

**Midlands State
University**

Established 2000



**“RETHINKING SEXUAL MINORITY RIGHTS IN THE CONTEXT OF THE
ZIMBABWEAN CONSTITUTION”**

TANAKA MUGANYI

REG NO:- R168188Z

SUPERVISOR – DR TARISAI MUTANGI

**SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS OF
A MASTER OF LAWS DEGREE IN ADVANCED CONSTITUTIONAL
AND HUMAN RIGHTS LAW**

OCTOBER 2017

ACKNOWLEDGEMENTS

I would like to extend my sincere gratitude to my supervisor Dr T Mutangi for providing direction and guidance to this work. I owe a debt of gratitude to my classmates and the rest of the Faculty of Law members, mum and dad for their unwavering support during the study.

DEDICATIONS

I dedicate this research to my **wife Privilege** with all the love and our two precious kids **Emmanuel** and **Kimberly**. Mathew **26 v 41** watch and pray, that ye enter not into temptation: the **spirit** indeed is **willing but the flesh is weak!!!**.

DECLARATIONS

I declare that this dissertation entitled *Rethinking Sexual Minority Rights in the context of the Zimbabwean Constitution* is my work and that it has not been submitted before to any degree or examination in any other university and that all sources I have used or cited have been indicated as references.

R168188Z

SIGNED

Date

..... .

Signature

.....

ABBREVIATIONS

LGBT- Lesbians Gays Bisexual and Transgender

CEDAW- Convention on the Elimination of All Forms of Discrimination Against Women

ACHPR- African Charter on Human and People's Rights

GALZ- Gays and Lesbians Association of Zimbabwe

ICCPR- International Covenant on Civil and Political Rights

ICESCR- International Covenant on Economic, Social and Cultural Rights

UDHR- Universal Declaration of Human Rights

ABSTRACT

The subject of sexual minority rights is a very controversial issue in the African society. The conventional understanding of sexual minority rights draws its inspiration from culture and religion to the effect that such conduct is unnatural, taboo and has no place in the African social system. Zimbabwe mirrors this conceptualisation of sexual minority rights and both laws and jurisprudence have depicted this intolerance, opting to be associated with the conventional view that shuns sexual minorities. While such is the prevalent ethos, proponents for sexual minority rights have however castigated this discriminatory tendencies in Zimbabwe arguing that laws and conduct that discriminates sexual minority groups run afoul of the international human rights regime. Zimbabweans embraced a new Constitution in 2013 which has an elaborate declaration of rights with the non-discrimination clause (Section 56) as one of the fundamental provisions therein. It is against this development that this study seeks to explore the sustainability of the intolerance towards sexual minorities, legally insofar as Zimbabwe's Constitution is concerned. It is argued herein that albeit the socio-cultural and religious motives attached to this subject, sexual minority rights must be treated as a human rights issue pursuant to understanding the arguments posed for and against embracing them.

Table of Contents

ACKNOWLEDGEMENTS.....	i
DEDICATIONS.....	ii
DECLARATIONS.....	iii
ABBREVIATIONS.....	iv
ABSTRACT.....	v
CHAPTER 1.....	1
1.0 INTRODUCTION.....	1
1.1 BACKGROUND OF STUDY.....	2
1.2 LIMITATION OF STUDY.....	7
1.3 STATEMENT OF PROBLEM.....	8
1.4 RESEARCH QUESTIONS.....	9
1.5 METHODOLOGY.....	9
1.6 SIGNIFICANCE OF STUDY.....	10
1.7 CHAPTER SYNOPSIS.....	10
CHAPTER 2.....	12
International legal position and theoretical framework of sexual minority rights.....	12
2.0 Introduction.....	12
2.1 Definitions of sexual minorities.....	12
2.2 Universal Declaration of Human Rights.....	13
2.3 International Covenant on Civil and Political Rights.....	15
2.4 International Covenant on Economic, Social and Cultural Rights (ICESCR).....	17
2.5 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).....	20
2.6 African Charter on Human and People’s Rights.....	21
2.7 Theoretical framework.....	23
2.7.1 Cultural Relativism and Ubuntu legal theories.....	23
2.7.2 Value based interpretation.....	25
2.8 Conclusion.....	27
CHAPTER 3.....	28
Sexual minority rights in Zimbabwe.....	28
3.0 Introduction.....	28
3.1 Rights of LGBT persons under the Lancaster House Constitution.....	28
3.1.1 Preamble to the Declaration of Rights.....	29
3.1.2 Protection from discrimination of the grounds of race <i>inter alia</i>	29
3.2 Constitution of Zimbabwe Amendment Number 20 Act 2013.....	30
3.2.1. The right to equality and non-discrimination.....	31
3.2.2 The right to privacy.....	34
3.2.3 The right to human dignity.....	34

3.2.4 Gender Balance as a National Objective.....	35
3.2.5 Recognition of other rights not expressly enshrined in the declaration of rights.	36
3.3 Limitation of Rights and Freedoms	36
3.3.1 Law of General Application.....	37
3.3.2 Reasonableness and justifiability in an open and democratic society based on human dignity, equality and freedom.....	38
3.4 Acts of Parliament and subsidiary legislation	39
3.4.1 Criminal Law (Codification and Reform) Act.....	39
3.5 Conclusion.....	40
Chapter 4.....	41
Comparative Jurisprudence on Sexual minority rights	41
4.0 Introduction	41
4.1 Malawi.....	42
4.1.1 Constitutional and Legal Framework on sexual minority rights in Malawi.	42
4.1.2 Other Pieces of Legislation.....	43
4.1.3 Penal Code of Malawi	44
4.1.4 The Marriage, Divorce and Family Relations Act.....	44
4.1.5 Judiciary’s Approach to Sexual Minority Rights.....	45
4.2 South Africa.....	46
4.2.1 The Constitution of South Africa.....	46
4.2.2 The attitude of the courts towards sexual minority rights in South Africa.	47
4.3 United States of America	50
4.3.1 Legislative framework.....	51
4.3.2 Courts’ Approach	52
4.4 Conclusion.....	53
Chapter 5.....	54
Conclusions and Recommendations	54
5.0 Introduction	54
5.1 Conclusions	55
5.2 Recommendations	57
5.2.1 Law Reform	57
5.2.2 Education	58
5.2.3 Judicial Activism	58
5.3 Limitations to the above recommendations.....	59
5.4 Conclusion.....	60
Bibliography	62

CHAPTER 1

1.0 INTRODUCTION

The attack and exclusion of the minority in Zimbabwe based on sexual orientation has steered much debate on the recognition of gays, lesbians and transgender persons in the political, social and legal circles. Proponents for sexual minority rights have profoundly tried to foster the inclusion of gays, lesbians and transgender persons within the protection of fundamental human rights. Their efforts however remain drowned in vain hence suggesting that a lot still has to be done. This therefore paves way for this study to shed light as to the nature and consequently to who fundamental human rights accrue.

Regardless of there being a multiplicity of technical definitions submitted by different scholars, homosexuality simply refers to the experience of being erotically attracted to a member of the same sex¹. Lesbians have been viewed as women who are attracted to other women, romantically and/or sexually.² The same definition has been extended to gays only differing in that in their context, men are the parties.³ A widely accepted definition of transgender entails that it is a term used to describe people whose birth-sex, gender identity and gender expression do not match at all.⁴ To interrogate the rights that accrue to such people in this study, focus will be narrowed down to the right to equality and non-discrimination⁵ being reinforced by the right to privacy⁶ and the right to human dignity⁷. An outline and introspection of the relevant internal legislation which includes the current Constitution, the Criminal Law (Codification and Reform) Act⁸, the Labour Act⁹ inter alia will be given. Pursuant to the above, will be an analysis of the regional instruments chief amongst them the

¹D J West *Homosexuality: Its Nature and Causes* (1960) 10.

² Southern Africa Litigation Centre (2016) 'Laws and Policies Affecting Transgender Persons In Southern Africa.

³Using the Courts to Protect Vulnerable People: Perspectives from the Judiciary and Legal Profession in Botswana Malawi and Zambia' (2015) *Southern African Litigation Centre* ISSN 978-0-620-62999-7

⁴ Laws and Policies Affecting Transgender Persons (n 2 above)

⁵ Section 56 Constitution of Zimbabwe Amendment No. 20 of 2013

⁶ Section 57(n 5 above)

⁷ Section 51 (n 5 above)

⁸ Criminal Law (Codification and Reform) Act [Chapter 9:23]

⁹ Labour Act [Chapter 28:01]

African Charter on Human and People's Rights. International instruments will also be invoked paramount being the Universal Declaration of Human Rights, Convention on the Rights of the Child, the International Covenant on Civil and Political Rights¹⁰ inter alia. This will be in a bid to review Zimbabwe's adherence to its obligations under international legal framework.

Thereafter, the locus classicus on the subject in Zimbabwe which is the case of *S v Banana*¹¹ will be a solid rock for analysis on the judicial approach to the subject at hand. Notwithstanding that, South African and internationally celebrated cases such as the *National Coalition of Gays and Lesbians v Minister of Justice*¹², *Obergefell v Hodgers*¹³, *Vriend v Alberta*¹⁴, *Bowers v Hardwick*¹⁵ cases will also be subject to analysis.

It will also be trite to review and assess scholarly and theoretical approaches in relation to the subject at hand. To further assess whether the current stance in Zimbabwe is justified, there will be a section on comparative jurisprudence to be assessed vis a vis the state of affairs in the Zimbabwean value based system. All the afore will be in a bid to proffer avenues for possible developments in the law that recognise and protect fundamental human rights for all of humanity without discrimination based on sexual orientation.

1.1 BACKGROUND OF STUDY

In 2013, the Zimbabwean people welcomed a Constitution¹⁶. This Constitution was ushered in amid realisation of the unequivocal inadequacy of the former Constitution which had been characterised by the adoption of several amendments. The main reason for the numerous amendments being that it was more of a cease fire deal than a people's Constitution.¹⁷ Paramount in this home-grown new order is a more elaborate and detailed declaration of rights that by international standards, enhances

¹⁰International Covenant on Civil and Political Rights (1966)

¹¹*S v Banana* 2000 (1) ZLR 607

¹²*National Coalition of Gays and Lesbians v Minister of Justice* CCT 11/98

¹³*Obergefell v Hodgers* 576 US (2015)

¹⁴*Vriend v Alberta* (1994) 20 CHRRD/358

¹⁵*Bowers v Hardwick* 478 US 186 (1986)

¹⁶Constitution of Zimbabwe Act No. 20 ,2013

¹⁷The Constitution had been amended 19 times prior to the ushering in of the 2013 Constitution.

the ethos of human rights.¹⁸ Of key interest in this study, is the right to equality and non-discrimination which is guaranteed to all persons in terms of section 56 of the Constitution¹⁹. Against that backdrop, there was an aura of profound anticipation that with the coming in of a new order, the rights of sexual minority groups would be promoted and fulfilled. However in essence, sexual minority rights issues have remained a taboo in the Zimbabwean societal and jurisprudential spheres. This therefore inspires the possibility of reforms in terms of section 56(6) of the Constitution.

It is trite to appreciate that the legislation in Zimbabwe has blatantly shown intolerance for gay people since time immemorial from the common law era to the present statutory position.²⁰ Section 73 of the Criminal Law (Codification and Reform) Act²¹ makes it clear that penetration per anum between males is a crime and it is punishable at law²². Even more, the provision further criminalises any other conduct that is akin to sexual activity between males labelling it as an unnatural offence.²³ Against this backdrop, it becomes problematic as to how such a provision can still be part of our laws in the light of the new constitutional order which makes it imperative that discrimination be eradicated.

A closer introspection into the issues of sexuality shows that the crux of the rights of sexual minority groups has been controversial throughout the development of jurisprudence.²⁴ In Zimbabwe, it would be unjust to any study on gay rights to omit two decisive events. Firstly, the Book Cafe incident in 1995²⁵ and the case of *S v Banana* both in the High court and the penultimate Supreme Court decision²⁶. It is on

¹⁸ J Mavedzenge and D A Coltart *Constitutional Guide: Towards Understanding Zimbabwe's Fundamental Socio-Economic and Cultural Rights* (2014)

¹⁹ Section 56(1) (n 16 above)

²⁰ Common law position stipulated that sodomy was an offence : See *S v Banana* 1998(2) ZLR at page 541 and *R v Masuku* 1968 (2) RLR 332

²¹ Criminal Law (Codification and Reform) Act [Chapter 9:23] Also discussed in L Renee 'Lesbian and Gay Rights in Zimbabwe' <http://www.wcl.american.edu/hrbrief/v512/html/zimbab.htm> (Accessed on 22 January 2017)

²² Section 74 (n 20 above)

²³ (n 20 above)

²⁴ Gays and Lesbians of Zimbabwe (2009) 'Sexual Orientation and Zimbabwe's Constitution : A case for inclusion' <http://archive.kubatana.net> (Accessed on 16 January 2017)

²⁵ The Gays and Lesbians Association of Zimbabwe (GALZ) clashed with the President who castigated them for their sexual orientation cited in M. Ilyayambwa 'Homosexual Rights and the Law: A South African Constitutional Metamorphosis' (2012) Vol. 2 No.4 *International Journal of Humanities and Social Science*.

²⁶ *S v Banana* 1998 (2) ZLR 533 (H) *S v Banana* 1999 (1) ZLR 50 (H) and *S v Banana* 2000 (1) ZLR 607 (S)

the basis of these two controversial events that silence was broken and the stage was set for the question on sexual minority rights to be mooted.

The Book Cafe incident of 1995 involved the clashing of Gays and Lesbians Association of Zimbabwe (GALZ) an association for gays and lesbians which had sought reservation for a stand at the Book Cafe, with the highest political authority in the country, the President. The subsequent utterances by the President of Zimbabwe in which he explicitly lambasted homosexuality and gay rights, mirrored the conservative society's philosophical conceptualisation.²⁷ It became common cause that homosexuality was perceived with disgust in the light of a culture punctuated by strong religious influences which could not fathom having such different people.

As alluded to earlier, a more topical event which brought the judiciary into the fray was the case of former President of Zimbabwe Canaan Banana who was arraigned before the courts on several counts of sodomy.²⁸ Acknowledging the ethos of judicial activism, the court had a chance to possibly inspire a paradigm shift from the discrimination based on sexual orientation. However, the Supreme Court regards to the majority decision, proved conservative and delivered a value based judgement which saw sodomy remaining a crime as according to them, it upset culture to its roots²⁹. Albeit the majority judgement having fostered the panorama of conservatism, the dissenting judgments by Justice Gubbay and Justice Ebrahim still provide solid arguments that warrant revisiting especially under the auspices of a new constitutional rights regime.

Internationally, the proponents of human rights have categorically emphasised the fundamentality of the principle of universality of rights. This entails that human rights must accrue to everyone by virtue of them being human³⁰. The Universal Declaration of Human Rights³¹ (UDHR) in its preamble heralded the fundamentality of the principle of universality towards the realisation of fundamental human rights³² and so

²⁷ President Mugabe uttered words to the effect that, "I find it outrageous and repugnant to my human conscience that such immoral and repulsive organisations like those of homosexuals, who offend both the agents of the law of nature and the morals and religious beliefs espoused by our society, should have any advocates in our midst or even anywhere in the world." cited in M. Ilyayambwa, (n 25 above) p 57

²⁸ *S v Banana* 1998 (n 26 above)

²⁹ *S v Banana* 2000 (n 26 above)

³⁰ "UN issues first report on human rights of gay and lesbian people" 15 Dec 2011 <http://www.un.org> (Accessed on 16 January 2017)

³¹ Universal Declaration of Human Rights of 1948

³² See also Article 7 (n 31 above)

does the African Charter at a regional level.³³ The United Nations Human Rights Commission³⁴ also captures the fundamentality of the right to equality emphasizing that it must be respected and thus in no way must sexual orientation be a basis for discrimination.

The study herein has therefore been necessitated by the realisation that the much anticipated 2013 Constitution is now in full swing regards to its implementation ushering in a new regime of rights in Zimbabwe. The conundrum is that people of a different sexual orientation continue to be discriminated against regardless of the Constitutional non-discrimination clause³⁵. 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.³⁶

Moreso, events in the jurisprudence of South Africa from the case of *National Coalition for Gay and Lesbian Equality v Minister of Justice and Others*³⁷ to the entrenchment of Section 9 in the South African Constitution have made it plausible to investigate why South Africa has shunned discrimination based on sexual orientation yet Zimbabwe has not.³⁸ Particularly, the study of South Africa is crucial because it is a country we have close proximity to, share the same legal history³⁹ and an almost identical Bill of Rights. The impact of the omission of 'sexual orientation' as a prohibited ground for discrimination in Section 56 (3) of the Zimbabwean constitution⁴⁰ which is contrary to Section 9 of the South African constitution which includes such a ground⁴¹ calls for a study also to investigate if that can suffice as justification for the discrimination.

