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THE RIGHT TO EQUALITY AND NON-DISCRIMINATION ON BASIS OF SEXUAL ORIENTATION AND GENDER IDENTITY IN ZAMBIA



*Towards combating discrimination on the basis of
sexual orientation and gender identity in Zambia*



Embassy
of the Federal Republic of Germany
Lusaka

P

Panos Institute
Southern Africa



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List of Acronyms

AU	African Union
CAL	Coalition of African Lesbians
ICCPR	International Covenant On Civil And Political Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social And Cultural Rights
LAZ	Law Association of Zambia
LGBTI	Lesbian, gay, bisexual, transgender and intersex
MSM	Men who have Sex with other Men
NASF	National HIV and AIDS Strategic Framework
PSAF	Panos Institute Southern Africa
UDHR	Universal Declaration of Human Rights
UNGA	United Nations General Assembly
UNHCR	United Nations High Commission for Human Rights

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Executive Summary

In 2014, Panos Institute Southern Africa (PSAf) commissioned a study on the right to equality and non-discrimination for Lesbians, Gays, Bisexual, Transgender and Intersex people (LGBTI) in Zambia. This was in efforts to support advocacy interventions that promote human rights for LGBTI people in Zambia. The study was part of an intervention aimed at addressing the apparent lack of interest and limited appreciation by human rights advocates in Zambia of the need to protect LGBTI rights as human rights. The specific objectives of the study were to generate evidence of human rights violations affecting LGBTI people and to highlight the Zambia obligations internationally, regionally and locally to protect all people regardless of their sexual orientation or gender identity. To meet these objectives, the study examined Zambia's international, regional and domestic obligation regarding the right to non-discrimination and equality. The study also reviewed Zambia's legislative framework regarding sexual orientation and gender identity and current social environment to document evidence of human rights violations for LGBTI persons. This report was compiled based on the findings of the study summarised below.

The report highlights the key concepts of the right to equality and non-discrimination. It highlights that the principle of equality and non-discrimination is the cornerstone of human rights which entails that everyone is equal and has equal value, and that no one should be treated with discrimination. The Republic of Zambia is not divorced from the current conversations on discrimination on the basis of sexual orientation and gender identity.

LGBTI persons in Zambia are viewed as undesirable, deviants and sinners. This study learnt that LGBTI persons live in constant or permanent fear of persecution and prosecution. For this reason LGBTI persons do not publicly disclose their sexual orientation or gender identity. Key challenges as found by this study are unfavourable legal environment, fear, homophobia, and socio-exclusion. LGBTI people suffer discrimination that erodes their human dignity and creates inequality in the society.

As a member state of the United Nations and signatory to the International Bill of Rights and to the regional African Charter on Human and Peoples' Rights, Zambia is bound by the interpretation given to the rights. Therefore, the fact that the treaty bodies affirm that LGBTI should be protected from discrimination and other human rights violations means that the country should ensure such protection and non-discrimination.

Despite this, the reality and situation of LGBTI persons in Africa remains a desperate one because among other challenges, the Charter also contains "claw-back" clauses attached to each right provision. These clauses, give deference to national laws over Charter provisions which then undermine the rights guaranteed by the Charter.

According to the Vienna Convention on the Law of Treaties, where there is a conflict between international law and domestic law, international law prevails. This principle highlights that Zambia's

international and regional human rights obligations as set in international instruments are paramount and that the Republic cannot use its domestic law to justify a breach of its international human rights obligations. In this sense Zambia's domestic laws cannot be used as a basis to breach the principle of equality and non-discrimination against LGBTI persons.

At domestic level, human rights in Zambia are enshrined in the constitution. Ideally the constitution should contain or at least express Zambia's international and regional obligations as found in international and regional instruments. However, none of the treaties to which Zambia is a state party have been domesticated. When the constitutional clauses on discrimination are interpreted in the context of international human rights standards which Zambia is party to, the theoretical position of the constitutional clauses on discrimination does apply and the end result is that LGBTI persons can enjoy constitutionally guaranteed rights such as, movement, assembly, expression, speech, life and dignity without fear of prosecution.

The main shortcoming of this constitutional provision is that the Bill of Rights contains only civil and political rights leaving out the economic, social and cultural rights as directive principles of state policy. The state of affairs has ensured that human rights development in Zambia has remained an illusion. Even though this is a general problem it possess a great and specific challenge to LGBTI persons who are not even explicitly recognised under the discrimination clause in the constitution. While it has been argued that the constitution already contains some of the rights set out in international and regional human rights treaties, the claw back clauses in the bill of rights do not give the same protection as international and regional standards.

At international level, formally recognised human rights are found in the Universal Declaration of Human Rights (1948) and the two International Covenants, that is: The International Covenant on Economic, Social and Cultural Rights (1966) and the International Covenant on Civil and political Rights (1966). These are collectively called the International Bill of Rights. There are other important treaties that further elaborate and offer human rights protection in particular contexts. These include, the International Covenant on the Elimination of all forms of Racial Discrimination (1965) the International Covenant on the Elimination of all forms of Discrimination against Women (1979) and the Convention on the Rights of the Child (1989). Zambia is a state party to all these instruments. As a state, Zambia has ratified almost all the major human rights instruments at both international and regional levels. However, at national level, Zambia has not domesticated any of the human rights instruments that it has ratified. This makes and has made the application and enforcement of international human rights standards a challenge in Zambia.

While there are all these instruments and obligations that provide for protection of human rights for LGBTI people, human rights defenders face challenges in carrying out this mandate due to homophobia, unfavourable legal environments, lack of understanding of human rights, lack of visibility of LGBTI persons, and lack of respect for human rights by police and other law enforcers.

CHAPTER 1: INTRODUCTION

Lesbian, gay, bisexual, transgender and intersex (LGBTI) persons are one of the most vulnerable groups in Zambia. They live in constant fear of arbitrary detention, discrimination in education, employment, housing and access to services. They also face extortion from different people. Same sex relationships are criminalised in Zambia and hence LGBTI persons are increasingly subjected to blackmail and extortion. Policy makers and political leaders have largely ignored the need for a legal framework protecting LGBTI persons and have openly called for continued criminalization and abuse of their rights. Statements from politicians have been hateful and hostile towards LGBTI persons threatening to push for legislation to stiffen punishment. In mid-April 2013, the National Constitution Convention of Zambia called for the inclusion of a specific clause in the new Constitution of Zambia prohibiting homosexuality as “anti-social practice.” However, the second draft of the new Constitution, yet to be officially released by the Government carries an anti-discrimination clause protecting people from any form of discrimination. Current concerns are that, while the new constitution may have a clause for protecting against discrimination, it is weak and does not make specific reference to discrimination on the basis of sexual orientation. The National HIV and AIDS Strategic Framework (NASF) 2011 – 2015 does not include LGBTI persons in their programmes although LGBTI persons are identified as Key Population. Attempts by concerned stakeholders to design programmes targeting LGBTI persons are believed to constitute breaking the laws that criminalize same-sex practices. The exclusion therefore leads to marginalisation of LGBTI population in HIV and AIDS programming, among other things.

