policy synchronisation with international human rights standards to foster inclusion, dignity, and equality for sexual minorities. Ultimately, it calls for a cultural shift alongside legal reforms to end systemic discrimination and promote social acceptance in Zimbabwe.[944]

In summary, discrimination against sexual minorities in Zimbabwe arises from deeply entrenched cultural, religious, and colonial legacies that criminalize and stigmatize non-heterosexual identities. The legal framework is inadequate and at odds with international obligations. Nonetheless, there exist opportunities through judicial activism, legal reform, education, and international human rights mechanisms to promote and realize sexual minority rights. Overcoming cultural barriers requires

[941] Rudman 2015: 1-27
[942] Ricky Nathanson v. Farai Mteliso & Ors (2019)
[943] Epprecht 2020: 275-296
[944] Epprecht 2020: 275-296

sustained societal and institutional engagement to align Zimbabwean laws and attitudes with principles of human dignity, equality, and non-discrimination

5.2. Summary of findings

Chapter two addressed the research questions of the study, which entailed a review of the historical and cultural background of homosexuality in Africa. It addressed whether the criminalisation of same-sex sexual acts in most African states including Zimbabwe is justified. Those who are homophobic base their views on moral, cultural, historical and religious grounds, and they argue that homosexuality is a Western import and un-African. This contradicts historical facts as there is evidence that highlights the existence of same-sex sexual acts in a number of African societies.[945] Religious values have been used to justify the criminal prohibitions of same-sex sexual acts in Africa. Religious leaders believe that same-sex sexual acts are condoned by God and against God's nature. This has been challenged based on the selective interpretation of the Bible.[946] In addition, most prominent and respected Christians were involved in relationships which would almost certainly be viewed as homosexual in cultures hostile to same-sex eroticism.[947] Homosexuality was traced back from its pre-colonial contexts, its development during colonialism, and its continued existence in post-colonial Africa, with a specific focus on Zimbabwe.

Homosexuality was found to have existed pre-colonially and perceptions of same-sex relationships from pre-colonial times, through colonialism, to the present, were examined, highlighting the shifting attitudes and legal frameworks that have shaped the experiences of sexual minorities on the continent. Contrary to the widespread belief that homosexuality is "un-African," historical evidence and anthropological studies indicate that same-sex practices existed in various African societies long before European colonisation. Notably, Edward Evans-Pritchard documented pederastic relationships among the Azande of Central Africa, and rock paintings by the San people in Zimbabwe depict male-male sexual acts dating back at least 2,000 years.[948] These findings challenge the narrative that homosexuality was introduced by Europeans.

[945] Gaidzanwa, 2001:11
[946] Baswell 1980: 240
[947] Baswell 1980: 243
[948]Gunda, 2010

Same-sex relationships in pre-colonial Africa often served specific social functions, such as maintaining loyalty among warriors, socializing young men, or managing population growth. Practices varied widely, among the Shona, *chisahwira* may have concealed pederastic relationships;[949] in Lesotho, "*mummy-baby*" relationships between adolescent girls were common; and in Ghana, lesbian relationships among unmarried Akan women were reportedly widespread. These practices were sometimes ritualised or integrated into initiation ceremonies, as seen among the Mukanda and Kivai in Zambia and the Quibanda in Angola.

There is no argument that Europeans had a huge influence on African societies during colonisation.[950] The arrival of European colonisers marked a significant shift. Colonial administrations imposed Western legal and moral codes, criminalising same-sex relations and enforcing binary gender norms. The English and Roman-Dutch legal systems, which still influence Zimbabwean law, defined heterosexuality as the only acceptable form of sexuality and stigmatised all deviations as "monstrous lust."[951] This legal framework persists, contributing to the marginalisation of homosexual individuals in post-colonial Africa. Despite colonial repression, same-sex practices persisted in various forms, often driven underground. Oral histories and anthropological interviews indicate that ritual male-male sexual acts continued after the fall of Zimbabwe's medieval states, and terms describing same-sex relations exist in many African languages, reflecting their historical presence.

