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Heterosexual nationalism and the mischaracterisation of anti-sodomy laws in Zambia

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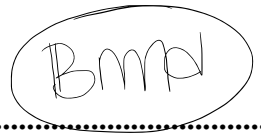

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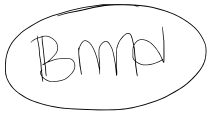

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ABSTRACT

Before colonisation, African territories were organised in Kingdoms, small polities and less structured societies. Each of these had their own, but similar customs, political, social, religious and legal systems. Sexuality, including sexual diversity, was a major part of these systems. The African traditional legal system had a penal system with substantive criminal laws and a procedure for sanctions. Sexual and gender minorities were not labelled or seen as deviants in the social and customary systems, and, therefore, consensual same-sex sexual conduct was not a substantive criminal offence in African traditional legal systems. Rather, African social, religious and legal systems were cultured in tolerance and acceptance of diverse sexualities and gender identities. There is enough evidence to say that African traditional forms of criminology were queered.

The culture of tolerance and acceptance was disrupted by colonialism. Colonialism and the colonisation of African territories created new nation states, introduced new value systems of socialisation, codified criminal laws and religious beliefs unknown to African societies. Concomitant with the introduction of these value systems, criminal laws and Abrahamic religions, came the labelling of sexual and gender minorities as deviants and the criminalisation of consensual same-sex sexual conduct through anti-sodomy laws. The labelling of sexual and gender minorities as deviant members of society and the criminalisation of consensual same-sex sexual conduct marked the birth of the regulation of sexual citizenship in African. In turn this was also the beginning of homophobia on the continent. While anti-sodomy laws were not introduced in response to the culture of tolerance and acceptance of sexual and gender minorities, but rather an incidental consequence of the codification of criminal law in colonial Africa, the effect of these laws, in combination with the new Christian value system, produced a counterculture of homophobia in African societies.

Anti-sodomy laws can be traced to the Bible in the Old Testament stories of Sodom and Gomora, through to the Code of Justinian, the English Buggery Act, the Offences Against the Persons Act and later into Criminal Codes exported to British African colonies. The original intention and purpose of these laws was to deter and punish anal sex between heterosexual and homosexual adults, with the primary target being sexual conduct between male adults. In Zambia, anti-sodomy laws were introduced in 1935 when the Criminal Code was adopted. After 1991, with the coming of the wave of democratisation in Africa, the discourse of sexual and gender minority rights emerged in Zambia, and with political and religious leaders being heteronormative socialised, Christianity and anti-sodomy laws became the weapon used in queer lawfare. Identifying itself as a Christian nation, Zambia has taken anti-sodomy laws as necessary to preserve its Christian identity, thereby producing heterosexual nationalism grounded in culture, religion and morality. Seen through the eyes of heterosexual nationalism, anti-sodomy laws in Zambia are mischaracterised as laws against homosexual orientation and gender non-conforming identity rather than the actual sexual conduct described in the provisions. Thus, heterosexual nationalism and the mischaracterisation of anti-sodomy laws is contrary to the African traditional forms of criminology, the culture of tolerance for sexual diversity and the original intention for the anti-sodomy laws as introduced and contained in the Criminal Code. Further, Christianity, the strongest pillar of heterosexual nationalism in Zambia, teaches tolerance, love and acceptance and not the hate and marginalisation produced and justified through heterosexual nationalism.

The mischaracterisation of anti-sodomy laws results in the violation of the rights of sexual and gender minorities in breach of Zambia's domestic and international human rights obligations. However, Zambia takes a human rights exceptionalism approach regarding sexual and gender minority rights, thereby dismissing calls for decriminalisation. For this reason, it is unlikely that decriminalisation will occur through direct parliamentary repeal in Zambia. As such, the local sexual and gender minority rights movement in Zambia can learn from countries like Botswana and South Africa and engage in lawfare aimed at decriminalisation through strategic litigation. While the factors that lead to successful strategic litigation and consequent decriminalisation may not be fully in place in Zambia, there is sufficient ground from which these factors can grow and incrementally place the sexual and gender minority rights movement in a position to succeed. Decriminalisation is the first step towards rebuilding the traditional African queer criminological perspectives that existed in pre-colonial African societies. In this regard, decriminalisation is not only a step towards decolonisation but towards decoloniality. Learning from other jurisdictions, decriminalisation is both an end in itself and a means to an end. It is an end in itself because it brings to an end an inherent discriminatory law that negatively impacts on the rights of sexual and gender minorities. It is a means to an end because it is a steppingstone towards social, political and other legal reforms that can improve the wellbeing of sexual and gender minorities.

LIST OF ABBREVIATIONS AND ACRONYMS

ACHPR	African Commission on Human and Peoples' Rights
AU	African Union
ANC	African National Congress
CAL	Coalition of African Lesbians
CCZ	Churches Council of Zambia
DPP	Direct of Public Prosecutions
EFZ	Evangelical Fellowship of Zambia
EU	European Union
FAZ	Football Association of Zambia
FHI	Family Health International
GIZ	German Aid Agency
FIFA	Federation of International Football Associations
HIV/AIDS	human immunodeficiency virus/ acquired immune deficiency syndrome
HRC	United Nations Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
LAZ	Law Association of Zambia
LEGATRA	Lesbian, Gay, Bisexual and Transgender Association
LEGABIBO	Lesbian, Gays, and Bisexuals of Botswana
LGBTIQ+	lesbian, gay, bisexual, transgender, intersex, queer+
MMD	Movement for Multi-party Democracy
NAC	National HIV/AIDS Council
OAU	Organisation of African Unity
OHCHR	United Nations Office of the High Commissioner for Human Rights
NASF	National HIV/AIDS Strategic Framework
NCGLE	National Coalition for Gay and Lesbian Equality
NGO	non-governmental organisations
ORS	Office of the Registrar of Societies
NHRI	National Human Rights Institution
SALC	Sothern African Litigation Centre
SDG	Sustainable Development Goals

SOGIE	sexual orientation and gender identity and expression
TBZ	Trans-bantu Association of Zambia
UN	United Nation
UDHR	Universal Declaration of Human Rights
UNDP	United Nations Development Programme
UK	United Kingdom
UNGA	United Nations General Assembly
UNIP	United National Independence Party
UPR	Universal Periodic Review
UNSG	United Nations Secretary General
USA	United States of America
USAID	United States Agency for International Development
UNZA	University of Zambia
UNZA-CER	University of Zambia Centre for Research Ethics
UPND	United Party for National Development
WCC	World Council of Churches
ZENERELA	Zambia Network of Religious Leaders Living with HIV
ZHRC	Zambia Human Rights Commission
ZMIT	Zambia Independent Monitoring Team

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Dedication

To the memory of my late parents, Esther Melody Banda and Harrison Mangani Banda

Chapter 1: Introduction

1.1. Contextual background to the problem

Sexuality and sexual diversity are among Africa's most controversial political, religious, social, and legal issues. This controversy is grounded on and informed by the narrative that Africa is organically heterosexual.[1] This narrative has a complementary relationship with anti-sodomy laws in most African states. As at June 2023, the time of submission of this thesis, 30 out of the 55 member states of the African Union (AU) criminalised consensual same-sex sexual conduct between adults as a means of prohibiting 'homosexuality'.[2] Although these laws vary in terms of the language used to define illegal sex, the severity of punishment for violating them, and the degree to which they are enforced, all appear to stem from and promote a continental culture of homophobia and compulsory heterosexuality.[3] In truth, however, at the time of enactment, these laws did not represent an inherent culture of homophobia, marginalisation and exclusion in Africa, but instead represent colonial governmentality and a somewhat outdated (un)-queered criminology.

Commonwealth African states, such as Zambia, provide pertinent examples of the status and impact of anti-sodomy laws on sexual and gender minorities as citizens of the African continent, as it is mainly in these states that anti-sodomy laws are retained, enforced and most significantly impact on sexual and gender minorities.[4] It is also in these states that a heteronormative national identity is emphasised.

Until recently, Zambia has been one of the least visible homophobic countries in Commonwealth Africa.[5] According to a 2016 Afrobarometer survey, Zambia ranks as the eighth most homophobic country on the continent, recording only 7 per cent tolerance levels of sexual and gender minorities, with the most tolerant country, Cape Verde, scoring 74 per cent and the least tolerant, Senegal, recording 3 per cent.[6] Using statistical data from the Afrobarometer survey, among other sources, a recent study by the Williams Institute confirms Zambia's ranking as one of the ten most

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1 S Murray & W Roscoe (eds) *Boy wives and female husbands: Studies in African homosexualities* (2001) 9.

2 See https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation/ (accessed June 7 2023). See also https://antigaylaws.org/regional/africa/ (accessed June 7 2023).

3 L Buist & E Emily *Queer criminology* (2018) 33.

4 Human Dignity Trust 'The criminalisation of consensual same-sex sexual relations across the Commonwealth-developments and opportunities' (2016) 7-8. L Buckle 'African sexuality and the legacy of imported homophobia' (2020) 1 https://www.stonewall.org.uk/about-us/news/african-sexuality-and-legacy-imported-homophobia (accessed 5 August 2022).

5 Zambia has enjoyed relative peace and stability, which could explain the lack of attention it has received from international scrutiny. However, attention was drawn to it when in 2019, the American Ambassador condemned the sentencing of a homosexual couple to 15 years in prison. This attracted international as in response to the American Ambassador's statement, the Zambian government requested for his recall with the President stating that Zambia would do without USAID "if America ties homosexuality to Aid." See 'US recalls ambassador to Zambia after gay rights row' *BBC* 24 December 2019 https://www.bbc.com/news/world-africa-50901537 and 'US ambassador recalled after dispute with Zambian government over gay rights and corruption' *CNN* 25 December 2019 https://edition.cnn.com/2019/12/25/politics/daniel-foote-zambia-ambassador/index.html (accessed 21 February 2021).

6 Afrobarometer 'Good neighbours? Africans express high levels of tolerance for many, but not for all' (2016) 12 https://afrobarometer.org/sites/default/files/publications/Dispatches/ab_r6_dispatchno74_tolerance_in_africa_eng1.pdf (accessed 21 February 2021).

intolerant and homophobic countries in the world.[7] Not surprising, Zambia is among the 30 African states that criminalise consensual same-sex sexual conduct between adults. It does so through the Penal Code, Chapter 87 of the Laws of Zambia, and in particular sections 155, 156 and 158. These provisions fall under the heading, 'offences against morality' and the sub-heading, 'unnatural offences.' These provisions were adopted at independence from the British colonial government, in 1964, and have remained in the same form on the statute books, except for an amendment in 2005. This amendment increased the punishment from 'a *maximum* of fourteen years, to a *maximum* of life imprisonment and *minimum* of fifteen years'.[8] As Zambia is hardly ever identified by international media as a homophobic country, the amendments did not attract any international attention, compared to similar amendments introduced in Uganda five years later.[9] After the 2005 amendment, sections 155 and 156 of the Penal Code states as follows:

> **Unnatural offences**
>
> **155.** Any person who-
> *(a)* has carnal knowledge of any person against the order of nature;
> or
> *(b)* has carnal knowledge of an animal; or
> *(c)* permits a *male person* to have carnal knowledge of *him* or *her*[10]
> against the order of nature;
> commits a felony and is liable, upon conviction, to imprisonment for a term not less than fifteen years and may be liable to imprisonment for life:
> Provided that where a person-
> *(i)* has carnal knowledge of a child against the order of nature;
> *(ii)* causes a child to have carnal knowledge of an animal; or
> *(iii)* permits a male person to have carnal knowledge of a male or female child against the order of

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7 A Flores *Social acceptance of LGBTI people in 175 countries and locations between 1981-2020* (2021) 34-47 https://williamsinstitute.law.ucla.edu/wp-content/uploads/Global-Acceptance-Index-LGBTI-Nov-2021.pdf (accessed 4 October 2022).

8 Penal Code amendment Act No. 15 of 2005. (emphasis added) Chapter 2 discusses the 2005 amendment in more detail.

9 See n 5. To further highlight the point Zambia is not categorised as a homophobic destination. For instance, Forbes and the famous social media App *Tik-Tok* both exclude Zambia among the most homophobic travel destinations but include countries which have higher tolerance level like Malawi. See https://www.google.com/url?sa=i&rct=j&q=&esrc=s&source=web&cd=&ved=0CAQQw7AJahcKEwj47ai16sn6AhUAAAAAHQAAAAAQAg&url=https%3A%2F%2Fwww.forbes.com%2Fsites%2Flaurabegleybloom%2F2019%2F11%2F25%2Fmost-dangerous-places-safest-lgbtq-gay-travelers%2F&psig=AOvVaw1F1TLytcU3D7lcBjpWTfPP&ust=1665083898384626 (accessed 5 October 2022). Similarly IOL media cites Uganda and Tanzania among the most dangerous travel destinations in Africa and exclude Zambia despite Zambia being ranked more intolerant by Afrobarometer and the Williams Institute (see n 6 and 7), and having similar laws as well as harsh lived experiences among sexual and gender minorities as in those countries https://www.iol.co.za/news/africa/africas-five-most-dangerous-countries-to-be-gay-in-8dd245f8-fe69-55b5-ac64-d3d60d609f13 (accessed 5 October 2022). The point is not to paint a gloomy picture about Zambia's homophobic status, but as discussed in Chapter 5, the lack of international attention in many respects impacts on the level accountability the state is made to give under the international human rights system and on the nature of support rendered to the sexual and gender minority rights movements in the country. In turn the efforts to decriminalise anti-sodomy laws are affected. Thus, for example, Uganda which has more international media attention receives more international scrutiny and its sexual and gender minority rights movement receives more technical and material support, hence more active than that of Zambia as Chapter 5 demonstrates.