1.1. RATIONALE FOR THE STUDY

In efforts to support advocacy interventions that promote human rights for LGBTI people in Zambia, Panos Institute Southern Africa (PSAf) designed an intervention to raise awareness on human rights for marginalised people. The aim of this intervention was to address the apparent lack of interest and limited appreciation by human rights advocates in Zambia of the need to protect human rights for LGBTI people. PSAf commissioned a study: *Right to Equality and non-discrimination on basis of sexual orientation* in order to generate evidence of discriminations as well as highlight Zambia's obligations in protecting rights of all citizens regardless of their sexual orientation. The study is targeted at civil society, the church and media. It focuses on why these groups have an obligation to protect and advocate for protection of the rights for LGBTI people.

The study addressed the following specific objectives:

- i) To identify and examine the concepts and theories of equality and non-discrimination and their use in advocacy in the promotion of the rights for LGBTI persons;
- ii) To generate evidence of human rights violations affecting LGBTI in Zambia;
- iii) To highlight the Zambia obligations internationally, regionally and locally to protect all people

- regardless of their sexual orientation or gender identity;
- iv) To discuss Zambia's compliance to the UN and other international instruments on non-discrimination and equality for all;
 - v) To discuss the challenges faced by human rights defenders in protecting human rights for LGBTI;
 - vi) To discuss existence of discrimination of human rights in current policies on the basis of sexual orientation and gender identity.

To meet these objectives, the study examined Zambia's international, regional and domestic obligation regarding the right to non-discrimination and equality. The study also reviewed Zambia's legislative framework regarding sexual orientation and gender identity and further analysed its impact on the rights of LGBTI persons. The study also collected evidence on how the current social environment contributes to violations.

This report was therefore compiled based on the findings of the study.

CHAPTER 2: HUMAN RIGHTS CONTEXT

2.1. Human Rights Defined

Human Rights are entitlements and freedoms that every individual human being has by virtue of simply being human. Article 1 of the Universal Declaration of Human Rights (UDHR) affirms this principle and states that “All human beings are born free and equal in dignity and rights”. This pronouncement and principle in the UDHR is the umbrella for the enjoyment, protection and fulfilment of all human rights. This principle basically entails that individuals are equal and thus should enjoy their rights without discrimination or distinction. To this end, Article 2 of the UDHR proclaims: “Everyone is entitled to the rights and freedoms set forth in this declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” In essence the UDHR proclaims the foundation for the enjoyment of all human right and this is the principle of equality and non-discrimination.

2.2. Equality and non-discrimination

As earlier stated the principle of equality and non-discrimination is the corner stone of human rights. Firstly it entails that everyone is equal and has equal value and secondly that no one should be treated with discrimination as all are equality. In this regard equality and non-discrimination go hand in hand. However, the principle of equality and non-discrimination is not absolute and therefore should be celebrated in context. That is to say human society creates responsibilities on people and groups. These responsibilities entail that people or groups cannot do anything they please in the pretext that they are exercising their individual or group rights. For example, a member of a group that kills people on the basis of race, gender or sexual orientation cannot say that his right to association has been violated when he is arrested for the killings. Similarly, it may be undesirable or hateful to choose one's friends on the basis of race or gender identity, but this is not an appropriate subject for regulation through anti-discrimination laws.

On the other hand, if the friendship or social contacts systematically influences access to social, economic, political or other opportunities, then it becomes a matter of legitimate state regulation. This sort of discrimination causes unjustified harm and is referred to as “invidious” discrimination. At a pragmatic level, it is recognised and agreed that social life is organised and is full of legitimate distinctions and discriminations. What international human rights law seeks to protect through the UDHR and other human rights instruments is against invidious discrimination, that is, discrimination that lends itself to ill or causes unjustifiable harm.

2.3 Race and discrimination

The history of human rights is full of invidious discrimination (herein after simply referred to as discrimination). The expressly stated prohibited groups of discrimination in Article 2 of the Universal Declaration on Human Rights (UDHR) shows the historical element of the right for equality and non-discrimination. For a long time race was a cause for much discrimination, violence, human rights violations and sadly war. The UDHR itself was born out of the pledge, “never again a reality” which was motivated by among other things, that race and ethnicity should not be a reason to discriminate or violate human dignity.

2.4 Gender, sex and discrimination

Likewise, gender and sex were once seen as legitimate grounds for discrimination. Young girls and women were for a long time widely seen as irreparably deficient in their rational capabilities, and thus incapable of exercising or holding the full range of human rights. Over the past several decades, dominant political ideas and practices in both western and non-western societies have been transformed by national and international movements to end slavery and later colonialism; to recognise women and “racial minorities” as equal members of society and before the law; to end all forms of discrimination on the basis of ethnicity, religion, gender and social status; and more recently, to end discrimination on the basis of one’s real or perceived HIV status.

2.5 Analysis of the existence of discrimination

In each case, within the struggle for equality, a logic of full and equal humanity has overcome claims of group inferiority, bringing (at least even formally) equal membership in society through expressly guarantying protection against discrimination. This is why today, international and even regional human rights law insists that the differences previously seen as grounds of discrimination be treated as irrelevant in the assignment and enjoyment of rights. This account emphasises the progressive development of the right to non-discrimination and indeed human rights generally. This progress has been made through processes of social, legal and political struggles. This account, now also raises the question of protection of other groups currently subject to discrimination, victims of invidious public violence or ridicule whose suffering remains legally and politically accepted or at least unchallenged. One such group is that of LGBTI persons. LGBTI persons suffer massive, systematic and publicly accepted or tolerated discrimination and human rights violation on the basis of sexual orientation and gender identity.

2.6 Diversity of sexual orientation

The formulation *LGBTI* emphasises the diversity of human sexual orientation and gender identity and thereby undermines conventional links between sex (defined by genitalia or chromosomes) and gender, sexual orientation and personal identity.

LGBTI persons are not people who merely engage in “deviant” sexual behaviour. They are simple human beings, targeted and despised by “mainstream” society because of their sexuality. Many societies impose gender and sexual orientation norms on individuals through custom, law and violence. This is aimed at controlling how LGBTI persons experience personal relationships and how they identify themselves. This “policing” of sexuality remains a major source of human rights violations. The Yogyakarta principles on the application of international human rights law in relation to sexual orientation and gender identity recruits that human rights violations targeted towards persons because of their actual or perceived sexual orientation or gender identity constitutes a global and entrenched pattern of serious concern. They include but are not limited to, extra-judicial killings, torture and ill-treatment, sexual assault and rape, invasion of privacy, arbitrary detention, denial of employment, education, health and other social amenities, public ridicule and criminal prosecutions. These violations are often compounded by experiences of other forms of violence, hatred; hate speech, discrimination and social exclusion such as those based on race, religion, disability or economic status.

In light of the above, there is now dialogue to address the issue of discrimination on the basis of sexual orientation and gender identity. Certain strides have been made but this movement is far from reaching any place of real success.

The Republic of Zambia is not divorced from the current conversations on discrimination on the basis of sexual orientation and gender identity. The recent criminal proceedings in Kabwe and the debates during the constitution drafting process highlight the fact that discrimination against LGBTI persons is a reality that needs to be addressed through human rights principles.

