Decriminalisation of Consensual Same-Sex Sexual Conduct in Zimbabwe: A Step Towards Inclusion and Equality of Sexual Minorities

Nqobani Nyathi

Abstract

Zimbabwe criminalises "sodomy" i.e. the consensual sexual conduct between consenting males. The basis of criminalisation of consensual same-sex conduct is that it is a crime against morality. This paper traces the colonial origins of criminalisation of consensual same-sex sexual conduct in Zimbabwe. It shows that criminalising consensual same-sex sexual conduct serves no purpose other than the justification of the exclusion and subordination of sexual minorities. Although no rights are accruing to sexual minorities specifically under the Constitution, the rights to equality, dignity and privacy apply to all, regardless of sexual orientation or gender identity. The research explores the prospects of decriminalisation of the consensual same-sex sexual conduct under the Constitution. To make this assessment, inspiration is drawn from international law and relevant comparative law, as guided by the Constitution's interpretation clause.

1 Introduction

The criminalisation consensual same-sex sexual conduct between males is repressive and it perpetuates the exclusion and subordination of sexual minorities.[1] It is unjustifiable and based on archaic colonial laws. It should be abolished on the basis that it is at odds which the Constitution of Zimbabwe's (Constitution) fairly expansive Declaration of Rights (DoRs). In this case, reliance will be on the rights to equality and non-discrimination, dignity and privacy. International law has shown progressiveness towards decriminalisation of consensual same-sex sexual conduct. Further, Zimbabwe's four neighbours, South Africa, Mozambique and, more recently, Angola and Botswana, have decriminalised consensual same-sex sexual conduct. Inspiration should be drawn from international law and may also be drawn from comparative law, as required by the Constitution's interpretation clause.

This argument is divided into six parts. In the next section, I discuss the evolution of the crime of sodomy, from its colonial origins to the current legal framework. In section 3, I examine the impact of criminalisation and the resultant social exclusion of sexual minorities. Section 4 analyses decriminalisation of consensual same-sex conduct under international law and comparative law. This includes the analysis of the mechanisms under the United Nations (UN) and regional human rights systems. Section 5 critically analyses the prospects of decriminalisation of consensual same-sex sexual conduct under the Constitution, taking into account the Constitution's interpretation clause, the limitation of rights clause and the substantive rights i.e. the right to equality, dignity and privacy.

2 The Evolution of the Crime of "Sodomy" and Legal Framework

To understand the nature and purpose of the law criminalising consensual same-sex sexual conduct, it is important to look into its historical origins and evolution.

[1] 'Zimbabwe: End Attacks on LGBT People', *Human Rights Watch,* 27 August 2012 <www.hrw.org/news/2012/08/27/zimbabwe-end-attacks-lgbt-people >, visited on 2 October 2019.

2.1 *The Legacy of a Colonial Imposition*

The criminalisation of consensual same-sex conduct also known as "sodomy" originates from European medieval laws.[2] As Mutua points out, the exclusion of sexual minorities, which is now deeply entrenched in our social fabric, is not "necessarily home-grown".[3] The name of the offence bears religious connotations, particularly the Abrahamic religions.[4]

Zimbabwe got the criminalisation of consensual same-sex sexual conduct, known as "sodomy" from the British colonialists i.e. after colonisation by Cecil John Rhodes's British South Africa Company (BSAC) and the formal recognition of the process by the British government.[5] Consequent to colonisation, the BSAC imposed Roman Dutch Law, which was the law applicable at the Cape of Good Hope then.[6] "Sodomy" was a crime under Roman Dutch law. Additionally, other tailormade repressive and racist laws were added.[7] England and Wales later decriminalised consensual same sex conduct in 1967 but its colonies did not.[8] On attainment of independence, Zimbabwe retained Roman Dutch law.[9]

The hallmark of the crime of "sodomy" is that in essence it only permitted sexual conduct for the purpose of procreation.[10] In an old South African case of *Rex* v. *Gough and Narroway*,[11] it turns out that under Roman Dutch law, "[a]ny gratification of sexual lust in a manner contrary to the order of nature was a crime". Some writers classified all forms of unnatural lust under the title of "sodomy".[12] The crime of "sodomy" also vaguely signified "misuse of the organs of procreation".[13] By practice, however, the crime meant anal penetration.[14] Other similar sexual offences not involving penetration of the anus were simple styled as "unnatural offences".[15]

In *S* v. *Chikore*,[16] Reynolds J reiterated the Roman Dutch law origins of the crime of sodomy as understood in the *Gough and Narroway* case.[17] He stated that:

---

[2] 'This Alien Legacy: The Origins of "Sodomy" Laws in British Colonialism', *Human Rights Watch* (2008) p. 13.

[3] M. Mutua, 'Sexual Orientation and Human Rights: Putting Homophobia on Trial', in S. Tamale (ed.), *African Sexualities: A Reader* (Pambazuka, 2011) pp. 452-453.

[4] *Ibid.*

[5] S. J. Ndlovu-Gatsheni, 'Mapping Cultural and Colonial Encounters, 1880s-1930s', in B. Raftopoulos and A.S. Mlambo (eds.), *Becoming Zimbabwe: A History from the Pre-colonial Period to 2008* (Weaver Press, 2009) pp. 58-68.

[6] 'More Than a Name: State Sponsored Homophobia and its Consequences in Southern Africa', *Human Rights Watch* (2003) p. 266.

[7] Ndlovu-Gatsheni, *supra* note 5. These laws include criminalisation of inter-racial sexual conduct.

[8] After the 1957 Wolfenden report, England and Wales decriminalised consensual same sex sexual acts in 1967. *See supra* note 2, pp. 6-7. The Dutch had already decriminalised the offence of sodomy after being annexed by the French Empire and the adoption of the Napoleonic code in 1811. *See supra* note 6, p. 261.

[9] Section 89 of the Lancaster House Constitution (LHC) provided that the law to be used in Zimbabwe was the law at the Cape of Good Cape in force as at 10 June 1891 as modified by legislation.

[10] *Supra* note 6, p. 261.

[11] *Rex* v. *Gough and Narroway* 1926 CPD 159.

[12] *Ibid.*, p. 161.

[13] *Ibid.*

[14] *Ibid*., p.162.

[15] Ibid., pp. 162-163.

[16] *S* v. *Chikore* 1987 (2) ZLR 48 (HC).

[17] *Rex* v. *Gough and Narroway*, *supra* note 11.

> [t]he crimes now known as sodomy and bestiality were included under this term, and some authorities also included acts such as self-masturbation, oral intercourse, lesbianism, and many other such practices. Some jurists even regarded normal coitus between a Jew and a Christian as "sodomy". This very broad base was later narrowed so that any sexual act "contrary to the order of nature" fell into one of three categories. These were sodomy, bestiality, and a third category into which fell certain residual, sexually abnormal acts which were classified generally as "unnatural offences".[18]

Under Zimbabwean law then, "sodomy" and "unnatural offences" were stand-alone crimes and distinguishable. Sodomy meant anal sexual intercourse between males, whether consensual or non-consensual.[19] The meaning of "unnatural offences" was still vague. The rationale for criminalising consensual same-sex conduct appears to have been aimed at protecting "sexual morality"[20] and morality in general.[21] Thus, any justification for the crime of sodomy in Zimbabwe is rooted in its Roman Dutch law origins. Evidently, such justification is difficult to rationalise in a constitutional democracy.

2.2 S *v.* Banana[22] *and the Challenge to the Criminalisation of Consensual Same-Sex Sexual Conduct under the Lancaster House Constitution*

Faced with a litany of charges based on sexual offences,[23] Zimbabwe's former non-executive President Canaan Sodindo Banana was tried.[24] These crimes were mostly committed while he still held office as the head of state. The trial court found the act of "sodomy" to be consensual in the first count.