10 Emphasis added.

nature;
that person commits an offence and is liable, upon conviction, to imprisonment for not less than twenty-five years and may be liable to imprisonment for life.

Attempt to commit unnatural offences

156. Any person who attempts to commit any of the offences specified in section one hundred and fifty-five commits a felony and is liable, upon conviction of not less than seven years but not exceeding fourteen years.

Section 158 criminalises 'gross indecency' 'whether in public or private between persons of the same sex or *any other person* (male or female)[11] and carries a penalty of twenty five years in prison'. The language of these provisions is similar to that in the Penal Codes of other Commonwealth African states such as Malawi, Tanzania, and Botswana before decriminalisation.[12] As discussed in Chapter 2, these Penal Codes were all drafted based on the Queensland Criminal Code, first introduced in Northern Nigeria and later transplanted to Colonial East Africa and then Malawi, and finally to Zambia.[13]

These provisions, constituting the anti-sodomy laws of Zambia, are often misunderstood and misinterpreted (mischaracterised) to mean that they criminalise homosexual *identity* (rather than the conduct described in the relevant provisions). Therefore, they are exclusively applied against homosexual persons and other sexual and gender minorities in the queer community in Zambia, even in the absence of actual acts of sodomy or gross indecency. However, from a strict criminal law point of view, sexual orientation and gender identity are not elements of the offences. The main provision, section 155, is self-explanatory in that '*any* person who has carnal knowledge with another person or permits a *male* person to have carnal knowledge of *him* or *her*', thus signifying that the conduct can either be *heterosexual* (between man and woman) or *homosexual* (in this case, between two men). Two aspects stand out regarding the identity of the actors in the offence. First, the generality of the provision is indisputable, in that it states that 'any person' and this means and can only mean 'any person'. The implication of that wording entails that heterosexual, homosexual, gender non-conforming and all other categories or human identities are included. Second, by stating that the unlawful act is one of permitting 'a male person to have carnal knowledge of *him* or *her* against the order of nature', the provision connotes both homosexual and heterosexual sodomy. In essence, the provision does not differentiate with regard to sexual orientation or gender identity and, by its exact drafting, rules out the applicability of the provision exclusively to sexual and gender minorities. Chapter 3, discusses this aspect in detail, bringing out the elemental character and nature of the offences, their present mischaracterisation and exclusive misapplication to sexual and gender minorities in Zambia.

As in most Commonwealth African states, similar provisions are justified and retained on the grounds of religion, morality and culture. In Zambia, they are in particular justified and maintained on

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11 Emphasis added.
12 See Human Dignity Trust (n 4) 7-8.
13 'Criminal laws on homosexuality in African nations' (2020) *Global Legal Research Center* https://www.loc.gov/search/?fa=partof:law+library+of+congress&q=homosexuality+in+Africa (accessed 21 February 2022).

the basis that the Constitution '[a]knowledges the supremacy of God Almighty, and [d]eclares the Republic of Zambia as a Christian Nation while upholding a person's right to freedom of conscience, belief or religion'.[14] While the legal effect of the declaration is debatable, in no other context has the declaration been referred to more than in the the sphere of political mobilisation and lawfare against sexual and gender minority rights and in the public discourse favouring the retention of anti-sodomy laws in Zambia.[15] In effect, the justification for, and the retention of anti-sodomy laws represents a form of heterosexual government rationality that contests the diversity of sexual citizenship, while respecting other diverse forms of citizenship such as religious and political citizenship.[16]

In light of the above, this thesis argues that Zambia, the subject of this study, similar to some other African states, has created a form of 'heterosexual nationalism' that informs it's retention of anti-sodomy laws on grounds which discussed in more detail below. The thesis further argues that the heterosexual nationalism narrative on the 'need' to retain the anti-sodomy laws (on each of the specific grounds) informs the mischaracterisation and misapplication of these laws, which consequently leads to their adverse impact on the lives of sexual and gender minorities in Zambia.

1.2. Definition of terms as used in this thesis

Anti-sodomy laws: Laws that criminalise anal or oral sex between persons. In the Zambian Penal Code, the anti-sodomy laws are referred to as the 'unnatural offences' of committing 'carnal knowledge' and 'gross indecency' 'against the order of nature'.

Coloniality:[17] The living legacy of colonisation and colonialism in post-colonial states through the retention and continued use of colonial laws, practices, and ways of thinking.[18] As a conceptual framework, coloniality starts from the understanding that colonialism and colonisation is not restricted to a historical era when African and other territories were subjected to European invasion, military control, and exploitation.[19] Rather that colonisation and the process of colonisation largely included engraving a way of thinking, behaviour, and world view on colonised communities that disrupted their culture. The continuation of these ways of thinking and behaviour and adoption of the coloniser's world, post colonialism, is what is referred to as coloniality. Coloniality in this regard has been referred

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14 Preamble of the Constitution of Zambia, para 1. In 1991, following a constitutional review process, Zambia was declared a Christian nation through a clause in the preamble. Subsequent constitutional amendments in 1996 and 2016 retained the declaration with the majority of the population supporting the retention of the declaration. For a detailed discussion of the declaration see A M Cheyeka 'Zambia, a "Christian nation" in the post Movement for Multiparty Democracy (MMD) era, 2011-2016' (2016) 6 *International Journal of Humanities and Social Sciences* 167.

15 A Van Klinken 'Homosexuality, politics and Pentecostal nationalism in Zambia' (2014) 20 *Journal of Christian Studies* 254-256.

16 M Waites 'United Kingdom: Confronting criminal histories and theorising decriminalisation as citizenship and governmentality' in C Lennox & M Waites (eds) *Human rights, sexual orientation, and gender identity in the commonwealth: From history and law to development activism and transnational dialogue* (2013) 145, 174.

17 For a full conceptual discussion on coloniality see S J Ndlovu-Gatsheni 'Why decoloniality in the 21st century' (2013) *The Thinker: For thought leaders* 13, and N Maldonado-Torres 'On the coloniality of being' (2007) 21 *Cultural Studies* 240.

19 R Mokotso 'Decoloniality of school governance in Lesotho: A religio-historical approach' (2022) *Pharo Journal of Theology* 103.

to as cognitive injustice and the highest level of colonialism.[20] 'Coloniality takes many forms such as Christian hegemony [religious heterosexual nationalism for example] and cultural genocide',[21] which Chapter 2 and 3 discuss. Coloniality also refers to how individuals view themselves and regulate their own behaviour, in a way underpinned by agents of socialisation, which are still influenced by colonial patterns such as schools, churches and society generally.[22]

Decolonisation: The process, method and aspiration of putting certain practices, laws and patterns of thinking in their pre-colonial African cultural, political and legal perspective.[23] As discussed in Chapter 2, African cultural, political and legal systems were disrupted through colonisation and colonialism in a way that either subordinated and/or reconstructed them in line with the colonial governments worldviews. Decolonisation thus involves a rediscovery, an understanding, a restoration and validation of the pre-colonial cultures, rationalities, customs and laws in relation to colonialism and the disruptive effect that colonisation had on them.[24] In this respect, this thesis uses decolonisation of anti-sodomy laws to refer to historical perspectives of cultural diversity and how anti-sodomy laws have had a disruptive effect on the pre-colonial culture of tolerance of sexual diversity. Ultimately, decolonisation is, in the used in this thesis isa contestation of the anti-sodomy laws from a historical perspective as laws that conflict with pre-colonial constructions of sexuality and sexual diversity in Zambia as a territory in Africa.

De-coloniality: The push back, discarding, dismantling and contestation of coloniality.[25] As opposed to decolonisation which refers to push back of the past in a structural sense, decoloniality seeks to reveal and correct the distortions of coloniality as a present day paradigm.[26] Therefore, in this thesis decoloniality refers to the push back and ideological contestation of heterosexual nationalism and the retention of anti-sodomy laws as forms of coloniality. Heterosexual nationalism as a form of coloniality silences voices, marginalises people and perpetuates discrimination and stigma against sexual and gender minority which, as argued in Chapter 2 started with the anti-sodomy laws. Decoloniality, at least in the context of this thesis, seeks to critic the hegemonic laws that underlay the oppression and silenced voices. In a sense, decoloniality connotes an unfinished decolonisation endeavour.

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[20] R Blanco 'Problematising the ultimate other of modernity: the crystallisation of coloniality in international politics' (2019) 4 *Contexto Internacional* 601.

[21] N Maldonado-Torres 'Religious studies and /in the decolonial turn'(2020) *Contending Modernity Blog Series* https://contendingmodernities.nd.edu/decoloniality/religiousstudiesdecolonialturn/ (accessed 18 October 2022).

[22] As above. See also A Quijano 'Coloniality and modernity/rationality' (2010) 21 *Cultural Studies* 168.

[23] I define pre-colonial as the period before the formal European settler colonisation and the introduction of codified criminal law as was as the influence of Abrahamic religions such as christianity. Notably, the essentialisation of African history into three time period (pre-colonial, colonial and post-colonial is contestable. For a discussion see O Taiwo 'It never existed' (2023) https://aeon.co/essays/the-idea-of-precolonial-africa-is-vacuous-and-wrong (accessed 21 March 2023). Decolonisation has also been defined, from a structural context, as the giving of and/ or attainment of independence from colonial rule. For example, *The Oxford handbook of law* defines decolonisation as the withdrawal by former colonial powers from their colonies; the attainment of political and economic independence from colonial powers. This definition positions both the colonised and the coloniser as the agents of decolonisation. In current discourses however, it is the formerly colonised who are positioned and position themselves as agents of decolonisation.

[24] For a comprehensive discussion of decolonisation as a concept and its evolution see D Kennedy *Decolonization: A very short story* (2016).

[25] Mokotso (n 19) 1.

[26] As above.

Government: Used as a foundation for the concept of governmentality defined below, in the Foucauldian theocratical frame, is an activity which aims to shape, guide or affect the behaviour, actions, and comportment of people.[27] In simple yet abstract terms, Foucault defined government as the 'conduct of conduct'.[28] In this sense government entails the regulation of others (by the state and social institutions) and the regulation of oneself. Macleod and Durrheim elaborating on Foucault, explain that 'conduct of conduct occurs in multiple, interwoven levels. It concerns the self-relating with the self, private interpersonal relations that involve some sort of control or guidance, relations within social institutions, and relations concerned with the exercise of political sovereignty.'[29] Dean corroborates by unpacking Foucault's definition stating, 'government as conduct of conduct can be expanded to be any more or less calculated and rational activity, undertaken by a multiplicity of authorities and agencies, employing a variety of techniques and forms of knowledge, that seeks to shape conduct by working through the desires, aspirations, interests and beliefs of various actors for definite but shifting ends and with diverse set of relatively unpredictable consequences, effects and outcomes'.[30] Government in this context has an external agent (the state or social institutions such as the church) and an internal agent (one self or group). It also has a subject- a group, society or population, and last a normative standard aspired for, such as heteronormativity. To use an obscure example, dieting, externally or self-imposed, in order to be slim is a form of government. From the above premise, in this thesis, government as the 'conduct of conduct' is restricted to the sphere of sexual citizenship particularly how external agents such as the state and social institutions like the church aim to create compulsory heterosexuality, and how individuals self-regulate in response to externally sponsored heteronormative narratives and actions. Used in this context the concept of government will be italicised to distinguish it from the general understanding of 'government' as a state body made up of the executive, the legislature and the judiciary.

Governmentality (government rationality): A systematic way of reasoning, thinking or calculating about how to exercise *government* in response to a problem, by using formal bodies of knowledge or expertise as the premise for discourse or decision making.[31] In short governmentality is how *government* is rationalised. Thus in the above example, if dieting in order to be slim is a form of *government* the rationale behind needing to diet in order to be slim, is governmentality. In this thesis, governmentality refers to the rationalisation of *government* in the sphere of sexuality and sexual citizenship.[32] This definition is borrowed from Foucault, who wrote that 'in simple terms governmentality as the rationality or art of *government*, is a way or system of thinking about the nature of the practice of *government*'.[33] In other words, the way that the state or social institutions rationalise

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27 M Foucault 'Governmentality' in C Gordon *et al* (eds) *The Foucault effect: Studies in governmentality* (1991) 88 and C Gordon 'Government rationality: An introduction' C Gordon *et al* (eds) *The Foucault effect: Studies in governmentality* (1991) 1-3.

28 As above.

29 C Macleod & K Durrheim 'Foucauldian feminism: the implications of governmentality' (2002) 32 *Journal for the Theory of Social Behaviour* 41.

30 M Dean *Governmentality: Power and rule in morden society* (2010) 18.

31 As above.

32 C Gordon 'Government rationality: An introduction' in C Gordon *et al* (eds) *The Foucault effect: Studies in governmentality* (1991) 1-3.