Herein, the antagonistic scholarly views on the interpretation of the leading international instruments establishing fundamental human rights such as the UDHR and the ICCPR will be expounded. The argument to be advanced is that the protection of people on the basis of sexual orientation and gender identity does not

³³ Article 3: African Charter on Human and People's Rights (Banjul Charter) Adopted 27 June 1981 and entered into force 21 October 1986

³⁴ <http://ap.ohchr.org> ^ "HRC Resolution 27/32 on "human rights & SOGI"

³⁵ Section 56 (n 16 above)

³⁶ Iliyambwa (n 25 above)

³⁷ *National Coalition for Gay and Lesbian Equality v Minister of Justice and Others* 1999 (1) SA 6

³⁸ (n 37 above)

³⁹ B Dube 'Roman-Dutch and English common law: the indispensable law in Zimbabwe' (2014) Vol. V, No 4. Quarter IV *Afro Asian Journal of Social Sciences*.

⁴⁰ Section 54 (3) (n 16 above)

⁴¹ The Constitution of the Republic of South Africa Act 108 of 1996

require the creation of new rights or special rights for LGBT persons but rather requires enforcement of the universally applicable guarantee of non-discrimination in the enjoyment of rights.⁴² Furthermore, they do provide that the rights to equality and non-discrimination are integral to the notion of universality of rights, an area indispensable to the cross-cutting rights system.⁴³ On the contrary and as expected, some scholars advocate that we ought to construe the equality clauses as they are and not try to super impose sexual orientation as a prohibited ground of discrimination mainly because heterosexuality has been regarded as the norm throughout the history of mankind.⁴⁴ Rudman is of the view that customary international law cannot be viewed as having developed to a point where it includes discrimination based on sex as a prohibited ground of discrimination.⁴⁵

Furthermore, there is a huge tension between the leading theorists of sexual orientation which are the conservatives and the liberals. The former are doggedly clinging on the view that homosexuals and transgender persons are a threat to the society.⁴⁶ Moreover, the efforts especially from the cultural and religious spheres to ensure sexual purity of its youth compound the fear and trepidation with guilty and shame.⁴⁷ They argue that natural law is in no position to see the acceptance of homosexuality. The liberalists on the other hand believe in the equality of all human beings and assert that humans have different opinions as they have freedom of conscience. As such, every human being has the right to enjoy the same fundamental rights regardless of the difference in opinion.⁴⁸

Another scholarly infested area of interest deals with the theories of equality and non-discrimination. Formal equality theorists take the heterosexual model as the norm and then seek to show that gays and lesbians (except for their choice of partners) are just like heterosexuals.⁴⁹ However, Professor Levit propounds that there should

⁴² United Nations Office of the High Commissioner of Human Rights 'Born Free and Equal: Sexual Orientation and Gender Identity In International Human Rights Law' (2012) 10-11

⁴³ D Petrova 'The use of equality and anti-discrimination law advancing LGBT rights' <http://sas-space.sas.ac.uk/4819/1/18Petrova.pdf> Accessed on 20 January 2017

⁴⁴ M Coutinho 'Lesbian and Gay Life in Zimbabwe' in A Hendricks (ed) *The Third Pink Book* (1993)

⁴⁵ A Rudman 'The protection against discrimination based on sexual orientation under the African human rights system' (2015) Vol.15 No. 1 *African Human Rights Law Journal*.

⁴⁶ K Kaoma 'Globalising the culture wars: US conservatives, African Churches and Homophobia' '2009 Res 1.10 'Human Sexuality' <http://www.lambetheconference.org/resolutions/1998/1998-1-10cfm> (Accessed on 17 January 2017)

⁴⁷ R Phillips 'Conservative Christian Identity and same-sex orientation: The case of Gay Mormons' (2005) Also discussed in D Petrova (n 43 above) pg 478

⁴⁸ J Pierceson 'Courts, Liberalism, and Rights: Gay Law and Politics in the United States' (2005)

⁴⁹ N Levit 'A different Kind of Sameness: Beyond Formal Equality and Anti-subordination Strategies in Gay Legal Theory' Vol. 16 No. 2 *Ohio State Law Journal*.

be a change in the rhetoric doctrine of equality theory by developing a theory of respect of the humanity of all people.⁵⁰ In so doing, the unified framework of equality has been proposed by other scholars which ushers equal respect, equal treatment and equal opportunity to all regardless of their sexual orientation.⁵¹

Cultural relativism is another key theory in understanding the resistance to sexual minority rights. It is associated with a general tolerance and respect for difference with the understanding that the cultural context is critical in understanding people's values, beliefs and practices.⁵² Proponents of this theory have submitted arguments to the effect that the diverse cultural landscape in the world makes it impractical to implement the concept of universality of rights⁵³. They categorically dismiss unqualified universalism as a vehicle for the West to clandestinely impose its social ideologies throughout the world⁵⁴. Cultural relativists also dismiss the individualistic perspective of rights in favour of focusing on the society as a whole⁵⁵. The implication to the society of affording rights to individuals to choose between homosexuality and heterosexuality becomes the paramount question which will be investigated. Pursuant to that, will be an interrogation to see if any reconciliatory formula can be derived between culture and human rights towards the inclusion of sexual minority rights.

Thus, arguments propounded by the mentioned schools of thought and the international jurisprudence on LGBT rights shall thus be crucial in the development of this discussion.

1.2 LIMITATION OF STUDY

Regardless of the crux of gay rights *vis a vis* the right to equality and non-discrimination being a very contentious issue, very little literature is available in respect of Zimbabwe. As a result, great reliance is placed upon regional and international literature. Exception to this being the afore mentioned case of *S v Banana*⁵⁶ which is the leading case affording vital information on the trajectory that

⁵⁰ Levit (n 49 above)

⁵¹ Petrova (n 43 above)

⁵² A Howson 'Cultural Relativism, EBSCO Research Starters' (2009) <https://www.ebscohost.com> (Accessed on 18 January 2017)

⁵³ Global Policy Forum 'Cultural Relativism vs. Universalism' (2005) <https://www.globalpolicy.org> (Accessed on 18 January 2017)

⁵⁴ (n 53 above)

⁵⁵ Howson (n 53 above)

⁵⁶ See (n 25 above)

prevails in Zimbabwe on sexual minority rights. Akin to the lack of literature on the subject at hand, is also the reality that the subject has been shunned by society in Zimbabwe immensely as unnatural since the Roman-Dutch law's inception⁵⁷. Therefore albeit the study being crucial and worthy, it is prone to be treated with scepticism by some parts of society.

Another crucial challenge which is likely to be encountered is the review of the issue from a more emotional and political perspective rather than as a legal study. The net effect of emotionalising and politicising the issue becomes ignoring reason and the actual position of the law in favour of expressing emotional discomfort on the issue. More so, political connotations may be implied from such a study. More imminent, is the allegation that the study is aimed at perpetuating western initiatives which seek to be imposed into Zimbabwe's human rights domain. Yet in actual fact, the document seeks to answer pertinent legal questions and against that, possibly inspire a legal regime that coincides with international human rights standards.

1.3 STATEMENT OF PROBLEM

The verdict and reasoning that was arrived at by the majority in *S v Banana*⁵⁸ can be interpreted to entail that gay and lesbian persons cannot be accorded rights simply because they differ from the majority view of heterosexuality, a view that was shunned in *Wisconsin v Yoder*.⁵⁹ However, that was then (during the old constitutional order). As it stands now, evidently there seems to be a clear gap in the law regarding the rights of sexual minority groups.

Fundamentally, it is subject to moot whether the exclusion of "sexual orientation" as a prohibited ground for discrimination in terms of section 56(3) makes it lawful for one to be discriminated on such a ground. More so, such lack of clarity raises another dilemma on whether the grounds stipulated in section 56(3) are exhaustive and no other prohibited grounds for discrimination can be read into the provision. Yet having said that, the wording of the provision ought to be taken into account which is to the effect that one cannot be discriminated "...on such grounds as..."

⁵⁷ Iiyayambwa (n 25 above) Also remarked In Coutinho,(n 45 above)

⁵⁸ *S v Banana* (n 25 above)

⁵⁹ *Wisconsin v Yoder* 406 US 205 (1972)

which is very problematic as to whether the provided are all the prohibited grounds for discrimination or simply part of a genus of possible grounds. In addition to that, it is not clear again as to how far the derogation of rights under section 86 (3) can go in derogating the rights of the minority.

1. 4 RESEARCH QUESTIONS

1. Did the 2013 Constitution usher any progressive changes in relation to sexual minority rights in Zimbabwe?
2. What is the international position regarding the rights of sexual minority groups?
3. What are the theoretical frameworks underpinning sexual minority rights and their relation to the Zimbabwean context?
4. What are the effects (positive or negative) of embracing the rights of gays and lesbians in the Zimbabwean society?
5. What measures need to be taken to achieve equality for sexual minority groups in Zimbabwe?

1.5 METHODOLOGY.

The writer will use a descriptive approach in outlining the Zimbabwean stance and perception on LGBT persons. This will encapsulate the relevant provisions, political and social influences leading to the discrimination and derogation of the rights of the minority based on sexual orientation.

A doctrinal approach will also be used in exploring the legal rules principles of equality and non-discrimination acclaimed internationally in the legal fraternity which include the formalistic and substantial approaches. In relation to this, the conceptual and philosophical basis both for and against according and protecting the rights of the minority who are being subjugated based on sexual orientation will be interrogated. The doctrine of margin of appreciation will also be explored in assessing Zimbabwe's response to the international instruments that seem to foster the recognition of LGBT persons and what is it that can be incorporated.

There is need to consider experiences from other jurisdictions. This will make a comparative approach necessary in which comparators such as South Africa will be looked at by virtue of similarities on the structuring of the constitutions and having the same legal system.⁶⁰ The United States of America has been chosen on the basis of being arguably a prototype democratic nation where respect for fundamental human rights thrives. The inclusion of Malawi is not only by virtue of its proximity to Zimbabwe but also its perceptions on the topic as a third world conservative country like Zimbabwe.⁶¹

1.6 SIGNIFICANCE OF STUDY.

The module under which this dissertation is premised on deals with the jurisprudence of constitutional structures and their relation to the protection, promotion and fulfilment of human rights. In light of that, this study is fundamental to the scrutiny of the rights to equality, privacy and human dignity to which part of the beneficiaries of these rights are being denied the right to enjoy them.⁶² It has also been anecdotally reported that not only are LGBT persons being discriminated, they have also been subjected to torture and heinous treatment from the police as well as the public at large. Analytical and very valuable submissions from this study will be used to further the education on human rights, usher proposals for a possible constitutional reform as well as trigger judicial activism on the subject matter of the study.

1.7 CHAPTER SYNOPSIS

The **first chapter** is the general introduction to the study herein. The introductory narrative will be structured as follows: the introduction, background of study, statement of the problem, significance of the study, the limitations of the study the

⁶⁰E K Quansah 'Same sex relationships in Botswana: Current perspectives and future proposals' (2002) *Africa Human Rights Journal* 201.

⁶¹M Malamba 'The Controversy of Homosexuality: A Critical Look at The Issues That Make Legalizing Homosexuality in Malawi Difficult' Unpublished LLM thesis, University of Gothenburg,(2012)

⁶²M.K Sullivan *Sexual Minorities: Discrimination, Challenges and Development in America* (2013)

research questions, methodology, and ultimately literature review. In essence, this chapter chronicles the study of sexual minority rights in an introductory fashion from the historical position of the rights of sexual minorities. More so, it introduces the rights which shall be under scrutiny in the study. Finally, it maps the direction of the study and stipulates the fundamental areas that the study shall be hinged upon.

Subsequent to that is **Chapter 2**. This chapter shall establish the prevailing international legal position in respect of sexual minority groups. Regards in this Chapter shall be given to international human rights instruments and international best practice in case law and other authoritative texts on the rights of the sexual minority from the UDHR, ICCPR and the African Charter on Human and Peoples' Rights inter alia. In addition to the international instruments, the theoretical framework that exists on the subject of sexual minority rights and the crux of human rights in general will also be discussed. Legal theories inter alia conservatism, liberalism and cultural relativism shall be interrogated to deduce their stance and treatment of sexual minority rights.

Chapter 3 shall present the prevailing situation in the jurisdiction regarding the rights of sexual minority groups and how such has inspired this study. Regards in this Chapter shall be given to current legislation and the attitude of the courts on the rights of the sexual minority in retrospect thus from the Lancaster House Constitutional order to the present new Constitutional order.

Chapter 4 will provide a comparative analysis on the question of sexual minority rights. The comparison herein shall be two fold thus regionally and internationally. Regionally comparing Malawi and South Africa and internationally with the United States of America. The endeavour of this chapter is to appreciate the developments in other jurisdictions, expose the inadequacies of our law and possibly prescribe a remedy on this area of law.

Chapter 5 provides the conclusive summary of the study. More so, this will be accompanied by recommendations meant to address the inadequacies that would have been exposed in the Zimbabwean system. This chapter will in turn postulate the writer's desired conclusion on the issues discussed herein.

CHAPTER 2

International legal position and theoretical framework of sexual minority rights

2.0 Introduction

The previous chapter set the tone to understand the contentious issue to be pursued in this discussion thus the rights of sexual minority groups in Zimbabwe under the 2013 Constitution. Against that understanding, this chapter shall therefore discuss the international jurisprudential and theoretical framework akin to sexual minority rights pursuant to answering the questions raised in the previous chapter. The policy basis behind understanding the international standpoint is that, hitherto to ascribing and prescribing any remedies to alter the Zimbabwean attitude towards sexual minority rights (that is if there be need for any reformatory work), it is prudent to have a sound understanding of the international trajectory on sexual minority rights as a comparator. Focus will be narrowed down to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the African Charter *inter alia* other substantive international instruments relevant herein. At the same time, the question of the jurisprudential philosophies guiding the distinctions and unanimity shall also be addressed *vis a vis* the theoretical framework of the discourse.

2.1 Definitions of sexual minorities

Legal instruments both at national and international level have not been able to succinctly define sexual minorities albeit some instruments do protect them. Definitions that have gained much prominence are derived from scholarship and international organisational bodies that are interested on the subject matter. A sexual minority is a group whose sexual orientation or practices differ from the majority of the surrounding population which are not only male or female but are also heterosexual. These sexual minorities include lesbians, gays, bisexual and transgender persons. Thus for the purposes of this study, the term LGBT shall be used to denote all of these minority groups. Lesbians are women who are

romantically and sexually attracted to other women.⁶³Gays are men who are romantically and sexually attracted to other men.⁶⁴Bisexuals generally refer to describe people who are romantically and/or sexually attracted to people of more than one sex or gender. A widely accepted definition of transgender entails that it is a term used to describe people whose birth-sex, gender identity and gender expression do not match.⁶⁵ As has been mentioned, the international legal framework does not provide for valued definitions of sexual minorities but this does not entail that they do not protect them as will see infra.

2.2 Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR hereinafter) has been at the upper echelon in providing for fundamental privileges and freedoms that accrue on everyone by virtue of being human.⁶⁶It was initiated to be a common standard of achievement for all peoples and nation.⁶⁷ The UDHR was adopted on 10 December 1948 through Resolution 217 (III) of the General Assembly.⁶⁸ Its adoption is hailed as the first time that countries agreed on a comprehensive statement of inalienable human rights.⁶⁹

The UDHR, albeit being the ideal yardstick which all States which purport to be democratic should follow, is not binding, the reason being that it is not a treaty hence does not create direct legal obligations for States.⁷⁰ However the provisions contained therein have been widely recognised by many if not all States as Customary International Law.⁷¹ This Customary International law comes in a two-fold approach, the first being State practice and the second being that a practice amounts to law “*opinion juris.*” The latter is the one that the UDHR is believed to have assumed. In addition, some of the Rights contained in the UDHR have been

⁶³Southern Africa Litigation Centre ‘Laws and Policies Affecting Transgender Persons In Southern Africa’ (2016)

⁶⁴(n 3 above)

⁶⁵ Laws and Policies Affecting Transgender Persons (n 2 above)

⁶⁶ ‘What is the Universal Declaration of Human Rights’

<https://www.humanrights.gov.au/publications/what-universal-declaration-human-rights> (Accessed on 16 March 2017)

⁶⁷Ilyayambwa (n 25 above)

⁶⁸A H Robertson and JG Merrills *Human Rights in the World. An Introduction to the study of the International protection of Human rights 4th Edition* (1996) 218.

⁶⁹ Robertson (n 68 above)

⁷⁰ P Alston and J Crawford *The Future of Human Rights Treaty Monitoring* (2000) 248.

⁷¹ Alston and Crawford (n 70 above) 249

widely acceptable as inderogatable rights to which they have been associated with the characteristics of *jus cogens*. So profound has been this Declaration that it became the foundational bedrock for binding treaties such as the International Covenant on Civil and Political Rights⁷², International Covenant on Economic and Social and Cultural Rights⁷³ as the two direct ones and several other treaties.⁷⁴

The provisions of Article 7 of the UDHR declare that all persons are equal before the law and are entitled without any discrimination to equal protection of the law.⁷⁵The Article is couched in such a fashion that prohibits two kinds of discrimination, that is to say, discrimination of any kind and discrimination that violates the rights provided for by the Declaration.⁷⁶The import of the wording *vis a vis* use of “*inter alia*” suggests that the stipulated grounds are not exhaustive. Therefore, implied inclusion of the ground of sexual orientation or transgender status seems to be directly within range that it must also not be a ground to discriminate a certain group of people.