On appeal to the Supreme Court, Banana challenged the constitutionality of criminalising consensual "sodomy" on the basis of non-discrimination under section 23 of the former Lancaster House Constitution (LHC).[25] The majority went on to apply a narrow constitutional approach and rejected comparative law. McNally JA, writing for the majority, said that Zimbabweans were conservative in sexual matters and hence Zimbabwe's "social norms and values" did not push for the decriminalisation of consensual "sodomy".[26] He stated that "Zimbabwe is a conservative society on questions of sexual morality and the Court should not strain to interpret provisions in the Constitution which were not designed to put Zimbabwe among the front-runners of liberal democracy in sexual matters."[27] This approach was wrong. Sexual minorities lack political capital to push for reforms through the legislature, for instance. The majority held that what was forbidden by section 23 of the LHC was discrimination between men and women and not between heterosexual men and homosexual men. They added that discrimination on the grounds of sexual orientation could only be prohibited by a constitution which proscribed such discrimination, like the South African Constitution.[28]

---

[18] *Chikore* case, *supra* note 16, p. 50.

[19] G. Feltoe, *A Guide to Criminal Law in Zimbabwe (*Legal Resources Foundation, 2006) p. 108.

[20] *Ibid.*, p. 54.

[21] *Ibid*., p. 56.

[22] *S* v. *Banana* SA (3) 885 (ZS).

[23] Two counts of "sodomy" (non-consensual), three counts of attempted "sodomy" and six counts of indecent assault.

[24] *Banana* case, *supra* note 22.

[25] *Ibid*., p. 903.

[26] *Ibid*., pp. 932-933.

[27] *Ibid*., p. 935.

[28] *Ibid*., p. 934.

The *Banana* case however shows that the judiciary's attitude towards consensual "sodomy" was lenient. Citing an earlier case of *S* v. *Roffey*,[29] it was held that "in this modern day imprisonment is not a proper sentence where both parties are willing adults and the act was committed in private".[30] '

2.3 *The Crime of "Sodomy" under the Criminal Law (Codification and Reform) Act*

Despite the medieval and colonial origins of laws criminalising consensual same-sex conduct, the post-colonial government refined them. This was done through the Criminal Law (Codification and Reform) Act (Code) in 2006.[31] It is therefore rather ironic that the aim of the Code was to reform criminal law in Zimbabwe and replace Roman Dutch Law.[32]

The Code provides that:

> [a]ny male person who, with the consent of another male person, knowingly performs with that other person anal sexual intercourse, or any act involving physical contact other than anal sexual intercourse that would be regarded by a reasonable person to be an indecent act, shall be guilty of sodomy and liable to a fine up to or exceeding level fourteen or imprisonment for a period not exceeding one year or both.[33]

In this way, the Code combined the common law crime of "sodomy" and the common law "offences against nature".[34] It also restricts "sodomy" to consensual anal sexual intercourse and other related consensual physical acts between males. Non-consensual sexual intercourse between males now falls under the crime of "aggravated indecent assault"[35] and carries the same sentence as rape.[36] In the Code, the crime of "sodomy" falls under "sexual crimes and crimes against morality".[37]

The definition of "sodomy" is still vague. It criminalises "any act involving physical contact other than anal sexual intercourse that would be regarded by a reasonable person to be an indecent act".[38] This is arguably contrary to the principle of legality, which requires that criminal law must be reasonably certain by way of definition. Thus, the crime is viewed in terms of what is permissible in a heteronormative lens. Anything else is perceived to be deviant.

---

[29] *S* v. *Roffey* 1991 (2) ZLR 47 (HC).

[30] *Banana* case, *supra* note 22, p. 930.

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

[32] Section 3(1) of the Code.

[33] *Ibid.,* Section 73 of the Code.

[34] G. Feltoe, *Commentary on the Criminal Law (Codification and Reform) Act [Chapter 9:23]* (Legal Resources Foundation, 2016) p. 84.

[35] Section 66 (1) of the Code.

[36] Section 66 (2) of the Code.

[37] Part 3 of the Code.

[38] Section 73 of the Code.

2.4 *Prohibition of Same-Sex Marriages under Section 78 of the Constitution*

Zimbabwe replaced the LHC after a referendum in 2013.[39] The new Constitution features a fairly comprehensive DoRs.[40] However, paradoxically, the DoRs prohibits same sex marriages.[41] The constitutional prohibition of same sex marriages serves no useful purpose. Rather, it perpetuates the stigmatisation of sexual minorities. This is one of the examples that demonstrate how the inequality and the exclusion of sexual minorities is politicised. One of the contentious issues during the Constitution making process was "whether to outlaw homosexuality".[42] Zimbabwe's perennially dominant political party, Zimbabwe African National Union (Patriotic Front) (ZANU-PF), sought a constitutional "prohibition of homosexuality".[43] It appears the compromise resulted in the prohibition of same-sex marriages.

3 Criminalisation, Exclusion and the Vulnerability of Sexual Minorities

As Cameron points out, sexual minorities are a particularly vulnerable group.[44] The current criminalisation legal framework exposes sexual minorities to human rights violations. It fuels stigma and discrimination. Here, the term "sexual minorities" is used to define a group whose sexuality is not heterosexual. This includes Lesbian, Gay, Bisexual and Transgender (LGBT) persons.

Human rights violations are experienced at individual level and also as a group. Zimbabwe's late former President Robert Mugabe, running a government characterised by unaccountability and human rights violations, sparked an attack against sexual minorities in 1995. His stance has characterised the discourse and political rhetoric against sexual minorities in Zimbabwe to date. At a book fair, Gays and Lesbians of Zimbabwe (GALZ) sought to display its literature but Mugabe, who was supposed to officiate, objected to the presence of GALZ.[45] While the organisers of the book fair eventually capitulated and revoked the offer to display literature to GALZ, Mugabe used the occasion to launch the most public act of exclusion of sexual minorities by the state. He said:

> I find it extremely outrageous and repugnant to my human conscience that such immoral and repulsive organisations, like those of homosexuals who offend both against the law of nature and the morals of religious beliefs espoused by our society, should have any advocates in our midst and even elsewhere in the world. If

[39] K. Vollan, 'The Constitutional History and the 2013 Referendum of Zimbabwe: A NORDEM Special Report 2013' *The Norwegian Centre for Human Rights* <www.jus.uio.no/smr/english/about/programmes/nordem/publications/docs/zimbabwe_constitution_2013.pdf>, visited on 4 September 2019. *See also* E. Mandipa, 'The Suppression Of Sexual Minority Rights: A Case Study of Zimbabwe', in S. Namwase and A. Jjuuko (eds.), *Protecting the Human Rights of Sexual Minorities in Contemporary Africa* (Pretoria University Law Press, 2017) p. 152.

[40] Chapter 4 of the Constitution.

[41] Section 78 (3) of the Constitution provides that "Persons of the same sex are prohibited from marrying each other."

[42] Vollan, *supra* note 39, p. 38.

[43] *Ibid*. *See also* P. Makova, 'Mugabe Holds Key to Conference Success' *The Standard*, 30 September 2012 <www.thestandard.co.zw/2012/09/30/mugabe-holds-key-to-conference-success/>, visited on 4 September 2019 and 'Report Of The Constitution Parliamentary Select Committee (COPAC) Presented to Parliament', 7 February 2013, p. 49.

[44] E. Cameron 'Sexual Orientation and the Constitution: A Test Case for Human Rights', 110 *South African Law Journal* (1993) p. 456.