33 C Macleod & K Durkheim 'Foucauldian feminism: the implications of governmentality' (2002) 32 *Journal for the Theory of Social Behaviour* 41.

decisions and control discourses to exercise and maintain power is 'govern-mentality'.[34] In Zambia, rationalisation behind the maintenance of anti-sodomy laws and the church's control of the discourse on sexuality which results in bio-power is a practical illustration of governmentality. This macro form of *governmentality* also produces a micro level governmentality,[35] a rationality or way of reasoning about self-government, or more precisely, the way people view, think of themselves and act as a result of or in response to hegemonic discourses from macro level governmentality.[36] For example, as a result of heteronormative discourses and the maintenance of anti-sodomy laws, sexual and gender minorities may individually and collectively define themselves in the sexual deviance lens within which they are discussed, and as such they begin to self-label and regulate as if they are sexual deviants and criminals.[37] Burchardt refers to this as the governmentality of sexuality.[38] The governmentality of sexuality is similar to what deviance and labelling theorists call secondary deviance – self-identity and behaviour regulation resulting from the label of deviance.[39]

Heterosexual nationalism: A form of governmentality that rejects the diversity of sexual citizenship using the principles of nationalism and state sovereignty to affirm a constructed heteronormative culture and identity which is protected by the retention of anti-sodomy laws.[40] Heterosexual nationalism therefore contests the recognition of sexual and gender minorities as a vulnerable class of citizens but instead labels them as social deviants and criminals. Heterosexual nationalism and the retention of anti-sodomy laws also exemplify coloniality in the sense that they are continuing living legacies of colonialism and colonisation.

Heterosexual nation: Countries or states that affirm heterosexual nationalism.[41]

Heterosexual socialisation: The process through which citizens in a given society are taught and learn that heterosexuality is the only natural and correct form of human sexuality and that any other form of sexuality and non-cis gender identities or expressions are a form of social (sexual, cultural, and religious) deviance.[42] Heterosexual socialisation also teaches that men and women have defined separate gender and sex roles.[43] As with all forms of socialisation, heteronormative socialisation occurs through the general agents of socialisation in a given society which include schools, family, all forms of media and religious institutions such as church. In heterosexual nations such as Zambia, heterosexual socialisation is a technic of exercising *government* in the sphere of sexuality, produces

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34 As above.

35 A Harris 'Discourses of desire as governmentality: Young women, sexuality and the significance of safe space' (2005) 15 *Feminism and Psychology* 39.

36 M Burchardt 'Transparent sexualities: sexual upness, HIV discourses and the governmentality of sexuality in South Africa' (2013) *Culture, Health & Sexualities* 498.

37 Harris (n 35) 39.

38 M Burchardt (n 36) 489-499.

39 See discussion on deviance under section 1.8.

40 L Banda 'LGBT lawfare in response to heterosexual nationalism inn Zambia' in S Gloppen, A Jjuuko, A Msosa & F Viljoen (eds) *Queer lawfare in Africa: Legal strategies in contexts of LGBTIQ+ criminalisation* (2022) 243.

41 As above.

42 C Lawson 'The effects of heteronormative socialisation on beliefs, attitudes, perceptions, and behaviours' (2019) 1 (unpublished PhD Thesis submitted at the University of Taxes).

43 As above.

governmentality by inculcating a heteronormative belief system and way of thinking, and perpetuates heteronormative coloniality.

Homosexuality: A person's romantic, emotional, sexual, social attraction towards persons of the same sex or gender and includes that person's self-identity with respect to those attractions.

Sexuality: A central aspect of being human throughout life that encompasses sex, gender identities and roles, sexual orientation, eroticism, pleasure, intimacy and reproduction.

Sexual diversity: The different ways in which sexuality exits as a human state such as the different sexual orientations and gender identities and the different ways in which it is expressed and experienced.

Sodomy: Anal or oral sexual intercourse between persons irrespective of their sexual orientation or gender identity.

Mischaracterisation of anti-sodomy laws: The perception or understanding that anti-sodomy laws criminalise homosexuality and gender non-conformity and therefore should be applied exclusively against sexual and gender minorities.

Misapplication of anti-sodomy laws: The exclusive application of anti-sodomy laws against sexual and gender minorities based on the mischaracterisation of the laws.

1.3. Heterosexual nationalism and the justification for retaining the anti-sodomy laws in Zambia

1.3.1. The nature of heterosexual nationalism

> In Zambia, it is illegal. It's a taboo, so we don't even want to talk about it. From a religious point of view, this is a country that has Christianity embedded in its constitution, so again that is a no-go area. So, for us the position is very clear.[44]

The above statement exemplifies the typical heterosexual nationalistic rhetoric. This part of the Chapter discusses the general nature and constituents of heterosexual nationalism in Zambia. References to other African countries are made to highlight the general nature of heterosexual nationalism in Africa while showing its specificity in Zambia.

The above and other similar statements by political leaders articulate not only political reasoning on sexuality and sexual citizenship in Zambia, but also how political leaders deflect sexual citizenship from its human rights perspective to a popular mobilisation against sexual and gender minorities for political expedience. From the author's observation of Zambian politics, this thesis contend that heterosexual nationalism generally, and retaining anti-sodomy laws particularly, are used as opportunities to maintain individual and collective political power. This contention is as follows:

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[44] George Kunda, former vice president and Minister of Justice in Zambia, addressing Parliament on the question of the strength of the sodomy laws in 2009. https://www.lusakatimes.com (accessed 12 March 2017).

The wave of democratisation experienced around the world in the late 1980's and early 1990's, was also felt by Zambia.[45] In 1991 Zambia transitioned from a one-party state to a multiparty state, which saw the coming into power of a neo-liberal political party – the Movement for Multiparty Democracy (MMD). Like most political parties in Africa and across the world at that time, the MMD presented itself as party whose aims was to consolidate democracy through the collective consent of the Zambian people and in their best interest. However, this ideal presentation of democracy concealed and still conceals the personal interests of individual politicians who enter(ed) the political arena.[46] Arguably, apart from the rhetorical 'I am here to serve the community', individuals who enter politics and contest elections also have latent interests that supersede their manifest interests and the interests of the electorate. Generally discussing the determinants of political entry, Gulzar argues that 'political aspirants, both those already in politics and those hoping to join for the first time, are consistently calculating what actions are likely to yield positive results for their personal political ambition'.[47] To this end, politicians act opportunistically by repealing or retaining certain laws and policies if doing so will have a popular effect.[48] While it can be argued, as Mansbridge does, that making or repealing laws to ensure the popular effect assures democracy, it can also be countered that enacting or repealing laws is a weapon used by politicians to undermine the interest of minorities such as sexual and gender minorities, which in itself contradicts the tenants of democratic governance.[49] For opportunist political leaders in Zambia and across Africa, anti-sodomy laws represent laws in respect of which retention has broad popular appeal.[50] The main reason for this populist effect in Zambia is that heteronormativity is seen as fundamental to Christianity – the religion of most of the voting population in the country.[51] Thus, to retain or acquire political relevance, to resonate with the electorate and with religious and traditional leaders who themselves retain a high level of influence on Zambian society, political leaders express heterosexual nationalism as the official, collective and individual ideal.[52] In practical terms

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45 For a discussion on democratisation in Africa see R Joseph 'Democratization in Africa after 1989: Comparative and theoretical perspectives' (1997) 29 *Comparative Politics* 363-382, B Hussein *The miraculous wave of democratization in Africa in the 1990s* (2020) and C Fombad 'Constitutional reforms and constitutionalism in Africa: Reflection on some current challenges and future prospects (2011) 59 *Buffalo Law Review* 1007.

46 S Gulzar 'Who enters politics and why?' (2021) *The Political Science Annual Review* 255.

47 As above.

48 S Gloppen, A Jjuuko, F Viljoen & A Msosa 'Introduction' in S Gloppen, A Jjuuko, A Msosa & F Viljoen (eds) *Queer lawfare in Africa: Legal strategies in contexts of LGBTIQ+ criminalisation* (2022) 11-12. This is not to suggest that all political leaders are opportunist and ill willed in weaponising law. S Gloppen & L Ranker 'LGBT rights in Africa' in C Ashford & A Maine (eds) *Research handbook on sexuality, gender and the law* (2021) 199, note that 'it cannot be assumed that political and other actors fuelling homophobia in African contexts always do so based on rational calculations of what is politically beneficial as it may be likely that they, or some actors within a coalition, at least in part denounce homosexuality based on their normative convictions, in accordance with a logic of appropriateness'. As discussed below, in the Zambia context, where the actors of socialisation are christian churches, the likelihood that christian mores such as heteronormativity remain are high, which shows the multi-layered nature and complexities of queer lawfare in Africa.

49 J Mansbridge 'Self-interest in political life' (1990)18 *Political Theory* 132.

50 See F Viljoen *International human rights law in Africa* (2012) 259-260 writes that the perverseness of homophobia is Africa is fuelled by opportunist political leaders citing several examples around the continent.

51 According to the latest census results 75.3% adults identified themselves as strong chrematistic Christians, 20.2% identified as just Christians while other religions were recorded as 2.5%. See *Zambia 2010 census of population and housing national analytical report* (2011) 17-18. https://www.zamstats.gov.zm/phocadownload/2010_Census/2010%20Census%20of%20Population%20National%20Analytical%20Report.pdf (accessed 15 January 2022).

52 Van Klinken (n 15) 13. D Greenberg *The construction of homosexuality* (1997) 8-9, suggests that the using laws against same-sex sexual conduct for political advantage is an old tactic used by politicians which dates to the Middle Ages. For example, the arrest and killing of the Knights Templar for sodomy, by French King Lou the LXXX was the pretext to acquire their vast wealth in debt burdened France in a manner the public would support. He argues that present day

this expression of heterosexual nationalism translates into several far-reaching actions and omissions. These include the wilful refusal to understand sexual diversity in all its aspects; the intolerance towards sexual and gender minorities; disregard for domestic and international human rights obligations in so far as they relate to sexual and gender minorities; and the exercise of 'bio-power'[53] through the retention and mischaracterisation of anti-sodomy laws, as laws against homosexual orientation and identity, rather than the sexual acts described in the laws.[54] The thesis discusses manifestations of heterosexual nationalism in Zambia in relation to the mischaracterisation and misapplication of anti-sodomy laws.

From the above discussion the primary contention of this thesis is that heterosexual nationalism in Africa generally and Zambia in particular, has a number of characteristics; it perceives an external enemy in Western liberal democracies, which advocate for the rights of sexual and gender minorities; it is sustained by the state but driven by both state and non-state actors such as the media, religious and traditional leaders and it rationalises the retention of anti-sodomy laws as a deterrence to homosexuality. Further heterosexual nationalism feeds the mischaracterisation of the anti-sodomy laws; it rationalises the negative impact of these laws on sexual and gender minorities as a justified consequence of their sexual deviance; it stands on the principles of state sovereignty whenever calls for decriminalisation are raised and ignores international human rights obligations with regard to sexual and gender minorities (human rights exceptionalism). Heterosexual nationalism also views sexual and gender minorities as a threat to Zambia's nation-statehood and thus excludes them from the construction of 'nation' and 'nationality', thereby denying them of their citizenship rights. This is because the 'construction of nationhood is seen, among other aspects, to require the 'respectable' or 'normal' reproductive human functions for the continuity of society in obedience to the religious command to 'go and multiply the earth'.[55] In Zambia, as in other heterosexual nations, heterosexuality is therefore seen as the decent and normal sexual citizenship that fulfils this ideal. Public health messaging such as 'healthy mother, healthy father, healthy children, healthy nation' exemplifies this construction of sexuality and nationhood. Kumari collaborates this point by arguing that the normalisation of sexuality and its linkages with nationalism and the state can be explored by looking at how 'respectable sexuality' is defined.[56] He argues:[57]

> [T]he essential connection between respectable sexuality and nationalism is that ideals or customs of dominant groups [in the case of Zambia this is the Christian majority socialised in heteronormativity] are recognized as national ideals and are socially and legally imposed though unevenly. The supposed abnormal or deviant is the other side of respectable sexuality. What is to be noted is the fact that the definitions of normality and deviance often correspond to heterosexuality and homosexuality.

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politicians in intolerant countries are aware of the political advantages to be gained by weaponizing anti-sodomy laws against sexual and gender minorities.

53 Coined and first theorised by Foucault 'bio power' refers to the exercise of power over people as living beings to control their bodies through law and policy'.

54 Banda (n 40) 236.

55 D Kecmanovic *The mass psychology of ethno-nationalism* (2014) 15-16.

56 K Kumari 'Heterosexual nationalism: Discourses on masculinity and femininity' (2018) 6 (10) *International Journal of Social Science Studies* 35. See also Lawson (n 42) 1-3.