Drawing inspiration for the UDHR, the court in *Bowers v Hardwick*⁷⁷in interpreting a similar provision styled in the fashion of Article 7 had a chance to deal with the matter in practice. The decision that was arrived at by the bench was to the effect that convicting the respondent who had consensual sexual intercourse with a partner of the same sex in their private bedroom was a clear violation of the right to privacy. Therefore the prohibition of consensual intercourse between persons of the same sex was deemed unconstitutional provided there were not in public.

Against the above background, it becomes pertinent to expose that of all the provisions considered and others in the UDHR reiterating issues on equality, they do not explicitly include prohibition of discrimination on the grounds of sexual orientation. This has been viewed by literalists as evidence that the UDHR does not protect the rights of these persons at all. However, scholars should not lose sight to the fact that when international law is made, the major concern is placed on the pertinent issues needing redress at that point but this does not mean that other issues such as sexual discrimination are any how less important.⁷⁸ In interpreting the context of the provisions on equality and non-discrimination, the context of the

⁷² ICCPR (1966)

⁷³ ICCPR (1966)

⁷⁴ See generally all International Treatise in line with the UN Declaration(n 6 above)

⁷⁵ Article 7 of the UDHR

⁷⁶ M Johannes *The Universal Declaration of Human Rights: Origins, drafting and intent* (1999)

⁷⁷ 478 US 186 (1986)

⁷⁸ G Brown ‘The Universal Declaration of Human Rights in the 21st century: A Living Document Changing the World’(2016) *A report by the Global Citizenship Commission* 44

provisions which is eradication of any form of discrimination has to be considered and in doing so, almost any ground of discrimination can be encapsulated to be part of the prohibited grounds.

Therefore, the UDHR must be applauded for its stance as the arguably ultimate parent of most of the binding treaties providing for human rights. Its provisions have assumed a binding nature as part of international customary law hence its provisions on equality and non-discrimination have to be followed to the letter. Though not expressly providing for sexual orientation as a ground for non-discrimination, impliedly in approaching it on a contextual basis, it shuns any ground of discrimination.

2.3 International Covenant on Civil and Political Rights.

The International Covenant on Civil and Political Rights (ICCPR) has been ratified by most of the States which are members of the United Nations.⁷⁹ The ICCPR was adopted in 1966 to give binding status to the provisions that were provided in the “non-binding” UDHR.⁸⁰ The ICCPR was crafted to regulate states in their administration of citizens in a bid to protect civil and political rights of individuals or groups of individuals. It must be noted from the onset that the ICCPR borrows quite significantly from the UDHR as has been alluded to earlier. As such, the right to equality in the ICCPR is a fundamental and core right.

The provisions of Article 2 (1) provide for the universality of rights that are contained therein and places an obligation on every State Party to see to it that the dictates of the ICCPR are met. It further provides for a prohibition of discrimination on the basis of race, clan, sex, language, religion, political opinion *inter alia*.⁸¹ The inclusion of “sex” has been interpreted in various incidences to include sexual orientation.⁸² This largely impacts on the rights of transgender persons who change their innate sex to another. That other sex becomes who they are and to discriminate against them will be an odious inference with the rights as provided under Article 2 (1).

⁷⁹ Robertson (n 68 above) pg 35

⁸⁰ Robertson (n 68 above)

⁸¹ Article 2 (1) of the ICCPR

⁸² B Cussano ‘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 on 20 March 2017)

In line with the above right, the court in South Africa in *Attorney General v Transgender Education and Advocacy and Others*⁸³ used Article 2 (1) to bolster its shunning of discrimination on the grounds of sex. It was behest that the refusal to register a transgender organisation amounted to discrimination on the basis of gender or sex and thus constituted to an unreasonable exercise of discrimination.

The provisions of Article 17 have been hailed for the direct protection of sexual minorities in particular, homosexuals. The provision of significant concern in particular is Article 17 (1) which provides for the right to privacy. The proviso was shone under light in *Toonen v Australia*⁸⁴ wherein it was used to defend the right of homosexuals who were contending interference of the State in their right to privacy, Article 26 on non-discrimination *inter alia*. The Human Rights Committee on the case opined that the government of Australia was in violation of Article 26 by constructing a law that made homosexual conduct a crime.

Article 27 of the Covenant behests that;

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 profess and practise their own religion or to use their own language.⁸⁵

What can be observed from such a provision is the acknowledgement of the diversity amongst people of different nations.⁸⁶ Therefore united in that diversity, the ICCPR provides for the protection of the minority and marginalised to whom discrimination might be the order of the day due to subdued voices in decision making and protection of their interests.

The provisions of Article 22 (1) are also relevant as they provide for freedom of association with other people of one's choice with the inclusion of the right to form or join trade unions for the protection of this interest. In the Zimbabwean context, the Gay and Lesbians Association based in Milton Park has been denied time and again

⁸³ JR Miscellaneous Application No. 308A of 2013 (HC)

⁸⁴ Communication number 488/1992

⁸⁵ Article 27 of the ICCPR

⁸⁶ J D Wilets and G Ross 'The Human Rights of Sexual Minorities' (1995) Vol. 22, No. 4 *American Bar Association* 22-27

the right to register.⁸⁷ This association has been continuously under attack from locals including the police. This then questions the rights given under the ICCPR on their protection of all people notwithstanding questioning Zimbabwe's relationship with the ICCPR as well.⁸⁸

The ICCPR as a document ushered in to give a binding status to the provisions of the UDHR could not deviate much from the provisions of its "Grund norm." It enacts provisions recognised the rights to enjoy all the freedoms enshrined there in particularly protecting the marginalised to which LGBT persons can be characterised as such.

2.4 International Covenant on Economic, Social and Cultural Rights (ICESCR)

The International Covenant on Economic, Social and Cultural Rights (ICESCR) is a fundamental treaty in international human rights law. The ICESCR was adopted in 1966 amid calls to guarantee socio-economic and cultural rights once regarded as third generation rights⁸⁹. The Covenant however became effective ten years later in 1976 and notably by 2015 it comprised of 164 States Parties⁹⁰. The underlying ethos of this multilateral treaty was the drive to commit States Parties to work towards granting and the subsequent realisation of economic, social and cultural rights to individuals.⁹¹ The ICESCR is premised largely on positive rights that is to say whilst according rights to individuals to enjoy them, it is premised on mandating States to provide certain necessities to their respective citizens progressively⁹².

Zimbabwe is a State Party to the ICESCR which it ratified in 1991.⁹³ Accruing therefrom is that by ratification, it agreed to be bound by the precepts of this treaty and uphold it religiously provided that it has not entered a reservation. The right to health⁹⁴, education⁹⁵, participation in cultural life⁹⁶ and also guarantees for the

⁸⁷ Gay and Lesbians in Zimbabwe <http://www.hrforumzim.org/members/gays-and-lesbians-of-zimbabwe-galz/> (Accessed on 20 March 2017)

⁸⁸ Gay and Lesbians in Zimbabwe (n 87 above)

⁸⁹ United Nations Office of the High Commissioner www.ohchr.org (Accessed on 19 March 2017)

⁹⁰ United Nations Office of the High Commissioner (n 89 above)

⁹¹ International Covenant on Economic, Social and Cultural Rights (1966) :Preamble to the Covenant

⁹² (no 95 above): Article 2(1)... Progressive Realisation involves taking positive steps towards achieving the fundamentals of the covenant from the available resources.

⁹³ United Nations Office of the High Commissioner (n 89 above)

⁹⁴ Article 12(n 91 above)

enjoyment of just and favourable conditions of work⁹⁷ *inter alia* other crucial rights are enshrined therein.

Paramount in the study herein is however the provisions of Article 2(2) of the ICESCR. The provisions of Article 2(2) of the ICESCR herald that;

The States 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, language⁹⁸

The fundamentality of this provision stems from the understanding that all the rights enshrined in the ICESCR must be enjoyed by every individual blind to the differences that may be apparent exemplified by the genus stated therein. Thus, discrimination is frowned at per the meaning of article 2(2) of ICESCR. Consequently, the Committee on Economic, Social and Cultural rights prescribes legislation as a strategic mechanism of realising the enshrined rights and less vulnerable to resource constraints. Ancillary to that, the Committee further elucidated that the enactment of provisions together with the establishment of enforceable remedies within the province of national legal systems is critical in fostering the spirit of the ICESCR.⁹⁹

Fundamental also in appreciating the premise of non-discrimination parameters in the ICESCR and beyond is the acclaimed General Comment Number 20 on the non-discrimination in Economic, Social and Cultural Rights.¹⁰⁰ The Committee responsible for administering the Covenant made a fundamental declaration to the effect that the non-discrimination clause is not exhaustive and against that reasoning, more grounds for discrimination can and must be read into the genus set forth in Article 2(2).¹⁰¹ Relying on the concluding wording employed in Article 2(2) *vis a vis* “other status” as prohibited grounds for discrimination, the committee opined that such

⁹⁵ Article 13 (n 91 above)

⁹⁶ Article 15 (n 91 above)

⁹⁷ Article 6 (n 91 above)

⁹⁸ Article 2(2) (n 91 above)

⁹⁹ International Justice Resource Centre, Economic, Social and Cultural Rights

<http://www.ijrcenter.org/thematic-research-guides/economic-social-and-cultural-rights-2> (Accessed on 16 March 2017) See also generally W. Kalin and J. Kunzli *The Law of International Human Rights Protection* (2009) 117-118

¹⁰⁰ General Comment Number 20 Non- Discrimination in Economic ,Social and Cultural Rights,2009

¹⁰¹ General Comment (n 100 above)

sentiments allow sexual orientation to be read into the provision as a prohibited ground for discrimination pursuant to realising the precepts of the ICESCR.¹⁰²

In paragraph 32, the Committee was laconic that sexual orientation, at law, must not be a barrier to impair one's realisation of the rights set forth in the ICESCR. More so, gender identity *vis a vis* transgender, transsexual or intersex were also censored as prohibited grounds for human discrimination in the ICESCR and within the human rights paradigm generally.¹⁰³

Suffice also to note the provisions of Article 4 of the covenant which address the issue of limitation to the rights. Article 4 allows limitation of the rights set out in the covenant;

...only to such limitations as are determined by law only in so far as this may be compatible with the nature of the right and solely for the purpose of promoting the general welfare in a democratic society.¹⁰⁴

The import of this article is that regardless of the guarantees set out herein, these rights can be limited. However from the provision, for the limitation to be justified it must meet a set criteria. Firstly, the nature of the limitation must be one that can be determined at law thus it must be legitimate. Secondly, there must be proportionality between the limitation and the nature of the right *vis a vis* the limitation should not be outrageous in the circumstances. Finally, such a limitation must be "solely" in pursuit of promoting general welfare in a democratic society. Therefore, for a state to limit the rights set out herein, the limitation must pass the three-tire test set out above otherwise the limitation will be unlawful.

Accruing therefore from the above exposition into the ICESCR, is a feat that there is an obligation incumbent upon state parties to device mechanisms to realise the rights set out in the ICESCR. Secondly and even more critical to this study, is the clarification and re -clarification of Article 2(2) of the Covenant especially by the General Comment Number 20 to the effect that sexual orientation and gender identity are also prohibited grounds for discrimination at International law. Albeit the non-binding nature of General Comments on States Parties, the recommendations therein are given due regard as interpretative guidelines to the ICESCR pursuant to achieving equality in the enjoyment of the rights guaranteed herein.

¹⁰² General Comment Number (n 100 above) para 15

¹⁰³ General Comment Number (n 100 above) para 32

¹⁰⁴ Article 4 (n 91 above)

2.5 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was adopted in 1979 by the United Nations Assembly.¹⁰⁵ The Convention as per its titling was premised on correcting the anomalies in societal perceptions towards women. The status *quo ante* then, was hinged on regarding women as second class citizens subservient to man. Against such prevalent stereotypes, CEDAW was therefore ushered in as a movement to foster and advocate for equality between men and women in basically all facets of life. Zimbabwe is a State part to CEDAW to which it ratified in 1991.¹⁰⁶

More critical herein is General Recommendation No.28. The Recommendation clarified the ethos of Article 2 to the effect that;

...discrimination based on sex and gender is inextricably linked with other factors that affect women such as race, ethnicity, religion or belief, health, status, age and sexual orientation and gender identity.¹⁰⁷

The committee in turn called on States Parties to condemn and not condone all forms of discrimination whether those explicitly stated in the convention and those that are implicit and emerging as prohibited grounds for discrimination.¹⁰⁸ Sexual orientation and gender identity were the key emerging grounds that the committee recognised suggesting a development in the way that the convention ought to be interpreted.¹⁰⁹ Such evolutive interpretation is paramount in maintaining the relevance of laws or treaties acknowledging that law is not static but living.¹¹⁰

¹⁰⁵United Nations Entity for Gender Equality and Empowerment of Women 'Convention on the Elimination of All Forms of Discrimination Against Women' www.un.org/womenwatch/daw/cedaw (Accessed on 20 March 2017)

¹⁰⁶Convention on the Elimination of All Forms of Discrimination Against Women Report on Zimbabwe (2012) www.ohchr.org (Accessed on 18 March 2017)

¹⁰⁷General Recommendation No. 28 of the Committee on the Elimination of Discrimination Against Women, 2010

¹⁰⁸International Service for Human Rights.

¹⁰⁹International Commission for Jurists : SOGI UN Database www.icj.org/SOGIUNDATABASE (Accessed on 19 March 2017)

¹¹⁰*Tyrer v. United Kingdom* (ECtHR) Judgement of 25 April 1978, Series A No. 26. See also S T Helmersen 'Evolutive Treaty Interpretation: Legality, Semantics and Distinctions' (2013) Volume 6, Issue 1 *European Journal of Legal Studies* 127-148.

Having said that, CEDAW also has major drawbacks towards the realisation of its mandate. Fundamental, is the resistance by some countries to follow this extended interpretation of “discrimination.” The Committee report on Zimbabwe¹¹¹ still shows that regardless of ratification in 1991, Zimbabwe had not fully integrated CEDAW into the national laws albeit more positives noted in the 2013 Constitution. Moreso, in Nigeria whilst the applauded developments of including sexual orientation and gender identity were being hailed, the nation was in the course of passing the Same Sex Marriage (Prohibition) Act¹¹² which would impose a 14 year sentence on offenders and ban all advocacy akin to the rights of LGBT persons. Such exemplifies the challenges in the operations of CEDAW.

Therefore, it remains key to note that evolutive interpretation has been employed and sexual orientation together with gender identity are now recognised under CEDAW per the General Recommendations as prohibited grounds for discrimination, internationally.

2.6 African Charter on Human and People’s Rights

The African Charter on Human and Peoples’ Rights (ACHPR) is a regional human rights instrument designed to reflect the history, values, traditions and development of Africa.¹¹³ The ACHPR, also known as the Banjul Charter, was a brain child of the Organisation of African Union which through its Assembly constituted by the Heads of States and their governments adopted it unanimously in 1981, though for various reasons entered into force about five years later.¹¹⁴

The African Charter on Human and People’s Rights is the most paramount document in the spheres human rights in Africa. The preamble of the Charter states that:

Considering the Charter of the Organisation of African Unity which stipulates that freedom, equality, justice and dignity are essential objectives for the achievement of legitimate aspirations of the African peoples.¹¹⁵

¹¹¹ CEDAW Report on Zimbabwe(n 106 above)

¹¹²International Commission of jurists(n 109 above)

¹¹³ ‘Minority Rights under the African Charter on Human and People’s Rights’ Pamphlet No. 6 <http://www.ohchr.org/Documents/Publications/GuideMinorities6en.pdf> (Accessed on 20 March 2017)

¹¹⁴ Murry and Evans *African Charter on Human and Peoples’ Rights* (2000)

¹¹⁵ Preamble of the African Charter on Human and People’s Rights

The import of this is that from the onset, it proffers guiding principles in the human rights discourse. In essence, such can be read in the issue at hand to reflect the utter detest for discrimination that is represented. As a result, the discrimination that LGBT persons are subjected to is unjustified as it upsets the founding precepts of this crucial instrument. It cannot also go without saying that the preamble also emphasises that there must be total eradication of “...all forms of discrimination...”¹¹⁶ Thus discrimination is frowned at categorically herein, whatever the circumstances.

The same ethos as afore-given is echoed by the provisions of Article 2 to the Charter which can be understood to be the non-discrimination clause, stating that rights under the Charter must be guaranteed without distinction of any kind whatsoever.

Moreso, Article 3 of the African Charter states that:

Every person shall be equal before the law.