[45] C. Ngwena, *What is Africanness? Contesting Nativism in Race, Culture and Sexualities* (Pretoria University Law Press, 2018) p. 200.

> we accept homosexuality as a right, as is being argued by the association of sodomists and sexual perverts what moral fibre shall our society ever have to deny organised drug addicts, or even those given to bestiality, the rights they might claim and allege they possess under the rubrics of individual freedom and human rights?[46]

A parliament motion on "homosexualism and lesbianism" in support of Mugabe followed his speech.[47] A member of parliament, Mr Chigwedere, crudely referred to sexual minorities as dogs[48] and a "festering finger" that needed to be chopped off.[49]

Mugabe's successor, Emmerson Mnangagwa, has always mimicked his position, however, with a softer tone.[50] Besides the support from his party, some of Mugabe's political adversaries also admire his stance against sexual minorities. On the day of the announcement of Mugabe's death,[51] Nelson Chamisa, the leader of the main opposition party, expressed his support of Mugabe's stance against sexual minorities.[52] Thus, the inequality and exclusion of sexual minorities that characterised Mugabe's rule cuts across the political differences.

In general, public actions against sexual minorities have either received support or no condemnation from the state. In 2011 Sexual Rights Centre, a civil society organisation based in Bulawayo, donated refuse bins to the City of Bulawayo.[53] The donation was opposed to an extent that some of the bins were defaced.[54]

Boldened by the attitude of the state against sexual minorities, religious leaders have also participated in publicly excluding sexual minorities.[55] Religious fuelled homophobia found a ready ally in state-sponsored homophobia. The two, each claiming justification from the other, complement their rhetoric against sexual minorities. As Ngwena contends, this exclusionary and dominant narrative "not only disenfranchises sexual minorities of equal citizenship but also sets them up as just targets for oppression, vilification and harm".[56]
Sexual minorities are reduced to what has been described as "unapprehended felons", which is a constant threat that lingers for one's entire life.[57] This entrenches the exclusion and

---

[46] C. Dunton and M. Palmberg, *Human Rights and Homosexuality in Southern Africa* (Nordiska Afrikainstitutet, 1996) p. 14.

[47] Parliament of Zimbabwe Hansard, 28 September 1995, 2779 Motion.

[48] The actual word used was *imbwa*, a shona word meaning dog.

[49] Parliament of Zimbabwe Hansard, *supra* note 47.

[50] R. Igual, 'Mugabe is Gone, but is His Successor Emmerson Mnangagwa Less Homophobic?', 24 November 2017,< www.mambaonline.com/2017/11/24/mugabe-gone-successor-less-homophobic/ >, visited on 2 October 2019.

[51] 6 September 2019.

[52] 'Chamisa reflects on Cde Mugabe's legacy', 6 September 2019, < www.zbc.co.zw/chamisa-reflects-on-cde-mugabes-legacy/ >, visited on 7 September 2019.

[53] 'Outrage as Homo Pressure Group Donates to Mayor', *The Chronicle*, 6 December 2011 <www.chronicle.co.zw/outrage-in-bulawayo-as-homo-pressure-group-donates-to-mayor/ >, visited on 2 October 2019.

[54] 'Litter Bins Furore Takes New Twist', *Newsday*, 24 January 2012, < www.newsday.co.zw/2012/01/2012-01-24-litter-bins-furore-takes-new-twist/ >, visited on 2 October.

[55] N. Tshili, 'Brothels Boom: Bulawayo Pastors Raise Alarm, Plot to Block Bar Opening' *The Chronicle*, 7 September 2016, < www.chronicle.co.zw/brothels-boom-bulawayo-pastors-raise-alarm-plot-to-block-bar-opening/>, visited on 2 October 2019. *See also* 'Homosexuality a Sin: Pastor Deuschle', *The Herald*, 27 May 2012, < https://www.herald.co.zw/homosexuality-a-sin-pastor-deuschle/ > visited on 2 October 2019.

[56] Ngwena, *supra* note 45 p. 201.

[57] Cameron, *supra* note 44 p. 455.

stigmatisation in many spheres of public life.[58] These include the curious case of a civil servant who was purportedly dismissed from employment after erroneously admitting guilt for attending a party hosted by GALZ.[59] At worse, this takes the form of law enforcement agents harassing employees of civil society organisations that focus on sexual minorities.[60] The worst form is exemplified by death threats and loss of employment resulting from disclosure of one's sexuality.[61]

One of the enduring tragedies that results from the criminalisation of consensual same sex conduct is its impact on access to health care and response to HIV. As a direct result of criminalisation, it is highly unlikely that sexual minorities can access basic health care services such as voluntary HIV testing with sexual partners. This is out of fear of stigmatisation and also out of fear of self-incrimination.

The criminalisation of consensual same-sex sexual conduct creates a complex ground for human rights violations against sexual minorities. But, according to the Constitution the "[s]tate and every person, including juristic persons, and every institution and agency of the government at every level must respect, protect, promote and fulfil the rights and freedoms".[62] When human rights are committed as a result of the conditions created by the state, for example, the criminalisation of consensual same-sex sexual conduct, it is necessary to remove such restrictions.

Ideally the legislature should be at the forefront of ensuring that laws are aligned[63] with the Constitution.[64] The chances of decriminalising consensual same-sex sexual conduct via legislative reform are however, quite slim. As pointed out above, ZANU-PF has always taken a stance against sexual minorities, which revolved around the ideals and political rhetoric of its long-time leader, Mugabe.[65] There is no indication that the party has changed its position. There is no indication again, that the main opposition party, Movement for Democratic Change (MDC), is willing to support decriminalisation of consensual same-sex sexual conduct, judging by its leader's rhetoric.[66]

4 International Law, Comparative Law and Decriminalisation of Consensual Same-sex Sexual Conduct

International law and comparative law are particularly important in interpreting the DoRs. The Constitution has made it an obligation to consider international law and also it encourages the use of foreign law as a guiding tool in constitutional interpretation. There is inclination towards

[58] *Ibid.*

[59] T. Shava, 'Court Rules in Favour of Dismissed Zimbabwe Worker Linked to Gay Party', *Voice of America*, 27 October 2015, <www.voazimbabwe.com/a/zimbabwe-sexual-orientation-sex-marriage-unconstitutional/3024732.html >, visited on 2 October 2019.

[60] 'Gays and Lesbians of Zimbabwe (GALZ) Raid and Arrests' *Kubatana*, 21 May 2010, <archive.kubatana.net/html/archive/sexual/100521osisa.asp?sector=CACT&year=2010&range_start=241 >, visited on 2 October 2019.

[61] 'Gay Zimbabwe Teacher Resigns After Death Threats', *BBC*, 27 September 2018, <www.bbc.com/news/world-africa-45665906 >, visited on 2 October 2019.

[62] Section 44 of the Constitution.

[63] Section 117 (2) (b) of the Constitution.

[64] Section 119 (2) of the Constitution.

[65] *See for example* the parliamentary debate on the motion title "homosexualism and lesbianism", *supra* note 47.

[66] *Supra* note 52.

decriminalisation of consensual same-sex sexual acts under international law. This provides a useful guide to decriminalising consensual same-sex sexual acts in Zimbabwe, whose neighbours have also decriminalised consensual same-sex sexual conduct, in the spirit of respecting fundamental rights.