The argument that homosexuality is socially produced and is a personal choice is also put forward in this chapter. This labelling of homosexuality as socially constructed has led people to believe that sexual orientation can be influenced therefore gays and lesbians are in a position to change their lives and become heterosexuals. However, evidence from science and psychology has proven that homosexuality is not limited to time and culture. In addition, psychological evidence has shown that homosexuals have no choice about their sexual orientation.[952]

[949] Epprecht 2004; Gunda 2006:126
[950] Epprecht 2008:49
[951] Epprecht 2008
[952] Dr Gregory M Herek, a professor on the psychology of the University of California, Davis, surveyed a United States national probability sample of 662 self-identified lesbians, gays and bisexual adults and found that 88% of gay men and 68% of lesbians reported that they had no choice at all about their sexual orientation.

Today, discrimination against sexual minorities in Zimbabwe and much of Africa is rooted in a combination of religious and cultural beliefs, many of which were reinforced or introduced by colonial authorities. There has been continued criminalisation and re-criminalisation of same-sex consensual sexual activity, based on the argument that it is against cultural values, immoral and a religious abomination.[953] Consequently, it is considered inappropriate for the Zimbabwean government to legalise homosexuality or decriminalise consensual adult same-sex relationships and practices. This is because of it is a moral issue rather than a legal issue. The current legal framework in Zimbabwe remains inadequate for the protection and promotion of lesbian and gay rights, largely due to ongoing cultural denial and the legacy of colonial laws.

The chapter incorporates Michel Foucault's analysis of the discursive construction of sexuality, emphasising how knowledge and power structures shape societal attitudes toward homosexuality. He looks at how homosexuality has been historically constructed and socially constituted. Further he explains how homosexuality was medicalised and was implanted in bodies. Foucault's work helps contextualise the historical "problematisation" of homosexuality in both Western and African contexts, illustrating how sexual identities are constructed and regulated through social and legal institutions. On sexuality as a product of power and knowledge, Foucault argues that what societies know and say about sexuality is not neutral or objective. Rather, it is produced by institutions (like medicine, law, and religion) that have the power to define, classify, and control sexual behaviours and identities. This is what he calls the "discursive construction" of sexuality. Foucault further pointed out that the modern system of sexuality was based on the medicalisation of sex and pleasure and the creation of sexual species.[954] In the 19th century, Foucault notes that homosexuality was no longer just an act or behaviour; it became a category of personhood, a "species." Medical and legal discourses began to define the "homosexual" as a particular type of individual, with specific psychological and social characteristics. This process of categorisation allowed for new forms of surveillance and control.[955]

[953] The Holy Bible in the Old Testament says, "Thou shall not lie with mankind as with womankind: it is an abomination, Leviticus 18:22. The Holy Bible, King James Version. Leviticus 20:13, "if a man also lie with mankind as with woman, both of them have committed an abomination, they shall be put to death, their blood shall be upon them"

[954] Foucault 1978: 58

[955] Foucault, 1978: 43.

Foucault uses the term “problematisation” to describe how certain behaviours (like homosexuality) became objects of concern, debate, and intervention by authorities. This means that homosexuality was not “discovered,” but rather “constructed” as a social problem through scientific, legal, and moral discourses. Contrary to the common belief that sexuality was simply repressed in the past, Foucault argues that the modern era saw a proliferation of talk about sex, what he calls the “incitement to discourse.” This led to more detailed regulation and management of sexuality, rather than its suppression.

The Chapter went on to look at the Zimbabwean legislative framework with regard to sexual minority rights. It is submitted that although the Zimbabwean Constitution recognises all citizens’ inherent dignity and guarantees the respect for that right, homosexual people have suffered state-sponsored homophobia and harassment for a long time due to the culture of denying them their rights. Further, the Constitution prohibits same-sex marriages which has been used as a constitutional basis for denying the rights of homosexual people.[956] Further, the Criminal Law (Codification & Reform) Act (Chapter 9:23) of Zimbabwe (the Criminal Law Act) still penalises sodomy.[957] This persisting criminalisation of homosexuality in Zimbabwe, along with the lack of protection and promotion of sexual minority rights, contributes to the perpetuation of homophobia.

The historical and cultural evidence presented in this chapter demonstrates that homosexuality is not a Western import but has deep roots in African societies. The criminalisation and stigmatisation of same-sex relationships are largely products of colonial intervention and the imposition of foreign legal and moral codes. Understanding this history is crucial for challenging contemporary discrimination and advocating for the rights of sexual minorities in Africa.