The provision thus further corroborates that discrimination on the basis of sexual orientation is unwarranted at regional level. All human beings are entitled to equal protection at law regardless of the differences they may possess and that can be read to suggest difference in sexual orientation too. The provision goes on to provide that every individual shall be entitled to equal protection before the law.¹¹⁷ This has been interpreted in the same manner as how most of the international provisions as seen afore have been understood, that is to say, the laws of a nation should serve to provide a platform for all persons to enjoy the universal rights freely.

On the other hand, the hotly debated provisions of article 17 which serve to provide that the promotion and protection of morals and national values recognised by the community shall be the duty of the State cannot go unmentioned and dealt with. It surely can be argued, from one point, that this provision serves as an exception to the absolutism of most fundamental human rights enshrined at a regional arena. The State is conferred an obligation to maintain, protect and further promote its national values. This then begs a question as to, what then happens when the rights provided are in contradistinction with the morals contained in that particular state? This goes back to the classic debate of universalism versus cultural relativism on the discourse of human rights, a contest that any debate in international human rights law will be

¹¹⁶ ACHPR: Preamble

¹¹⁷ *Kazeem Amina v Nigeria Communication 205/97*

inchoate if not raised. The contributions to this debate are best answered through philosophical submission as will be dealt with substantively *infra*.

The court had a chance to interpret some of the rights given herein in the case of *Courson v Zimbabwe*.¹¹⁸ The issue in this case was equality and non-discrimination, regarding the status of homosexuals in Zimbabwe. The complainant herein brought forward an issue pointing to article 60 of the Charter which states that the commission was obliged to draw inspiration from international law on human and peoples' rights. There was an addendum annexure to which the complainant attached the views adopted by the Human Rights Committee in the case of *Toonen v Australia*¹¹⁹. In this case the committee was of the view that the criminalisation of homosexuality in Tasmania was unreasonable and interfered arbitrarily with Toonen's right to privacy under article 17(1) of the (ICCPR).

Therefore, as expounded, it is clear that the ACHPR draws much from the internationally acclaimed legal instruments protecting the rights of all individuals to which LGBT persons are protected as well. Though the Charter provides the limitation of the manifestation of some rights due to protection of culture and morals, such limitations should be necessary in a democratic society, proportionate to the interests protected and be lawful.

2.7 Theoretical framework.

This segment serves to expound that since laws are based on theoretical frameworks, there are certainly sexual minority theories that influence the stance that the law as well as the judicial bench adopts. Salient substance on other theories worth considering in Zimbabwe shall also be given.

2.7.1 Cultural Relativism and Ubuntu legal theories

Cultural relativism refers to a notion that fosters tolerance and respect for difference, referring to the idea that cultural context is critical in understanding people's values, beliefs and practices.¹²⁰ Albeit the varying degrees of cultural relativism, the

¹¹⁸ (2000) AHLRLR 335 (ACHPR 1995)

¹¹⁹ Communication number 488/1992

¹²⁰ Howson (n 52 above)

underlying ethos behind cultural relativism is that culture is crucial in the validation of any moral rule or right.¹²¹

The import of this doctrine arises from the understanding that different people subscribe to different notions of right and wrong across societies. Therefore, to craft an international instrument blind to these differences and hope that it will be binding on everyone in the world uniformly seems utopia. An-Na'im argues that it is that lack of cultural legitimacy of human rights standards that causes violations once they are superimposed on a people.¹²²

International jurisprudence seems to embrace the ethos of cultural relativism unequivocally. The margin of appreciation doctrine expounded by the European Court of Human Rights gives leeway to states to apply international regulations in their states in a manner akin to its established practices.¹²³ Logically, the provision seems to be capable of being utilised as a shield against imposition of alien standards of human rights. On application to the issue herein, this can be used to reject an interpretation of the right to equality and non-discrimination which tends to be too liberal than what is culturally permissible in Zimbabwe.

Having said that however, cultural relativism also has its shortcomings. Fundamental is that it can upset the ethos of universality totally in respect of some rights. Donnelly poses a question to the effect that;

If human rights are based in human nature, on the fact that one is human, and if human nature is universal, then how can human rights be relative in any fundamental way?¹²⁴

Such is a problematic question as it goes to the genesis of the human rights discourse *vis a vis* the UDHR.

It is further a hindrance to the progressive evolution of societies.¹²⁵ Its connotations can be used to legally clothe very conservative states to foster primitive ideologies at the expense of certain groups of people. Sexual minority groups in conservative

¹²¹ J Donnelly 'Cultural Relativism and Universal Human Rights' (1984) Vol. 6, No. 4 (Nov. 1984) *The Johns Hopkins University Press Human Rights Quarterly* 400-419.

¹²² A An-Na'im 'Towards a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman, or Degrading Treatment or Punishment' in A. An-Na'im (ed) *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (1992)

¹²³ M R Hutchinson 'The Margin of Appreciation Doctrine in the European Court of Human Rights' (1999) Vol. 48, Issue 3 July 638-650.

¹²⁴ Donnelly (n 121 above) 403

¹²⁵ Donnelly (n 121 above)

countries, Zimbabwe included, are discriminated on the basis that they are different and the State clothes itself with cultural relativism. The case of *S v Banana* is one such example. Therein, the court guided by cultural values held that discrimination on the basis of sexual orientation was constitutional taking into account the cultural regime which was and still is largely conservative.

The Zimbabwean set up seems to be a very conservative people wherein human dignity and collectivism are integral notions of society.¹²⁶ This then subscribes to the concept of *Ubuntu*. As discerned from their popular maxim, *Ubuntu ngumuntu ngabantu* (a person is a person through persons), the concept is linked to liberalism, embodies an understanding of what is necessary for human beings to grow and find fulfilment.¹²⁷ It can be argued that the conservative nature against LGBT persons prevails people collectively shun against them. However, Mertz argues that the concept is so fluid that it is up to the people living at a particular time to refashion the interpretation of *ubuntu*. In that wise, the notion is open to development.

2.7.2 Value based interpretation

Courts play a significant role in the developing of law. They are the chief drivers of legal change and it is the writer's view that if LGBT persons are to be accorded their dignity, it is most likely to be through the interplay of courts. Jurisprudentially, courts are guided by theoretical frameworks and principles they adopt from the surrounding society and one of such is often referred to as the value based interpretation.¹²⁸ Faced with LGBT cases, courts are guided by certain backgrounds, political and moral values that are cherished by a particular society.¹²⁹ It is asserted that any theory of interpretation that does not conform to the values of its society is basically hollow and unacceptable.¹³⁰ This theory has been utilised in sexual minority cases and the courts have made clear their conservative stance. It is to be acknowledged that the problem with this theory is that values are very diverse and relative in nature.

¹²⁶ *S v Banana 2000 (1) ZLR 607 (S)* ...judgement provides anecdotal evidence to this effect.

¹²⁷ E Cameron 'Sexual orientation and the constitution: A test case of Human Rights' (1993) *South African Law Journal* 450. See also *Using the Courts to Protect Vulnerable People: Perspectives from the Judiciary and Legal Profession in Botswana Malawi and Zambia* (2015) Southern African Litigation Centre ISSN 978-0-620-62999-7

¹²⁸ K B Mensah 'Legitimacy and interpretation in Ghanaian law: The literal interpretation theory versus the value based theory' (2004) *Law Democracy and Development Law Journal*.

¹²⁹ Mensah (n 128 above)

¹³⁰ Mensah (n 128 above)

Zimbabwe however is so fortunate because the values to be used have been enshrined on paper in the 2013 Constitution.

The Preamble, for starters, acknowledges the supremacy of God Almighty, implying that some of the values are predicated on the natural school of God which behest that any laws that fall under the precepts of God's law is no law at all. Section 3 on the Founding values and principles further establishes the foundation to which Zimbabwe is built upon. In that regard, the philosophical basis of the reasoning of the courts are predicated on these values. This theory essentially portrays that judges are agents of the majority thus going against the values of the majority instigates a counter majoritarian dilemma which leads to the excommunication of the judges as was seen in Zimbabwe in the resignation of McNally J (as he then was)¹³¹.

Narrowing the theory to the discourse on sexual minorities, the majority in the Banana case was pedestal on a value based interpretation. The Christian and African Traditional Religion conservative values shun against LGBT persons. References are always made with approval on moral asserting cases such as *Corbett v Corbett*¹³². It is even acknowledged that one of the possible reasons for the minimum number of cases of sexual orientation is that the value based conservative attitude of the court is well conspicuous. Courts in Zimbabwe apart from the legal legitimacy also seek ethical legitimacy.¹³³ Their basis are doggedly hinged on cultural relativism, the doctrine of margin of appreciation as explained earlier. Therefore, this theory has been found to be very much compatible with the 2013 constitution and has enjoyed wide acceptance.

However, the theory above has found antagonism in the **evolutive theory of interpretation**. This theory postulates that interpretations should be guided by the modern contextual environment. Proponents of this theory argue that most of the cultural values have become archaic and bear no resemblance to the ever changing society. In that regard, all interpretations should be used in light of the developments in the society. The Zimbabwean society has been very much susceptible to the Western standards of living chiefly through the media. Homosexuals are there in Zimbabwe, they are just afraid of coming out. The modern society dictates that due to their proliferation, sexual minority statues should not be interpreted as they were

¹³¹ Justice McNally's forced resignation came after his rulings against the land reform policy which the majority in Zimbabwe had adopted.

¹³² 1970 (2) ALLER 53

¹³³ Mensah (n 128 above)

in ancient times, the society has changed. This promotes the right to development. However, ideal as it is, the theory is barricaded by the conservative stance in Zimbabwe though it can be used to challenge this.

2.8 Conclusion

Wherefore, the objective of this chapter has been a discourse on the understanding of the law in relation to sexual minorities internationally and theoretically. It has been acknowledged that albeit not expressly enshrining sexual orientation as a ground for non-discrimination, such ground should be read to the expressly given grounds. This is premised on the objective of all the international provisions which seek equality and non-discrimination of human beings through any ground whatsoever. It has further sufficed from the theoretical frameworks that conservatism theories are still justified albeit the rise of other antagonistic theorists who believe in the recognition of sexual minority rights. Prudently therefore, the next Chapter shall look at the same ethos of sexual minority rights in the Zimbabwean context, appreciating the distinctions and unanimity that exists between the two regimes that is domestic and international law herein explained.

CHAPTER 3

Sexual minority rights in Zimbabwe

3.0 Introduction

Chapter 2 provided an appreciation of the rights of sexual minorities internationally. The reasoning behind the exposition was to understand the rights afforded or due to such people from an international human rights law perspective. Having done that, this Chapter shall then focus on the rights of sexual minority groups in the Zimbabwean context. To be able to appreciate the various paradigms of sexual minority rights in Zimbabwe, the first part shall look at the rights under the Lancaster House dispensation. Subsequently, the sexual minority rights under the 2013 Constitution are discussed together with other key pieces of legislation which are necessary in appreciating the *status quo* in Zimbabwe regarding sexual minority groups.

3.1 Rights of LGBT persons under the Lancaster House Constitution.

The Lancaster House Constitution that governed post-independence Zimbabwe until the ushering in of the 2013 Constitution was the first step in realising general precepts of constitutionalism in Zimbabwe.¹³⁴ The Constitution was born when the Zimbabwe nationalist movements agreed to a cease fire deal with the former imperialist government paving way for elections which eventually brought majority rule.¹³⁵ Therein, the philosophical conceptualisation behind the document albeit being primarily a political document, also established the human rights dispensation which was to govern Zimbabwe for the next thirty-two years.¹³⁶ Thus, it is paramount to have an appreciation of the framework that subsisted under the Lancaster House Constitutional dispensation, to be able to decipher the changes brought about by the 2013 Constitution on the rights of LGBT persons.

¹³⁴Constitution of Zimbabwe 1980 (Lancaster House Constitution)

¹³⁵University of Zimbabwe Editorial Team (2014) Vol. II (1) *University of Zimbabwe Student Law Review Journal*:Zimbabwe Legal Information Institute www.zimlil.org (Accessed on 20 March 2017)

¹³⁶Constitution of Zimbabwe 1980 (n 134 above) : Chapter III The Declaration of Rights

3.1.1 Preamble to the Declaration of Rights.

Section 11 of the Lancaster House Constitution canvassed the preamble to the Declaration of rights which exposed the scope of the rights therein *vis a vis* the targets of the rights, the limitation parameters and the interpretative framework of the rights.¹³⁷ Section 11 was to the effect that the fundamental rights therein could be limited if the enjoyment of such rights would prejudice the rights of others, and also if the limitation was in the public interest. Moreso, the provision also guaranteed the enjoyment of rights by all persons subject to the limitations elucidated above.

Other than the above, Section 11 of the Lancaster House Constitution did not comprehensively introduce the Declaration of rights, the interpretative trajectory to be followed therein and the impact of foreign conventions which Zimbabwe is a party to. Suffice also to generally note that it was shallow and deficient of proclaiming the obligations incumbent upon the state in the human rights discourse, at least expressly. Thus the interpretation of the rights became more of a common law affair and reliance on judicial activism.

3.1.2 Protection from discrimination of the grounds of race *inter alia*

Section 23 of the Lancaster House Constitution was the then non-discrimination clause.¹³⁸ The provisions thereof herald as follows;

... a person shall be regarded as having been treated in a discriminatory manner if as a result of the law or treatment, persons of a particular description by race, tribe, place of origin, political opinions, colour, creed, sex, gender, marital status or physical disability are prejudiced-...¹³⁹

The significance of this provision is to cement that even under this old dispensation, discrimination was not condoned, except in a few instances noted in subsection 3 *inter alia* discrimination for affirmative action and the application of customary law to Africans.¹⁴⁰ Having said that, it seems however from the wording that the genus of prohibited grounds of discrimination enshrined therein was rather exhaustive in

¹³⁷ Section 11 (n 134 above)

¹³⁸ Section 23 (n 134 above)

¹³⁹ Section 23(2) (n 134 above)

¹⁴⁰ Section 23(3) (n 134 above)

terms of what the legislature wished to communicate. Seemingly, reading new grounds such as sexual orientation into the afore-mentioned provision could be equated as redrafting or redirecting the framers' intention. Moreover, from the heading of the right, which gave an insight of the provision, it seemed clear that the paramount intention was to address discrimination on the basis of race, hence sexual orientation at the time of drafting must have in the furthest of the thoughts of the negotiating drafters. Therefore, albeit there being a non-discrimination clause, it seems it spoke only to the grounds enshrined therein and was not subject to any modifications.

The interpretation of Section 23 above was primarily enunciated in the case of *S v Banana*¹⁴¹. Therein the defendant was charged on a multiplicity of accounts of sodomy. The allegations were to the effect that the former President of Zimbabwe had sodomised some soldiers during his time as President of Zimbabwe (1983-1986). In his defence, Banana contended that he was being subjected to discrimination on the basis of his sexual orientation (gay). Therein, both the High Court and the Supreme Court maintained that sodomy was not only unlawful but also immoral in regard to the Zimbabwean context. Thus such discrimination on the grounds of sexual orientation therein was deemed to be justifiable as it was not within the contemplation of the provision taking into account the value system of the jurisdiction.

The essence of the judgement philosophically, represented and still represents strong convictions imbedded in society regards to respect for morality. The decision accentuated the difficulty in relying on the judiciary to be revolutionary in attaining law reform and seemingly underscores the need to specific mention of sexual orientation in legislation to clarify on the actual position of the law.

3.2 Constitution of Zimbabwe Amendment Number 20 Act 2013

The Constitution of Zimbabwe (the Constitution) is the supreme law of the country.¹⁴²To that end, any piece of legislation, conduct or law which does not coincide with the connotations of this document is void to the extent of its inconsistency. The adoption of the 2013 Constitution saw the expansion of the

¹⁴¹*S v Banana* (no 26 above)

¹⁴² Constitution of Zimbabwe Amendment Number 20 Act, 2013 :Section 2

declaration of rights setting a precedent that has seen this Constitution being one of the finest in the world.¹⁴³ In that regard, it is very vital that it be interrogated at length to appreciate its actual position regarding LGBT persons' rights in Zimbabwe hitherto any arguments being tendered.

The fundamental area of study herein shall be the Declaration of Rights which is Chapter 4 of the constitution. It should be noted that the declaration of rights which Zimbabwe now has is more elaborate and advanced in comparison with the one which was in the Lancaster House Constitution¹⁴⁴. The provisions of section 11 entail that the State must take all practical measures to protect the fundamental rights and freedoms enshrined in Chapter 4 and to promote the full realisation and fulfilment of these rights. This is further reinforced by the dictates of section 44 which behests that the duty to respect all the rights contained within the ambit of chapter 4 lies on the State, every person (juristic included), every institution and agency of the government.¹⁴⁵ Therefore, it can be depicted that the constitution acknowledges the rights and existence of LGBT persons, every person and entity should respect and deal with that. The question that then arises is whether the formulation of chapter 4 provides for rights of LGBT persons and if not, whether the same rights can be read into the already existing rights.