4.1 *International Law*

Zimbabwe is a party to several international law instruments that include the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (African Charter). Under international law, there is a trend towards the protection of sexual minorities.[67] This is despite the non-existence of an international human rights treaty that specifically focuses on the right to sexual orientation and gender identity.[68]
The UN system of human rights protection has shown that the antiquated criminalisation of consensual same-sex sexual conduct is a violation of basic human rights. In *Toonen* v. *Australia*,[69] the United Nations Human Rights Committee (UNHRC) adopted its views that criminalisation of consensual same sex sexual conduct primarily violated the right to privacy under Article 17 of the ICCPR.[70] The UNHRC said that "it is undisputed that adult consensual sexual activity in private is covered by the concept of 'privacy'" under the ICCPR. The UNHRC also refused to accept that "[m]oral issues are exclusively a matter of domestic concern, as this would open the door to withdrawing from the Committee's scrutiny a potentially large number of statutes interfering with privacy".[71] This is particularly important when the so-called moral issues are raised as a result of prejudice and preconceived views against a certain group of people. The UNHRC did not however consider sexual orientation as other status, and without explanation stated that reference to sex under Article 26 of the ICCPR includes sexual orientation. One of the shortcomings of the decision however is the view by UNHRC that it was unnecessary to consider the violation of the right to equality when such a finding should have been at the core of the decision.[72] This is because in this context the right to privacy and the right to equality are linked.[73]

Earlier in 1994, the UN High Commissioner for Refugees had already recognised "sexual orientation" as a qualification under "particular social group" eligible for protection.[74] Subsequently, other UN treaties were interpreted by their respective supervisory bodies to cover discrimination of the grounds of sexual orientation.[75] Other binding UN treaties have also been extended to include sexual minorities, i.e. LGBT persons, from concluding observations and general comments.[76]

In addition, soft-law standards such as the Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity have been

[67] F. Viljoen, *International Human Rights Law in Africa* (Oxford University Press, 2012) p. 261.
[68] *Ibid.*
[69] Communication 488/92. The views were adopted on 31 March 1994.
[70] *Ibid*., para. 9.
[71] *Ibid*., para. 8.6.
[72] *Ibid*., para. 11.
[73] This is also pointed out in an individual opinion by the UNHRC's Mr. Bertil Wennergren.
[74] P. Alston and R . Goodman, *International Human Rights* (Oxford University Press, 2012) pp. 222-223.
[75] *Ibid.* p. 223. These are CEDAW), CESCR, CRC and CAT.
[76] Viljoen, s*upra* note 67 p. 262.

developed with the aim of securing the rights of sexual minorities.[77] The Yogyakarta Principles "establish basic standards for how governments should treat people whose rights are too often denied and whose dignity is too often reviled".[78] They call for the amendment of laws including "criminal law, to ensure its consistency with the universal enjoyment of all human rights".[79]

There is also an "Independent Expert on sexual orientation and gender identity" (SOGI expert) appointed by the UN Human Rights Council.[80] The SOGI expert has called for an end to criminalisation of same sex relations.[81]

In terms of the regional human rights systems, the European human rights system provides invaluable jurisprudence on decriminalisation of consensual same-sex sexual conduct. The European Court of Human Rights (ECtHR) became the first international law institution to recognise the rights of sexual minorities.[82] In the case of *Dudgeon* v. *UK*,[83] the ECtHR found criminalisation of consensual same-sex sexual relations to be a violation of the right to privacy in the European Convention on Human Rights and Fundamental Freedoms (European Convention). Using the proportionality test, the ECtHR held that the justifications of retaining the law were "outweighed by the detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation".[84] The ECtHR also added that "[a]lthough members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved".[85]

The ECtHR deemed it unnecessary to consider whether the prohibition from discrimination in terms of Article 14 of the European Convention was violated.[86] This was on the basis that similar issues had already been exhausted and "absorbed" under the right to privacy.[87] Similarly in *Norris* v. *Ireland*,[88] the ECtHR again found criminalisation of consensual same-sex sexual conduct to be a violation of the European Convention on the same grounds as the *Dudgeon* case. The ECtHR later followed the same decision in *Modinos* v. *Cyprus*[89] in 1993.

The Inter-American human rights system has not dealt with a direct challenge on decriminalisation of consensual same-sex sexual conduct. However, the Inter-American

---

[77] *Ibid.* The Yogyakarta principles were subsequently amended in 2017, *see also* <yogyakartaprinciples.org/principles-en/ >, visited on 8 October 2019.

[78] ''Yogyakarta Principles' a Milestone for Lesbian, Gay, Bisexual, and Transgender Rights', *Human Rights Watch*, 26 March 2007 <www.hrw.org/news/2007/03/26/yogyakarta-principles-milestone-lesbian-gay-bisexual-and-transgender-rights >, visited on 8 October 2019.

[79] Principle 1(b) of the Yogyakarta Principles.

[80] 'Independent Expert on sexual orientation and gender identity' <www.ohchr.org/en/issues/sexualorientationgender/pages/index.aspx >, visited on 8 October 2019.

[81] 'UN SOGI expert urges end to criminalisation of same sex relations by 2030', < www.hrc.org/blog/un-sogi-expert-urges-end-to-criminalization-of-same-sex-relations-by-2030 >, visited on 8 October 2019.

[82] Alston and Goodman , *supra* note 74 p. 222.

[83] (1981) 4 EHRR 149.

[84] *Ibid*., para. 60.

[85] *Ibid.*

[86] *Ibid,*. Para. 70.

[87] *Ibid.,* para. 69.

[88] Application no. 10581/83.

[89] 16 EHRR 485 (25 March 1993).

Commission on Human Rights in its report on violence on LGBT people in America "highlighted the inconsistency of laws that criminalize consensual sex between same-sex persons with the principles of equality and non-discrimination".[90] Also, in *Marta Lucía Álvarez Giraldo* v. *Colombia,* the Inter-American Commission on Human Rights found that:

> [w]hile the facts of the case do show that the prison authorities argued that other female inmates "rejected sexual acts between women," the State cannot operate on the basis of these stereotyped assumptions, using them as justification to deny the rights of persons subject to its jurisdiction. To the contrary, the State must be about the business of gradually eradicating these very pernicious prejudices. [91]

This indicates that the Inter-American Commission on Human Rights is rather constant in its approach to protecting the rights of sexual minorities.

The issue of decriminalisation of consensual same-sex sexual conduct has not been tested under the African human rights system. The closest case before the African Commission on Human and Peoples' Rights (African Commission), *Courson* v. *Zimbabwe*,[92] was withdrawn by the complainant. In *Zimbabwe Human Rights NGO Forum* v. *Zimbabwe*,[93] the African Commission said that the aim of this principle of equality "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*" in an *obiter dictum*. This *dictum* is significant. It shows that the interpretation of the right to equality should be inclusive rather than exhaustive.

In 2014, the African Commission passed a resolution titled "Resolution on the Protection against Violence and other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity".[94] This Resolution, while not calling for decriminalisation, was a bold step towards the protection of sexual minorities in Africa.[95] It may be used to interpret that the criminalisation of consensual same sex acts violates fundamental rights, including the right to equality and the right to equal protection of the law.

When interpreting the Constitution, a court, tribunal or body or forum "must take into account international law and all treaties and conventions to which Zimbabwe is a party".[96] This is an injunction to consider international law.[97] In terms of practical application, the clause means that where international law is considered, the courts must provide reasons for doing so, and conversely, the reason for non-application of international law. This includes both international law that binds Zimbabwe and non-binding international law. The DoRs can be assessed and understood under the international law framework.[98] Thus, international law treaties, customary

---

[90] 'IACHR Hails Unconstitutionality Decision on Criminalization of Consensual Sexual Relations between Same Sex Adults in Belize', 22 August 2016, <www.oas.org/en/iachr/media_center/PReleases/2016/119.asp >, visited on 8 October 2019.