CHAPTER 3: CHALLENGES FACING THE LGBTI COMMUNITY IN ZAMBIA

The levels of homophobia are extremely high in Zambia. This statement seems harsh but in actual fact it expresses the reality regarding the everyday life of LGBTI persons in the country. Being an LGBTI, person in Zambia is very challenging. It is no secret that LGBTI persons in Zambia are viewed as undesirable, deviants and sinners. This study learnt that LGBTI persons live in constant or permanent fear of persecution and prosecution. For this reason LGBTI persons do not publicly disclose their sexual orientation or gender identity.

Key challenges as found by this study are as follows:

3.1. Unfavourable legal environment

Homosexuality is illegal in Zambia, and one can be prosecuted and jailed for being in a same sex relationship. The government continues to deny that homosexuals exist in the country. Politicians and church leaders debate and use gay rights issues for one to lose or gain political mileage, making sexual minorities like Men who have Sex with other Men (MSM) vulnerable to black mail and extortion. The Zambian Penal Code Act criminalises same-sex sexual activity for both men and women. According to Cap 87, Sections 155 and 156, the Penal Code prohibits same sex relations and calls them “unnatural offenses”. The stress, strain, mental torture and anguish that comes from fear of prosecution on the basis of one's sexual orientation or gender identity must be seen as violation on ones right to health. This is what former United States of America President Franklin Roosevelt meant in his “four freedoms speech.”

3.2. Fear

The study found that most LGBTI people would rather hide their true sexual orientation and try to fit in the “normal society”. Some gays and lesbians have actually married and are in heterosexual relationships just to fit into the generally accepted life. This fear of publicly declaring their orientation was revealed by the fact that none of the persons interviewed gave permission to have their story expressly included in the study. The constant and permanent fear of persecution and prosecution is the biggest challenge in the life of any LGBTI person in Zambia. This fear exists due to the criminalisation of same sex relationships through such laws as the sodomy laws and the Penal code. The fear itself, therefore reveals a serious violation of human rights.

3.3. Homophobia

LGBTI people are faced with homophobia from different social levels. These could include irrational fear of homosexual feelings, thoughts, behaviours, or people and an undervaluing of homosexual

identities, resulting in prejudice, discrimination and bias against homosexual individuals. As a result, homosexual individuals are shamed and hated. This eventually affects their access to public services such as health institutions. This therefore means that their right to health care is affected and in a sense violated. This is so because, it is feared that medical personnel would find out their sexual orientation or gender identity and report them to the police.

3.3.1 Social Homophobia

The public discontent against LGBTI persons tones the environment of Zambia. The politicisation of the rights of LGBTI persons has exacerbated the level of stigma and discrimination in Zambia. Below are examples of some of the statements by political and religious leaders:

- i) July 7, 2012: Chairperson of the Technical Committee on Drafting the Zambian Constitution Annel Silungwe stated that “gay rights” were not incorporated in the constitution.
- ii) February 29th 2012: Former republican Vice President George Kunda challenged government to state its position on recent calls by the United Nations Secretary General Ban Ki Moon to have homosexuality rights recognised.
- iii) The reaction to Ki Moon's statements is another sign that sexual minorities face discrimination. The UN Secretary General simply stated that in keeping with the principle of equality and non-discrimination, sexual orientation should not be a ground for discrimination. The public outcry was that the UN was bringing gay rights in Zambia and promoting homosexuality which was “against our values.” If the UN chief can receive such wide criticism after talking about the principle and right to equality in the context of sexual minorities, then the chances of human rights defenders championing this cause and being respected are almost nil.
- iv) 28th February 2012: Then Law Association of Zambia (LAZ) Vice President Martin Musaluke was quoted as saying it was unattainable to respect gay rights because homosexuality in Zambia is a crime. He was reacting to Ban Ki Moon who, on a recent visit to Zambia, stated that people should not be discriminated against on the basis of their sexual orientation.

3.3.2 Religious- driven homophobia

The submission of the Pentecostal Bishops of Zambia made by Bishop Sakala to the technical committee on the draft constitution stated:

“We are grateful to our international partners support towards Zambian democratic processes. However, we are aware of well-crafted plans by some donor and/or their agencies or even their

proxies who are covertly pressuring for the inclusion of practices that are foreign to Zambia...The concerns we raise in this respect are well founded especially in the wake of high level public pronouncements made by prominent global leaders who have in the recent past been heard to require nations to accept gay rights as conditions for aid. As a matter of public concern, it is in this light that some churches have submitted to the Technical Committee to spell out categorically who the minority and marginalised groups implied in Article 60 of the first draft constitution really are... While noting that the chairperson of the Technical Committee recently assured a church gathering in Lusaka that there will be no inclusion of gay rights in this constitution, the clarity and definition is still necessary."

This is so because we do not want to end up with a situation where advocates for homosexuality and related rights sooner or later resort to use or misuse Article 60 to champion their rights. It is our position as already submitted that this constitution must clear any doubt lingering in the minds of the citizens as to what mischief exactly this Article is intended to care.

We wish to put it in record that the lives of our citizens are not for sale. We deserve the liberty to freely enshrine strong moral and Christian values in the highest document of the land in order to preserve posterity".

3.3.3 Socio-exclusion:

The study learnt that most LGBTI persons that have expressed their orientation or gender identity have been rejected by their families. Many have been seriously ridiculed and put through prayers to cast out the "homo-demon". Others have been put through traditional rituals to exorcise the demon, in some cases enduring grave body injury through razor cuts. Others have been chased from home and told to return when they get back to their senses. Some have been reported to the police although the actual prosecution has not taken place due to lack of evidence and the burden of proof in criminal matters. The right to belong to a family is thus violated through rejections and publicly supported moves that enhance discrimination. Therefore, to feel accepted and for others in order not to cause pain to their parents, some LGBTI persons try to fit in, act normal and marry. However, they are unhappy in these marriages of convenience and have affairs with persons of the same sex they are attracted to so that they self-actualise.

Statements like the ones above fuel discrimination which in turn leads to stigma, contempt, prejudice, aversion and hatred. All this eventually leads to violence and violation of human rights on the basis of sexual orientation and gender identity.

Examples of the Violation of Rights of MSM¹

LGBTI Rights	How the rights are violated
The right to equality in rights and before the law	In many countries the LGBTI community is denied the right to equality before the law through special criminal provisions or practices on the basis of sexual orientation. The failure of many states to legally recognise the individual as the “right holder” with rights over control of their own lives and bodies could be interpreted as violating this right.
The right to non-discrimination	Denied by omitting sexual orientation or sex/gender identity in anti-discrimination laws, constitutional provisions or their enforcement.
The right to freedom from violence and harassment	Denied by omitting sexual orientation and sex/gender identity and gender expression in anti-discrimination laws, constitutional provisions or their enforcement.
Right to free development of one’s personality	Violated by the failure to recognise sexual difference and choice in all its forms and to develop legal protections for that diversity.
The right to life	Violated in states where the death penalty is applicable for sodomy. Denied by states which do nothing to curb a fear of difference that results in violence and death.
The right to be free from torture or cruel, inhuman or degrading treatment	Infringed upon by police practices in investigations or in the case of LGBTI persons in detention. Forced stripping of transgender people in detention is unfortunately all too common a form of torture.
The right to protection from arbitrary arrest and illegal detention	Occurs in a number of countries with individuals suspected of having a homo/bisexual identity. Detentions of dubious legal character are commonly carried out against transgender persons. Even where the law criminalises same-sex activity it can only be enforced if “caught in the act”. Arresting someone on the presumption of their sexuality is to all intent and purposes illegal.
The right to a fair trial	Often affected by the prejudices of judges and other law enforcement officials.