57 As above.

The declaration of Zambia as a Christian nation and the abnormalisation of non-heteronormative sexualities and gender non-conforming identities is illustrative of this point. Van Klinken rightly observes that in Zambia:

> a discourse of national belonging is anchored on a script of family values. Following this script church organisations [in agreement with the state] not only reinforce a normative, exclusively heterosexual definition of the nation, but also explicitly support the state's criminalisation of same sex practices. Appealing to the bible and the divine order of creation, as well as to an invented traditional Zambian or African culture, they 'baptise' a post-colonial Zambian nationalist ideology in which heterosexuality is normalised while homosexuality is suppressed and construed as a threat to the nation's moral order.[58]

Even without the declaration, many other illustrations exist. In essence heterosexual nationalism constructs heterosexuality as the only legitimate form of sexual citizenship. Although they do so to varying degrees, nations other than Zambia that espouse heterosexual nationalism include Burkina Faso, Ghana, Kenya, Malawi, Niger, Nigeria, Senegal and Zimbabwe.[59]

An example of the extent and emotive nature of the discourse and expressivity of heterosexual nationalism and its complementary relationship with the mischaracterisation of anti-sodomy laws in Zambia can best be illustrated by looking at the Zambian political leadership's reaction to Ban Ki Moon's statement during his visit to the country in 2012 in his capacity as United Nations Secretary General (UNSG). Mr Moon urged the Zambian government to 'improve its human rights protection by taking advantage of the current constitution making process to prohibit discrimination on the basis of race, gender, age, *sexual orientation*, *gender identity* and disability'.[60] In response to this statement, the political leadership (reflecting and in unity with the general public) expressed considerable discontent, charging that Mr. Moon was misguided because he wished 'to promote homosexuality in Zambia', something which was understood as un-Zambian.[61] Spearheading this displeasure, the political and religious leadership more broadly retorted that 'homosexuality is illegal under the Penal Code' and that this law is necessary to preserve Zambia's sovereign declaration as a Christian nation.[62] In the same vein, opposition political leaders responded by stating that the UN and the government had conspired to legalise homosexuality in Zambia, and that they would not support its decriminalisation in Parliament.[63]

The leading online news platforms of that time carried the story on the first and second day of the speech. A total of 169 comments were made on the speech,168 of which amounted to insulting the

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58 Van Klinken (n 15) 256.

59 See Afrobarometer (n 6) 12.

60 Speech of the former UNSG Ban Ki Moon, delivered to the Parliament of Zambia on 24 February 2012. https://www.un.org/sg/en/content/statement/secretary-general-remarks-national-assembly-republic-zambia (accessed 6 September 2019) (emphasis added).

61 'NGOs want Ban Ki-Moon to apologise for asking Zambians to respect gay rights' *The Zambian Watchdog* 27 February 2012. https://zambiawatchdog.com/ngo-wants-ban-ki-moon-to-apologise-for-asking-zambia-to-respect-gay-rights/ (accessed 2 November 2022).

62 'Zambia: Ban Ki Moon calls for respect of homosexuals and lesbians' *Lusaka Times* 25 February 2012. https://www.lusakatimes.com/2012/02/25/ban-kimoon-calls-respect-homosexuals-lesbians (accessed 6 September 2019).

63 As above. See also 'Constitution committee trying to include gay rights in Zambia say HH' *The Lusaka Times* 1 March 2012. https://www.lusakatimes.com/2012/03/01/constitution-committee-include-gay-rightshh/ (accessed on 1 November 2022).

UNSG for coming to 'champion gay rights in Zambia'.[64] The telling aspect of the comments is that all 169 commenters mischaracterised the anti-sodomy provisions as laws criminalising homosexuality (as identity and not homosexual acts) and as applying exclusively to sexual and gender minorities (negating the occurrence of heterosexual sexual intercourse per anum). This issue was the second most commented-on story in the life of the online media, with the first being a total of 197 when Zambia won the Africa Cup of Nations (AFCON) in the same year, 2012.[65] It is worth noting that Zambia describes itself as a footballing nation, arguably the pride that came from winning the AFCON is comparable with the national anger and rage that was aroused by a call to protect the rights of sexual and gender minorities.

The net outcome of the visit by the UNSG was that the words 'vulnerable and marginalised groups' were deleted from the discrimination clause of the draft Constitution, which at the time, was subjected to public debate. Demanding this outcome, the church organisations, referred in Zambia as the church mother bodies, made a joint statement, which read as follows:[66]

> 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 of the constitution making process to spell out categorically who the *minority* and *marginalised* groups implied in Article 60 of the first draft constitution really are [...] the clarity of definition is 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 of Article 60 to champion their rights.

Within days article 60 of the draft constitution was amended by the removal of the words 'marginalised' and 'vulnerable'.[67] The unfolding of these events is telling of the religious nature of heterosexual nationalism in Zambia. As stated already, this religiosity is predominantly informed by the declaration of Zambia as a sovereign Christian nation.[68]

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64 'Zambians Reject UN Secretary Generals call to recognise homosexuality' *Tumfweko* 26 February 2012. http://tumfweko.com (accessed on 14 December 2017). One comment stated as follows "Zambia inherited the laws and legal system of its colonial master upon independence in 1964. Laws concerning homosexuality have largely remained unchanged since then and homosexuality is covered by the sodomy laws that also proscribe bestiality. Today the comeback advocating for Lesbians, gay, bisexual and transgender rights, what a turn of events. Sodomy is anal or oral rape. Do we need to remind these advocates of this demonic act? be warned they will come in the name of human rights to force you."

65 Van Klinken (15) 260.

66 Joint press statement of the church mother bodies issued on 4 September 2014. (emphasis added).

67 Press statement of the Chairperson of the Technical Committee on a new Zambia constitution accessed from the national archives. See also 'New Zambian constitution to ban homosexuality' *allAfrica* 5 April 2013. https://allafrica.com/stories/201304161240.html (accessed 2 November 2022).

68 Van Klinken (n 15) 256.

Also featuring prominently in the discourse of heterosexual nationalism is the assertion of state sovereignty and human rights exceptionalism.[69] Using sovereignty and human rights exceptionalism, the state seeks to delink sexual and gender minority rights from 'main stream' human rights discourse and attendant state obligations. The collective discontent with the UNSG's statement to respect the rights of sexual and gender minorities and the subsequent amendment of the draft constitution was seen as Zambia standing up to international bullying in the name of human rights and asserting its sovereignty. In 2019 these themes were fully expressed when former President Edgar Lungu requested the American ambassador to Zambia to leave the country following his statement on the conviction and sentencing of two gay men under the anti-sodomy laws.[70] In what has been termed as uncharacteristic and strong from a diplomat, the American ambassador issued a press statement expressing the following view:[71]

> I understand that Zambia is a Christian nation. I also understand that the constitution of Zambia was written to protect all citizens. I was personally horrified to read yesterday about the sentencing of two men, who had consensual relationship, which hurt no one, to 15 years imprisonment for crimes against the order of nature. Meanwhile, government officials can steal millions of dollars without prosecution […] Decisions like this oppressive sentencing do untold damage to Zambia's international reputation by demonstrating that human rights in Zambia is not a universal guarantee. They perpetuate the perception against disenfranchised groups and minorities, such as people from other tribes or political affiliations, albinos, the disabled, our lesbian, gay, bisexual, transgender and intersex (LGBTI) brothers and sisters, and anyone who is deemed 'different' […] Perhaps, it's time for Zambia to consider its outdated stance and obsolete legislation on how to treat the LGBTI community, and anyone who is considered 'different.'

In content, the statement contested heterosexual nationalism and its prominent constituents of state sovereignty, human rights exceptionalism and Christian governmentality. The executive received the statement as an insult to Zambia's sovereignty, separation of powers (as the court made the decision as an independent arm of government) and its commitment to human rights. Illustrative of this reaction, the President requested for the American ambassador to be recalled, and during an interview stated:[72]

> We are saying no to homosexuality. Why should you [the USA] say we are only going to be civilised when we allow it. Are you saying we are very primitive now because we are frowning upon homosexuality? Even animals don't do it, so why should we be forced to do it […] The ambassador has insulted our collective wisdom as Zambians. I think a retraction or apology can do but I don't know how far this issue will go because already the US is tying this issue to Aid. If that is how you are going

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69 For a discussion of human rights exceptionalism in international law see A Braford & E Posner 'Universal exceptionalism in international law' (2011) 52 *Harvard International Law Journal* 4. See also M Ignatieff *American exceptionalism and human rights* (2005) 147-338.

70 'US ambassador recalled after dispute with Zambian government over gay rights and corruption' *CNN* 25 December 2020 https://edition.cnn.com/2019/12/25/politics/daniel-foote-zambia-ambassador/index.html. See also 'US recalls ambassador after gay rights row' *BBC* news 24 December 2019 https://www.bbc.com/news/world-africa-50901537 (accessed 30 January 2020).

71 'U.S. press statement on the severe LGBTI sentencing in Zambia' issued on 29 November 2019. The statement can be accessed on https://www.lusakatimes.com/2019/11/29/jailing-of-kapiri-gay-couple-to-15-years-horrifies-us-envoy/ (accessed on January 2020).

72 The Presidents interview and statements can be accessed on https://www.youtube.com/watch?v=DyNQGrwt7Ig&app=desktop (accessed 30 November 2020).

> to bring your Aid then I am afraid the West can leave us alone in our poverty, and we shall continue scrounging and struggling on our own and get ourselves going. No amount of money will change Zambia's views on homosexuality.

Expressing his views on sexual and gender minorities, he continued saying the following:[73]

> They require help. For me I think homosexuals are sick but require help. The fact that they went to jail is probably one thing but mental help should be rendered to them. A pardon could be considered but not in the manner the ambassador is coming out, by insulting the collective wisdom of the Zambian people, the sovereignty of this state and so on and so forth, he cannot do that.

The issue went on with the US ambassador responding that he was shocked at the venom and hate directed at him by Zambian politicians and the public in the name of Christianity.[74] He went on to say that in his view Christianity meant treating people with compassion and that he could not imagine Jesus treating people the way Zambia responded to him or the way it treats sexual and gender minorities.[75] The Zambian government was criticised by some foreign media outlets but this only had the effect of arousing a sense of national sovereignty and resistance against 'west neo-colonial tendencies to impose their values on Africa'.[76] Following much push back, the US Department of State recalled the ambassador from Zambia.[77]

The two incidents outstandingly bring out the narrative and counter narrative of heterosexual nationalism. As stated above, heterosexual nationalism views the call by Western democracies to respect the rights of sexual and gender minorities as international bullying and the imposition of western values. In this regard, heterosexual nations like Zambia respond by asserting their state sovereignty and expressing an unprecedented level of pride in their culture and Christian heritage. This thesis thus agrees with Hoad, who has comments on such instances in heterosexual nations, stating that homophobic strands in African nationalism represents a displaced resistance to perceived and real encroachments on neo-colonial national sovereignty by economic and cultural globalisation.[78] In my view the Zambian President's reaction the statement by the American ambassador is an example of such displaced resistance. Similar reactions were made by different African Presidents such Uhuru

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73 As above.

74 See n 70 and 71.

75 As above.

76 'US ambassador recalled after dispute with Zambian government over gay rights and corruption' *CNN* 25 December 2020 https://edition.cnn.com/2019/12/25/politics/daniel-foote-zambia-ambassador/index.html. See also 'US recalls ambassador after gay rights row' *BBC* news 24 December 2019 https://www.bbc.com/news/world-africa-50901537 (accessed 30 January 2020).

77 As above.

78 N Hoad *African intimacies: Race, homosexuality and globalization* (2007) xii. While the encroachment on African states sovereignty is –in many instances a perception– it is also real in others and this sends African leaders on the defence. The victims are usually sexual and gender minorities who suffer the backlash of this neocolonial sovereignty battle between Africa and the West. M Epprecht *Sexuality and social justice in Africa: Rethinking homophobia and forging resistance* (2013) has cautioned that while Western commentary on the rights of sexual and gender minorities is important, it can lead to unprecedented back class for sexual minorities in Africa as they become the victims of political defiance of the state. In this regard he suggests that mobilisation against homophobia would be more progressive if predominantly done by local civil society organisations and human rights activists.

Kenyatta, Robert Mugabe, Paul Kagame and others when interviewed on the subject of sexual and gender minority rights in their countries.[79]

With regard to human rights, as seen above heterosexual nationalism takes the stance of human rights exceptionalism, whereby it professes a commitment to human rights but claims that the rights of sexual and gender minorities are not within the scope of rights protected by domestic or international law. Apart from opportunist political gesturing discussed above, Chapter 3 demonstrates that human rights exceptionalism regarding sexual and gender minority rights can be attributed to lack of understanding of sexual diversity in general. Related to this lack of understanding is the framing of homosexuality as a deviant sexual 'practice' by choice due to mental illness, un-culturedness arising from western influences or being possessed by some evil spirit whose cure is turning back to God.[80] In this sense heterosexual nationalism in Zambia defines sexual citizenship within the context and limits of religious citizenship, particularly the Christian moral ethic of sexuality.[81] Under this ethic, sexual socialisation is based on the narrative/belief that God created human beings as heterosexuals and therefore any other form of sexuality is a choice of deviant citizens.[82] As such, anti-sodomy laws are seen as necessary to deter the deviance and maintain Zambia's sovereign culture, morals and identity as a Christian nation. It is in these three forms that this thesis argues heterosexual nationalism manifests and lawfare mobilised against sexual and gender minorities in Zambia: religious, cultural and moral heterosexual nationalism. They feed the retention and mischaracterisation of the anti-sodomy laws with the common phraseology being 'homosexuality is illegal'. This thesis also argues that these nationalist rationales for retaining anti-sodomy laws should not be dismissed as mere heterosexual rhetoric, but rather should be examined as indicators that heterosexual nations need a different and perhaps more innovative approach (specific to country context) if any legal and social change is to occur.[83] Zambia as the study country provides a good lens through which this can be done.