[91] 'Report No. 122/18 Case 11.656 Report on Merits (Publication) Marta Lucía Álvarez Giraldo Colombia' <https://www.oas.org/en/iachr/decisions/2018/COPU11656EN.pd > para. 176, visited on 25 October 2019.

[92] AHRLR 335 (ACHPR) 1995.

[93] (2006) AHRLR 128 (ACHPR 2006).

[94] A. Jjuuko, 'The Protection and Promotion of LGBTI Rights in the African Regional Human Rights System: Opportunities and Challenges' in Namwase and Jjuuko, *supra* note 39, p. 260.

[95] M. Killander 'Human rights developments in the African Union during 2014' 15 *African Human Rights Law Journal* (2015) p. 542.

[96] Section 46 (1) (c) of the Constitution.

[97] *Mudzuru and Another* v. *Minister of Justice, Legal & Parliamentary Affairs N.O and Others* CCZ 12/2015, p. 26.

[98] *S* v. *Makwanyane* CCT/3/94, para. 35.

international law and soft law mechanisms accordingly provide a useful guidance in interpreting fundamental rights. Decisions of bodies such as the UNHRC and regional human rights systems, i.e. the African human rights system, the European human rights system and the Inter-American human rights system, provide some guidance in constitutional interpretation.

4.2 *Taking a Leaf from Neighbours*

Zimbabwe's four neighbours, South Africa, Mozambique, Angola and Botswana, have decriminalised consensual same-sex sexual acts. Angola and Botswana decriminalised recently, in 2019. The mode of decriminalisation has been through legislative reform as in Mozambique and Angola or through litigation as in South Africa and Botswana.

Mozambique did not explicitly criminalise consensual same-sex sexual acts. The Mozambique Criminal Code, which was repealed in 2015, criminalised "unnatural vices".[99] There was fear that the clause prohibiting "unnatural vices" could be interpreted to criminalise consensual same sex conduct.[100] Due to activism of the CSOs in Mozambique, the current law does not criminalise consensual same sex sexual acts.[101] As of 2007, Mozambique Labour Laws also prohibit discrimination on grounds that include sexual orientation.[102] Angola, too, used to criminalise "vices against nature".[103] On 23 January 2019, the law was repealed and taking a step further aimed at inclusiveness, Angola now prohibits discrimination on the grounds of sexual orientation.[104] In Angola the change was brought forward by change of political leadership in September 2017 and the activism by CSOs.[105] These legislative reforms by Zimbabwe's fellow Southern Africa Development Community (SADC) members are quite significant at a political level.

Breaking away from the oppressive apartheid under white minority rule, South Africa brought in a new constitutional order which replaced the old system of parliamentary sovereignty with a system of constitutional supremacy.[106] This system brought in a comprehensive Bill of Rights and wide review powers of the judiciary.[107] Thus, explicitly identifying sexual orientation as a ground of unfair discrimination made it much easier to establish that criminalisation of consensual same sex sexual conduct was unfair discrimination[108] in the case of *National Coalition for Gay and Lesbian Equality and Another* v. *Minister of Justice and Others.*[109] In South Africa, the political parties and the CSOs played a critical role in including sexual

---

[99] E. Lopes, 'The Legal status of sexual minorities in Mozambique' in Namwase and Jjuuko, *supra* note 39, p. 184.

[100] *Ibid*., pp. 184-185.

[101] *Ibid*., pp. 185-186.

[102] *Ibid.*, p. 185.

[103] G. Reid, 'Angola Decriminalises Same Sex Conduct', *Human Rights Watch*, 23 January 2019, <www.hrw.org/news/2019/01/23/angola-decriminalizes-same-sex-conduct >, visited on 7 October 2019.

[104] *Ibid*.

[105] F. Viljoen, 'Abolition of Angola's anti-gay laws may pave the way for regional reform', *The Conversation*, 14 February 2019,
<theconversation.com/abolition-of-angolas-anti-gay-laws-may-pave-the-way-for-regional-reform-111432>, visited on 7 October 2019.

[106] I. Currie and J. De Waal, *The Bill of Rights Handbook* (Juta, 2013), p. 2.

[107] *Ibid.*

[108] A. Sachs, *The Strange Alchemy of Life and Law* (Oxford University Press, 2009), p. 243.

[109] 1999 (1) SA 6 (CC).

orientation as an unfair discrimination ground. Admittedly, the involvement of political parties makes their experience quite different from the other African States, especially Zimbabwe.[110]

In Botswana, the decriminalisation of consensual same conduct was a result of incremental strategic litigation and CSO activism. The case of *Kanane* v. *State*[111] tested the constitutionality of criminalisation of consensual same-sex conduct. In the *Kanane* case, the High Court concluded that the justification of criminalisation was to protect public morality.[112] On appeal, it was held that public sentiments were not in favour of decriminalisation, like in the *Banana* case. In both instances, the courts abdicated their role to interpret the law and protect fundamental rights to public opinion. With a slight progress, the Labour Laws of Botswana added sexual orientation as a ground for unfair discrimination in 2010.[113]

Litigating for the rights of sexual minorities gained traction in *Rammoge & Others* v. *The Attorney General.*[114] The challenge concerned the registration of a CSO under the name of Lesbians, Gays and Bisexuals of Botswana (LEGABIBO). The High Court found that the decision not to register the organisation was discriminatory on the basis of sexual orientation.[115] On appeal the decision was upheld. In *ND* v. *Attorney General of Botswana,*[116] the High Court of Botswana ordered the Registrar to change the gender marker on the identity document of a transgender man from female to male. Finally, in the *Motshidiemang* v. *Attorney General*,[117] the High Court of Botswana struck down the criminalisation of consensual same sex conduct on the basis of inconsistency with the Constitution of Botswana.[118] Notably, the Constitution of Botswana, like the Constitution of Zimbabwe, does not include sexual orientation as a ground of unfair discrimination. Commenting on the *Motshidiemang* judgment, Viljoen stated that the decision "sets a precedent on which other African courts can rely".[119]
The interpretive clause of the Constitution provides that when interpreting the DoRs, relevant foreign law may be considered.[120] The advantages of considering foreign law are that it helps in clarifying and amplifying our domestic jurisprudence. Hence, it must not be taken lightly. It is also a constant reminder for all concerned, especially the judiciary, that there is a world somewhere where they can tap on the wisdom of those who have already travelled certain paths. A rigid and confined approach to constitution interpretation thwarts the growth of domestic jurisprudence.

---

[110] Cameron, *supra* note 44, pp. 465-466.
[111] 2003 2 BLR 64 (CA).
[112] *Kanane* v. *State* 1995 BLR 94.
[113] L.C. Olebile, 'The Status of LGBTI Rights in Botswana and its Implications for Social Justice', in Namwase and Jjuuko, *supra* note 39, p.196.
[114] 000175-13.
[115] *Ibid.*
[116] T. Esterhuizen, 'Progressive Botswana Court Affirms that Legal Recognition of Gender Identity at Core of Human Dignity', *Daily Maverick,* 21 November 2017, <www.dailymaverick.co.za/article/2017-11-21-op-ed-progressive-botswana-court-affirms-that-legal-recognition-of-gender-identity-at-core-of-human-dignity/>, visited on 22 October 2019.
[117] 591/19.
[118] The Attorney General filed a notice of appeal; however pending the finalisation of the appeal, the decision remains in force.
[119] F. Viljoen, 'Botswana Court Ruling is a Ray of Hope for LGBT People Across Africa', *The Conversation,* 21 June 2019, <theconversation.com/botswana-court-ruling-is-a-ray-of-hope-for-lgbt-people-across-africa-118713>, visited on 8 October 2019.
[120] Section 46(1) (e) of the Constitution.