3.2.1. The right to equality and non-discrimination

Section 56 of the Constitution provides for the right to equality and non-discrimination. The ethos of this right is that all persons are equal before the law and have the right to equal protection and benefit of the law.¹⁴⁶ It can be deciphered that the right is twofold. On one end is equality and on the other is prohibition of non-discrimination. The interpretation of equality herein must be alive to the prevailing trajectory and seek to substantially foster equality on getting opportunities and how they are to be perceived at law. The substantial equality paradigm is goal oriented in that the end result is paramount and therefore efforts are at times made to empower

¹⁴³ T Madebwe 'Constitutionalism and the new Zimbabwean Constitution' (2014) Vol.1 *Midlands State University Law Review* 6

¹⁴⁴ Lancaster House Constitution 1979 had a less elaborate Bill of Rights.

¹⁴⁵ Section 44 (n 142 above)

¹⁴⁶ Section 56(1) (n 142 above)

a once disadvantage group in a bid to realise equality¹⁴⁷. Contrary to that, is a feat which is formalistic in nature which would focus only in bringing parity to people of a similar category which in context would justify discrimination of sexual minority groups on the ground that they are not the same with those of a heterosexual nature. This sameness equality is shallow and does not go to the root in addressing societal imbalances.

Paramount in Section 56 is the wording that “All persons...” meaning that even the minority groups are protected in the same manner by the non-discrimination clause. The non-discrimination part of the right prohibits any unjustified differential treatment of persons. Only if the justifiable grounds for discrimination as prescribed at law are met can discrimination be allowed. Subsection 3 of section 56 stipulates the prohibited possible grounds for discrimination. It stipulates that,

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.

Sexual orientation is not expressly included in the genus. This is the same with other Statutes such as the Labour Act¹⁴⁸ and Public services Act which mirror the grounds canvassed in section 56 (3). However drawing inspiration from international instruments¹⁴⁹ as discussed in depth in the previous chapter, there can be fruit in holding that the provision is open ended by virtue of the words “such grounds as...”¹⁵⁰, hence sexual orientation can be encapsulated there within. General Comment Number 20 on Non-Discrimination in Economic Social and Cultural Rights emphasises that albeit the absence of other prohibited grounds of discrimination including sexual orientation, it must be read into the grounds as over the years it has been a major ground for discrimination. On the other hand however, the analogous grounds principle suggests that addition of a ground which is not listed can only be as far as such a ground is consistent with those listed. It is therefore contentious as on one hand international human rights standards of late emphasise the inclusion of

¹⁴⁷G Hedin ‘Formal or Substantive Equality? Gender Equality in European Community Law’(2009) www.lup.lub.lu.se/luur (Accessed on 26 March 2017)

¹⁴⁸ Labour Act [Chapter 27:01]

¹⁴⁹General Comment Number 20 Non-Discrimination in Economic Social and Cultural Rights,2009 para 15

¹⁵⁰ Section 56 (3) (n 142 above)

sexual orientation as a prohibited ground of discrimination, whilst on the other hand, conservative Zimbabwe may argue that sexual orientation as a prohibited ground of discrimination does not fall within the same genus as those listed in section 56 of the constitution.

The provisions of section 56 (3) guarantee all persons that they partake in activities freely without fear of being subjected to discrimination. Subsection 5 of Section 56 provides for an internal limitation to this right. It heralds that discrimination can only be allowed if it is established to be,

...fair, reasonable and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.¹⁵¹

Against this backdrop, it is evident that the Constitution takes exception with its granting of this right to equality and non-discrimination as it is not unqualified. *Inter alia* subsection 6 avails an understanding that the provision frowns at negative discrimination but hails discrimination which promotes the rights of the once disadvantaged classes primarily (though not limited to) women.

With regards to the gay rights in particular, the connotation of the provision summarily can be construed to entail that gay people have the right to be afforded equal protection at law and not to be discriminated on the basis of their sexual orientation, albeit not falling under the listed grounds but relying on the above cited international human rights jurisprudence. In the event their rights are going to be curtailed or questioned, such conduct in terms of subsections 1 and 2 violates the Constitution. Yet notwithstanding that, gay and lesbian people can still be discriminated upon in terms of subsection 5. However for this to suffice if challenged, the discriminating party must show that albeit discrimination being there, it is permissible in terms of the constitutional limitation clause, section 86. This is done by adduction of evidence to the effect that such discrimination is fair, reasonable and justifiable in a democratic society.¹⁵² Absence of such would therefore mean that such discrimination is unjustified and thus *ultra vires* the Constitution.

¹⁵¹ Section 56 (5) (n 142 above)

¹⁵² J de Waal and I Currie *The Bill of Rights Handbook Fifth Edition* (2005)

3.2.2 The right to privacy

Section 57 of the Constitution provides for the right to privacy. It provides that:

Every person has the right to privacy...¹⁵³

Accordingly, the freedom safeguards against any arbitrary interference into the lives of individuals primarily by the State. Sexuality is one of the most private aspects of an individual if not the most private.¹⁵⁴ Against that reasoning, this right seems to unequivocally guard against interference into this area. It becomes problematic therefore that the state seems to be at the fore in deeming gay marriages and rights as unlawful yet it falls within the private arena. It will therefore also be apposite to understand the extent of the interference by the state in denying such rights and at the same time appreciate if this right to privacy can be derogated and the circumstances under which it can be derogated. This is to be dealt with later under the scrutiny of section 86.

3.2.3 The right to human dignity¹⁵⁵

The constitution also provides for the right to dignity. It emphasises expressly that dignity is inherent upon an individual both in their private and public life. Dignity is an expression which entails that a human being has an innate right not only to be valued and respected but to receive ethical treatment.¹⁵⁶ Suffice to mention that the wording of this provision is consistent with the preamble of the UDHR which also emphasises that dignity is inherent to everybody by virtue of being human. In South Africa (which shall be discussed in depth in the next chapter), the courts have categorically stated that the right to human dignity is not conferred which otherwise would mean that the state can limit it. On the contrary, the right to human dignity is due to a person as long they fit within the basket of human beings.¹⁵⁷ This right establishes the inalienability of fundamental human rights.¹⁵⁸ Relying on this right, it

¹⁵³Section 57 (n 142 above)

¹⁵⁴Sexuality Rights are Human Rights <https://iwhc.org/articles/sexual-rights-human-rights/> (Accessed on 22 March 2017)

¹⁵⁵Section 51(n 142 above)

¹⁵⁶Duhaime's Law Dictionary www.duhaime.org/LegalDictionary (Accessed on 23 March 2017)

¹⁵⁷ See generally *National Coalition for Gay and Lesbian Equality v Minister of Justice and Others* 1999 (1) SA 6

¹⁵⁸ G P Carrozza 'Human Dignity and Judicial Interpretation of Human Rights. A Reply' (2008) *Scholarly works Paper* 683

can logically be fathomed that because LGBTI persons are human, they too possess the inherent human dignity and thus are entitled to protection by the law. Moreover, in terms of the Constitution, the right to human dignity cannot be limited regardless of the circumstances.¹⁵⁹ Albeit the above strength bestowed on the right to human dignity, it however remains problematic. To recognise this right would mean Zimbabwe acknowledges LGBT persons as human beings who must not be discriminated which however as seen earlier is far inaccurate. Accordingly, it seems to follow that not only does Zimbabwe exclude the rights of sexual minorities, it views them as another species falling outside the basket of human beings.

3.2.4 Gender Balance as a National Objective.

The provisions of section 17 albeit not in the declaration of rights are very crucial in this discourse. They dwell much on the hugely debated issue of gender balance. The proviso dictates that the State is conferred the obligation to promote full gender balance in Zimbabwe and promote full participation of women on the basis of equality to men. Questions have been raised as to whether this provision can be used to protect the rights of transgender persons. Proponents have it that rights exist in protecting every person by virtue of being human regardless of the ever-expanding diversity.¹⁶⁰ In that regard, after undergoing transgender, one falls on either of the two sexes and does not form a third sex of his or her own.¹⁶¹ Henceforth, it follows that the aspect of gender balance and promotion also governs such people. Thus at law, they would be protected under the ambit of section 17. The writer, however, holds that to adopt such an interpretation and path will be to strain the provision to unprecedented levels in this context.

http://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1705&context=law_faculty_scholarship
(Accessed on 20 March 2017)

¹⁵⁹Section 86(3) (b) (n 142 above)

¹⁶⁰ DESA 'Creating an Inclusive Society :Practical Strategies to Promote Social Integration' (2009) 9
www.un.org/esa/egms/docs/Ghana (Accessed on 20 March 2017)

¹⁶¹F Godoy et al (eds) 'Mr and Mrs X: The rights of Transgender Persons Globally'(2015) *International Bar Association LGBTI Law Committee*.

3.2.5 Recognition of other rights not expressly enshrined in the declaration of rights.

Noteworthy also in the quest to investigate whether Zimbabwe recognises the rights of sexual minorities are the provisions of section 47. They provide that Chapter 4 does not preclude the existence of other rights and freedoms that can be established.¹⁶²

Under the ambit of international law as has been established afore, sexual minority rights are recognised.¹⁶³ Section 46 (2) holds that the courts have an obligation to consider relevant international law in particular the conventions ratified by Zimbabwe which needless to point out, recognise sexual minority rights. In that regard, can it not be construed that section 47 provides that albeit chapter 4 having nothing to the effect of “rights of sexual minorities,” we are not precluded from having in our minds that such rights exist? This can however be answered by flipping to the next page which establishes that such rights ought to be consistent with the spirit of the Constitution.

3.3 Limitation of Rights and Freedoms

The rights enshrined in the declaration of rights of the Constitution are however not absolute save for only a few which are categorically stated.¹⁶⁴ Section 86 of the Constitution is the limitation clause allows the limitation of rights within a set framework and for specified reasons enshrined therein. As alluded to afore, on fight blush, it seems that the right to equality, privacy and dignity seem to foster recognition of the rights of sexual minorities. Section 86 however takes away the joy in that song. It provides that the rights in chapter 4 (except for those not subject to derogation) can be limited in terms of the law of general application, and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society. In the interests of defence, public safety, public order, public morality, public health and other general public interest, rights can be limited. To this end, it is paramount to appreciate the prerequisites required to justifiably limit a right that is to

¹⁶² Section 47(n 142 above)

¹⁶³ General Comment Number 20 Non-Discrimination in Economic Social and Cultural Rights, 2009 para 15

¹⁶⁴ Section 86(3) of the Constitution provides for the rights which cannot be limited.

say, the requirement of a law of general application, the reasonableness and justifiability in an open and democratic society based on human dignity, equality and freedom.

3.3.1 Law of General Application

As alluded above, a law of general application is a prerequisite for the limitation of a right. It entails that a limitation must be authorised by a law and the law must be of general application.¹⁶⁵ The essence of this requirement is that with regards to form, the law limiting any of the rights in the declaration of rights must be clear, precise and accessible. Substantively and even more crucial, the law must apply impersonally, equally and must not be applied arbitrarily.¹⁶⁶ Henceforth, limitation of a right must not be directed at constricting the freedom of a particular group but must be objectively aimed at limiting the right of the general populace. In this wise, it means that the laws limiting sexual minority rights must satisfy these prerequisites.

Section 73 of the Code which provides for the crime of sodomy (discussed in depth later) as well as section 78 of the constitution serve as the laws that make homosexuality unlawful in turn limiting the right to equality and non-discrimination. The above provisions have to thus meet the threshold of general application if they can be justified under the ambit of section 86 of the constitution. With regards to form, these laws are substantially clear as they prohibit acts of homosexuality in their wording, with section 73 of the Code as the most unequivocal one making consensual anal sexual intercourse between males criminal. Substantively however, it seems section 73 of the Code in particular is exclusively directed at homosexual persons. It addresses anal sexual intercourse between males and excludes similar sexually akin action when it comes to women. Taking the above substantive observations into account, it seems logical to allude that the law is not of general application as it is focusing on a particular group which is of a different sexual orientation and moreover within that group it is targeted on homosexual men only. To this end, it seems such a provision fails to be a law of general application as it does not apply equally to everyone.

¹⁶⁵ de Waal and Currie(n 152 above)

¹⁶⁶ de Waal and Currie(n 152 above)

3.3.2 Reasonableness and justifiability in an open and democratic society based on human dignity, equality and freedom.

The connotations of this requirement are that the reasons for limiting the right must be acceptable in an open and democratic society. Akin to the afore, the limitation imposed by the law on the right must be proportional in the way it violates the enshrined right in order to achieve its purpose. In this context, it means any method to limit the right enshrined in the constitution must not violate it more than is necessary from the subsisting circumstances.

The aspects reasonableness and justifiability in a democratic society have therefore to be assessed objectively at the same time taking into account the nature of the right. The questions arising therefore are whether or not criminalising sodomy is a proportional limitation to the right to non-discrimination and the right to human dignity and whether or not there are no other realistic ways available of maintaining the conservative status quo in Zimbabwe without restricting the rights of LGBT persons? To answer these questions, it is necessary to consider South African jurisprudence which has dealt with this ethos before Zimbabwe. In *the National Coalition for Gay and Lesbian Equality v Minister of Justice and Others*¹⁶⁷(which shall be discussed in detail in the next chapter), the court held that discrimination of same sex-partners from extension of citizenship was not justifiable in a democratic society based on human dignity, equality and freedom. Moreso, in its reasoning there were other progressive ways to preserve the institution of marriage without shunning persons of a different sexual orientation. Drawing inspiration from this judgement, it seems very logical to conclude that criminalising same sex relationships is even worse and therefore should not be tolerated in a democratic society that Zimbabwe is driving towards.

It is proposed that Zimbabwe is a conservative country. Starting from the preamble of the Constitution, the supremacy of the Almighty God implies that the law therein is derived largely from natural law, which does not acknowledge homosexuals and transgender persons jurisprudentially.¹⁶⁸ The founding values and principles do not recognise LGBT persons on face value but rather acknowledge the maintaining of cultural and religious values, a stance that was dealt with succinctly in *S v*

¹⁶⁷*National Coalition for Gay and Lesbian Equality v Minister of Justice and Others* 2000(2) SA 1

¹⁶⁸*Corbett v Corbett* 1970 (2) ALLER 83

*Banana*¹⁶⁹. Section 16 holds that all State institutions and agencies of government at every level must promote and preserve cultural values and practices recognised in Zimbabwe. Homosexuality has been regarded as an ‘unnatural’ practice hence regarded as alien to society.¹⁷⁰ Section 78 (3) on marriage rights emphatically establishes that persons of the same sex are prohibited from marrying each other. Though a contention can be raised that homosexuals can do all other things apart from marrying, a contextual interpretation of this proviso holds that this is also prohibited as backed by the subsidiary Criminal Law (Codification and Reform) Act Chapter [9:23].

Wherefore, the expansion of the declaration of rights provided by the coming in of the 2013 Constitution, seems to foster the rights of LGBT persons in respect of how they are couched. However, the interpretative criteria ascribed seem to be the biggest challenge that impairs legal arguments into sociological ones. Notwithstanding that there is need to be guided by the values of the constitution. There is need to avoid a scenario where the law is ignored totally if it seems to be contrary to a certain line of thinking, usually the dominant one in this case heterosexuality.

3.4 Acts of Parliament and subsidiary legislation

3.4.1 Criminal Law (Codification and Reform) Act

The Zimbabwean criminal law is very unequivocal in criminalising acts akin to homosexual behaviour. Section 73 of the Criminal Law (Codification and Reform) Act provides for the crime of sodomy. It provides as follows:

(1) 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 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.¹⁷¹

From the afore stated provision, it is apposite to conclude that the law in Zimbabwe frowns at gay behaviour in the strictest sense. The provision under discussion not

¹⁶⁹*S v Banana* 2000(n 26 above)

¹⁷⁰*R v Masuku* (no 20 above) See also *S v Banana* (no 26 above)

¹⁷¹ Criminal Law (Codification and Reform)Act [Chapter 9:23] : Section 73(1)

only criminalises the actual anal sexual intercourse between males , but also “any act involving physical contact other than anal intercourse..” which has traces of any gay undertones. Against this understanding, it is evident that the ethos of gay rights in Zimbabwe is deemed to be an anomaly which must never be tolerated even in the slightest degree. In this regard, to talk about the rights of gays in the present criminal law dispensation would seem blatantly unreasonable.

Suffice to allude that inspiration to enshrine sodomy as a criminal offence in Zimbabwe was a phenomenon drawn from common law. In the case of *R v Masuku*¹⁷², sodomy was deemed to be an unnatural offence. An unnatural offence then, was defined as any sexual act not aimed at procreation. Since then, the common law evolved so that “unnatural offences” have moved from their rationale in the procreation fetish to be directed almost exclusively against the gay community. To that end, it was found fit that the Code encompasses sodomy as a crime.

The law seems however to be silent regarding the criminal liability of similar “indecent” conduct by females *vis a vis* lesbianism. Such a lacunae has not been interrogated in Zimbabwe by our courts as yet because of the rarity of such incidences. Primarily, this is because of the criminal connotations that accrue as a result of such conduct and in time, it seems to have become alien to people. Having said that, the status quo per the Code as it stands has no tolerance for the rights of gays with the question of criminal liability of lesbians still a point subject to moot though a contextual interpretation would answer this question evoking that it is but the same thing.