¹ Protection International (2010) Protection Manual For LGBTI Defenders

The right to privacy	Denied by the existence of 'sodomy laws' applicable to LGBTI persons even if the relation is in private between consenting adults.
The right to freedom of expression and freedom of association	Either denied explicitly by law, or LGBTI community may not enjoy them because of the homo/ transphobic climate in which they live.
The right to freedom of practice of Religion	Usually restricted in the case of LGBTI persons, especially in the case of the clergy advocating against them.
The right to work	The most affected among the economic rights of LGBTI community, many LGBTI persons are fired because of their sexual orientation and sex/gender identity or discriminated in employment policies and practices.
The right to physical and mental health	Found to be in conflict with discriminatory policies and practices, some physicians' homo/transphobia, the lack of adequate training for health care personnel regarding sexual orientation, transgender or intersex issues can negatively impact on this right.
The right to form a family	This is denied by governments by not recognising same-sex families and by denying the rights otherwise granted by the state to heterosexual families who have not sought legal recognition, but still enjoy several rights.
The right of protection against separation from parents	Children can also be denied this right based on a parent's sexual orientation and/or sex/gender identity or gender expression.
The right to education	LGBTI students may not enjoy this right because of prejudices and violence created by peers or teachers in schools. The high rate of school drop-out amongst LGBTI youth is a direct consequence of bullying and discrimination.
The right to defend these rights	Violated by state's failure to protect LGBTI defenders, repeal laws that are used to discriminate against LGBTI organisations and which prevent organisational activities from being carried out.

Table 1: LGBTI Rights How the rights are violated

The table above shows all the human rights violations that the LGBTI population are faced with due to their sexual orientation and gender identity. These are an example of how they experience discrimination and non-equality.

CHAPTER 4: OBLIGATIONS REGARDING THE RIGHT TO EQUALITY AND NON-DISCRIMINATION IN THE CONTEXT OF LGBTI PERSONS

While there is a high level of human rights violations and abuse on basis of sexual orientation, there are obligations and instruments that provide for protection of LGBTI people from violations and abuse and demand protection of their rights. This part of the report will discuss International and Regional obligations as well as the domestic legal framework on the right to equality and non-discrimination in the context of sexual orientation and gender identity.

4.1. The Normative content of the Right to Equality and Non-discrimination

Discrimination and equality has been the subject of many academic and practical definitions. However, there is common understanding within the human rights discourse as to what the two mean or entail. For purposes of this report, discrimination, means treating a person or group of persons in a negative different manner because of a real or perceived trait or characteristic that is seen as “not normal” or “undesirable” by society or certain sectors of it. In the context of sexual orientation and gender identity, discrimination will mean or manifest itself through, social exclusion, hate speech, public ridicule, torture and denial of public amenities. For example, a person who is transgender or intersex will be denied an education, turned away from a hospital despite being very sick or dismissed from employment. This is because society does not find the person's sexuality “normal”, “acceptable” or “desirable”. In other words, discrimination takes away the dignity and humanity of a person and says “because you are transgender, you do not deserve health services, education, employment that the things normal human beings need and you should be excluded from society”. To this end, discrimination against LGBTI persons finds itself contained in sodomy law such as section 158 of the penal code. Most of these laws are based on the social construction of what is natural and normal without regard to empirical circumstances and the dignity and mystery of human sexuality.

4.1.1. Impact of discrimination on Human Dignity

Discrimination takes away human dignity and creates inequality in human society. This is because discrimination denies people their enjoyment of human rights. Inequality means that other human beings are better than others, or that other people are less human. Equality on the other hand entails that all human beings are born equal, that a person's race, colour, gender or sexuality does not make that person worse or better than another. Equality therefore says that as long as one is human, they deserve to be happy, they deserve medical treatment when sick and be respected as a human being even if society does not agree with certain traits they have. Equality therefore means that one is human first and other traits follow. All human rights are therefore based on the principle of equality of human beings and non-discrimination. The two are the basis or foundation for international, regional and domestic human rights law.

To explain the principle of equality and non-discrimination, the United Nations Human Rights Committee passed General Comment Number 18 of 1989, at its 37th session. A General Comment is a document that is made by a treaty body of a human rights mechanism to interpret the meaning of a particular human right and to give it content.

4.1.2. Non-discrimination and Equality before the law

In giving content to the principle, the General Comment proclaims that non-discrimination, together with equality before the law and equal protection of the law WITHOUT ANY discrimination, constitutes a basic and general principle relating to the protection of human rights. Thus the principle is reflected in every international and regional human rights instrument and should be in every national constitutional bill of rights. To this effect, all member states of the United Nations and other regional human rights mechanisms have the obligation to ensure that all citizens in their countries enjoy their human rights without any discrimination and that they are treated equally.

The General Comment 18 of 1989 passed by the United Nations Human Rights Committee was made to give content to Article 2 of the International Covenant on Civil and Political Rights (ICCPR) but can non-the less be applied generally in interpreting and understanding the right to equality and non-discrimination. The committee noted that while the ICCPR does not define discrimination, the term should be understood to imply *“any distinction, exclusion, restriction or preferred which is based on any ground such as race, colour, language, religion, political is other opinion or other status and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons on an equal footing, of all rights and freedoms.”*

Even though the General Comment does not explicitly state sexual orientation and gender identity, the reference to other status is generally agreed to ensure that other groups such as LGBTI persons should be protected. On the other hand successive General Comments of the different United Nations treaty bodies have stated that sexual orientation and gender identity are prohibited grounds of discrimination. For example, General Comment No. 15 of 2002 on the right to water, General Comment No. 14 of 2000 on the right to health, General Comment number 18 of 2005 on the right to work, General Comment No. 19 of 2007 on the right to social security and General Comment No. 4 of 2003 on the right of development of a child; all state that sexual orientation and gender identity should not be a ground for discrimination. In essence therefore the United Nations treaty bodies through the General Comments have recognised and affirmed that LGBTI persons should be protected from any form of human rights violations.

4.1.3. Zambia’s Obligations to the UN International Bill of Rights

As a member state of the United Nations and signatory to the International Bill of Rights and to the regional African Charter on Human and Peoples’ Rights, Zambia is bound by the interpretation given

to the rights. Therefore, the fact that the treaty bodies affirm that sexual minorities should be protected from discrimination and other human rights violations means that the country should ensure such protection and non-discrimination. It should also be noted that the nature of a state's obligation with regard to international and regional human rights standards is that the state should reflect such obligations in its domestic laws and policies.

According to the Vienna Convention on the Law of Treaties, where there is a conflict between international law and domestic law, international law prevails. This principle highlights that Zambia's international and regional human rights obligations as set in international instruments are paramount and that the Republic cannot use its domestic law to justify a breach of its international human rights obligations. In this sense Zambia's domestic laws cannot be used as a basis to breach the principle of equality and non-discrimination against LGBTI persons.