1.3.2. Religious/Christian heterosexual nationalism

Religious heterosexual nationalism identifies itself with a particular religion and contests sexual diversity based on the teachings of that religion on human sexuality. This form of nationalism holds that homosexuality is against the religious teachings of the majority population (the 'citizens') be it Christianity, Islam or another religion. The postulation that homosexuality is against the 'will of God'

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79 Notably the Kenyan President responded in much the same terms as President Lungu of Zambia saying that 'the issue of homosexuality is a subject of no major importance to the people of Kenya and the Republic of Kenya. This is not an issue of human rights as the Western media wants to put it, this is an issue of society. The people of Kenya themselves have rejected this and bestowed upon themselves a constitution in which they have said this is not a subject they are willing to engage in' The full interview can be accessed on https://m.youtube.com/watch?v=lwTgU-RZLHQ (accessed 30 November 2020).

80 Van Klinken (n 15) 255-257.

81 For a full discussion on sexual citizenship, see D Evans *Sexual citizenship: The material construction of sexualities* (1993) 1-19.

82 A Cheyeka 'Zambia, a "Christian nation" in the post Movement for Multiparty Democracy (MMD) era, 2011-2016' (2016) 6 *International Journal of Humanities and Social Sciences* 167.

83 Jjuuko, Viljoen, Gloppen & Msosa 'Conclusion' in Gloppen, Jjuuko, Msosa & Viljoen (eds) *Queer lawfare in Africa: Legal strategies in contexts of LGBTIQ+ criminalisation* (2022) 436, note that 'Queer lawfare is on the rise in Africa, partly driven by regional and global trends– but different country contexts shape the form it takes' and therefore, 'context is critical in influencing the different drivers of queer lawfare in Africa'.

is perhaps the strongest argument for retaining and misapplying anti-sodomy laws in heterosexual nations like Zambia.

Religious nationalism in general, and thus religious heterosexual nationalism in particular, takes two forms; the politicisation of religion and conversely the influence of religion on politics.[84] In Zambia, it takes the latter where christianity informs politics. In particular, religious heterosexual nationalism is based on the political and constitutional declaration that 'the Republic is a Christian nation'.[85] The declaration was first made in a dramatic speech by then President Fredrick Chiluba in 1991, following his victory in the first democratic election after decades of one-party rule under Kenneth Kaunda and the United National Independence Party (UNIP).[86] Chiluba was supported by Pentecostal leaders who had gained prominence by criticising the socialist style of the UNIP government which they termed as 'evil'.[87] Himself a Pentecostal Christian, Chiluba made the following declaration:[88]

> Dear God, as a nation we now come to your throne of grace and admit our sin. We repent from all our wicked ways of idolatry, witchcraft, immorality, injustice and corruption [...] On behalf of the nation I now enter into a covenant with God and make the following declaration: That I declare today, that as president I submit myself to the lordship of Jesus Christ, I like wise submit the government and the entire nation to the lordship of Jesus Christ. I further declare that Zambia is a Christian nation. That it shall seek to be governed by the righteous principles of the word of God. Fellow countrymen, a new dawn has come to Zambia. God bless us and help us to live according to his righteous laws.

Cheyeka observes that, after the speech, 'no other politician would dare go back on this declaration as political mobilisation was centered around Pentecostal affiliation'.[89] To this end, sexual and gender minorities have been made a symbol of evil following the story of Sodom and Gomora, and thus their persecution and the retention of anti-sodomy laws is interpreted as living up to the theo-political aspiration of Zambia. To affirm this aspiration, the declaration was later enshrined in the first line of the preamble of the Constitution, which pronounces: 'We the people of Zambia, acknowledge the supremacy of almighty God; declare the Republic as a Christian Nation'.[90] As such Christian retentionists of anti-sodomy laws in Zambia base their argument on the supremacy of the Constitution by stating that in a democracy, the constitutionally expressed will of the people should be reflected in the law.[91] Thus, anti-sodomy laws, it is argued, express the collective will of the Zambian people to be governed by Christian mores and hence should be retained to ensure that the unchristian deviance of

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84 M Juergensmeyer 'The worldwide rise of religious nationalism' (1996) 50 *Journal of International Affairs* 20.

85 C J Kaunda 'From fools for Christ to fools for politicians: A critique of Zambian Pentecostal Theo-political imagination' (2017) *Mission Research* 13. https://journals.sagepub.com/doi/pdf/10.1177/2396939317730694 (accessed 1 December 2020, see also I Phiri 'President Fredrick Chiluba of Zambia: The Christian nation and democracy' (2003) 33(4) *Journal of Religion in Africa* 401.

86 As above.

87 Kaunda (n 85) 1-3.

88 The speech and the events were captured in a propaganda documentary sponsored by local and international evangelicals. See https://m.youtube.com/watch?v=gIZDvJF5-D8 (accessed 2 December 2020).

89 A M Cheyeka 'Zambia, a "Christian nation" in the post Movement for Multiparty Democracy (MMD) era, 2011-2016' (2016) 6 *International Journal of Humanities and Social Sciences* 167.

90 Preamble of the Constitution of Zambia, 1996 constitutional amendment, chapter one of the laws of Zambia. The declaration was retained in the 2016 amendment verbatim.

91 Kaunda (n 85) 13.

homosexuality is prevented and punished. This rhetoric of Christian nationalism is predominantly driven by Pentecostal Christian churches who perhaps have the most influence in the discourse on sexuality in Zambia. Van Klinken observes:

> In Zambia this is even more apparent because it is the only country on the continent where Pentecostal Christianity has shaped a popular, constitutionally embedded sense of national identity […] the constitutional and political configuration of Zambia as a Christian nation clearly shapes and defines the debates and politics concerning homosexuality and LGBTI rights. [92]

The influence of Pentecostalism on legal and political discourses in Zambia reveals a strong relationship between church and state. As was earlier illustrated, the church influenced the removal of the words 'vulnerable' and 'marginalised' from the draft Constitution to make certain that sexual and gender minorities do not have recourse to constitutional protection through or due to these phrases. In similar light, the registration of a civil society organisations whose aim was to promote the rights of sexual and gender minorities was rejected after pressure from religious leaders.[93] Voicing the discontent of the 'church' Bishop John Mambo, a prominent church leader, said: 'Homosexuality cannot be an issue of human rights because it is a sin against the teachings of the Bible'.[94] Notwithstanding the constitutional protection of freedom of association under article18, besides Zambia's international treaty obligations, the Registrar of Societies, yielding to the pressure of religious leaders and characterising the anti-sodomy laws as laws against homosexual orientation, took a human rights exceptionality stance by blatantly refusing to register sexual and gender minority rights organisations. Long cites him as reasoning that sexual and gender minority rights 'organisations would be illegal because homosexuality is a criminal offence in Zambia', adding that in a Christian nation such as Zambia is, he could 'not register such organisations any more than he could a satanic organisation'.[95] Apart from the exceptionalism stance, the reasoning once again demonstrates the marriage between the anti-sodomy laws and religious heterosexual nationalism in Zambia. As such the lawfare battle is tilted against the rights and interests of sexual and gender minorities in the country.

The influence of the Christian heterosexual nationalism extends to non-state actors, as exemplified by the controversy surrounding the Fédération Internationale de Football Association (FIFA) request to its affiliate members like the Football Association of Zambia (FAZ) to include a non-discrimination clause based on sexual orientation and gender identity in their constitutions.[96] In Zambia, this sparked the same controversy as the call by Ban Ki Moon, with religious nationalism as the prominent theme in the discourse. Church leaders spoke out that 'if FAZ agrees to a clause banning

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92 A Van Klinken 'Gay rights, the devil and the end times: Public religion and the enchantment of the homosexuality debate in Zambia' (2013) 23 *Journal of Religion* 13.

93 S Long *More than a name: State-sponsored homophobia and its consequences in Southern Africa* (2003) 34.

94 'Mambo attacks Zulu for defending homosexuals' *The Post* 16 July 1998.

95 Long (n 93) 69.

96 *Diversity and anti-discrimination at FIFA* (2017) 3 https://resources.fifa.com/image/upload/diversity-and-anti-discrimination-at-fifa.pdf?cloudid=zxfj6wm19g7tgk0yfw8t (accessed 25 June 2020). This came after a long struggle and criticism of FIFA for its 'weak' position on discriminatory practices such as race, sexual orientation and gender identity in Football.

discrimination against gays, it will be inviting the wrath of God in the nation'.[97] The rhetoric shows that Christian heterosexual nationalism sees the human rights values and principles of equality and non-discrimination with respect to sexual orientation and gender identity as counter religious and (in a somewhat unexplained theology) a promotion of evil. FAZ took the exceptionalism stance, declined to include the non-discrimination clause, with its leadership pronouncing that 'FAZ could not go against the laws of Zambia as a Christian nation and will ensure that the laws of football do not conflict the laws of Zambia'.[98] Common in the thread is the fact that in countering the human rights narratives, anti-sodomy laws have been referenced as vital to preserve the Christian values of the nation, adding a political tone of the sovereignty of the state and the collective will of the governed. Chapter 3 discusses these aspects in more detail.

At this stage, an important question to consider is: Why is Christian heterosexual nationalism and its ethic on sexuality so strong in Zambia? Three reasons can be attributed to the role and strength of Christian heterosexual nationalism in Zambia. First, it is what this thesis refers toas, Christian coloniality – the continuation of colonial patterns, systems and rationalities of governance using colonial-order theo-political teachings. The religious nature of Zambia dates back to the 'birth' of the nation at independence. Most of the early political leaders in the liberation struggle were educated in mission schools where Christianity was a major part of their socialisation and formal education.[99] Christian socialisation and colonial education not only had a disruptive effect on the culture of tolerance for sexual diversity present in pre-colonial African and Zambian societies,[100] but it would later reflect in the laws and policies that they retained at independence and the leadership provided thereafter – governmentality and coloniality.[101] Mokotso writes that the fruits of Christianity and mission education surfaced at the beginning of the twentieth century with the emergency of mission-educated African 'elite' who lead the struggle for liberation but unknowingly and unintentionally protected the legacies of colonialism after independence.[102] For instance, the first President of Zambia, Dr Kenneth David Kaunda, named in part after David Livingstone, the Scottish missionary and explorer, was taught at Lubwa Mission Centre to be a teacher and missionary.[103] Kaunda acknowledges

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97 'outrage over attempt to block anti-gay discrimination in Zambian football' *Mamba online* *https://www.mambaonline.com/2017/02/20/outrage-attempt-block-gay-discrimination-zambian-football/* (accessed on 20 June 2020).

98 Ponga Liwewe speaking with CGTN news https://www.youtube.com/watch?v=zKnXo1Z7TZU (accessed on 26 June 2020).

99 For a full discussion on christian socialisation as concept and its impact see P Vermeer 'Religious education and socialisation' (2010) 31 *British Journal of Religious Education* 201-211 and S Hunt 'Believing vaguely: Religious socialisation and christian beliefs in Britain (2015) *Italian Journal of Sociology of Education* 10-46. In broad terms Christian socialisation is the process by individuals and groups attain the values, beliefs and conceptions of Christianity so deeply engraved that their decisions and lives are shaped by it. Both Vermeer and Hunt state that individuals who are educated at Christian based schools and have a christian parents acquire and embrace ways of thinking that is reflected in their leadership capacities and ways of life.

100 See 2.2 in Chapter under which the cultural disruptive nature of colonialism, the non-disruptive nature of decolonisation and coloniality productive of Christian socialisation are discussed in more detail.

101 J Mwanakatwe *End of Kaunda era* (1994) 18 recounts how the first cabinet of independent Zambia in 1964 were all educated at mission schools and how their Christian education shaped their personal and collective leadership, the policies and laws adopted in Zambia.

102 Mokotso (n 19) 9.

103 Kaunda's father was a missionary deployed by David Livingstone from morden day Malawi to spread christianity to the northern part of Zambia, then northern Rhodesia. Thus, at home and at school, Kaunda and most of the independence leaders, were christian socialised and grounded.

that his leadership mentality and actions, through the introduction of the national philosophy of humanism in Zambia, were singularly influenced by teachings from the Bible and in particular the New Testament.[104] In all his national addresses he emphasized the strict adherence to Christian mores in education, workplaces, and social life.[105] Heterosexuality was thus a major part of the Christian mores on which Zambia's nationhood after independence was built. As such it can be argued that the seeds of Christian heterosexual nationalism, which saw the constitutional declaration of Zambia as a Christian nation and the present day experience, were planted before the birth of Zambia as a nation-state.[106] From the very beginning, the UNIP government retained religious (Christian) education as a compulsory subject in basic education schools.[107] This not only ensures Christian socialisation, but also a Christian moral ethic that perpetuates heterosexual socialisation. In this regard, it can be argued that Christian and religious socialisation are based on continuity and control, meaning that via this process the state, with the church as its supporting agents, can exercise bio power.