Chapter 3 critically examines the position of international and regional legal frameworks for the protection of sexual minority rights, with a particular focus on the tension between universal human rights standards and cultural relativism in Africa. It is submitted that there is no international human rights treaty specifically dedicated to sexual minority rights.[958] Instead, protection is derived from general human rights

[956] The Constitution of Zimbabwe Amendment No 20 of 2013, Section 78
[957] The Criminal Law (Codification & Reform) Act (Chapter 9:23) Section 73
[958] Viljoen 2011

instruments, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). International human rights legislation lays down obligations for states to comply with. Through ratification, international human rights treaties require governments to implement domestic legislation that aligns with their obligations and duties. States that ratified these instruments are obligated to respect, protect, and fulfill the rights of all individuals, including sexual minorities, by refraining from discrimination, preventing third-party violations, and creating conditions for the realisation of rights.

At the international level, the chapter looked at international human rights protections which are enshrined in the Universal Declaration on Human Rights (Universal Declaration),[959] The International Covenant on Economic Social and Cultural Rights,[960] and the International Covenant on Civil and Political Rights (ICCPR), together with monitoring mechanisms.[961] At the regional level, the chapter examined the African human rights system,[962] while outlining some of the human rights protections that the system offers to sexual minorities.[963] The chapter highlights the ongoing conflict between universalism (the idea that human rights are inherent and apply to all people) and cultural relativism (the belief that rights should be interpreted within specific cultural contexts). Many African states invoke cultural relativism to resist the extension of sexual minority rights, framing them as Western impositions. However, this stance often impedes social progress and is used to justify discrimination. The chapter argues that courts and human rights actors must adopt creative approaches, drawing from local philosophies and religious texts, to reconcile universal human rights standards with cultural contexts.

The UN system offers several mechanisms to protect sexual minority rights. These include communications. Individuals can bring complaints to the Human Rights Committee (HRC) under the ICCPR. Landmark cases such as ***Toonen v Australia***[964]

[959] It was adopted in 1948 by UN member states and contains *jus cogen* rights. Sepulveda et al 2004: 14

[960] Was signed and ratified in 1966 on the General Assembly resolution 2200 A (XXI)

[961] It has 166 state parties which was signed and ratified in 1966 by the General Assembly resolution 2200 A (XXI) and entered into force by 1976 in relation to sexual minority rights.

[962] Which includes the African Commission, the African Charter on Human and People's Rights (ACHPR)

[963] Viljoen 2007; Ankumah 1996

[964] Communication 488/92, HRC, U.N Doc. CCPR/c/50/D/488/1992 (March 1994)

established that “sex” includes sexual orientation, setting a precedent for non-discrimination. However, no African country has had a communication considered on sexual minority rights, partly due to procedural barriers and lack of accessibility. There is also state reporting, where States are required to report on their human rights practices. The HRC has repeatedly called for the decriminalisation of same-sex conduct and criticised discriminatory laws. However, the effectiveness of this mechanism is limited by frequent reporting defaults and the absence of sanctions for non-compliance. In addition to this, treaty bodies issue general comments to clarify the scope and interpretation of treaty provisions, reinforcing the principle of non-discrimination on the basis of sexual orientation.

The HRC put forward two arguments for extending protection to homosexuals. First it was argued that homosexuals should be treated as a sexual minority group that needs special protection by the international HRC. Second, they argued that same-sex sexual acts take place in private, between consenting adults therefore their activities do not cause any harm to the public and therefore state interference should be limited to protect their right to privacy.

The African human rights system, particularly the African Charter on Human and Peoples’ Rights (ACHPR) and the African Commission, provides some protections for sexual minorities. However, these are often constrained by prevailing cultural attitudes and legal frameworks in member states. The chapter explored the three bodies under the African Human Rights system and their impact on sexual minority rights. It analysed the African Charter on Human and Peoples’ Rights, which established the African Commission that promotes and protects human rights in Africa. The ACHPR is the first and only regional human rights instrument to embody peoples’ rights and individual and state duties.[965] The Charter mandates State parties to respect, protect, promote and fulfill the rights recognised.[966] However, like any other international instrument, the ACHPR does not mention homosexual rights, which does not however mean that it omits these rights.[967] It however recognises universally accepted political

[965] Viljoen 1997:47
[966] Heyns 2002:138
[967] Jjuuko 2017:267

and civil rights, which include non-discrimination,[968] equality[969] and freedom from cruel and degrading treatment.[970]

Besides incorporating these rights, the Charter uses a Universalist language which is all-inclusive, including the use of 'every person'. The chapter explored the fact that although the Charter provides for these rights, it however has limitations to these rights, where it incorporates claw-back clauses that have allowed State parties under the treaty to avoid their obligations.