4.2. Domestic Legal Framework on the Right to Equality and Non-discrimination

At domestic level, human rights in Zambia are enshrined in the constitution. Ideally the constitution should contain or at least express Zambia's international and regional obligations as found in international and regional instruments. However, none of the treaties to which Zambia is a state party have been domesticated.

4.2.1. The Constitution of Zambia

The constitution was enacted at independence in 1964. It has since undergone a number of amendments. In 1976, the constitution was amended and the country saw the birth of a one party state. In 1991, after massive protests and demonstrations, the constitution was again amended, resulting in the re-introduction of multiparty democracy. In 1996, the constitution was again amended, this time with the aim of strengthening the country's democracy. Despite all the amendments, the current 1996 constitution remains largely the same as the 1964 constitution which was adopted from the British colonial government.

Article 11 expresses the right to equality and non-discrimination, stating that:

"It is recognised and declared that every person in Zambia has been and shall continue to be entitled to fundamental rights and freedoms of the individual that is to say, the right, whatever his race, place of origin, political opinion, colour, creed, sex or marital status but subject to the limitations contained in this part.....".

Article 23 (3) says discrimination "means affording treatment to different persons attributed, wholly or mainly to their respective descriptions by race, tribe, sex, place of origin, marital status, political opinion, colour, or creed whereby persons of one such description are not made subject or accorded privileges or advantages which are not accorded to persons of another description"

Looking at these two Articles, it is therefore clear that the constitution is still strong in ensuring the principle of equality and non-discrimination. The following points are brought out by these Articles:

- i. Interpreted within the context of Zambia's international and regional obligations, based on the reference to "sex" of "other status" which can be interpreted to include sexual orientation and gender identity, therefore it affords LGBTI persons protection. Such an argument would be in line with the recommendation of the Human Rights Committee as stated in the case of TONEEN which will be discussed within the recommendations of the committee on economic, social and cultural rights.
- ii. Based on the proposition within the decision of the African Commission on Human and People's Rights on the constitutional law principle which states that when interpreting a constitution, it should be interpreted in a way that gives the maximum rights to individuals, then an interpretation of the Zambian constitution and in particular the Articles in the Bill of Rights (Article 11 and 23) in the context of Zambia's international and regional obligations regarding the right to equality and non-discrimination is and would be more favourable.
- iii. Such interpretation as above would mean that sexual orientation and gender identity is (though not expressly) a prohibited ground of discrimination to the enjoyment of the rights set in the constitution and indeed in the international and regional instruments to which Zambia is a state party.

When the constitutional clauses on discrimination are interpreted in the context of international human rights standards which Zambia is party to, the theoretical position of the constitutional clauses on discrimination does apply and the end result is that LGBTI persons can enjoy constitutionally guaranteed rights such as, movement, assembly, expression, speech, life and dignity without fear of prosecution.

4.2.1.1. Shortcomings of the Constitution

Under the current constitution, human rights are guaranteed and protected in the Bill of Rights. The rights guaranteed under the Bill of Rights include the right to life, personal liberty, freedom of expression, movement assembly, the right to fair trial and non-discrimination. However, there are the following shortcomings that have been recorded

- i. Civil and Political Rights: The Bill of Rights contains only civil and political rights leaving out the economic, social and cultural rights as directive principles of state policy. The Bill of Rights has actually never been amended and hence retains its colonial nature akin to an oppressive regime. The state of affairs has ensured that human rights development in Zambia has remained an illusion. Citizens cannot have the benefit of protection offered under international human rights standards. Even though this is a general problem it possess a great and specific challenge to LGBTI persons who are not even explicitly recognised under the discrimination clause in the

constitution. For example LGBTI persons cannot even register a formal organisation that looks at the interest of their community. This violates their freedom of association and assembly but no constitutional support can be given to them none the less.

- ii. Exclusion of the Economic, Social and Cultural Rights: The lack of economic, social and cultural rights in the Bill of Rights sums up the fact that Zambia is failing in its international and regional obligations. In fact, as far back as 1996, the United Nations Human Rights Committee observed and expressed concern that the Zambian constitution is not in harmony with the country's international human rights obligations. This was made under the concluding observations of the 1996 session of the Human Rights Committee. This compounds the problem for LGBTI persons in that as the rights are not provided for in the constitution LGBTI persons cannot even begin to claim them.
- iii. Domestication of the International Instruments: It has been argued that the constitution already contains some of the rights set out in international and regional human rights treaties. However the point remains that the claw back clauses in the bill of rights do not give the same protection as international and regional standards. The non-domestication of rights means that LGBTI person cannot enforce their internationally guaranteed rights in the courts of law in Zambia.

4.3 Regional Obligation

At regional level, Zambia is a member state of the African Union (AU) and a state party to the African Charter on Human and People's Rights (herein after referred to as the African Charter).

4.3.1 The African Charter

The African Charter was adopted by the Organisation of African Unity (OAU) now the AU in Nairobi Kenya on the 27th June 1981 and entered into force on 21st October 1986. Zambia became a state party to the charter on 10th January 1984.

The African Charter is the principal human rights binding treaty for the protection and promotion of human rights in Africa. Other instruments include the Protocol to the Charter on the Rights of Women and the African Charter on the Rights and Welfare of the Child. The Charter has 26 substantive provisions which create obligations on Zambia and other African member states to respect, protect and fulfil human rights of its citizens. The rights in the Charter include the right to equality and non-discrimination, right to life, dignity of the person, work, health, freedom of expression assembly and association.

Article 2 of the African Charter states the principles and right to equality and non-discrimination. It states as follows: -

“Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national or social origin, fortune, birth or other status”

Article 3 spells out the principle of equality in the following terms:

“Every individual shall be equal before the law, every individual shall be entitled to equal protection of the law”

Articles 4 and 5 also fall within the principles of equality and non-discrimination in the sense that they emphasize the dignity of the human being. Article 4 recognises that “human beings are inviolable and every human being shall be entitled to respect for his life and integrity of his person”. Article 5 goes further to state that “every individual shall have the right to the respect of the dignity inherent in a human being and to recognition of his status.”

Looking at the Articles 2, 3, 4 and 5 under the African charter, it is evident that

- i. It recognises that first before anything or any status the citizens of member states are “human beings” and as such their inherent dignity puts them at an equal status with every other person hence no form of discrimination should exist to deny them their rights Articles, 2, 3, 4 and 5 are therefore very crucial for the protection of sexual minorities. Although sexual orientation and gender identity is not expressly mentioned, the common implication of the Articles is that LGBTI persons are recognised as right holders and hence protected.
- ii. The African Charter is overseen by the African Commission on Human and People's Rights and the African Court. The Commission was created by the Charter with the mandate to protect and promote the rights enshrined in the charter.
- iii. The Commission has somewhat dispelled the belief that LGBTI persons are not recognised or afforded protection under the charter. It expressly stated that sexual orientation and gender identity should not be a basis for discrimination to enjoy the rights in the Charter. In essence recognising and protecting the human rights of LGBTI persons under the principle of equality and non-discrimination. This was evident in the case of ZIMBABWE HUMAN RIGHTS NGO FORUM vs. ZIMBABWE (2005) AHRLR, 128 (ACHPR – 2005). The decision was adopted by the Commission in May 2006. Although the issues were not specifically on sexual orientation and gender identity the Commission expressed the protection.
- iv. The Commission stated in paragraph 169, as follows: -
“Together with equality before the law and equal protection of the law, the principle of non-discrimination provided under Article 2 of the charter provides the foundation for the enjoyment of all human rights. As Shestack has observed, equality and non-discrimination ‘are central to the human rights movement’. The aim of this principle is to ensure equality of treatment for

individuals irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability age or sexual orientation.”