3.5 Conclusion

Succinctly, the position of the law in Zimbabwe as it seems castigates any practice of manifestation of LGBT persons. Every Act has to be interpreted in light of the supreme law, the constitution which does not expressly provide for the rights of LGBT persons. To that end, the exclusion of any recognition of LGBT persons in the Acts of Parliament and the Constitution raises questions on the realisation of the constitutionally enshrined rights notably the right to human dignity which cannot be limited and other quintessential rights that seem to unequivocally foster non-

¹⁷²*R v Masuku* (n 20 above)

discrimination. The only avenue available in order to argue for the rights of LGBT persons seems to be solely through interpretation. Having discussed the current legislative position and the interpretations adopted by the courts in Zimbabwe, the next chapter shall then juxtapose the position exposed herein with the subsisting position in other jurisdictions in a bid to see how (if at all) the rights of LGBT persons have been incorporated in their respective laws together with how the courts have interpreted such provisions.

Chapter 4

Comparative Jurisprudence on Sexual minority rights

4.0 Introduction

The major thrust of the previous chapter was to categorically expose the subsisting legal regime in Zimbabwe insofar as the rights of sexual minorities are concerned. Such an appreciation of the status quo in Zimbabwe is fundamental in a bid to aptly capture the positives and negatives that characterise the legal system regarding the rights of sexual minorities. In turn, possible remedies can be initiated to cure the negatives on the other hand strengthening the positives. With this appreciation of the Zimbabwean position from the previous chapter, chapter 4 therefore seeks to comparatively assess the Zimbabwean position with that of Malawi, South Africa and United States of America. The juxtaposition of Zimbabwe with the above noted jurisdictions is fundamental in exposing the loopholes in our legal system (if any) that barricade the system from conforming to international best practices pursuant to respecting the rights of LGBT persons. Accordingly, a comparative analysis facilitates the adoption of progressive policies and laws that have addressed the plight of sexual minorities convincingly in their respective countries where they have

been implemented. This in turn will pave way for the possible recommendations that will be ushered in the next chapter.

4.1 Malawi

The Republic of Malawi is a country situated in sub Saharan Africa and is one of the 36 African countries that criminalise homosexuality¹⁷³. The general spectrum of Malawi is largely conservative and subscribe mainly to the culturally and religiously 'orthodox' conduct. In this regard, any conversation or forum on sexual minority rights runs afoul of the fundamental underpinnings of the Malawi society. It is on this basis that issues of homosexuality have been frowned at nationally exemplified by the criminalisation of acts of sodomy in the Penal Code¹⁷⁴ and the explicit prohibition of same sex marriages in The Marriage, Divorce and Family Relations Act¹⁷⁵ *inter alia* other discriminatory pieces of legislation which are however couched implicitly.

The courts have also affirmed the general societal convictions on homosexuality with the case of *Republic v Steve Monjeza and Tiwonge Chimbalanga*¹⁷⁶ being the leading case in this jurisdiction. The case epitomised the once clandestine and shunned issue of homosexuality, to a point where it not only invited national but international lens on the discriminatory laws in Malawi.

Albeit, the above seemingly discriminatory trajectory in Malawi, the constitutional dispensation as shall be envisaged is very much in tandem with international human rights instruments notably the ICCPR. It is thus crucial to appreciate the prevailing trajectory in Malawi regarding sexual minority rights with a critical eye on the legislation and how the judicial reaction has shaped the ethos of sexual minority rights therein in a bid to comparatively appreciate the status quo in Zimbabwe.

4.1.1 Constitutional and Legal Framework on sexual minority rights in Malawi.

¹⁷³Malawi Penal Code [Chapter 7:01] Section 153

¹⁷⁴ Section 153 (n 173 above)

¹⁷⁵The Marriage, Divorce and Family Relations Act (Marriage Act) 2015

¹⁷⁶*Republic v Steve Monjeza and Tiwonge Chimbalanga Case No. 359 of 2009*

The Constitution of Malawi was adopted in 1995¹⁷⁷ and has since then been amended to accommodate the needs of the people ensuing over the years. Suffice to mention that the Bill of Rights in the constitution mirrors the ICCPR as a model representation of human rights protection.

Section 20 of the Malawi Constitution is the non-discrimination clause. The proviso to Section 20 stipulate that,

...discrimination of any persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on the grounds of race, colour, sex, language ... or other status.

A reading of the above provision is suggestive of a jurisdiction that outlaws any unjustified discrimination which at law is in tandem with international best practice. One therefore can be pardoned on the basis of the above provision to infer that the 'other status' stipulation at the end of the provision can be interpreted in a manner that canvasses any other unjustified discrimination inclusive of discrimination on the basis of sexual orientation. Coupling this right are also the provisions of Section 12 of the Malawi constitution which make it incumbent upon the State to guarantee all persons the inherent dignity due to them.¹⁷⁸

Section 21 of the Malawi Constitution also provides for the right to privacy. The ethos of the provision just as that in Zimbabwe also speaks to the right that individuals have to personal privacy. It is within the contemplation of this right that individuals have the right to a private life which is uninterrupted especially by the state provided practice of such private conduct is not detrimental to the state or the rights of other right holders.

It is on the basis of the above extracted rights that the Malawian Constitution aptly satisfies the internationally acclaimed respect for human rights and freedoms at least as it appears from a reading of the constitutional provisions.

4.1.2 Other Pieces of Legislation

¹⁷⁷Constitution of Malawi, 2004 (Revised Edition consolidated all amendments as of 21 January 2004 since the 1994 Constitution.)

¹⁷⁸Section 12(n 177 above)

Albeit a very lucrative and sound Bill of Rights as accentuated in the Malawi Constitution, the ensuing Acts of Parliament seem to trample upon these rights. Sexual minority rights seem to be as alien as has been the discourse and therefore still castigated to the core.

4.1.3 Penal Code of Malawi¹⁷⁹

The Penal Code of Malawi unequivocally criminalises intercourse between consenting adults of the same sex. The provisions of Sections 137A, 153 and 156 of the Code criminalise consensual sexual activity between individuals of the same sex with penalties up to fourteen years and the option of corporal punishment.¹⁸⁰ Section 153 provides for the crime of buggery wherein paragraph (a) criminalises having carnal knowledge of another individual of the same sex through the anus which is against the order of nature.¹⁸¹ Section 153(c) in turn criminalises the corresponding acceptance by an individual of allowing someone of the same sex to have carnal knowledge of him which is also against the order of nature.¹⁸² The ensuing provisions are reflective of the absolute intolerance of homosexuality in Malawi regardless of the constitutional provisions which seem to speak to non-discrimination.

To further establish and reinvigorate the intolerance of sexual minority rights, in 2011, an amendment to the Penal Code ushered in Section 137A which saw the criminalisation of consensual lesbian sex.¹⁸³

4.1.4 The Marriage, Divorce and Family Relations Act.¹⁸⁴

The Marriage, Divorce and Family Relations Act is the relevant Act of Parliament in Malawi responsible for regulating marriages, their dissolution and any other issues akin to the institution of marriage and the family. Of interest however to this discourse is that the Act limits marriage to “...two persons of the opposite

¹⁷⁹The Penal Code [Chapter] 7:01 of Malawi

¹⁸⁰M Malamba ‘The Controversy of Homosexuality :A Critical Look at the Issues that Make Legalising Homosexuality in Malawi Difficult’ (2012)

¹⁸¹ Section 153(a)(n 179 above)

¹⁸²Section 153(c))(n 179 above)

¹⁸³The Other Foundation ‘Canaries in the coal mines: An analysis of spaces LGBTI activism in Malawi’ (2017) *Country Report* 15

¹⁸⁴The Marriage, Divorce and Family Relations Act (Marriage Act) 2015

sex...”¹⁸⁵ Accordingly therefore, the Act does not recognise homosexuality and lesbianism as lawful and it maintains that sex is determined at birth and thus effectively denies the existence of transgender people in Malawi. It thus exclusively perpetuates a heteronormative perspective of marriage.

4.1.5 Judiciary’s Approach to Sexual Minority Rights

The 2009 case of the *Republic v Monjeza and Chimbalanga*¹⁸⁶ was the epitome of sexual minority rights in Malawi, particularly homosexuality. Therein, the judiciary had the opportunity to shape the future of sexual minority rights, whether to follow international jurisprudence and pronounce sexual minority rights or ultimately signal the remaining of Malawi in the doldrums of discriminatory conservatism.

The court however chose to stick to the latter. It convicted the accused persons for violating the provisions of Sections 153 and 156 of the Penal Code without hesitation and subsequently handed down a fourteen year sentence to both accused persons. In delivering the judgement, the Chief Magistrate opined that such conduct was “bizarre” and unnatural in the Malawian socio-cultural and religious setting and as such could not be condoned. It is this judgement and the ensuing reasoning that just like the Banana judgement in Zimbabwe, accentuated the conservatism that characterises both jurisdictions. Albeit the pardon later extended to these offenders after pressure from the international community with the visit of the UN Secretary General as the panacea, the then President heralded that homosexuality still had no place in Malawi echoing President Mugabe’s 1995 sentiments at the Book Cafe.¹⁸⁷

In 2012 however, the coming in of Joyce Banda as the President saw the suspension of laws which suppressed sexual minority rights, wherein the responsible Minister opined that they “...maybe unconstitutional.”¹⁸⁸ This move was coupled with an initiative to review the laws and facilitate possible law reform, which however is yet to yield anything substantial.¹⁸⁹ The resultant effect is still that sexual minority rights remain a social taboo in Malawi, whether this is legally sustainable however is

¹⁸⁵ Malawi Country Report (n 183 above) 16

¹⁸⁶ *Republic v Steve Monjeza and Tiwonge Chimbalanga Case No. 359 of 2009*

¹⁸⁷ ‘Under pressure, Malawi’s leader pardons gay couple’ ABC news

<http://abcnews.go.com/international/wirestory?id=10778353> (Accessed on 01 June 2017)

¹⁸⁸ Malawi Country Report (n 183 above)

¹⁸⁹ Malawi Country Report (n 183 above). In 2013 the Malawi High Court announced its intention to review the constitutionality of the laws against sexual minority rights.

a question that the Supreme Court seems better placed to answer. Whether or not these Acts of Parliament or conduct to discriminate against sexual minority groups is consistent with the Constitution, is the ultimate question. In the Republic case *supra*, the Chief Justice refused to hold the matter as a constitutional issue on a technicality *vis a vis* lack of clarity on the documents. This is based on the Courts Amendment Act which gives the prerogative to determine a Constitutional matter to the Chief Justice.¹⁹⁰

Pursuant to the discussion of Malawi, it seems trite to note that the ensuing debate on whether sexual orientation as a prohibited basis for discrimination also arises there. Accordingly, the question of analogous grounds on the prohibited grounds of discrimination and the cultural relativism versus universalism debate also suffices. It seems Malawi mirrors the Zimbabwean problem on whether to remain enslaved by culture and religion at the expense of an evolutive interpretation per the dictates of international human rights standards. A solution for either country therefore seems better placed to persuade the other, be it for or against sexual minority rights.

4.2 South Africa

The Republic of South Africa is one of the few developed countries in Africa¹⁹¹. It is economically sound and multi-racial in nature with the resultant ethos being a secular culture. Against this background, the South African legal system has developed pragmatically in tandem with international human rights instruments. Herein, the decisive aspects to consider comparatively shall be Constitution of South Africa of 1996 and the court decisions that have dealt with sexual minority rights.

4.2.1 The Constitution of South Africa.

South Africa was one of the first countries in the world to protect the rights of sexual minorities per their 1996 Constitution.¹⁹²The leading constitutional provision with regards to sexual minority rights in South Africa is section 9 of the South African

¹⁹⁰Courts (Amendment) Act 2004 : Section 9(3)

¹⁹¹ 'Top 10 Most Developed African Countries' <http://www.africaranking.com/most-developed-african-countries/> Accessed on 02 August 2017

¹⁹² Iiyambwa (no 25 above)

constitution. It provides for the right to equality and non-discrimination.¹⁹³ The provisions thereof provide for prohibited grounds for discriminating against an individual including race, colour, sex *inter alia*. Worthy to note however for this discussion, is that Section 9 of the Constitution explicitly provides for 'sexual orientation' as a prohibited ground for discrimination. The explicit inclusion of this ground in the supreme law of South Africa cured any equivocal reservations on whether sexual minority rights are recognised in the jurisdiction. South Africa therefore being a neighbour to Zimbabwe and the most prominent of its neighbours due to the large volumes of Zimbabweans in South Africa, ought to pose as a provider of a panacea to the question of sexual minority rights in Zimbabwe. The human rights framework in South Africa represents international best practice in respect of non-discrimination. Fundamental therein is that, not only are the human rights an issue of paper work but they are implemented per the dictates of the law, a feat which seems to be the biggest shortcoming for both Zimbabwe and Malawi.

Having alluded to the provisions of Section 9, interrogating other rights such as the right to dignity and privacy to bolster the constitutional recognition of sexual minority rights would be in this case trying to bolster an already clearly established position at law. Suffice to however just mention that, the afore mentioned rights can be invoked in conjunction with Section 9 (that is if need be) to prove the inalienable worth of a human being which cannot be derogated by virtue of a different sexual orientation. It is therefore explicit within the Bill of Rights in South Africa that sexual minority rights have a place within the human rights discourse therein.

4.2.2 The attitude of the courts towards sexual minority rights in South Africa.

Pursuant to the constitutional provisions in South Africa, the judiciary has aptly enunciated these provisions in their decisions in recognising fundamental human rights.

The case of *National Coalition for Gay and Lesbian Equality v Minister of Justice and Others*¹⁹⁴ is one such example of the courts upholding sexual minority rights. Therein, the Constitutional Court had to decide whether or not to declare Section 25(5) of the Aliens Control Act unconstitutional. The provisions thereof omitted to extend the

¹⁹³The Constitution of the Republic of South Africa Act 108 of 1996 : Section 9

¹⁹⁴*National Coalition for Gay and Lesbian Equality v Minister of Justice 2000 (n 167 above)*

rights due to spouses of citizens, who themselves were aliens to parties who were in permanent same sex partnerships. In ruling that Section 25(5) was unconstitutional, the court held that the present case presented a scenario where the rights to equality and dignity are acquiescent to each other. The policy basis for this reasoning was hinged on the understanding that treating same sex marriages in a manner that is unequal to heterosexual relationships constituted a quintessential compromise on the individuals' right to dignity.

To further bolster its reasoning, the court opined that the limitation imposed by Section 25(5) was not justifiable in a democratic society based on human dignity, equality and freedom. Secondly, the court alluded to the fact that there is no rational connection between discriminating against same sex relationships and the submitted aim of government to protect the institution of marriage and family as a fundamental pillar of humanity. To that end, the court found that extending protection to same sex relations under the act did not in any way compromise the protection afforded to the institutions of marriage and family. Moreover, there were other methods that could be initiated to reinforce this protection without discriminating against sexual minority rights.

Another case worthy of mention is that of the *National Coalition for Gay and Lesbian Equality v Minister of Justice and Others*¹⁹⁵. Albeit having the same parties, the Constitutional Court herein had to decide whether or not to confirm an order by the High Court to the effect that the law offence of sodomy, the inclusion of sodomy in schedules to certain acts of Parliament and a section of the Sexual Offences Act¹⁹⁶ were unconstitutional and invalid insofar as they prohibited sexual conduct between men. Inevitably also, the decision of the court would automatically have an impact on the common law offence of sodomy in the jurisdiction.¹⁹⁷

The court, per O'Regan J held that equality at law ought to be substantive and broad. Pursuant to that, the court held that the offences cited herein prohibited sexual intimacy between gay men in violation of the right to equality and constituted discrimination on the basis of sexual orientation. Thus with sexual orientation as a prohibited listed ground for discrimination, the court confirmed the order of unconstitutionality.

¹⁹⁵ *National Coalition for Gay and Lesbian Equality v Minister of Justice and Others* 1999 (n 157 above)

¹⁹⁶ Sexual Offences Act 23 of 1957 (South Africa)

¹⁹⁷ Ilyayambwa, (n 25 above)

Suffice also to mention that the court interrogated the criminalisation of sodomy *vis a vis* the right to privacy. It averred that such offences criminalised private conduct between consenting adults which caused no harm to other members of society. Such intrusion into the intricacies of sexuality of an individual at law constitutes a violation of the right to privacy.¹⁹⁸ It demeans persons of a different sexual orientation and hinders their expression. In turn, their dignity is violated and opens floodgates for other stereotypical avenues of discrimination aimed at such people. Therefore, such laws cannot be tolerated lest the non-discrimination clause be made mockery of.