5 Repealing the Crime of "Sodomy" as a Test Case for the Constitution

Drawing inspiration from international law and comparative law, it is argued that the crime of "sodomy" can be successfully challenged on the basis that it is unconstitutional. An obvious disadvantage will be an adverse judgment, whose impact may be far reaching than the *Banana* case. Taking a leaf from Botswana's incremental strategic litigation as discussed above, a cautious approach and team work by CSOs that represent sexual minorities would be a basic starting point.

The Constitution brought a significant departure from the LHC on legal standing to litigate on constitutional issues. Previously, the LHC restricted standing to a person only acting on their own behalf and only to someone in custody and clearly unable to enforce their rights as stated, for example, in *Chombo* v. *Parliament of Zimbabwe & Ors.*[121] Standing has now been widened. It includes "any person acting in their own interests",[122] "any person acting on behalf of another person who cannot act for themselves",[123] "any person acting as a member, or in the interests, of a group or class of persons",[124] "any person acting in the public interest"[125] and "any association acting in the interests of its members".[126]

While the DoRs disappointingly has a clause that prohibits same-sex marriages,[127] it nonetheless guarantees fundamental rights that are comprehensive in scope.[128] The prohibition of same-sex marriages is of no consequence to the challenge of the criminalisation of consensual same-sex conduct. First, it is on its own, only a limitation on marriage rights. Second, it would be utterly irrational to restrict consensual sexual acts or intimacy only to the married.

The argument for decriminalisation of consensual same sex conduct is centred on the right to equality and non-discrimination.[129] First, the point of departure is that the criminalisation of consensual same-sex conduct is aimed at nothing more than the subordination and exclusion of sexual minorities. Second, equality appears to be at the core of Zimbabwe's constitutional values.[130] In addition, the argument is also based on the right to human dignity and [131] the right to privacy.[132] These rights are equally important and interlinked to the right to equality. They are not included as alternative rights.

5.1 *Constitutional Interpretation*

Before looking at the substantive rights that may be raised to challenge the crime of "sodomy", constitutional interpretation will be analysed. When interpreting the Constitution, "a court,

[121] ZWSC 5/2013.
[122] Section 85 (1) (a) of the Constitution.
[123] Section 85 (1) (b) of the Constitution.
[124] Section 85 (1) (c) of the Constitution.
[125] Section 85 (1) (d) of the Constitution.
[126] Section 85 (1) (e) of the Constitution.
[127] Section 78 of the Constitution.
[128] *See* the Declaration of Rights under chapter 4 of the Constitution.
[129] Section 56 of the Constitution.
[130] *See for example*, the Preamble of the Constitutional and section 3(1) (f) of the Constitution.
[131] Section 51 of the Constitution.
[132] Section 57 of the Constitution.

tribunal, forum or body"[133] is guided by five principles. First, they "must give full effect to the rights and freedoms" contained in the DoRs.[134] Second, they must "promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom" and in particular the values of the Constitution.[135] The constitutional values referred to are the values that Zimbabwe is founded on. These include the supremacy of the Constitution, the rule of law, fundamental rights and freedoms, the inherent dignity of each human being and the equality for all.[136] Third, they must "take into account international law and all treaties and conventions to which Zimbabwe is a party".[137] Fourth, they "must pay due regard to all the provisions of this Constitution".[138] In particular, they must pay due regard to the "principles and objectives" of the Constitution.[139] These principles and objectives include "fostering of fundamental rights and freedoms".[140] Fifth, they may consider relevant foreign law.[141]

Over and above the interpretive guidance given under section 46 of the Constitution, the approach that the courts must take is to move away from formalism and give constitutional provisions a generous and purposive interpretation. In *Smyth* v. *Ushewokunze and Another*[142] Gubbay CJ stated that,

> [w]hat is to be accorded is a generous and purposive interpretation with an eye to the spirit as well as to the letter of the provision; one that takes full account of changing conditions, social norms and values, so that the provision remains flexible enough to keep pace with and meet the newly emerging problems and challenges. The aim must be to move away from formalism and make human rights provisions a practical reality for the people.[143]

In constitutional interpretation, the aim of the courts "should always be to expand the reach of a fundamental right rather than to attenuate its meaning and content".[144]

In the case of *Rattigan and Others* v. *Chief Immigration Officer, Zimbabwe, and Others,*[145] Gubbay CJ pointed out that:

> [w]hat is to be avoided is the imparting of a narrow, artificial, rigid and pedantic interpretation; to be preferred is one which serves the interest of the Constitution and best carries out its objects and promotes its purpose. All relevant provisions are to be considered as a whole and, where rights and freedoms are conferred on persons, derogations therefrom, as far as the language permits, should be narrowly or strictly construed.[146]

---

[133] Section 46 (1) of the Constitution.
[134] Section 46 (1) (a) of the Constitution.
[135] Section 46(1) (b) of the Constitution.
[136] Section 3 of the Constitution.
[137] Section 46(1) (c) of the Constitution.
[138] Section 46 (1) (d) of the Constitution.
[139] Section 46 (1) (d) of the Constitution.
[140] Section 11 of the Constitution.
[141] Section 46(1) (e) of the Constitution.
[142] 1997 (2) ZLR 544 (SC).
[143] *Ibid.,* p. 553.
[144] *Ibid. See also Rattigan & Ors* v. *Chief Immigration Officer & Ors* 1994 (2) ZLR 54 (S) at p. 57F-58E and *R* v. *Big M Drug Mart Ltd* (1985) 18 DLR (4th) p.321.
[145] 1994 (2) ZLR 54 (ZS).
[146] *Ibid.,* p. 57.

The courts should strive for an approach that leans in favour of human rights. Derogation from rights must be narrowly interpreted. In essence, the approach that should be followed is that the Constitution is a living creature which should be flexible enough to be relevant to the changing environment in favour of human rights.

5.2 *The Limitation Clause*

The rights provided under the DoRs are not absolute and they must be "exercised reasonably and with due regard for the rights and freedoms of other persons."[147] They may only be limited by a law of general application and such limitation must be "fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom".[148] Whether the limitation is fair, reasonable, necessary and justifiable is a result of considering a number of factors. These include: first, the nature of the right in question;[149] second, the purpose of the limitation and whether the limitation is necessary in the interests of "defence, public safety, public order, public morality, public health, regional or town planning or the general public interest";[150] third, the nature and approach of the limitation;[151] fourth "the need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others";[152] fifth, "the relationship between the limitation and its purpose, in particular whether it imposes greater restrictions on the right or freedom concerned than are necessary to achieve its purpose";[153] and lastly "whether there are any less restrictive means of achieving the purpose of the limitation".[154]

Some rights, because of their nature, have no limitations. They are inviolable. They include the right to dignity.[155] Ordinarily, once there is a *prima facie* violation of a right as provided under the DoRs, the second phase will be to access whether there is a "justifiable infringement"[156] i.e. that the violation is fair, reasonable, necessary and justifiable. In respect of the right to dignity, once the courts hold that the crime of sodomy violates the right to dignity, the matter ends and there is no need to prove that the crime may be limited using the criteria set out in the limitation clause. The right to equality is self-limiting,[157] but basically on the same grounds as the general limitation clause provided under section 86 of the Constitution.