The above has been seen as a positive and progressive move towards the protection of LGBTI persons in Africa. By expressly including sexual orientation, the Commission affirmed that sexual orientation is a prohibited ground of discrimination under the Charter. Therefore, “other status” or “sex” under Article 2 of the Charter can be taken to include sexual orientation.

4.3.2 Shortcomings of the Regional Instruments

Despite the above position of the African Charter, the reality and situation of LGBTI persons in Africa remains a desperate one.

- i. Some human rights scholars consider the Charter's coverage of other civil and political rights to be inadequate. For example, the right to privacy or a right against forced or compulsory labour are not explicitly recognised. The provisions concerning fair trial and political participation are considered incomplete by international standards.
- ii. The Charter also contains “claw-back” clauses attached to each right provision. These clauses, give deference to national laws over Charter provisions which then undermine the rights guaranteed by the Charter. The inclusion of such clauses creates national standards of measure against which the rights of the Charter are measured.
- iii. Under the Charter, there is also establishment of the African Court of Human rights. The African Court's decisions are binding on member states. Under the current structure, only the African Commission and member states have direct access to the African Court. Individuals and NGOs do not have direct access to it. They can only get direct access to the African Court if states make a declaration to that effect. This therefore becomes a challenge when human rights defenders try to challenge some of the human rights violations.

4.4. International Obligations on the Right to Equality and Non-discrimination

At international level, formally recognised human rights are found in the Universal Declaration of Human Rights (1948) and the two International Covenants, that is: The International Covenant on Economic, Social and Cultural Rights (1966) and the International Covenant on Civil and political Rights (1966). These are collectively called the International Bill of Rights. There are other important treaties that further elaborate and offer human rights protection in particular contexts. These include, the International Covenant on the Elimination of all forms of Racial Discrimination (1965) the International Covenant on the Elimination of all forms of Discrimination against Women (1979) and the Convention on the Rights of the Child (1989). Zambia is a state party to all these instruments.

4.4.1. The Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) was unanimously adopted by the United Nations General Assembly on 10th December 1948, henceforth human rights day.

The principle of equality is stated under Article 1 of the UDHR. This principle is the foundation for the enjoyment and protection of human rights and the basis of international human rights law. Article 1 states: All human beings are born free and equal in dignity and rights"

Article 1 recognises the equality of mankind and the inherent dignity of every individual. It emphasises the fact that every person is a right holder and stands at an equal level with every other individual in the enjoyment of rights. It therefore creates the foundation for the principle of non-discrimination. The principle of non-discrimination is recognised under Article 2 of the UDHR as follows: - "Everyone is entitled to all the rights and freedoms set in this declaration, without discrimination of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"

Article 7 of the UDHR further elaborates this principle by stating that "everyone" is equal before the law and entitled without any discrimination to equal protection of the law. It goes further to state that "All" are entitled to equal protection against "any discrimination" in violation of this declaration and against any incitement of such discrimination.

Although the UDHR does not expressly prohibit non-discrimination on the basis of sexual orientation and gender identity, the UDHR affords protection of all minority and vulnerable groups including LGBTI persons. The United Nations General Assembly (UNGA) has recognised that the list set in Article 2 is not exhaustive. For instance, under resolution 45/187 of 1990 and 46/203 of 1991 the UNGA affirmed that people living with HIV are protected from discrimination under the term "other status." Likewise LGBTI persons are protected under Article 2. More specifically, in 2008 the UNGA recognised "sexual orientation" as a prohibited ground of discrimination under resolution A/63/430/Add.

More recently, the UNGA, through the United Nations Human Rights Council adopted a more detailed resolution stating that "sexual orientation and gender identity" should not be grounds of discrimination for the protection or enjoyment of human rights. This was under resolution 17/19 of 2011. This resolution was the first of its kind in the sense that it called on the United Nations High Commission for Human Rights (UNHCR) to undertake a study on the violation of human rights on the basis of sexual orientation and gender identity. Zambia was one of the three countries which abstained during the voting. This shows that the country has reservations for the protection of the rights of LGBTI persons. On the other hand it also shows that Zambia does not want to make any express statements against the human rights of LGBTI persons. However, the resolution remains binding on the Republic of Zambia. Following the resolution 17/19 to which Zambia abstained, the UNHCR

stated that there was massive and systematic violations of human rights in the world against individuals on the basis of their sexual orientation and gender identity.

In a nutshell, the UDHR affords protection for sexual minorities and all member states of the UN are bound by this standard. Although it may be argued that the UDHR is not a binding treaty, it is commonly agreed that it has attained the status of international customary law and hence binding even on Zambia, and other states.

4.4.2. International Covenant on Civil and Political Rights

The international covenant on civil and political rights (ICCPR) is a binding treaty that elaborates and amplifies the civil and political rights in the universal declaration. Zambia became a state party to the ICCPR on the 10th April 1984.

The principle of equality and non-discrimination in the ICCPR starts from the preamble. It recognises that rights are derived from the inherent dignity of the human person. Under Article 2 (1) the ICCPR creates the obligation on all state parties to ensure that every citizen of each country enjoys the rights therein without any discrimination.

It states; -

“Each state party to the present covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognises in the present covenant, without distraction of any kind, such as race, colour, sex language, religion, political or other opinion, national or social origin, property, birth or other status”

The treaty body that is responsible for ensuring that state parties adhere to the obligations in the covenant is the human rights committee. In interpreting the principle of equality and non-discrimination, the committee passed General Comment No. 18 discusses the normative content of the right to equality and non-discrimination in general terms.

The protection of LGBTI persons under the ICCPR was however, more specifically dealt with by the committee in 1994 in the landmark decision of TOONEN Vs. AUSTRALIA (1994) Com No. 488/1992. U.N, where the human rights committee held that the reference to “sex” in Article 2 (1) and Article 26 of the ICCPR must be taken to include sexual orientation. The committee further stated that sodomy laws or laws that criminalise consensual sex between adults of the same sex expressly violate the right to non-discrimination, equality and the right to privacy protected under Article 17. The case of TOONEN is very important for interpreting the ICCPR in protecting the human rights of LGBTI persons.

This landmark case was brought to the Human Rights Committee by Mr. Nicholas Toonen, a twenty-nine-year old resident of Hobart, Tasmania and leading member of the Tasmanian gay law reform group. He alleged that the laws of Tasmania, though not enforced against consenting adults for more than ten years, interfered with his private life by empowering police officers to investigate intimate aspects of his sexuality and his efforts to achieve legislative repeal of the sodomy laws of Tasmania. Mr. Toonen argued that the overall effect of the social and legal system regarding sexuality was that it discriminated people on the basis of their real or perceived sexual orientation.