The chapter further examined the African Commission on Human and People's Rights, which is a body established under the ACHPR to protect human and people' rights. It has promotional and protective obligations. The chapter emphasised the interdependence and alignment needed between international and regional systems to effectively protect sexual minority rights. It advocates for substantive limitations on state interference in consensual same-sex relations between adults, invoking the "harm principle", the idea that private conduct that does not harm others should not be subject to state regulation or discrimination. International practice increasingly interprets the rights to non-discrimination and privacy as encompassing protections against the criminalisation of same-sex conduct.

However, significant challenges remain, including procedural barriers to accessing international mechanisms, a lack of awareness, and persistent cultural and political resistance. The chapter recommended that human rights bodies and courts act as independent custodians of justice, upholding universal human rights standards while engaging constructively with local cultural and religious contexts.

Chapter 4 looked at what can be done to protect, promote, realise and legalise sexual minority rights amid cultural barriers. Zimbabwe's debate on sexual minority rights is heavily influenced by cultural, religious, and political rhetoric that frames homosexuality as "un-African." This perception shapes both public policy and daily life, resulting in widespread discrimination against lesbian and gay individuals. Despite Zimbabwe's Constitution incorporating international human rights standards and a non-discrimination clause, it does **not explicitly protect sexual orientation**. Same-

[968] Article 2, African Charter on Human and People's Rights
[969] Article 3, African Charter on Human and People's Rights
[970] Article 5, African Charter on human and People's Rights

sex marriage remains constitutionally banned, and homosexual individuals are vulnerable to legal penalties, social stigma, violence, and marginalisation. This shows that there is a clear gap between formal legal protections and the lived realities of sexual minorities, demonstrating that legal recognition alone does not guarantee substantive protection or eliminate discrimination.

The chapter examined how the rights of sexual minorities can be protected through the use of constitutional rights enshrined in the Constitution. It looked at how the rights to equality, human dignity and privacy could be interpreted and applied in favour of decriminalisation of same-sex sexual acts. The role of courts was looked at with regard to how the courts could interpret the rights to equality, human dignity and privacy progressively and privately protect the rights of gays and lesbians, on the one hand and how the parliament could repeal the provision criminalising sodomy and same-sex sexual conduct. The chapter investigated how international human rights principles have been used to address discrimination against sexual minorities and improve their protection in Zimbabwe. It highlighted the importance of aligning national laws and practices with these international standards and explored how Zimbabwe could benefit from adopting such principles.

The chapter went on to look at best practices from other jurisdictions like South Africa which served as a leading example. It is the first African country to include sexual orientation as a protected ground in its Constitution. The landmark case ***National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others***[971] led the Constitutional Court to declare laws criminalising homosexual conduct unconstitutional, based on the equality clause in the South African Constitution. South Africa legalised same-sex marriage through the Civil Unions Act 17 of 2006, following the Constitutional Court's decision in ***Minister of Home Affairs v Fourie***,[972] which was grounded in Section 9 of the Constitution prohibiting discrimination based on sexual orientation. It is submitted that despite legal advances, societal resistance and public disapproval remain significant, showing that legal change must be accompanied by cultural and institutional shifts for genuine equality to be realised.

[971] 2000 2 SA (CC)
[972] 2006 (1) SA 524 (CC)

South African courts have extended rights to homosexual individuals in employment and benefits, as seen in cases like ***Satchwell v President of the Republic of South Africa*** **and** ***Langemaat v Minister of Safety and Security***[973]. The Promotion of Equality and Prevention of Unfair Discrimination Act prohibits hate speech and harassment based on sexual orientation, a model Zimbabwe could adopt to address hate speech and violence against sexual minorities. The Supreme Court of Kenya affirmed the right of homosexual individuals to freedom of association, ruling that it is unconstitutional to deny registration of organisations based on sexual orientation. This precedent could guide Zimbabwe in recognising and supporting advocacy groups for sexual minorities.