The current demographics in Zambia reveal the legacy of Christian education and socialisation. As earlier stated, from the latest census report, approximately '75.3 per cent of Zambians self-identify as strong Christians'.[108] Although the Catholic Church and other protestant traditional churches retain a huge part of this population, the Pentecostal churches, which as Van Klinken states, influence the discourse on sexuality in Zambia, have grown in influence especially among young people.[109] This demographic also dictates that the majority of the electorate are likely to vote for a leader who professes Christian values. Thus, as earlier argued, for political expedience and religious relevance, political leaders (themselves Christian socialised) would rather align themselves to the Christian narrative about sexuality and hence retain Zambia's anti-sodomy laws to avoid backlash with the voters. In this respect it can be argued that the separation between church and state was only formal in independent Zambia but that the informal relationship between the two which made colonialism possible persists ever stronger. Writing in the Zimbabwean context, which is has no significant difference to that in Zambia, Dube argues that the informal but strong relationship between church and state demonstrates through sexuality discourse in post-colonial Africa and, undermines democracy in the sense that religious leaders are covertly regime enablers, change resistors and social life regulators.[110] This complements Grossman's views that in countries with large Christian populations, political leaders are likely to seek validation from Christian leaders by speaking out against sexual and

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104 See K D Kaunda *Letter to my Children* (1973) and K D Kaunda *Zambia shall be free* (1963).

105 C Dillon-Malone *Zambian, humanism, religion and social morality* (1989) 1-18.

106 This illustrates the argument of coloniality not only in Zambia but Africa. Mokotso (n 19) 4, writes that missionary imperialism, which exploited Christianity and education for power, control and paternalism, is still alive and well in post-colonial Africa today. Writing on the same idea Ezeanya-Esiobu points out that apart from the goal of converting Africans to Christianity, another goal of missionary education was to colonise the consciousness and ideas of the local populations. This was accomplished through socialisation and acculturation package and administered in the form of the gospel and the education system. See C Ezeanya-Esiobu *Indigenous knowledge and education in Africa* (2019) 28-32.

107 As above.

108 *Zambia 2010 census of population and housing national analytical report* (n 25) 17-18.

109 A Van Klinken 'The homosexual as the antithesis of biblical manhood? Heteronormativity and masculinity politics in Zambia' (2011) 17(2) *Journal of Gender and Religion in Africa* 127-129.

110 B Dube 'Religious leaders as regime enablers: the need for decolonial family and religious studies in post-colonial Zimbabwe' (2021) 43 *British Journal of Religious Education* 46.

gender minorities and implementing laws or policies that are homophobic as a way of attaining or maintaining popularity with the voters.[111]

Christian coloniality is compounded by the fact that both pentecostal and traditional churches still play an important public and social role by funding and running schools and hospitals, in both urban and rural parts in Zambia. Consequently, the church is also positioned to influence state policy and legislation in relation to matters they teach as agents of socialisation. For example a statement from the Evangelical Fellowship of Zambia (EFZ) and the Churches Council of Zambia (CCZ),[112] commonly referred to as the church mother bodies, during a press briefing at the start of the constitution making process captures this position well:[113]

> Zambia being a Christian nation and also having a rich African and traditional heritage, requires a consistent upholding of the highest moral and family values. Therefore, we re-affirm our stand for hetero-sexual marriages only, as in the current constitution. Same sex relationships are condemned in the Bible and are widely unacceptable in our society.

In similar light the Council of Churches in Zambia stated:[114]

> The Council of Churches wishes to reiterate their stand on family values. Marriage is between male and female and no other way. We believe that homosexual relationships are contrary to the order of nature as designed by God the Creator. We therefore wish to state categorically that we are opposed to [the] legalization of homosexuality […] We believe in strong family units because they are the basis of a strong and orderly community.

It is worth noting that unlike the EFZ, the CCZ, which represents the traditional churches, is critical of the declaration of Zambia as a Christian nation due to the rise of fundamental and radical pentecostalism in the country.[115] However, despite the two church mother bodies being ideologically opposed regarding the declaration, they are united on the point that the declaration helps uphold their disapproval and contestation of non-heteronormative sexualities and gender non-conforming identities in Zambia.

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111 G Grossman 'Renewalist christianity and the political saliency of LGBTs: Theory and evidence from Sub-Saharan Africa' (2015) 77 (2) *Journal of Politics* 337, the saliency or importance LGBTI issues in politics in Sub-Saharan Africa is related to the christian demographics of a particular country. His empirical study revealed that Politicians will seek christian validation and retain political power by speaking against sexual minorities and enforcing laws and policies that are homophobic, in countries that have a high Pentecostal presence such as Zambia.

112 The EFZ is an association of evangelical churches in Zambia and one of the leading faith-based organisations in the Country. The CCZ is an association of the traditional churches in Zambia including the catholic church. It is arguably the most influential faith-based organisation in the Country.

113 Evangelical Fellowship of Zambia, 2012, *Pastoral statement on the state of the nation* (4 March 2012). Lusaka. http://www.efzsecretariat.org/index.php?option=com_content (accessed 21 June 2019).

114 Council of Churches in Zambia,2012. *Pastoral Letter: From elections to justice and fair play* (5 March 2012) Lusakahttp://www.ccz.org.zm/sites/default/files/CCZ%20March%20Pastoral%20Letter.pdf (accessed 21 June 2019).

115 The catholic church, organised under the Zambia Episcopal Conference (ZEC), is also critical of the constitutional declaration of Zambia as a christian nation citing similar reasons as the CCZ. For a full discussion of the theological arguments regarding the declaration see M Hinfelaar 'Debating the Secular in Zambia: The response of the catholic church to scientific socialism and christian nation, 1976–2006' in H Englund (ed) *Christianity and Public Culture in Africa* (2011) 50-66.

The second reason why Christian heterosexual nationalism thrives in Zambia, like in most heterosexual nations, is lack of critical biblical scholarship.[116] This is compounded by the fact that there are few, if any, religious leaders prepared to take a stand against homophobia. By contrast, in countries like South Africa, critical theology is a normal part of the discourse.[117] Prominent religious leaders like the late Archbishop Desmond Tutu were able to speak out against homophobia in ways that challenge the conservative christian position on sexuality, as when he stated:[118]

> The Church of Jesus Christ, far from being inclusive and welcoming of all, has over and over again pushed many to the periphery; instead of being hospitable to all, it has made many of God's children outcasts and pariahs on the basis of something which, like race or gender, they could do nothing about – their sexual orientation.

Such views represent the anti-thesis of conservative Christian theology and teaching on sexuality and thus would be seen as heresy by most Christian leaders in Zambia. Van Klinken observes that 'it seems to be considered self-evident in popular and political discourses in Zambia, and thus to require no explanation, that homosexuality is incompatible with christianity.'[119] In many instances, a simple reference to the Bible is seen as a sufficient without an actual systematic theological explanation.[120] Hence, 'it tends to be ignored [or rather dismissed] that, from a global perspective, there are strands within christianity that adopt different interpretations of the bible and that, even in Zambia there are different voices on homosexuality'.[121] While systemic theological positions differ and are healthily debated on issues like baptism, the sabbath (day of worship) and the role of women in the church, those who express divergent views on sexuality are quickly associated with the devil and as sell-outs.[122] For example, Dette Zambia Resources Foundation, a local civil society organisation, was threatened with deregistration and accused of being a satanic institution when it issued the following statement in support of sexual and gender minorities:[123]

> We suggest that, as a nation dedicated to Christ by virtue of Zambia being declared a Christian nation, we need to reconsider our position on Homosexuals […] Jesus, the man whose name Zambia has been declared, never condemned people, sinners or persons with different sexual orientation.

While the above quote from Dette Zambia Resources Foundation represents, in my view, a valid queer theological position, it is received as blasphemy in the Zambian context. The lack of queer theological perspectives sustains the narrative that the Bible prescribes compulsory heterosexuality, and that sexual and gender minorities have no place in Christianity. Consequently, the label that sexual and

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116 M R Gunda *The Bible and homosexuality in Zimbabwe: A socio-historical analysis of the politics, cultural, and Christian arguments in the homosexual public debate with special reference to the use of the Bible* (2010) 68.

117 As above.

118 Desmond Tutu Foreword in, P Germond and S De Gruchy (eds) *Aliens in the household of God: Homosexuality and the Christian faith in South Africa* (1997).

119 Van Klinken (n 109) 265.

120 As above.

121 As above.

122 A Van Klinken 'Christianity, human rights and LGBTI advocacy in Zambia: The case of Dette Resources Foundation' in A Van Klinken & E Chitando (eds) *Public religion and politics of homosexuality in Africa* (2016) 37-38.

123 'Dette supports homosexuals' *Tumfweko* 29 April 2013 http://tumfweko.com/2013/04/29/dette-support-homosexuals/ (accessed November 2020).

gender minorities are sexual and religious deviants is rooted in Zambian society to the extent that sexual and gender minorities are deprived of their religious citizenship.[124]

Related to the lack of critical biblical scholarship and queer based theological perspectives, the third reason why Christian heterosexual nationalism is strong in Zambia is the lack of regulation of religious affairs. The fear of the state to regulate the activities of the church has led to all sorts of 'prophets' and 'men of god' rising and opening churches without having gone through any form of theological training. To survive, most of these 'men of god' and religious entrepreneurs use popular theology condemning sexual and gender minorities as evil and calling for the retention of anti-sodomy laws. For example, there are no regulations on the qualifications a person must have to open or pastor a church in the country. By contrast, in countries like Rwanda this danger has been noticed, leading to the state enacting legislation to regulate church ministry.[125] Further, in Zambia churches do not pay tax and are not required to be audited.[126] This has left the door open for abuse of religion as a social institution, with adverse consequences on sexual and gender minorities.

It is worth noting, as argued by Van Klinken, that 'unlike Uganda and Malawi, where the mobilisation against sexual and gender minorities through Christian heterosexual nationalism is predominately led by foreign evangelical churches, in Zambia the rhetoric and mobilisation is by local evangelical leaders'.[127]

1.3.3. Cultural heterosexual nationalism

Like Christian heterosexual nationalism, cultural heterosexual nationalism is also a strong basis for the retention of anti-sodomy laws in Zambia. Cultural heterosexual nationalism is broadly grounded on the narrative that Africa is organically heterosexual; that pre-colonial African societies did not have diverse forms of human sexuality and gender identity, and therefore that 'homosexuality is unAfrican'.[128] In this regard cultural nationalists argue that 'homosexuality is exported from the West into Africa, to disrupt African cultural values'.[129] An extended arm of cultural heterosexual nationalism is that African civil society organisations that speak for the rights of sexual and gender minorities in Africa are sponsored by the West.[130] In essence cultural heterosexual nationalism in Africa generally, as an offspring of African cultural nationalism, is a contestation of what is perceived as western value systems and a rejection of what is deemed as 'unAfrican' and 'bad for' Africa.[131] In the post-colonial era between the 1960s to the late 1980s, cultural nationalism was used by some African leaders to reject principles of good governance and human rights as forms of neo-colonialism. Late President Mobuto of the former Zaire for instance used the rhetoric that 'democracy is not fit for African

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124 Van Klinken A & L Phiri '"In the image of God": Reconstructing and developing a grassroots African queer theology from urban Zambia' (2015) 21 *Theology & Sexuality* 50.

125 Rwanda Governance Boards Act, 2018.

126 Section 70 of the Income Tax Act exempts churches from paying any taxes except for pay as your earn tax for personnel its employees.

127 Van Klinken (n 109) 275.

128 Murray & W Roscoe (n 1) 1-3.

129 Murray & W Roscoe (n 1) 1.

130 Epprecht M *Sexuality and social justice in Africa: Rethinking homophobia and forging resistance* (2013) 11.

131 As above. See also Epprecht M *Heterosexual Africa? The history of an age of exploration the age of AIDS* (2008).

governance as it is contrary to traditional African leadership styles'.[132] Rationalising in the same line, most post-colonial African leaders, as did those in Zambia, adopted one party systems of governance and identified themselves with soviet style economic and political ideologies as a way of disassociating from what was perceived as western neo-colonial capitalist influences.[133] With the end of the cold war and the wave of democratisation which dismantled one-party states in Africa, and saw the introduction of neo-liberal policies, cultural nationalism evolved into a form of contestation for self-preservation against aspects of globalisation and western value system.[134] Stambolis-Ruhstorfer argues that at the end of the cold war, states that identified with the Soviet Union, such as Zambia, concretised their cultural nationalism, from which grew cultural heterosexual nationalism, as a way of guarding against the cultural disruptive potential of capitalism.[135] He further states that 'in former Soviet countries that joined the European Union, some conservatives fought back against required E.U. anti-discrimination laws protecting sexual and gender minorities arguing that they violated their distinct cultural traditions'.[136] This is the same trajectory of African countries like Zambia which identified with the Soviet Union. In this regard Juergensmeyer agrees that the post-cold war era brought out African leaders who, despite embracing some western political value systems, were nonetheless eager to complete the process of decolonisation by asserting the legitimacy of their countries' own traditional value systems to build a post-colonial, post-cold war national identity based on 'indigenous culture' with compulsory heterosexuality deemed as one of the defining features of that culture.[137]

From the above, it can be argued that cultural heterosexual nationalism in Africa and some parts of eastern Europe is a product of bruised national ego's following the end of the cold war, with most states feeling their sovereignty would be lost to neo-colonial value systems of the capitalist west.

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132 P Ikambana *Mobutu's totalitarian political system: An Afrocentric analysis* (2007) 13-29. See also A M Ibrahim 'LGBT rights in Africa and the discursive role of the international human rights law' (2015) 15 *African Human Rights Law Journal* 263.