In response to the allegations and arguments by Toonen, the Federal government of Australia adopted an exceptionally rights proactive stance which was commendable. It “conceded that Toonen has been a victim of arbitrary interference with his privacy and that the legislative provisions challenged by him cannot be justified on public health or moral grounds.” Its only opposition consisted of forwarding the views of the Tasmanian government, which argued that the statutes were a necessary and proportional means of preventing the spread of HIV and AIDS and of preserving the “Moral standards of Tasmanian society.”

After examining all the arguments the human rights committee reasoned that the criminalisation of sexual behaviour and the sodomy laws “can’t be considered a reasonable or proportionate measure to achieve the aim of preventing the spread of HIV/AIDS” because these sodomy and discriminating laws and policies “drive underground many of the people at risk of infection” and impede public health programs. The committee also rejected Tasmania’s claims that moral issues are exclusively a matter of domestic concern.

With respect to Mr Toonen’s arguments that the sodomy laws and policies of the state violated the rights to equality and non-discrimination protected and guaranteed under the ICCPR, the Federal Government of Australia requested for the committee’s “guidance,” on whether sexual orientation and gender identity could be submitted under the term “other status” in Article 2 and 26. The government conceded that if the committee were to conclude that the “other status” clause covered sexual orientation, and then the laws should be viewed as discriminating under the ICCPR. Although the committee did not emphatically resolve this issue, its conclusion and resolution was that the reference to “sex” in Article 2, paragraph 1, and 26 is to be taken as including sexual orientation.

The landmark decision in Toonen established that LGBTI persons are entitled to enjoy all the rights in the ICCPR and that no individual should therefore be discriminated against in the enjoyment of these rights on the basis of sexual orientation or gender identity. Zambia, being a state party to the ICCPR, has the obligation to ensure that LGBTI persons are treated equally and that they should enjoy all the civil and political rights guaranteed in the ICCPR.

4.4.3. The International Covenant on Economic Social and Cultural Rights (ICESCR)

The International Covenant on Economic Social and Cultural Rights (ICESCR) like the ICCPR develops and amplifies the corresponding rights in the universal declaration in detail and further specifying the steps required for full realisation of the rights set therein. Zambia became a state party to the ICESCR on 10th April 1984. Despite being a state party for 30 years now, Zambia has not domesticated any of the economic, social and cultural rights set in the ICESCR. The constitution, and in particular the bill of rights, does not contain any Economic, Social and Political rights and instead the constitution sets them as directive principles of state policy. The reason for non-domestication is and has always been resource constraints.

Human rights jurisprudence is to the effect that whether a state has domesticated or not and whether the rights are considered judiciable or not in a state, the state is bound to perform or fulfil the "minimum core obligation." The minimum core obligation is the basic obligation that every state has to fulfil under the ICESCR without giving the excuse of resource constraints. It is the principle of non-discrimination. That is to say, at the very least, every state party to the ICESCR should afford the enjoyment of the ESCR's without discrimination on any basis. Further that every individual should be treated equally in the enjoyment of rights and before the law. This does not require financial resources to fulfil, and hence is called the minimum core obligation.

The principle and right of non-discrimination is guaranteed under Article 2 (2) of the ICESCR. It states:-

"The state parties to the present covenant undertake to guarantee that the rights enunciated in the present covenant will be exercised without discrimination of any kind such as the race, colour, sex, language, religion or political or other opinion, national or social origin, property, birth or other status." The treaty monitoring body of the ICESCR is the Committee on Economic, Social and Cultural rights. The Committee interprets the various rights in the ICESCR and provides the normative content through General Comments. With regard to sexual orientation and gender identity, the committee has held and stated in a number of instances that LGBTI persons are protected under the ICESCR and should enjoy all the rights in the covenant without discrimination.

In General Comment No. 20, the committee observed that "other status" under Article 2 (2) of the ICESCR includes sexual orientation. Under paragraph 32 of the said General Comment the committee states that:

"States parties should ensure that a person's sexual orientation is not a barrier to realising covenant rights, for example, in accessing survivors' pension rights. In addition, gender identity is recognised as among the prohibited grounds of discrimination."

Under the same General Comment, the committee refers to the Yogyakarta Principles on the application of International Human Rights law in relation to sexual orientation and gender identity as a source of guidance.

This declaration that sexual orientation and gender identity is a prohibited ground of discrimination for the enjoyment of rights in the ICESCR is reflected in other important General Comments. For example, General Comment No. 14 on the rights to health expressly states that sexual orientation should not be a barrier to accessing or receiving health care or of the underlying determinants of health. The underlying determinants of the right to health include housing, water, food, clean environment access to education, information, etc. It should be noted that the rights to health means both physical and mental health. Hence stress or mental distress or anguish that may come as a result of fear of persecution due to one's sexual orientation signifies ill health and if such fear exists due to the laws and policies of a state on sexual orientation then it further signifies a breach of the right to health.

In essence, the ICESCR recognises and protects the human rights of LGBTI persons from discrimination and violation of human rights. Zambia therefore has the obligation to protect the rights of every citizen regardless of that citizen's sexual orientation or gender identity under the ICESCR.

4.4.4. The Yogyakarta Principles on the application of International Human Rights Law in relation to Sexual Orientation and Gender Identity

The Yogyakarta Principles are a set of standards and principles that provide universal guidance on the application of international human rights law in relation to sexual orientation and gender identity. The Principles are not a binding treaty but have been universally accepted even under the United Nations human rights system as a guide for states. For example, General Comment 20 of the Committee on Economic Social and Cultural Rights referred to the Yogyakarta Principles as a guide for state parties in their obligations under the ICESCR in the context of sexual orientation and gender identity.

The Principles were developed and adopted in November 2006. In that year, a group of human rights experts, including United Nations experts, members of human rights treaty bodies, judges, academics and human rights defenders, met in Yogyakarta, Indonesia. They developed the Principles drawing from the standards of international and regional human rights treaties. The Principles therefore address a broad range of human rights standards and their application to issues of sexual orientation and gender identity. Each Principle is accompanied by detailed recommendations to states. For example, Principle 1 and 2 relate to the universal enjoyment of human rights and the right to equality and non-discrimination respectively.

Under these Principles it is stated that:

“Everyone is entitled to enjoy all the human rights without discrimination on the basis of sexual orientation or gender identity. Everyone is entitled to equality before the law and the equal protection of the law without any such discrimination whether or not the enjoyment of another human right is also affected. The law shall prohibit any such discrimination and guarantee to all persons the equal and effective protection against any such discrimination.

Discrimination on the basis of sexual orientation or gender identity includes any distinction, exclusion, restriction or preference based on sexual orientation or gender identity which has the purpose or effect of nullifying or impairing equality before the law or equal protection of the law, or recognition, enjoyment or exercise, on an equal basis, of all human rights and fundamental Freedoms”

Other principles include the right to be recognised before the law, the right to life, privacy, security of the person and dignity. The Principles were developed in response to the massive discrimination, harassment, stigmatisation, violence and prejudices that LGBTI persons suffer worldwide. As already stated the Principles are not binding but offer a very rich guidance for Zambia in the interpretation of its international human rights obligations towards LGBTI persons.

The international instruments give Zambia an obligation to protect the right of equality and prohibit discrimination for people of different sexual orientations and gender identity.