The law criminalising consensual same-sex sexual acts comes with its own justification. It is a sexual offence that seeks to safeguard public morality.[158] There are obvious difficulties in arguing for the justification of criminalisation of a consensual sexual act based on the justification of offending morality. That argument would be confined along the line that only heterosexuality is recognised. This would be swimming against the tide of historical and scientific evidence. While heteronormative public sentiment may be in favour of criminalisation, on its own, it should not be decisive in constitutional adjudication. The

[147] Section 86 (1) of the Constitution.
[148] Section 86 (2) of the Constitution.
[149] Section 86 (2) (a) of the Constitution.
[150] Section 86 (2) (b) of the Constitution.
[151] Section 86(2) (c) of the Constitution.
[152] Section 86(2) (d) of the Constitution.
[153] Section 86 (2) (e) of the Constitution.
[154] Section 86(2) (f) of the Constitution.
[155] Section 86 (3) (b) of the Constitution.
[156] Currie and De Waal, *supra* note 106, p. 151.
[157] Section 56(5) of the Constitution.
[158] Part three of the Code.

authority to interpret the law that is granted to the judiciary is already derived from the people of Zimbabwe.[159] As Dworkin points out, "the principles of democracy we follow do not call for the enforcement of a consensus, for the belief that prejudices, personal aversions and rationalisations do not justify restricting another's freedom, itself occupies a critical and fundamental position in our popular morality."[160] If courts were to defer to public opinion as it was done in the *Banana* case, it will be tantamount to abdicating the judiciary's constitutional duty to interpret the law impartially.

What is perceived as fair, reasonable, necessary and justifiable in a democratic society may be an abstract concept. In the case of *Woods and Others* v. *Minister of Justice, Legal and Parliamentary Affairs and Others,*[161] the Supreme Court of Zimbabwe, then the apex court charged with constitutional adjudication, held that limitations of guaranteed rights must not be arbitrary or excessive. It was said that:

> [w]hat is reasonably justifiable in a democratic society is an elusive concept. It is one that defies precise definition by the Courts. There is no legal yardstick, save that the quality of reasonableness of the provision under attack is to be adjudged on whether it arbitrarily or excessively invades the enjoyment of the guaranteed right according to the standards of a society that has a proper respect for the rights and freedoms of the individual.[162]

Reliance must be placed on Zimbabwe's constitutional values provided for in section 3 of the Constitution. They may still be vague or abstract, but the sum total of their application steers to an interpretation that favours the guaranteed fundamental rights.

In the *Rattigan* case, Gubbay CJ calls for a narrow and strict interpretation of the limitations placed on rights. This is converse to the generous and purposive interpretation of provisions granting rights.[163] This may be achieved through the weighing of competing issues or the proportionality test used in the South African case of *Makwanyane*.[164] By this test, the court puts the justifications of infringement on one scale and the effect of the infringement caused by the challenged law on the other scale. If the inroads into human rights are substantial, the grounds for justifying the law must be more persuasive.[165] In this case, it must also be taken into consideration that the objections to consensual same-sex sexual acts, even if reasonably believed, are founded on prejudice and the belief that same sex desire is steeped in depravity. Thus, the criminalisation of consensual same sex acts does not serve any legitimate purpose. On the other hand, its effects far outweigh any justification. I now turn to analyse the substantive rights violated by the criminalisation of consensual same-sex sexual conduct.

5.3 *The Right to Equality and Non-discrimination*

By criminalising an act of expressing intimacy, sexual minorities are subordinated in a heterogeneous society. The criminalisation reflects preference of heterosexual sexual intercourse over non heterosexual intercourse. It perpetuates the stigma that non heterosexual

---

[159] Section 162 of the Constitution.

[160] R. Dworkin, *Taking Rights Seriously,* (Harvard University Press, 1978) p.254.

[161] 1995 (1) SA 703 (ZS).

[162] *Ibid.,* p. 706.

[163] Rattigan case, *supra* note 146.

[164] At para. 104. *See also Nyambirai* v. *National Social Security Authority and Another* 1996 (1) SA 636 (ZS), p. 647.

[165] Currie and De Waal, *supra* note 106, p. 163.

intimacy is deviant, and therefore criminal. Thus, by extension, the identity of sexual minorities is criminalised. While consensual sexual conduct between women is not criminalised, they are nonetheless not spared from this stigma and its effects. Even when not frequently enforced, the mere presence of the crime of "sodomy" is a constant reminder of exclusion and inequality.

In the *National Coalition For Gay And Lesbian Equality* case Sachs J pointed out that a challenge to criminalisation of consensual sexual intercourse between people of the same sex was not about "who may penetrate whom where".[166] It was rather about the "status, moral citizenship and sense of self-worth of a significant section of the community" and the "nature of the open, democratic and pluralistic society" that our Constitution also envisages.[167] In this way, the crime of "sodomy" has little to do with certain physical acts. It has more to do with the people whose conduct is seen as a threat to the "order of things".[168] In this regard, the crime "sodomy" unfairly discriminates against sexual minorities as compared to those who are heterosexual. It criminalises difference.

The Constitution provides for equality for all.[169] The preamble of the Constitution proclaims that the people of Zimbabwe in their diversity are united in a common "desire for freedom, justice and equality". Equality is also one of the values upon which Zimbabwe is founded.[170] The inclusion of equality as part of the principles and values that Zimbabwe is founded on is of importance. The Constitution must be interpreted in a manner that promotes the values that underlie a democratic society, which include equality.[171] The right to equality in the Constitution is more concise than the equivalent provision in the former LHC.[172] The equality and non-discrimination clause provides that "[e]very person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race, colour, tribe, place of birth, ethnic or social origin, language, class, religious belief, political affiliation, opinion, custom, culture, sex, gender, marital status, age, pregnancy, disability or economic or social status, or whether they were born in or out of wedlock."[173] The crafting of the equality clause was contested during the Constitution making process. The contestations were inspired by the persistency to curtail the rights of sexual minorities. The first draft during the Constitution making process included the ground of "circumstances of birth". It was opposed on the grounds that it was a ploy to "retain and entrench homosexuality".[174] It would seem that another ground of "natural difference" was also rejected.[175]

The rejection of the grounds mentioned above however does not and should not have any meaningful impact on the scope of the right to equality and non-discrimination. The grounds listed are mere examples. This is shown by the use of the phrase "on such grounds

[166] *National Coalition for Gay and Lesbian Equality* case, *supra* note 109, p.55.
[167] *Ibid*.
[168] Ngwena, *supra* note 45, p. 197.
[169] Section 56(1) of the Constitution.
[170] Section 3 (1) (f) of the Constitution.
[171] Section 46(1) (b) of the Constitution.
[172] *See* the right to "Protection from discrimination on the grounds of race, etc." under section 23 of the former LHC Constitution.
[173] Section 56 (3) of the Constitution.
[174] 'Copac in gay storm', *The Herald*, <www.herald.co.zw/copac-in-gay-storm/ >, visited on 5 October 2019.
[175] *Ibid.*

as",[176] indicating that there could be more.[177] The right to equality should not be interpreted restrictively. Grounds not listed under the equality and non-discrimination clause can still be successfully raised just as the African Commission included sexual orientation as a ground for non-discrimination in a *dictum* in the *Zimbabwe Human Rights NGO Forum* case.[178]

In sum, the criminalisation of consensual same-sex sexual conduct violates the right to equality. There is no rational purpose of criminalising consensual sexual acts between adults. The non-inclusion of sexual orientation as a listed ground is insignificant as it is only a matter of interpretation.

5.4 *The Right to Dignity*

The justification for the offence of the crime of "sodomy" is to preserve morality. This is premised on the reasoning that consensual same sex conduct between males deviates from the social standards. Consensual same-sex sexual acts are not deviant, as historically criminalised. It is therefore irrational to justify criminalisation of any consensual same-sex sexual acts, whatever opinion the majority has. Difference should not be a factor in the treatment of individuals.[179] Criminalisation of consensual sexual conduct leads to a perception that a significant part of the society that is not heterosexual is unworthy.[180] Yet, the dignity of sexual minorities is heavily attached to choosing their sexual partners without the burden of criminalisation of acts of intimacy.