The chapter examined how equality clauses in foreign jurisdictions have provided constitutional arguments for decriminalising same-sex conduct. For example, the Indian Supreme Court in ***Suresh Kumar Koushal and another v Naz Foundation***[974] considered international precedents but ultimately relied on local context in its decision-making. Zimbabwe's equality clause, while closed-list, could be interpreted to include discrimination based on sex, forming a basis for challenging laws criminalising same-sex conduct. The concept of **substantive equality** is emphasised. True equality requires recognising and accommodating differences, not merely treating everyone the same. This approach is necessary to achieve the Constitution's commitment to equality for all, including sexual minorities.

The Chapter recommended legal reforms which should explicitly protect sexual orientation and decriminalise same-sex conduct, drawing on best practices from South Africa, Kenya and Botswana. In addition to this, non-legal strategies, such as public education, advocacy, and engagement with religious and community leaders, are vital for shifting societal attitudes and achieving substantive equality. The roles of courts, and civil society organisations are also critical in advancing and protecting sexual minority rights. It was shown that the judiciary has a significant role to play in the protection of sexual minority rights in Zimbabwe as illustrated by decided cases. Courts remain an avenue to be used by homosexual advocates to advance their rights. However, there is no clear indication on the direction to be taken by courts if the question of criminalisation of same-sex sexual acts is challenged on the basis of

[973] 2001 12 BCLR 1284
[974] The Naz Foundation case

violation of their rights to human dignity, equality and privacy. This is because of the prevailing political, legal, cultural environment as well as the impact of public opinion on court decisions.

Gay rights advocates should then think carefully about the framing of strategic litigation on issues around the decriminalisation of same-sex sexual acts before moving to courts to challenge penal provisions. It is clear that while public opinion is important in setting the parameters of a public discourse on the issues of homosexuality, it must not be permitted to override what is clearly legal doctrine in the analysis of the rights of gays and lesbians. Courts must then be cautious at all times to ensure that they do not reduce themselves to courts of public opinion by throwing away legal principles and pandering to the ideas and caprices of the majority.

Parliament was also argued in chapter four to have a dual role to play in the decriminalisation of same-sex sexual conduct in Zimbabwe. One is through passing an amendment to the criminal code to remove provisions that criminalise same-sex sexual acts. The other way is to give effect to a court decision that has invalidated sodomy laws on the basis of violating constitutional provisions.

The Chapter concludes that meaningful change requires confronting entrenched cultural norms and informal practices, not just formal legal reforms, because legal protections alone cannot transform deeply rooted social attitudes or eliminate discrimination. True progress demands a comprehensive approach that addresses both the structural and cultural dimensions of inequality, empowering marginalized communities and fostering societal acceptance to bridge the gap between law and lived realities.

5.3. Significance and Implications of the Findings

The findings in this study are of profound significance due to their challenge to entrenched misconceptions and cultural biases that have historically marginalised sexual minorities in Zimbabwe and broader African contexts. By meticulously tracing the existence of same-sex relationships from pre-colonial times to the present, this study dispels the pervasive notion that homosexuality is a recent, Western import alien to African cultures.[975] The anthropological and historical evidence revealing same-sex practices embedded in various African societies demonstrates that discriminatory laws

[975] Epprecht 2004: 20-60, 277-306

and attitudes are not grounded in indigenous cultural realities but largely stem from colonial impositions and imported religious doctrines.[976] This reconceptualisation is pivotal as it undermines the cultural relativist arguments frequently used to justify discrimination and criminalization of sexual minorities in Zimbabwe.[977]

The implications of the findings highlight a critical legal and social dissonance. Zimbabwe's legal framework, anchored by the 2013 Constitution and colonial-era sodomy laws, explicitly denies sexual minorities fundamental rights by criminalising consensual same-sex sexual acts and prohibiting same-sex marriages. These laws institutionalise state-sponsored homophobia and contradict Zimbabwe's international human rights obligations to uphold dignity, equality, and privacy regardless of sexual orientation.[978] The persistence of these laws prolongs systemic human rights violations and social exclusion of sexual minorities, adversely affecting their physical safety and mental well-being. The analysis illuminates that mere legal reforms, while necessary, are insufficient without addressing the cultural and religious narratives that sustain intolerance and prejudice.[979]