133 For example, Julius Nyerere conceived and led the movement for ujamaa or familyhood, as the basis for African socialism. Kaunda, following the concept of ujamaa started humanism in Zambia. Both philosophies, styled as African socialism were said to be based on the concept of ubuntu and thus marketed as authentic African political-socio-economic conceptions to preserve the African identity in the post-colonial world. In his conception paper Nyerere posited that:

> [W]e, in Africa, have no more need of being 'converted' to socialism than we have of being 'taught' democracy. Both are rooted in our own past – in the traditional society which produced us. Modern African socialism can draw from its traditional heritage the recognition of 'society' as an extension of the basic family within the limits of the tribe, and, indeed, of the nation. It was in the struggle to break the grip of colonialism that we learnt the need for unity. […] African socialism did not have the 'benefit' of the Agrarian Revolution or the Industrial Revolution. It did not start from the existence of conflicting 'classes' in society. Indeed, I doubt if the equivalent for the word 'class' exists in any indigenous African language; for language describes the ideas of those who speak it, and the idea of 'class' or 'caste' was non-existent in African society. see J K Nyerere *Ujamaa: The basis of African Socialism* (1962) 8.

While these ideologies helped shape the post-colonial African state and can be useful to make certain decolonisation arguments, they are not without their demerits. This thesis contends that they also planted the seed for human rights exceptionalism and cultural relativism which are used today to contest the universal human rights principles. These contestations manifest in the form of cultural heterosexual nationalism as discussed above.

134 M Stambolis-Ruhstorfer 'The importance of sexuality in research on ethnicity and nationalism' (2017) 17 *Studies in Ethnicity and Nationalism* 47.

135 As above.

136 As above.

137 Juergensmeyer (n 84) 10.

In Zambia the MMD government, which took over from UNIP after the reintroduction multiparty politics, styled itself as a liberal political party that embraced principles of democracy and human rights as a way of re-creating Zambia's nationhood in the global setting, but paradoxically rejected what they termed neo-colonial conditionalities to economic aid. As did most African governments post 1990, Zambia embraced 'western' neo-liberal economic policies as vehicle for economic transformation but abstractly rejected what they saw as social and cultural disruptions of African/ Zambian identity. Cultural heterosexual nationalism thus grew and remains one of the forms of mobilisation against perceived foreign concepts of sexual citizenship which threaten this organic national identity.[138] In this regard, reforms such as decriminalisation are viewed as contemptuous to pure Zambian cultural values and hence resisted with a xenophobia tone.

Cultural heterosexual nationalism takes two basic forms in Zambia and perhaps in other heterosexual nations in Africa. These are political and religious. Religious based cultural heterosexual nationalism is driven by religious and traditional leaders who link African culture and value systems to Christian mores on sexuality. Van Klinken observes that 'both in popular discourse and in the rhetoric of political and religious leaders, Christianity and Zambian culture are strangely deployed as almost interchangeable canons for arguing against homosexuality, which is considered un-Christian, un-Zambian and un-African'.[139] The interchangeable use of religion and culture in highly Pentecostalised countries like Zambia is strange and surprising because 'Pentecostalism generally presents the rhetoric of breaking with the past and is not interested in authentic Africaness' which it associates with witchcraft.[140] Perhaps what is at play here is the old saying that nothing unites opposites like a common enemy. In this case, sexual diversity is the common enemy for religious and political leaders who both need to mobilise the same constituency. It can also be observed that religious and cultural themes are constructions and as such can be employed in a way that suggests synergies. However, the fallacy of religious based cultural heterosexual nationalism, is that it conveniently 'forgets' that Christianity is not originally part of African culture but was imported into Africa through colonialism. Religious based cultural heterosexual nationalism can be seen from the call by then Minister of Justice, Wynter Kabimba, urging members of the public to 'report homosexuals to the police' stressing that:

> [A]s Zambians, we have declared that we are a Christian nation and there is no way we can allow this un-Zambian culture. I to urge all Zambians to rise and denounce this vice and report all homosexuals to the Police. Why should someone or some institutions want to import this homosexuality and try to influence others to practice it? We can't allow it; I'm calling on all citizens to stand firm and reject it:[141]

This call was made when the executive was under pressure from the legislature to act against perceived foreign funding of local civil society organisations promoting the rights of sexual and gender

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138 Stambolis-Ruhstorfer (n 134) argues that at the end of the cold states that identified with the Soviet Union developed cultural nationalism and thus cultural heterosexual nationalism as a way of guarding against the cultural disruptive potential of capitalism. The inclination to the East was to a large extent, an attempt to disassociate from the identity created by the colonising west.

139 Van Klinken (n 15) 268.

140 As above.

141 'Kabimba urges Zambians to denounce homosexuality' *Lusaka Times* 22 April 2013 https://www.lusakatimes.com/2013/04/22/kabimba-urge-zambians-reject-and-denounce-people-and-institutions-championing-homosexuality/ (accessed 7 July 2020).

minorities in Zambia. As discussed in Chapter 3, this form of rhetoric is used for political mobilisation and for retaining political relevance in the eyes of the a 'religious minded' public. The court cases that followed are also discussed in Chapter 3 when examining the mischaracterisation of anti-sodomy laws in the criminal justice system in Zambia. The point to be noted is that religious grounded cultural nationalism is more of political propaganda than being an articulation of any existing national ideology that marries religion and culture.

Politically charged cultural heterosexual nationalism is driven by political leaders who view non-heteronormative sexualities as impositions from western governments. To a large extent, political based cultural heterosexual nationalism rejects the minority rights thesis (discussed later in this Chapter) using cultural relativism and human rights exceptionalism as opposed to standing on the universality of human rights norm. In this context, culture is 'used' as legitimate basis to politicise sexuality with expected favourable outcomes. Gloppen and Rakner define politicisation as the process by which a social phenomenon (In this case, sexuality) becomes the basis for mobilisation by societal and political actors, who turn it into an issue of major political significance, as a subject of heated public arguments, mobilisation and conflict.[142] Most statements based on this form of cultural heterosexual nationalism are very strong. For instance, that 'those championing gay rights must go to hell as these rights and practices are foreign to Zambia and we shall not tolerate them' made by former President of Zambia Edgar Lungu when he was Minister of Home Affairs.[143] Presidents Museveni, Kenyatta and former late President Mugabe have been quoted to make similar strong statements.[144] These statements are based on the view that sexual and gender minorities in Africa are seeking rights that are neither fundamental nor universal. The collective impact of these statements by African political leaders is that they reinforce homophobic cultural relativism and hence cultural nationalism in individual countries like Zambia. The critical nature of politically charged cultural heterosexual nationalism were best illustrated in the events that lead to the recalling of the American Ambassador to Zambia, discussed above.

At international level, the strength of cultural heterosexual nationalism in Africa can be seen from the controversy surrounding the observer status of the South African based NGO, the Coalition of African Lesbians (CAL). This controversy led to the construction of a somewhat unified form of African cultural nationalism and a cultural thesis based on the 'shared values' of the AU. The aspect of African shared values is discussed in more detail in Chapter 4. Although the ideal of shared values seems new in the context of sexuality, it has always existed in the post-colonial state of African identity. Ndjio explains it as follows:[145]

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142 S Gloppen & L Rakner 'LGBT rights in Africa' in C Ashford & A Maine (eds) *Research handbook on gender, sexuality and law* (2020) 198.

143 'Gays Marry at Own Risk – Lungu.' *Zambia Daily Mail* 9 April 2019. http://www.daily-mail.co.zm/local-news/3599 (accessed June 2019).

144 President Robert Mugabe is one of the first, if not the first African leader to employ cultural heterosexual nationalism and mobilise against sexual and gender minorities. He first did this in his infamous speech at the Harare Book Fare in 1995, where he referred to African culture as decent and retorted that calls by UK Prime Minister David Cameron for Zimbabwe to respect the rights of sexual and gender minorities as satanic. He also infamously described sexual and gender minorities to be worse than pigs and dogs. See 'Mugabe: Worse than pigs and dogs' *World News* 25 November 2011 (accessed 2 November 2022).

145 B Ndjio 'Sexuality and nationalist ideologies in post-colonial Cameroon.' in S Wieringa and H Sivori (eds) *The sexual history of the global south: Sexual politics in Africa, Asia, and Latin America* (2013) 143. For critical discussion of

> Across the continent, the refoundational aspirations of Pan-Africanist thought and Afrocentrist philosophies sustained the nationalist ambition to constitute an exclusive African sexual identity. They also provided an ideological justification for the exclusion by many African post-colonial states of a variety of sexual experiences, expressions, and desires from the realm of respectable citizenship.

Zambia, like other African heterosexual nations, expresses its cultural nationalism as if there is a single identity and custom about sex, sexuality and gender in the country. The basis of this essentialisation is questionable. With 74 ethnic groups[146] in the country, the customs and practices on sex and marriage are different as explained in numerous anthropological texts on sexual diversity in pre/post-colonial Zambia discussed in Chapter 2.[147]

The starting point in contesting cultural heterosexual nationalism is to note that the geo-political territories that comprise African countries today are a product of topographic colonialism. Before colonial rule, African societies were organised in different independent kingdoms, chiefdoms and other smaller types of communities or polities. These polities had their own religion, legal, political, economic and social systems of which sexuality and gender was integral. Given this background, cultural heterosexual nationalism has to be viewed and debated within the premise of the diversity in culture, value systems and conceptions of sexuality and gender in pre-colonial Africa. Thus, to assert that homosexuality is un-African suggests, at the very least, that pre-colonial African societies had one and the same value system on sexuality. The vast literature on the subject is telling of diverse sexualities and gender non-conforming identities in pre-colonial African societies including Zambia.[148] Present-day Africa testifies to the diversity of African culture and values systems, passed on for generations, and as such, the possibility of a monolistic 'Africanness' is ruled out.[149] Amponsah *et al* caution that 'we must be quick to point out that the idea of a singular African culture risks being a fallacy because of the intimidating diversity of Africa and Africans'.[150] That African culture regarding social life (including sexuality) is diverse, is therefore not contestable.[151] Thus, Murray and Viljoen fittingly point out:

> [T]he question is not whether "homosexuality" as such, is an acceptable value, but rather whether tolerance for diversity and minorities has value in a particular society. Clearly, in multi-lingual, multi-

native African identities in the context of sexuality see C Ngwena *What is Africaness? Contesting nativism in race, culture and sexualities* (2018) 151-156.

146 In discourse in Zambia the word often used is 'tribes' to describes the 74 ethnic groups and different on the basis of language.

147 These works include V Tuner *The ritual process: structure and anti-structure* (1969) 75, K Poewe *Reflections of a woman anthropologist: No hiding place* (1982) Smith and Dale *The ila speaking People of Northern Rhodesia* (1920) and E Colson *Marriage and family among the plateau Tonga of Northern Rhodesia* (1958) 139-140.

148 For full discussions on pre-colonial African and Zambian sexualities see Murray & Roscoe (n 1), Epprecht (n 87) Epprecht (n 88) and E Colson *Marriage and family among the plateau Tonga of Northern Rhodesia* (1958) and Colson *The organisation of the Gwembe Tonga* (1995).

149 Ngwena (n 145) discusses the notion of Africaness in philosophical detail.

150 S Amponsah *et al* 'African culture and the challenge of equality education for sustainable development' (2017) *American Journal of Continuing Adult Education* 49.

151 This is not to suggest that there are no cords that behind Africanness together.

> ethnic, and multi-religious states, which predominate in Africa, the tolerant accommodation of divergence and of minorities should be paramount. [152]

Apart from the historical and present-day diversity, cultural heterosexual nationalism can also be contested on the basis that it ignores the fact that culture is not static but dynamic. In present day Africa generally, and Zambia specifically, the visibility of sexual and gender minorities and consensual same-sex conduct between adults requires no citation.[153] Hence, even assuming that historically, Africa and Zambia did not have sexual and gender minorities, present day Zambia certainly has and based on the minority rights thesis, they deserve their rights to be respected, protected and fulfilled as sexual citizens among other grounds.[154]

Contestations of cultural heterosexual nationalism almost unescapably invites the question: 'What really is African culture?' and should what is culturally deviating and contested be a subject of criminal law? Having considered several definitions of African culture and the different critical perspectives in the discourse on the subject, Ezedike defined African culture as:

> [t]he sum total of shared attitudinal inclinations and capabilities, art, beliefs, moral codes and practices that characterise Africans. It can be conceived as a continuous, cumulative reservoir containing both material and non-material elements that are socially transmitted from one generation to another. African culture, therefore, refers to the whole lot of African heritage.[155]

In essence African culture, as are all cultures 'a complex and diverse whole that embodies the totality of the African in a community, a lifelong process that bestrides birth and death'.[156] And given the complex diversity, there are underlying beliefs and practices which bring people together, making culture capable of definition and thus defining a people.[157] The vast nature of this discourse is not within the scope of this thesis. However, taking these definitions, it can be agreed that culture in its very nature is diverse and constructed. That being the case, the question whether culturally contested matters should be subjects of formal criminal law has to be answered within the context of the purpose of criminal law. This thesis take the approach that like morality, culturally contested matters such as consensual same-sex sexual conduct between adults should only be subjects of criminal law if they cause actual harm to the public and not if they contradict abstract cultural self-indulgence.

Despites these contestations, cultural heterosexual nationalism is however, sustained for a number of reasons. One reason is that sexual diversity is not a subject that African and indeed Zambian scholars have researched on and written much about as addressed in Chapter 6. As such, heterosexual narratives about African sexualities have for a long time gone unchallenged. Only in the recent past has some scholarship developed and even then, this came after initial works by western scholars. It

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152 As above.