4.4.5 Challenge of Domestication of the International Instruments

Zambia is a common law jurisdiction and therefore a dualist state. A dualist state is one that needs to domesticate into its national law, the international instruments it has ratified, if the said international instruments are to be enforceable. As a state, Zambia has ratified almost all the major human rights instruments at both international and regional levels. However, at national level, Zambia has not domesticated any of the human rights instruments that it has ratified. This makes and has made the application and enforcement of international human rights standards a challenge in Zambia.

It is a commonly agreed principle of international human rights law that if a state has ratified a human rights treaty, it has expressed its willingness to be bound by the standards and obligations in the treaty and therefore bound. Bearing in mind the Vienna Convention on the law of treaties, the non-domestication of a human rights treaty is not an excuse for failure to live by the standards set in the treaty.

CHAPTER 5: CHALLENGES FACED BY HUMAN RIGHTS DEFENDERS IN PROTECTING RIGHTS FOR LGBTI PERSONS

The principle and rights of non-discrimination are important in the advancement of the rights of every person not only LGBTI persons. The argument focuses on the person as a human being with rights that should be respected, protected and fulfilled before the person can be categorised as a man, woman, child, black, white, straight, gay, lesbian, Christian, Jew or whatever category that the human family has created. The principle of equality respects the inherent dignity of individuals and our collective humanity. That is why the basis of human rights law is equality and non-discrimination.

However, human rights defenders are often exposed to risk and vilification in their societies and as a result have been faced with a lot of abuse. Human rights defenders are individuals, groups of people or organisations who promote and protect human rights through peaceful and non-violent means. With all the international, regional and domestic legal instruments, there are still challenges facing the protection of rights for LGBTI people. The challenges identified include:

1. Homophobia –The discrimination, stigma and ultimate human rights violation is birthed by the homophobia that has its roots from social, cultural, religious and legal teachings. This homophobia is driven by a number of social issues and also due to communities not receptive of same sex relations, makes it difficult to protect rights of LGBTI. Human rights defenders as community members are also homophobic due to the teachings. This makes it difficult for promotion and protection of human rights for LGBTI people as it hinders any effective advocacy and understanding of the human rights.
2. Unfavourable legal environments. The criminalisation of homosexuality makes it difficult for human rights defenders to protect the rights for LGBTI persons. Zambia “sodomy” Law found under Part 15 of the Penal Code CAP 88 of the laws of Zambia outlines “OFFENCES AGAINST MORALITY”. The provisions under Part 15 are seen as progressive in Zambian society because they help to protect and preserve public morals or Zambian culture. Defending rights for LGBTI persons is seen as promoting criminality. Human rights defenders therefore face prosecution for their identity as well as their activity if they carry out their role. They have been at a risk of being detained. Many have been ridiculed or otherwise ill-treated in an attempt to force them to stop advocating, promoting and protecting rights for LGBTI. The case of Paul Kasonkomona is an example.
3. Lack of understanding of human rights - Human rights education plays a vital role in building social structures that provide a common understanding and recognition for equal rights for all. The rights for LGBTI are easily contested and controversial as they challenge dominant social norms or because they are seen as threatening to the established political, religious and economic order. As part of the communities, human rights defenders also have limited understanding of

the concepts and theories of human rights and their application. This therefore compromises the efforts and their role in protecting and advancing human rights for all.

4. Lack of visibility for LGBTI persons – Due to the criminalisation of homosexuality, stigmatisation of the LGBTI people and discrimination that they face, the LGBTI population are driven to the margins of society and hide from the general population. Coupled with the fact that sentence for the 'sodomy' offence attracts the maximum penalty of life imprisonment, LGBTI persons live in constant fear of prosecution and hence do not reveal themselves. Defenders have brought to the public attention the many ways in which people whose sexual orientation or gender identity differs from the perceived norm are prevented from exercising their rights and freedoms which others take for granted. Human rights defenders, however, still use this invisibility as an excuse to protect, promote and advance the rights for LGBTI.
5. Lack of respect for human rights by police and other law enforcers - Law enforcement agents lack adequate information and understanding of human rights principles and standards as well as understanding of human sexuality. Coupled with the social discrimination, moral and cultural misconceptions around LGBTI persons, they therefore believe that they are justified to persecute the LGBTI people. This has led to police brutality, degrading of human dignity even at the assumption that one may be an LGBTI person. The LGBTI persons therefore do not have access to justice at the hands of such enforcers.

CHAPTER 6: CONCLUSION AND RECOMMENDATIONS

The report aimed to generate evidence on discrimination of the LGBTI population that affects their enjoyment of human rights. The report reflected on how violation of human rights of LGBTI people in Zambia affects their enjoyment of human rights. It highlighted the international, regional and local obligations for the protection of all people regardless of their sexual orientation or gender identity. It reviewed Zambia's compliance to the UN and other international instruments on anti-discrimination and equality for all. The report presented a case why human rights defenders in Zambia should advocate for protection and respect of human rights for LGBTI people in Zambia.

Based on the study, the following conclusions and recommendations were made:

Issue	Conclusion	Recommendation
Lack of understanding of human rights and the principles of equality and non-discrimination	The report found that there is lack of understanding and contextualising the principles of human rights including the equality and non-discrimination. This principle is not extended to LGBTI persons in Zambia despite the fact that Zambia is a state party to the international and regional human rights instruments which guarantee protection without regard to a person's sexual orientation or gender identity. This situation exists As a result, LGBTI persons suffer publicly tolerated, accepted and enhanced discrimination and are not regarded as human beings within rights.	There is need for awareness raising on human rights and equality concepts. This will enhance and improve understanding of basics of human rights for marginalized groups which will ensure tolerance for the LGBTI and protection from inequality and discrimination.
Unfavourable laws that promotes discrimination	The Zambian laws discriminates by criminalising homosexuality. This breeds fear which leads the LGBTI to be at the margins of the communities. This makes it impossible for policy considerations regarding the vulnerability of LGBTI persons and enhances their human degradation and inaccessibility and enjoyment of their human rights. Hence even though it is commonly known that	Government and stakeholders need to ensure compliance with the international instruments of human rights. This entails and includes domestication of the instruments on human rights to warrant better compliance to the principle of equality and non-discrimination.

	<p>LGBTI persons are vulnerable to human rights violations, they are still excluded from government policies that could protect them from the violations.</p>	<p>There is need to intensify advocacy for legal reforms and compliance with international instruments to guarantee better protection and enjoyment of human rights by all.</p>
<p>Homophobia</p>	<p>Driven by various factors from social, religious, cultural and political, homophobia feeds on the public ignorance and existing myths about sexual orientation and gender identity. Since the Christian community represents a major constituency, political leaders have also taken the stage and condemn LGBTI persons so that they gain political mileage. The politicisation of the human rights of LGBTI persons has “weakened” any political will to afford protection on the basis of sexual orientation and gender identity.</p>	<p>There is need for continuous dialogue, sensitisation and training and education to improve the understanding of human sexuality advocacy for tolerance and respects for human rights for LGBTI. The discussions that challenge the issues around the social challenges of hate speech, homophobia, social and institutional discrimination that negatively impact the rights of LGBTI people.</p>

Table 23: Summary of Issues, Conclusions and Recommendations

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Vision: A Southern African community
that drives its own development