The Constitution provides that every person "has inherent dignity in their private and public life, and the right to have that dignity respected and protected".[181] In addition, "recognition of the inherent dignity and worth of each human being" is one of the values and principles of the Constitution of Zimbabwe.[182] The word "dignity" is recurrent in the Constitution, indicating the value and worth of every Zimbabwean. Also, no law in Zimbabwe may limit the right to dignity.[183] The inclusion of sexual minorities relies on the respect of everyone's worth, without differentiating based on an individual's sexual orientation and gender identity. In the Botswana *Rammoge* case, it was said that denying a person his or her humanity is to deny such person their dignity.[184] Further, it was remarked that, "[m]embers of the Gay, Lesbian and Transgender community although no doubt a small minority, and unacceptable to some on religious and other grounds, form part of the rich diversity of any nation and are fully entitled in Botswana, as in other progressive States, to the constitutional protection of their dignity".[185]

---

[176] Section 56(3) of the Constitution.

[177] S.M. Wekesa 'Decriminalisation of homosexuality in Kenya: The prospects and challenges' in Namwase and Jjuuko *supra* note 39, p. 96.

[178] *Zimbabwe Human Rights NGO Forum* case, *supra* note 93 para. 169. *See also Toonen* case, *supra* note 69, para. 6.9.

[179] Cameron, *supra* note 44, p. 465.

[180] For example, *see* P. Thornycroft, 'Gay Zim Teacher Forced to Quit Saddened by 'Level of Intolerance'' *IOL*, 30 September 2018, <https://www.iol.co.za/news/africa/gay-zim-teacher-forced-to-quit-saddened-by-level-of-intolerance-17276167 >, visited on 5 October 2019. *See also supra* note 61.

[181] Section 51 of the Constitution.

[182] Section 3 (1) (e) of the Constitution.

[183] Section 86 (3) (b) of the Constitution.

[184] *Rammoge* case *supra* note 114, p. 51.

[185] *Ibid.*

Likewise, sexual minorities are part of Zimbabwe's rich history of diversity and plurality. Contrary to popular belief that homosexuality was introduced by colonialist and later spread by the West, there is evidence of historical same-sex intimate relations.[186] Difference, especially the kind that is opposed on the basis of prejudice, needs constitutional protection so that the dignity of everyone is protected. Criminalisation of consensual intimacy is the highest form of marginalisation that impairs self-worth and dignity of sexual minorities.

5.4 *Privacy*

The right to privacy is linked to the rights to equality and dignity. In the *National Coalition for Gay and Lesbian Equality* case, Sachs J observes that "[c]onduct that deviates from some publicly established norm is usually only punishable when it is violent, dishonest, treacherous or in some other way disturbing of the public peace or provocative of injury".[187] The criminalisation of consensual same-sex sexual conduct is based on none of these. It is based on deviancy, perceived through a heteronormative society. What is criminalised in reality is the person who performs the act than the act itself.[188] With regards to the crime of "sodomy", no one is harmed, except for the so-called public mores. Structured in this way, the crime of sodomy is inherently pervasive and intrusive. Because the crime is consensual, there are less chances of successful prosecution. This opens up some ways in which the right to privacy may be violated. The crime of "sodomy" encourages blackmail,[189] police entrapment[190] and other invasive methods of gathering evidence.

The right to privacy may simply be understood as the right to be left alone and freedom from disturbance of one's private life or freedom from scrutiny, surveillance or disclosure of private information. In the Zimbabwean context, the right to privacy is centred on the protection from arbitrary searches and seizure and disclosure of health conditions. In the previous LHC this right was titled as protection against "[p]rotection from arbitrary search or entry".[191]

Section 57 of the Constitution provides for the right to privacy. Every person's right to privacy entails not to have "their home and premises or property searched",[192] "their person, home, premises or property searched",[193] and "the privacy of their communications infringed".[194] The obvious limitation to the right to privacy is when there is a probable cause in terms of the laws of criminal procedure,[195] i.e. the requirement of reasonable grounds to search.[196] Sexual minorities CSOs have been searched before for no rational reason.[197] The searches were motivated by ulterior motives. This does not, however, take away the point that even if enforced

---

[186] M. Epprecht, 'The 'Unsaying' of Indigenous Homosexualities in Zimbabwe: Mapping a Blindspot in an African Masculinity', 24 *Journal of Southern African Studies* (1998) p. 631.

[187] *National Coalition for Gay and Lesbian Equality* case, *supra* note 109, para. 108.

[188] *Ibid.*

[189] Cameron, *supra* note 44, p. 456.

[190] *Ibid.* p. 465.

[191] Section 17 of the LHC.

[192] Section 57 (a) of the Constitution.

[193] Section 57 (b) of the Constitution.

[194] Section 57 (d) of the Constitution.

[195] *See for instance*, part 6 of the Criminal Procedure and Evidence Act [9:07].

[196] Section 49 Criminal Procedure and Evidence Act [9:07].

[197] 'Report of the Special Rapporteur on the Situation of Human Rights Defenders, A/HRC/16/44/Add.1, 28 February 2011: Zimbabwe',< www.icj.org/sogiunjurisprudence/report-of-the-special-rapporteur-on-the-situation-of-human-rights-defenders-ahrc1644add-1-28-february-2011-zimbabwe/ >, visited on 25 October 2019.

legally, the laws legalising search of adults engaged in consensual sex are a violation of privacy. They do so by imposing a burden that is not imposed on those engaged in heterosexual sex. They bring a sense of shame and diminish self-worth resulting from the lingering guilt that a person's only way of expressing sexuality and intimacy is a criminal act that may, at some point, be subject to public scrutiny through the enforcement of criminal law.

Criminalisation of consensual sexual intercourse has been found to be a violation of the right to privacy before in South Africa,[198] United States of America,[199] India[200] and more recently Botswana.[201]

6 Conclusion

The criminalisation of consensual same-sex sexual conduct in private exposes sexual minorities to various forms of human rights violations and other abuses. Repealing the crime of "sodomy" is a step towards the equality and inclusion of sexual minorities in Zimbabwe. The focus on the history of the crime of criminalisation of consensual same sex acts between males in Zimbabwe briefly demonstrates the irrationality of the "sodomy" law as introduced by the colonialist. The opportunistic politicisation of the issue of sexual minorities that led to the further development of the colonial laws is premised on prejudice and popularism, which makes it difficult to achieve decriminalisation of consensual same sex conductive through legislative reform.

The Constitution, with its DoRs and values, makes a promise for the protection of all persons regardless of sexuality. The criminalisation of consensual sexual conduct in private violates the rights the constitution entitlements. These include equality and non-discrimination, dignity and privacy.

The Constitution must be interpreted generously and purposively in order to give effect to the fundamental rights promised in the Constitution. This involves taking into account the values of the Constitution which includes the respect for fundamental rights, equality and dignity. This also includes narrowly construing limitation of the rights guaranteed in the DoRs. International law, which is steeped towards the decriminalisation of consensual same sex conduct, should be considered. In addition, a leaf must be taken from our neighbours who have decriminalised consensual same sex conduct.

[198] *National Coalition for Gay and Lesbian Equality* case, *supra* note 109.

[199] *Lawrence* v. *Texas* 539 US 558 (2003).

[200] *Natej Singh Johar & Ors* v. *Union of india, Secretary Ministry of Law and Justice,* W.P.(Crl)No. 76 of 2016.

[201] *Motshidiemang* case, *supra* note 117.