Furthermore, the study's engagement with Michel Foucault's theory on the discursive construction of sexuality offers critical insight into how sexual identities have been historically regulated and problematised through power structures such as law, religion, and medicine.[980] This framing reinforces the understanding that homophobia is socially and legally produced rather than naturally inherent, thus opening avenues for deconstructing these constructs and advocating for transformative justice and equality.[981]

The findings also underscore the tension between universal human rights principles and cultural relativism in African legal and political discourse. This tension often results in the exclusion of sexual minority rights from African human rights frameworks, despite the Universalist language in instruments like the African Charter on Human and Peoples' Rights.[982] The data expose procedural and substantive barriers within

[976] Tamale 2011: 80-98.
[977] Magashula & Ngwena 2023: 79
[978] Magashula & Ngwena 2022: 432-459
[979] Human Dignity Trust, Zimbabwe Country Profile, 2024; United Nations Development Programme (UNDP). "Zimbabwe Baseline Report: Insights into Human Rights and Social Inclusion of Sexual Minorities." 2022.
[980] Foucault 1990:133-160
[981] Kosofsky 1990; Foucault 1990:43-80
[982] Mutua 2002: Chigozie 2023:250-274

regional and international mechanisms that hinder effective legal recourse for sexual minorities, emphasizing the necessity for strategic litigation, judicial activism, and augmented regional human rights advocacy tailored to African contexts.[983]

From a policy perspective, the study highlights several critical pathways for advancing sexual minority rights in Zimbabwe. Legal advocacy focusing on the constitutional rights to equality, dignity, and privacy could challenge the constitutionality of sodomy laws and the prohibition of same-sex marriage.[984] Emulating jurisdictions such as South Africa, which has successfully integrated sexual orientation as a protected ground in its Constitution and enacted progressive legal reforms, is presented as a pragmatic model.[985] Equally important are non-legal approaches like public education campaigns, engagement with religious and community leaders, and civil society mobilization to transform societal attitudes and cultural resistance.

In essence, the significance of these findings lies in their potential to reframe the debate on sexual minority rights in Zimbabwe, from one dominated by cultural and moral condemnation to one grounded in historical truth, legal equality, and human dignity.[986] The implications compel policymakers, legal practitioners, and activists to confront cultural myths and colonial legacies that obstruct justice for sexual minorities. They demand a holistic approach that intertwines legal reforms with cultural and social transformation to create an inclusive society where sexual minorities enjoy substantive equality and protection from discrimination and violence.[987] Ultimately, the study makes a compelling case for the recognition and enforcement of sexual minority rights as an essential dimension of human rights and social justice within Zimbabwe and beyond.

5.4. Summary of Recommendations

The recommendations for the recognition of sexual minorities' rights in Zimbabwe provide a comprehensive and robust framework for legal, social, and cultural reforms to advance equality and human dignity amid entrenched barriers. The key recommendations are as follows:

[983] Mute 2023: 51-76
[984] S v Banana
[985] Section 9 of the Constitution of South Africa
[986] Epprecht & Clark 2020: 275-296.
[987] United Nations Development Programme (UNDP). "Inclusive Governance Initiative: Zimbabwe Baseline Report," 2022; Epprecht & Clark 2020: 275-296.

First, legal reforms are paramount. The study strongly urges the repeal of colonial-era sodomy laws criminalising consensual same-sex conduct and the removal of constitutional prohibitions on same-sex marriage. Drawing from the progressive experience of jurisdictions like South Africa and Botswana, the study emphasises interpreting Zimbabwe's equality clause progressively to include sexual orientation as a protected ground, employing the "sex discrimination argument" that sodomy laws constitute discrimination based on sex.[988] Additionally, the right to privacy and human dignity, enshrined constitutionally and supported by international human rights jurisprudence, should be leveraged to challenge discriminatory laws. The study stresses the need for Zimbabwe to adopt an open-list approach in its equality clause to broaden protection against discrimination, allowing new grounds such as sexual orientation to be included.[989]