To further corroborate the pragmatic adherence to the non-discrimination clause by the courts, the case *Du Toit and Another v. Minister for Welfare and Population Development and Others*¹⁹⁹ is another quintessential example. Therein, the court held that the provisions of the Child Care Act and the Guardianship Act which reserved the right to adopt children exclusively to married couples or single persons violated the Constitution. Accordingly, same sex partners by this landmark ruling were also extended the right to adopt children in tandem with equality and non-discrimination.

It is thus from a sound Constitution and complimentary work by the courts that South Africa has managed to uphold sexual minority rights and curtail discrimination in astute fashion. Ilyayambwa however still notes that albeit such strides there is still a level of stigma that accompanies one upon being termed gay or lesbian²⁰⁰. In the *Louis Dey case*²⁰¹, the dissenting judgement interrogated the effect of one being termed a homosexual *vis a vis* defamation. The judgement in a nutshell heralded that as long as being termed a homosexual still carries defamatory connotations, substantive equality is not a reality. To that end, it suffices to note that *de facto* discrimination seems to still subsist in South Africa though the law has made strides to eradicate such.

As has been envisaged, protection of sexual minority rights is possible in Africa with South Africa providing an archetype. It however took a commitment and understanding of respect for difference. Massoud and Duarte argue that laws sometimes have to be revolutionary and in some instances to an extent that is

¹⁹⁸ Explanatory Note <http://www.saflii.org/za/cases/ZACC/1998/15media.pdf> (Accessed on 10 September 2017)

¹⁹⁹ *Du Toit and Another v. Minister for Welfare and Population Development and Others* 2002 (10) BCLR 1006 (CC)

²⁰⁰ Ilyayambwa, (n 25 above)

²⁰¹ *Le Roux and Others v Dey* 2011 (3) SA 274 (CC)

against the general convictions of the majority.²⁰²To them, it is only this way that minority groups can be accommodated because democratic means such as referendums only foster the rights of the majority to the exclusion of others. However despite this low statistic, the sexual minority rights found their way into the Constitution. The action by South Africa seems to suggest that at times, there is need to liberate ourselves from cultural and religious convictions in favour of objectively appreciating acts from a purely human rights perspective to accommodate minorities.

4.3 United States of America

The United States of America(USA) has been chosen as a comparator in this study due to its comprehensive history on the rights of sexual minorities. It is a developed country with a more advanced legal system in comparison with Zimbabwe. To that end, it arguably sets the tone on the treatment of sexual minority to which Zimbabwe, as a developing country can borrow key aspects where applicable to fill in its loopholes. It falls under a line of countries with sound economic systems and champions of human rights activism. In this wise, it will be deciphered from what can be termed an ideal scenario of how LGBT persons should be treated to establish whether Zimbabwe can borrow anything from this State.

It has to be noted that the USA as lexically understood is composed by multi-federal States that often have laws that differ from one State to the other. In addition to that, the country is characterised by even greater social diversity. It is home to a multiplicity of racial groups, people who subscribe to various religions together with a number of pressure groups who advocate for amongst other ideologies liberalism and conservatism.²⁰³ The response to LGBT persons has differed but as it stands, the liberation of sodomy laws seems to be flourishing. Against this background, it is fundamental that the developments in this jurisdiction be traced to see if Zimbabwe

²⁰² Duarte J 'South Africa Gay and Lesbian Film Festival' May (1994) cited in Ilyayambwa (n 25 above) 52

²⁰³ 'Diversity in America Celebrating Our Multicultural Heritage' Available at <https://worldandi.com/specialcollection/special-collection-diversity.asp> (Accessed on 3 August 2017)

can draw inspiration because albeit there being an economic gap, the socio-cultural and religious debate on sexual minority rights is very much akin to that in Zimbabwe.

4.3.1 Legislative framework

The law on sodomy in the USA is characterised by a long line of events on from as early as the 18th century. In 1779, Jefferson enshrined a law in Virginia which made any act of sodomy be punishable by castration.²⁰⁴ The pillars behind the public shunning of sodomy were rooted in the law of natural justice which viewed such acts as “unnatural”. Before 1962, sodomy was a felony in every state, punishable by a lengthy term of imprisonment with hard labour. In the 1970s, just as in Zimbabwe, the police could raid and arrest any person suspected to be conducting homosexual acts. Conservatives in the USA contended that the State legislators should enact statutes that will permit population to flourish. Much behind the history and the prevailing state of affairs of the position of LGBT persons in the United States is to be understood through case law as will be dealt with *infra*.²⁰⁵

The controversial provision to which LGBT persons rely on for recognition in the Constitution is Section 1 of the Fourteenth Amendment to the United States Constitution. They read;

... nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.²⁰⁶

This provision is not necessarily unique as almost every country that claims to be a democracy has such a provision enshrined in its constitution, Zimbabwe included. The provision is in essence is similar to section 56 of the Zimbabwean Constitution with the distinction being in interpretation which is restrictive in the Zimbabwe and liberal in the USA. The intricacy and use is well understood through how it has been interpreted by the courts hence the need to discuss the case law masking the subject of the discourse.

²⁰⁴G M Herek ‘Homosexuality’ in A E Kazdin (ed.) *Encyclopedia of psychology* (2000) 149-153

²⁰⁵R M Salokar ‘Beyond Gay Rights Litigation’ (1997) 3 *GLQ: A Journal of Lesbian and Gay Studies* 389

²⁰⁶Section 1 of the 14th Amendment of the US Constitution

4.3.2 Courts' Approach

On the right to privacy, the Constitution does not succinctly encompass the niceties that outline all the elements the right to privacy if the proviso were to be broken down. In this wise, the judiciary in *Lochner v New York*²⁰⁷ in their wisdom of interpretation, ruled that there are rights retained by people that are not expressly mentioned within the Bill of Rights.

In the case of *Griswold v Connecticut*²⁰⁸, the court deliberated on the right to privacy and held that a Connecticut law prohibiting the sale and use of birth control was unconstitutional because it infringed on the right of marital privacy. This meant that the marriage institution had to be respected and its sanctity had to be upheld. The question that was begged at this time was; was every type of marriage protected under the auspices of this thinking?

The ruling in the *Griswold* case ignited the gay movements which sought to have their marriages protected under the right to privacy. Three years later, the case of *Bowers v Hardwick*²⁰⁹ sought to address the burning question that was boggling the minds of the people in the USA. In a 5-4 ruling, the majority held that the constitutional right to privacy did not in any way protect the right to have private, consensual intercourse with a person of the same sex.

The Supreme Court was later faced with similar facts as those in *Bowers* (supra) in the case of *Lawrence v Texas*.²¹⁰ The court, acknowledging the new millennium, overruled its earlier decision. Justice Kennedy ruled that the *Bowers* court had erred in finding that the government had historically restricted private consensual sexual relations between persons of the same sex. Sexual mores had changed with time as there was a 17 year gap between *Bowers* and the *Lawrence* case. Various States in the USA had repealed their anti-sodomy statutes leaving a few remaining conservatives. The learned judge held further that homosexuals were protected under the ambit of the Due Process Clause that gave them the right to partake in intimate conduct without the intervention of the government.

²⁰⁷ *Lochner v New York* 98 US 45 (1905)

²⁰⁸ *Griswold v Connecticut* 381 US 479 (1965)

²⁰⁹ *Bowers v Hardwick* 478 US 186 (1968)

²¹⁰ *Lawrence v Texas* 539 US 558(2003).

The latest case which had far reaching impacts was *Obergefell et al. v. Hodges, Director, Ohio Department of Health*.²¹¹ The Respondents contended that allowing LGBT persons meant procreation would be severed hence this would further harm the institution of marriage. This reasoning mirrors the thinking the majority of the Zimbabweans have against homosexuality.

The majority began by noting that the institution of marriage has evolved over time both legally and socially. It was found that the Court had long recognised that the Constitution protected the right to marry, including in *Loving v Virginia*²¹², in which the Court invalidated bans on interracial marriage. The court laid more far reaching constitutional principles, including four essential principles relating to the right to marry: the right to personal choice in relation to marriage as an inherent aspect of an individual's autonomy; the importance of the union of marriage to the two individuals which was "unlike any other"; that marriage provides a safeguard for children and families and that marriage was central to social order, with states offering married couples rights, benefits and responsibilities. Each of these principles applies equally to same-sex marriages and while limiting marriage may have previously been seen as just and natural, the prevalent position is now that limiting marriage to opposite-sex partners is inconsistent with the "central meaning of the right to marry".

The reasons that are established in the *Obergefell* case pronounce the diversion that the USA has taken from the position that Zimbabwe upholds. The history is essentially the same, both were radical conservatives. However, with the change in time, the USA has become liberal owing to the courts' intervention. Rights do not come only from history, but from a better understanding of how liberty should be defined in our own time.

4.4 Conclusion

The recognition of sexual minority rights has been a mixed bag depending with the country in question. In every jurisdiction, the issue always boils down to the debate of cultural relativism versus universalism. Malawi, probably due to its close proximity to Zimbabwe has a legal regime similar to that of Zimbabwe which is conservative in nature. South Africa however has since moved away for the conservative view

²¹¹ *Obergefell et al. v. Hodges, Director, Ohio Department of Health* 576 US (2015)

²¹² *Loving v Virginia* 388 US 1, 12 (1967)

through its constitution which encompasses sexual orientation as a ground for non-discrimination. Internationally, the United States which has shared the same history on the subject as that of Zimbabwe has with time embraced liberalism from all radical sodomy laws that have existed in time. The ball then is left in Zimbabwe's court with options of either embracing the modern dictates on sexual orientation like in the USA and South Africa or to seek consolation from countries like Malawi that are still conservative and are stalling law reform on the topic. These comparisons pave the way for the possible reforms, if any, that Zimbabwe can make, a feat to be discussed in the next chapter.

Chapter 5

Conclusions and Recommendations

5.0 Introduction

The preceding chapter was premised on comparatively juxtaposing the concept of sexual minority rights in Zimbabwe with the subsisting frameworks on sexual minority rights in Malawi, South Africa and the United States of America. The reasoning behind such comparison as depicted therein was to appreciate how sexual minority rights have been viewed in these different countries by diverse societies in a bid to derive any positives that may aid Zimbabwe in dealing with this contentious issue. Accordingly, at the end of Chapter 4 varying philosophical conceptualisations accrued from the jurisdictions which were studied insofar as how they have treated sexual minority rights. It is against this background, that Chapter 5 draws inspiration

from the observations made in other jurisdictions and international human rights law noted in this study to shape a plausible way for Zimbabwe on how to treat sexual minority rights. To this end, conclusions from this study shall be noted insofar as Zimbabwe's position on the rights of LGBT persons is concerned. Moreso, the Chapter shall propose recommendations that are deemed fundamental in the resolution of the crux of sexual minority rights in Zimbabwe.

5.1 Conclusions

It has accrued from the study that the crux of sexual minority rights in Africa is a very complex issue. Fundamentally, this is because the regime is associated with Western secularism and therefore termed as alien to Africa as depicted in Zimbabwe in the case of *S v Banana* and in Malawi in the case of *Republic v Monjeza and Another* discussed in chapters 3 and 4 of this study respectively.²¹³ Moreso, it has accrued from the discussion that most of Africa is still immersed in cultural conservatism and therefore there is strong conviction that laws must mirror the subsisting general value consensus of a particular society which mirrors the Zimbabwean and Malawian positions as exposed in the findings in chapters 3 and 4 respectively. It cannot go without saying further that, such conservatism is coupled with a strong religious background that exists. In essence, religion is instrumental in instructing the conduct (both in the negative and positive) expected of a society. Politics becomes the conveying agent of these beliefs and societal reservations. Political utterances seem to be decisive in these jurisdictions. This was the major thinking that was deduced from the philosophical value based interpretation on the theoretical framework.

Zimbabwe has proved to be a prototypical testimony of this phenomenon in Africa. To this end, the above philosophical conceptualisations have made it difficult to embrace sexual minority rights even as other quarters of the world have decided to accept that differences in sexual orientation must not be a ground for discrimination. The marriage institution in Zimbabwe is jealously protected. However, the question remains whether the doctrine of substantive equality as opposed to formalistic equality can be extended to LGBTI persons. Heteronormative sexuality seems to be predominant orientation by far in Zimbabwe and as such the political leadership has

²¹³*S v Banana*(no 26 above) and *Republic v Monjeza and Chimbalanga*(no 200 above)

promulgated this understanding. The resultant ethos has been that equality seems to be only as far as heteronormative persons are concerned to the exclusion of homosexual persons.

Furthermore, it is trite to allude that whilst the Constitution outlaws any unjustified discrimination and in turn stipulates prohibited listed grounds, “sexual orientation” is not expressly stated. To that end, it is subject to moot whether or not to read ‘sexual orientation’ into the genus of grounds in the non-discrimination clause or interpret the express exclusion of such a ground as an intentional indication that discrimination on such a ground is allowed. The Criminal Law (Codification and Reform) Act as noted still unequivocally enshrines homosexuality as a criminal offence.

A comparative analysis with other jurisdictions in Africa and beyond as noted in Chapter 4 also shows the contentious issue of universalism of rights against the ethos of cultural relativism. Akin to that, is the conflict between adopting evolutive interpretation of rights (which recognises the change in world trajectory) against a value based interpretation (which fosters that values of a society must always shape the ensuing jurisprudence).

In respect of the countries juxtaposed with Zimbabwe, Malawi echoes the conservatism undertones against sexual minority rights in the same manner that Zimbabwe does. The reasons for this intolerance are an amalgamation of cultural, religious and political connotations that are similar to those in Zimbabwe. This is notwithstanding that the constitution just as that of Zimbabwe guarantees fundamental rights and freedoms. On the other hand, countries such as South Africa and the USA have seen it fit to embrace sexual minority rights. South Africa is noteworthy because it quintessentially includes sexual orientation as a prohibited ground for discrimination in its Constitution.

The precedence in South Africa suggests that discriminating on the basis of sexual orientation is not only a violation of the non-discrimination clause but also extends to violating other rights notably, the right to dignity and the right to privacy. Zimbabwe’s Declaration of Rights also has these rights and therefore such an interpretation cannot be ignored.

Limitation of rights at law can only suffice if the two prerequisites at law have been satisfied namely that there is a law limiting such a right and secondly that the

limitation is reasonable and justifiable in an open democratic society based on human dignity, equality and freedom. The court in the *National Coalition for Gays and Lesbians v Minister of Justice and Others*²¹⁴ dealt with the issue of whether or not these rights could be limited and if such limitation could justify the non-recognition of sexual minority rights. Suffice to note, the constitutional limitation clause in South Africa is almost in verbatim a mirror of that of Zimbabwe thus such an interpretation is persuasive in this jurisdiction.²¹⁵ The court held that albeit the existence of the law, limiting these rights in the name of prohibiting sexual minority rights was not justified in an open and democratic society based on society based on human dignity, equality and freedom. Moreso, there were alternative ways of maintaining the family without impeding on the rights of sexual minority groups. It is against the backdrop of this interpretation that Zimbabwe's conduct in limiting these rights can be reviewed.

5.2 Recommendations

5.2.1 Law Reform

The human rights framework ushered in by the 2013 Constitution aptly captures Zimbabwe's commitment to uphold the underlying principles of international human rights instruments that it is signatory to.²¹⁶ In that premise, the discussed international instruments unequivocally herald that discrimination is not warranted in international law and sexual orientation has been noted as an unjustified ground for discrimination whether expressly or impliedly. Against this standpoint therefore, if Zimbabwe hopes to aptly mirror international human rights standards there is need to specifically recognise "sexual orientation" as prohibited ground for discrimination.

Law reform therefore would be necessary to make sure that laws which discriminate persons of a different sexual orientation are struck down as *ultra vires* the Constitution, special mention being the Criminal Law (Codification and Reform) Act which criminalises sodomy.

Acknowledging that most of the discussion on the non-discrimination clause was an issue of juxtaposing conflicting and competing modes of interpretation, it is recommended that if recognition of sexual minority rights is to suffice, a constitutional

²¹⁴ *National Coalition for Gay and Lesbian Equality v Minister of Justice and Others* (n 167 above)

²¹⁵ Section 86 of the Constitution of Zimbabwe and Section 36 of the Constitution of the Republic of South Africa

²¹⁶ International Covenant on Civil and Political Rights, 1996

amendment to include “sexual orientation” as a prohibited ground of discrimination would be plausible as a panacea to the debate. Realistically, this would take a bold step by a human rights conscious legislature just as what South Africa did to still enshrine this right notwithstanding that the majority resisted the inclusion of sexual minority rights in the Constitution²¹⁷.