Second, the judiciary bears a critical role in advancing sexual minority rights through judicial activism. Courts should interpret constitutional provisions creatively and independently, disregarding public opinion when adjudicating minority rights issues, thus safeguarding human dignity and equality even amid societal resistance. The judiciary's mandate includes reviewing and invalidating laws inconsistent with constitutional guarantees and international human rights obligations, thereby spearheading legal change. Recognizing the judiciary as a guardian of fundamental rights encourages strategic litigation and landmark judgments that can dismantle discriminatory legal frameworks.[990]

Third, the study highlights the indispensable role of civil society organizations (CSOs) and advocacy groups in lobbying, litigating, and educating to shift public discourse and policy. Groups like GALZ in Zimbabwe exemplify grassroots activism vital for raising awareness, protecting community rights, and building alliances that echo the successful strategies employed in other African contexts. Public interest litigation spearheaded by CSOs can serve as a catalyst for progressive court decisions, while advocacy can mobilize support for legislative reforms.[991]

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[988] Mutua 2002: 200-230

[989] A Guide for the Litigation of Economic, Social and Cultural Rights in Zimbabwe, 2015: 184-220.; Epprecht: 2012: 15-30

[990] Epprecht 2013; Bronwen 2021: 15-30

[991] Our Story | Zimbabwe | MPact Global Action, https://mpactglobal.org/wp-content/uploads/2021/06/BTG-Story-of-Change_Zimbabwe.pdf (Accessed 09 October 2025)

Fourth, a paradigm shift is necessary in societal attitudes, which requires targeted public awareness campaigns and inclusive education. These campaigns should focus on dismantling myths about sexual minorities, fostering empathy, and promoting understanding of human rights principles. Integration of LGBTQ+ topics into curricula across educational levels can cultivate tolerance early, reducing stigma and discrimination. Sensitization efforts should also engage religious leaders as change agents, encouraging dialogue that reconciles cultural values with human rights.[992]

Fifth, comprehensive anti-discrimination legislation is essential to extend legal protections beyond criminal law reforms. The enactment of equality laws that explicitly prohibit discrimination based on sexual orientation across employment, housing, healthcare, and public services will promote substantive equality and social inclusion. Mechanisms to address hate crimes and protect vulnerable minorities are also necessary components of such legislation.[993]

Sixth, political will and parliamentary action are pivotal. The legislature must proactively amend or repeal discriminatory laws, including criminal codes and family laws like the Marriage Act and Children's Act, to remove heteronormative definitions and enable recognition of diverse family structures. Parliamentary endorsement of human rights reforms signals national commitment and complements judicial and civil society efforts.[994]

Finally, the study advocates for harmonising national laws with international human rights treaties to which Zimbabwe is a party. Courts and policymakers should consistently consider international conventions and foreign jurisprudence in constitutional interpretation and legislative reforms. This alignment not only respects Zimbabwe's treaty obligations but also situates the country within evolving regional

[992] The Other Foundation, "Canaries in the Coal Mines – An Analysis of Spaces for LGBTI Activism in Zimbabwe" (2017) https://theotherfoundation.org/wp-content/uploads/2017/02/Canaries_Zimbabwe.pdf (Accessed 09 October 2025)

[993] The Gay Oral History Project in Zimbabwe: Black Empowerment, Human Rights, and the Research Process, Cambridge University Press, 2014 https://www.cambridge.org/core/journals/history-in-africa/article/gay-oral-history-project-in-zimbabwe-black-empowerment-human-rights-and-the-research-process/160FBF959FB659BE8E4812D8D6A745CA (Accessed 09 October 2025)

[994] Legal Grounds: Reproductive and Sexual Rights in Sub-Saharan African Courts, Volume III, Pretoria University Law Press (PULP), 2017, https://www.chr.up.ac.za/images/publications/legal_grounds/chapter2/lg-40_child_marriage_zimbabwe.pdf (Accessed 09 October 2025)

and global human rights frameworks promoting dignity, equality, and non-discrimination for sexual minorities.[995]

In summary, the recommendations form an interlinked strategy that combines legal reform, judicial independence, civil society advocacy, public education, legislative action, and international cooperation. The study underscores that legal changes alone are insufficient without addressing cultural resistance; thus, holistic efforts to transform societal attitudes are essential. Through sustained, multifaceted approaches, Zimbabwe can move towards the substantive recognition, protection, and promotion of sexual minority rights, closing the gap between constitutional ideals and lived realities for LGB individuals.

[995] Murray, Stephen O & Wieringa 2005: 20-60

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