5.2.2 Education

Hinged to the subsequently proposed recommendation of law reform is education. Albeit it not being expressly a legal remedy, its impact is so indispensable that it is inseparable from all the recommendations that can be proposed. It is has accrued from chapters 3 and 4 that the discrimination of sexual minorities in conservative countries such as Zimbabwe is more significantly philosophical and sociological than it is legal. The discrimination has more to do with historical indoctrination and preserved conceptualisations passed from generation to generation in academic and religious curricular insofar as the subject of LGBT persons is concerned. It is argued herein that the mentality of discriminating sexual minorities accrued from nurturing than it can be said to have emerged naturally. Legal reform through the legislature can be done, but without education, discrimination will always prevail. Where it that the legislature is to be bold enough as was the case in South Africa and protect sexual minority rights as depicted in chapter 4, it may face very strong resistance in a country as conservative as Zimbabwe from society. It therefore seems advisable that educational consultative forums on the discrimination of sexual minority groups vis a vis human rights be forerunners to any legal reform that may ensue akin to the crux of LGBT persons. Advocacy, educational and training materials can act as guides in accessing and using the various United Nations and regional systems of protection. This will specifically be used by activists working to defend the rights of LGBT persons. Through education, discrimination against sexual minority groups was cultivated and thus through the same agent (education) non-discrimination can be promoted.

5.2.3 Judicial Activism

²¹⁷ Ilyayambwa (n 25 above)

With South Africa serving as an example of law reform through the legislative framework, an alternative path lies with the courts. The American reform came as a result of a long line of judicial decisions which brought about the liberal laws on sodomy that are currently prevailing in the States. Judicial activism is a doctrine that deserves a manifestation in reality and not just on paper. However, the hurdle that has to be dealt with is the political atmosphere in Zimbabwe to which the polity in power are conveniently ignorant to the current dictates of the modern world.

Furthermore, the recognition of sexual minority rights is crucial in as far as realising the ethos of the right to health. It is common cause that HIV and AIDS are a phenomenon that is pertinent in Africa and Zimbabwe is no exception. In tandem with that, it is also a scientific fact that homosexual men are more susceptible to infection.²¹⁸ Yet with that knowledge, because of discriminating against homosexuality and subsequent criminalisation, there is no attention given to them notwithstanding their vulnerability. Homosexuality is a fact particularly in Zimbabwe prisons and therefore there is need to recognise this fact and deal with it²¹⁹. To deny a fact does not in any way alter its truthfulness. Accordingly, acceptance of difference in sexual orientation at law will facilitate taking action in respect of such vulnerable groups notably provision of condoms in prisons, pursuant to realising the right to health and eradicating the pandemic.

5.3 Limitations to the above recommendations

Whilst the above points make it meritorious to recognise sexual minority rights, proponents against homosexuality also make seemingly plausible arguments.

Firstly, recognising homosexuality and other sexual minority rights alike, is a blatant insult to the 'African philosophy'. What is this 'African philosophy'? The answer lies within an appreciation of the substance of the African Charter. The African Charter is the most supreme instrument governing human rights system in Africa. Albeit the human rights regime within the document being neutral, the Preamble to the Charter

²¹⁸ R Dotinga 'Biology Leaves Gay men highly vulnerable to HIV: Study' (2012) www.health.usnews.com/health-news/news/articles/2012/07/20 (Accessed on 24 June 2017) See also J Wilton 'Getting to the Bottom of it: Anal sex, rectal fluid and HIV transmission' www.catie.ca/en/pif/fall-2014

²¹⁹ P Shumba 'Khami prison inmate up for sodomy' <http://www.chronicle.co.zw/khami-prison-inmate-up-for-sodomy/> (Accessed on 24 June 2017)

provides for interpretative criteria to be employed when interpreting the rights therein.²²⁰

Paragraph 5 of the Preamble is clear that the human rights discourse in Africa must be read in tandem with the “...historical tradition and values of African civilisation.” Moreso, the ethos of peoples’ rights is prominent in the Preamble which reflects the largely collective perception of human rights that subsists in Africa. Pursuant to that, upon adopting such an interpretation would instruct that human rights must be understood from a standpoint that acknowledges values of a society. Thus, albeit being universal, the intricacies of a particular right must not be generalised but be understood with regards to the context and setting. The value consensus in Zimbabwe is largely against the acceptance of sexual minority rights and therefore must fall.²²¹ Moreover, in terms of the Preamble to the African Charter, in Africa, it is not so much about the individual but how the people of a society perceive a certain action.

Pursuant to the above ethos, it seems addition of any grounds in analogous fashion in section 56 of the Constitution must take into account the values and principles that shape the people of Zimbabwe²²². Homosexuality is not one of those values or principles that shape Zimbabwe notwithstanding the importance of tolerance in society. Therefore in this regard, excluding people of a different sexual orientation would be justified. However to make it unequivocal and curtail an interpretation crisis, the Constitution must be clear that such a ground must not be read into the listed grounds because it does not conform to the values of the people. After all, sociological jurisprudence scholars propound that law is a reflection of the societal convictions and nothing else.²²³ Imposing a law as is suggested by the South African example seems to be problematic in Zimbabwe which is not as multi-racial and secular as South Africa is.

5.4 Conclusion

²²⁰ See generally G E Devenish *Interpretation of statutes* (1992)

²²¹ *S v Banana* propounded that the interpretation accorded to a right is sensitive to the society. Accordingly, how a right is interpreted in another jurisdiction may differ with the meaning accorded to it in Zimbabwe.

²²² There is strong conviction that prohibited grounds in Section 56 of the Constitution of Zimbabwe are not exhaustive and therefore other grounds can be added.

²²³ H Barnett *Constitutional and Administrative Law 11th Edition* (2016)

The crux of sexual minority rights in Zimbabwe was and is still a very controversial issue. It stems from the study that there are always two conflicting sides to the arguments regarding sexual minority rights. To further complicate a consensual resolution to this conflict, is the fact that proponents both for and those against sexual minority rights submit very persuasive arguments to support their standpoints. Each argument proposed for the adoption of sexual minority rights seems to be countered aptly by a corresponding one to discredit it. Notably, evolutive interpretation is countered by value based interpretation, the maxim of statutory interpretation *ejusdem generis* is countered by another maxim *expressio unis est exclusio alterius* and so do most of the propositions submitted herein. The International Human Rights Instruments whilst seemingly providing for uniformity regarding non-discrimination are also juxtaposed with the African Charter which seems to grant states leeway to extend human rights in a way that takes into account their socio-cultural philosophies.

To that end, it seems impossible to reconcile the two schools of thought as much as it is to contemplate that the typical recommendations that is law reform and judicial activism can remedy the crux of sexual minority rights. The only feasible panacea therefore would be the submission of one school of thought to the other coupled with a paradigm shift in philosophical conceptualisations. This can only be achieved through education pursuant to any law reform that may seek to accommodate sexual minority groups. Other than that, it seems very difficult to fathom a resolution solely by law reform or judicial activism, for this debate goes to the core and fundamental values of the Zimbabwean society.

Bibliography

Legislation

Zimbabwe

Constitution of Zimbabwe Amendment Number 20 Act of 2013

Constitution of Zimbabwe 1980 (Lancaster House Constitution)

Criminal Law (Codification and Reform) Act [Chapter 9:23]

The Labour Act [Chapter 28:01]

South Africa

The Constitution of the Republic of South Africa Act 108

Sexual Offences Act 23 of 1957

Malawi

Constitution of Malawi, 2004 (Revised Edition consolidated all amendments as of 21 January 2004 since the 1994 Constitution.)

The Penal Code [Chapter] 7:01 of Malawi

The Marriage, Divorce and Family Relations Act (Marriage Act) 2015

International instruments

African Charter on Human and People's Rights

Convention on the Elimination of All Forms of Discrimination Against Women Report on Zimbabwe, (2012) Available at www.ohchr.org Accessed on 18 March 2017

General Comment Number 20 Non-Discrimination in Economic Social and Cultural Rights, 2009

General Recommendation No. 28 of the Committee on the Elimination of Discrimination Against Women, 2010

International Covenant on Civil and Political Rights, 1996

Universal Declaration of Human Rights of 1948

UN issues first report on human rights of gay and lesbian people" 15 Dec 2011 Available at <http://www.un.org> Accessed on 16 January 2017

Case law

Zimbabwe

Courson v Zimbabwe (2000) AHLRLR 335 (ACHPR 1995)

S v Banana 1998 (2) ZLR 533 (H)

S v Banana 1999 (1) ZLR 50 (H)

S v Banana 2000 (1) ZLR 607 (S)

R v Masuku 1968 (2) RLR 332

South Africa.

Du Toit and Another v. Minister for Welfare and Population Development and Others
2002 (10) BCLR 1006 (CC)

Le Roux and Others v Dey 2011 (3) SA 274 (CC)

National Coalition for Gay and Lesbian Equality v Minister of Justice and Others
2000(2) SA 1

National Coalition for Gay and Lesbian Equality v Minister of Justice and Others
1999 (1) SA 6

Malawi

Republic v Steve Monjeza and Tiwonge Chimbalanga Case No. 359 of 2009

United States of America

Bowers v Hardwick 478 US 186 (1968)

Griswold v Connecticut 381 US 479 (1965)

Lawrence v Texas 539 US 558(2003).

Lochner v New York 98 US 45 (1905)

Loving v Virginia 388 US 1, 12 (1967)

Obergefell et al. v. Hodges, Director, Ohio Department of Health 576 US (2015)

Vriend v Alberta (1994) 20 CHRRD/358

Wisconsin v Yoder 406 US 205 (1972)

International case law

Kazeem Amina v Nigeria Communication 205/97

Tyrer v. United Kingdom (ECtHR) Judgement of 25 April 1978, Series A No. 26

Toonen v Australia Communication No. 488/199

Authoritative Texts

Books

Alston, P and Crawford, J (2000): *The Future of Human Rights Treaty Monitoring*, Cambridge University Press

Barnet, H (2016) : *Constitutional and Administrative Law 11th Edition*, Routledge

Hendricks, A (ed) (1993): *The Third Pink Book*, Prometheus Books

Devenish, G E (1992): *Interpretation of statutes*, Juta & Co. Ltd

De Waal, J and Currie, I (2005): *The Bill of Rights Handbook Fifth Edition*, Juta and Company

Kazdin, A E (ed.) (2000): *Encyclopaedia of psychology*, American Psychological Association & Oxford University Press

Johannes, M (1999): *The Universal Declaration of Human Rights: Origins, drafting and intent*, University of Pennsylvania Press

Kalin, W and Kunzli, J *The Law of International Human Rights Protection*, Oxford University Press

Mavedzenge, J and Coltart, D A (2014): *Constitutional Guide: Towards Understanding Zimbabwe's Fundamental Socio-Economic and Cultural Rights*

Murry and Evans (2000) : *African Charter on Human and Peoples' Rights*, Cambridge University

Na'im, A(ed) *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus*.
University of Pennsylvania Press

Robertson, A H and Merrills, J G (1996): *Human Rights in the World. An Introduction to the study of the international protection of Human rights 4th edition*, Manchester University Press

Sullivan M K, (2013): *Sexual Minorities: Discrimination, Challenges and Development in America*, Routledge

Journal Articles

Cameron, E 'Sexual orientation and the constitution: A test case of Human Rights (1993) South African Law Journal

Carrozza G S "Human Dignity and Judicial Interpretation of Human Rights. A Reply" (2008) *Scholarly works Paper* 683 Available at

http://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1705&context=law_faculty_scholarship Accessed on 20 March 2017

Cibane, S ' Application of the Constitutional Value of Ubuntu in Private relations: The Private Law of Contract a test case' www.thelawthinker.com Accessed on 31 March 2017

Cussano, B '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 on 20 March 2017

Dube, B 'Roman-Dutch and English common law: the indispensable law in Zimbabwe' (2014) Vol. V, No 4. Quarter IV *Afro Asian Journal of Social Sciences*

Duhaime's Law Dictionary www.duhaime.org/LegalDictionary Accessed on 23 March 2017

De Vos, P 'On the legal construction of gay and lesbian identity and South Africa's transitional Constitution' (1996) *South African Journal of Human Rights*

Donnelly, J 'Cultural Relativism and Universal Human Rights' (1984) Vol. 6, No. 4 *The Johns Hopkins University Press Human Rights Quarterly*

Dotinga, R *Biology Leaves Gay men highly vulnerable to HIV: Study* (2012) www.health.usnews.com/health-news/news/articles/2012/07/20 Accessed on 24 June 2017

Gays and Lesbians of Zimbabwe 'Sexual Orientation and Zimbabwe's Constitution : A case for inclusion' (2009) <http://archive.kubatana.net> Accessed on 16 January 2017

Gay and Lesbians in Zimbabwe <http://www.hrforumzim.org/members/gays-and-lesbians-of-zimbabwe-galz/> Accessed on 20 March 2017

Global Policy Forum, Cultural Relativism vs. Universalism 2005 <https://www.globalpolicy.org> Accessed on 18 January 2017

Hedin, G 'Formal or Substantive Equality?-Gender Equality in European Community Law' (2009) www.lup.lub.lu.se/luur Accessed on 26 March 2017

Helmersen, S T 'Evolutive Treaty Interpretation: Legality, Semantics and Distinctions' (2013) Volume 6, Issue 1 *European Journal of Legal Studies*

Howson, A 'Cultural Relativism' (2009) <https://www.ebscohost.com> Accessed on 18 January 2017

Hutchinson, M R 'The Margin of Appreciation Doctrine' (1999) Volume 48, Issue 3
European Court of Human Rights

Ilyayambwa, M 'Homosexual Rights and the Law: A South African Constitutional Metamorphosis' (2012) Vol. 2 No.4 *International Journal of Humanities and Social Science*

International Justice Resource Centre, Economic, Social and Cultural Rights
<http://www.ijrcenter.org/thematic-research-guides/economic-social-and-cultural-rights-2> Accessed on 16 March 2017.

Kaoma, K 'Globalising the culture wars: US conservatives, African Churches and Homophobia' (2009) Res 1.10 'Human Sexuality'
<http://www.lambetheconference.org/resolutions/1998/1998-1-10cfm> Accessed on 17 January 2017

Lassiter, J 'African culture and Personality' (2000) *African Studies Quarterly*

Levit, N 'A different Kind of Sameness: Beyond Formal Equality and Anti-subordination Strategies in Gay Legal Theory' Vol. 16 No. 2 *Ohio State Law Journal*

Madebwe, T 'Constitutionalism and the new Zimbabwean Constitution' (2014) vol.1 *Midlands State University Law Review*

Malamba, M '*The Controversy of Homosexuality: A Critical Look at The Issues That Make Legalizing Homosexuality in Malawi Difficult*' (2012) Unpublished Thesis
University of Gothenburg

Mensah, K B 'Legitimacy and interpretation in Ghanaian law: The literal interpretation theory versus the value based theory' (2004) *Law Democracy and Development Law Journal*.

Merz, T 'Ubuntu as a moral theory and human rights in South Africa' (2011) *African Human Rights Law Journal*

'Minority Rights under the African Charter on Human and People's Rights' Pamphlet No. 6 <http://www.ohchr.org/Documents/Publications/GuideMinorities6en.pdf>
Accessed on 20 March 2017

Pierceson, J 'Courts, Liberalism, and Rights: Gay Law and Politics in the United States' (2005) *Temple University Press*.

Petrova, D 'The use of equality and anti-discrimination law advancing LGBT rights' <http://sas-space.sas.ac.uk/4819/1/18Petrova.pdf> Accessed on 20 January 2017

Quansah, E K 'Same sex relationships in Botswana: Current perspectives and future proposals' (2002) *Africa Human Rights Journal*.

Renee, L 'Lesbian and Gay Rights in Zimbabwe' *American University*
<http://www.wcl.american.edu/hrbrief/v512/html/zimbab.htm> Accessed on 22 January 2017

Rudman, A 'The protection against discrimination based on sexual orientation under the African human rights system' (2015) Vol.15 *African Human Rights Law Journal*

Salokar, R M 'Beyond Gay Rights Litigation' (1997) *GLQ: A Journal of Lesbian and Gay Studies* 3

Shumba, P. 'Khami prison inmate up for sodomy' <http://www.chronicle.co.zw/khami-prison-inmate-up-for-sodomy/> Accessed on 24 June 2017

'Sexuality Rights are Human Rights' <https://iwhc.org/articles/sexual-rights-human-rights/> Accessed on 22 March 2017

'Top 10 Most Developed African Countries' <http://www.africaranking.com/most-developed-african-countries/> Accessed on 02/08/2017

'Under pressure, Malawi's leader pardons gay couple' ABC news
<http://abcnews.go.com/international/wirestory?id=10778353> Accessed on 01 June 2017

United Nations Office of the High Commissioner Available at www.ohchr.org

Accessed on 19 March 2017

University of Zimbabwe Editorial Team 'University of Zimbabwe Student Law

Review' (2014) Journal Vol II(1) *Zimbabwe Legal Information Institute* www.zimlii.org

Accessed on 20 March 2017

'Using the Courts to Protect Vulnerable People: Perspectives from the Judiciary and Legal Profession in Botswana Malawi and Zambia' (2015) Southern African Litigation Centre ISSN 978-0-620-62999-7

Wilets, J D and Ross, G 'The Human Rights of Sexual Minorities' (1995) Vol. 22, No. 4 *American Bar Association* 22-27

Wilton, J 'Getting to the Bottom of it: Anal sex, rectal fluid and HIV transmission'

www.catie.ca/en/pif/fall-2014 Accessed on 10 August 2017