153 R Murray & F Viljoen 'Towards non-discrimination on the basis of sexual orientation: The normative basis and procedural possibilities before the African Commission on Human and Peoples' Rights and the African Union' (2007) 29 (1) *Human Rights Quarterly* 29.

154 As above.

155 E O Ezedike *African culture and the African personality: From footmarks to landmarks on African philosophy* (2009) 455.

156 Amponsah *et al* (n 150) 50.

157 As above.

can be argued that the literature that has been published by non-African scholars has, in some respects, reinforced the view that there is a Western agenda to force Africans to accept homosexuality.

1.3.4. Moral heterosexual nationalism

Moral heterosexual nationalism holds that homosexuality is immoral, unnatural and champions heterosexuality as the decent and 'natural' form of sexual citizenship. It is premised on deviance theory arguing that homosexuality is a choice that represents a deviation from what are perceived as organic heteronormative societies like Zambia. To ensure a decent sexual citizenship, moral heterosexual nationalism postulates that one of the functions of law is to enforce morals.[158] As such, most anti-sodomy laws are termed 'laws against immorality and the order of nature'.[159] This view, founded in natural law theory, contests the separation thesis that the realm of law is to prevent public harm and not to delve in the private lives of citizens.[160]

In post-colonial Zambia, moral heterosexual nationalism can be traced back to the introduction of humanism as the official national ideology in 1967. Under the guise of humanism, former President Kenneth Kaunda and the UNIP government introduced and enforced a strict national moral code contained in a booklet titled 'The Zambian moral code: A pragmatic approach' which was a citizen's duty to know and uphold.[161] The code addressed various subjects of public and private citizenship such as appropriate dress code, love, sex and marriage. Even though the code did not address sexual diversity directly, its reference to marriage and love affairs, as between man and woman affirmed the heteronormative character of humanism. If anything, it can be argued that from the tone of the code, sexual diversity or gender non-conformity were unthinkable such that they could not even be discussed or raised. The section on love and sex, for instance, consistently referred to a 'decent love affair' which it unequivocally defined as 'between a man and a woman at the sole initiation of a man; as woman, shall at all times wait to be proposed to'.[162] With such a strict definition reflecting the patriarchal nature of the code, any 'thinking' on diverse sexualities was ruled out. The Zambian moral code in many respects defined respectable citizenship and to date has an impact on sexual citizenship in Zambia.[163] Even though humanism ended in 1991, its religious undertone remained and informed subsequent governmentalities such as the declaration of Zambia as a Christian nation. It can therefore be argued that the Christian moral ethic regarding sexuality started by the missionaries and sustained by humanism in immediate post independent Zambia, was continued in the post democratisation era with the declaration of Zambia as a Christian nation.

Continuing the legacy of humanism, morality was made a constitutional value and basis for constitutional, legislative and policy formulation and interpretation in the 2016 constitutional

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158 P Delvin *The enforcement of morals* (1965) 15.

159 Human Rights Watch *This alien legacy: The origins of sodomy laws in British colonialism* (2008) 37-45.

160 L Fuller *The morality of the law* (1964) 33-38.

161 *The Zambian moral code: A programmatic approach* (1975) 13.

162 As above.

163 Van Klinken 'Sexual citizenship in postcolonial Zambia: from Zambian humanism to christian nationalism' in B Bompani & C Valois (eds) *Christian citizens and the moral regeneration of African state* (2017) 136-137, A Van Klinken 'Religion, sexualities and politics' in J Chammah *et al* (eds) *Competing for Caesar: Religion and politics in postcolonial Zambia* (2020) 85.

amendment.[164] Article 8 was introduced in the 2016 amendment to make certain that Zambia does not lose its history of upholding morality as the basis for law, policy and governance. Moral arguments to retain and enforce the anti-sodomy laws are thus partly made based on article 8 of the Constitution.[165] As discussed in Chapter 3, decisions based on article 8 can be arbitrary as exemplified by Religious Affairs Minister refusing Somizi Mhlongo entry into Zambia to perform at a concert on the following grounds:

> Every country has laws. Here in Zambia, we have a constitution that guides citizens on morals and its Christian values. We do not condone gayism. It is a crime and inviting such people means we are slowly accepting the vice.[166]

It can be argued that constitutionalising morality opens the door for political and majority abuse of minority groups such as sexual and gender minorities. Addressing this concern, the Human Rights Committee (HRC) under General Comment 22 states as follows:[167]

> The Committee observes that the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition.

It is safe to argue that Zambian moral heterosexual nationalism is the aggregation of Christian moral ethics and cultural nationalism. It appears that Zambia is stuck with the Devlinian thesis of law as a tool for policing sexual citizenship while the initiators of the law moved from that position.

1.3.5. Age of consent and protection of children

Anti-sodomy laws have also been retained as a means to protect children.[168] This argument holds that anti-sodomy laws are necessary to prevent homosexuals from having 'carnal knowledge' with children. The argument ignores the fact that 'carnal knowledge' with any person against their will is an offence and most importantly that any form of sexual conduct with a minor is an offence.[169] In Zambia carnal knowledge with any person below 18 years under the Penal Code, and the below 16 years under the Children's Code is a strict offence irrespective of consent of the person or how old the person looks.[170] However, it is admitted that stronger child protection laws are needed in response to various forms of sexual abuse such are internet pornography, child prostitution and child trafficking. Currently, the penalty for these offences in Zambia is life imprisonment.[171]

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164 Article 8, Constitution of Zambia, Act No.2 of 2016.

165 A Ministerial position responsible for national guidance and religion was created to oversee the process of ensuring that article 8 is actualised in Zambia.

166 The full story is covered on https://zambainreports.com/2019/06/south-africa-gay-artist-barred-entering-zambia (accessed 21June 2019).

167 HCR General Comment number 22 para 8.

168 Chapter 3 discusses this aspect in more detail.

169 Section 136, 137 & 138 of the Penal Code of Zambia.

170 In Zambia the age of consent is 18 years under the Penal Code section 138, of the Penal Code and 16 years under the Children's Code.

171 As above.

1.4. Nature, magnitude and impact of the problem in Zambia

1.4.1. General nature of the problem in Zambia

In brief terms, the problem is, the anti-sodomy laws of Zambia more than being a product of colonialism, represent coloniality, in that they are mainly a sustained commodity of heterosexual nationalism. Once retained at independence the laws took a life of their own in the post democratisation era but retaining aspects of the colonial governmentality on which they were first conceived. As stated in the introductory note and discussed in more detail in Chapter 3, these laws, retained, nurtured, and mobilised through heterosexual nationalism, are mischaracterised, and misapplied as anti-homosexual orientation and identity laws. The mischaracterisation and misapplication, have adverse effects on the rights of sexual and gender minorities in breach of Zambia's human rights legal obligations. The consequent breach, seen through the eyes of heterosexual nationalism, is often seen as legitimate or ignored as insignificant, as the victims (sexual and gender minorities) are labelled as deviants and constituting a criminal population.

This part highlights the general nature of the problem; mischaracterisation of anti-sodomy laws in Zambia. The magnitude and effects of the problem, relating to misapplication, are discussed later below. With respect to mischaracterisation, a pure criminal law analysis of the provisions reveals that it is not an ingredient of the offence to establish homosexual orientation for a person to be convicted. In the same light, it is not a defence for a person to argue that they are not homosexual for them to be acquitted. As such, neither the *actus reus* nor the *mens rea* of the offence require the establishment of the sexual orientation or gender identity of the accused person. This suggests that anyone who commits sodomy (has canal knowledge against the order of nature) as described in the provision, is a sodomite regardless of their partners sex, and therefore liable to prosecution and conviction if proven guilty. However, that is not the case as the provisions are misunderstood to be anti-homosexuality laws and therefore are applied exclusively against sexual and gender minorities in Zambia. Homosexuality itself, is misunderstood to mean anal sex, and all sexual and gender minorities, including intersex persons, are categorised as homosexuals in Zambia.[172] The net result is that Zambian society, driven by heterosexual nationalism, has converted 'sodomy' into a term synonymous to 'homosexuality'. Consequently, a homosexual has become synonymous to a sodomite and a sodomite synonymous to homosexual.[173] In essence, by interpretation of the anti-sodomy laws, sexual and gender minorities in Zambia are collectively and individually labelled as deviant criminal citizens, and by application this label is used to justify the myriad human rights violations against them.[174] Writing generally on anti-sodomy laws, Leslie puts the point as follows:[175]

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172 S Pierre 'Exploring discourses and actions of othering homosexual citizens by officers of the Zambia Police service in Lusaka, Zambia' unpublished master's dissertation, Van-Hall Larenstain University of Applied Science, 2013 31-33.

173 C R Leslie 'Creating criminals: The injuries inflicted by "unenforced" sodomy laws' (2000) 35 *Harvard Civil Rights-Civil Liberties Law Review* 110.

174 Panos institute *Towards equality and non-discrimination on the basis of sexual orientation and gender identity in Zambia* (2014) 8-9. See also Amnesty International 'The alien legacy of the origins of sodomy laws in British colonialism' in Lennox & Waites (eds) *Human rights, sexual orientation and gender identity in the commonwealth: From history and law to development activism and transnational dialogue* (2013) 111.

175 Leslie (n 173) 114.

> Sodomy laws do not merely express societal disapproval, they go much further by creating a criminal class. The contours of criminal class are not defined by conduct, but by sexual orientation regardless of whether one's desires are ever manifested in conduct. As members of this criminal class, gay men and lesbians are targeted for violence, police harassment and discrimination. Sodomy laws do not merely define the fluid boundaries of a social class, rather they achieve indirectly what the states cannot do directly; criminalize homosexuality.

For the first time by a court in Africa, similar concerns were expressed by the South African Constitutional Court in the landmark decision of *National Coalition for Gay and Lesbian Equality* (NCGLE) *v Minister of Justice and Others*, as follows:[176]

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

The *NCGLE* case although not in Zambia, highlights an important principle in criminal law; that states may criminalise harmful conduct but not status or identity. Thus, a law whose social effect is to criminalise identity is problematic. The universality of this principle was the focus of and discussed by the US Supreme Court in *Robinson v California*, where the court invalidated a law that criminalised being addicted to narcotics holding that 'being addicted to narcotics is a status and not an act and therefore in which case it decided that[…] punishing for such a status inflicts a cruel and unusual punishment in violation of universal human rights norms'.[177] The mischaracterisation of anti-sodomy laws raises the question of the original mischief of the laws at enactment in pre-independent Zambia and the rationale of their retention at independence. This is discussed in Chapter 2.

1.4.2. Magnitude and extent of the problem in Zambia

The mischaracterisation of anti-sodomy laws in Zambia lends itself to the second aspect of the problem; misapplication (enforcement). Based on their mischaracterisation as laws against homosexual orientation, the anti-sodomy laws of Zambia are misapplied to give effect to heteronormativity against sexual and gender minorities. Seen as legitimate, the misapplication of anti-sodomy laws in Zambia is at two levels: societal (public) and institutional. Nurtured by heterosexual nationalism, at societal (public) level, anti-sodomy laws are among the few laws where society or the public deems it justifiable to take matters into their own hands regarding their enforcement.[178] In this regard 'mob-justice' energised by heterosexual nationalism is usually carried out against sexual and gender minorities under the guise of citizens responsibility to maintain public morality and the

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176 (1998) ZACC Para 15.
177 (1962) US 660 370.
178 R Rich *The sociology of criminal law: Evaluation of the deviance of the Anglo-American society* (1979) 7.

declaration of Zambia as a Christian nation.[179] These violations occur with the full awareness of the state which turn a blind eye on them. It is worth probing the social psychology behind the mob misapplication of law in the context of sexual and gender minorities. Rich explains that heterosexual socialisation breeds subconscious hatred for sexual and gender minorities which translates to violence in 'conducive' environments of heterosexual nationalism such Zambia.[180]

At institutional level, the anti-sodomy laws are misapplied by both state and non-state actors. Among state actors are the police, health care institutions and the media, both public and private. A report by the Transbantu Association of Zambia (TBZ) supported by United States Agency for International Development (USAID) highlights disturbing human rights violations against sexual and gender minorities by Zambia police (ZP) officials in the form of rape, assault, extortion, unlawful detention and torture.[181] For instance, 32 per cent of the 'female' transgender participants who were interviewed in the TBZ survey alleged that they were raped and assaulted by police.[182] A similar statistic was recorded in the USAID / Family Health International (FHI360) 'Open Doors Project Report.'[183] The report indicates that sexual and gender minorities are abused by both the police and the public but that these cases of abuse are never officially reported and recorded as sexual and gender minorities fear further victimisation.[184] In most instances sexual minorities are 'outed by arrest' and this leads to a whole range of abuse such as media harassment, loss of family support, loss of employment and generally a normal way of life.[185] The depth of the problem is highlighted in a study on wellbeing of sexual and gender minorities in Zambia, capturing lived experience of violence:[186]

> The levels of physical violence among sexual and gender minority people in our Zambian study are not only higher than the levels of violence among the general Zambian population, they are also higher than the levels of violence among sexual and gender minority populations elsewhere in the world. For example, in Virginia, USA, 27% of transgender people participating in a community-based survey said they had experienced physical violence in their lifetime. In our Zambian study it was 64% of gender minority participants. In a study among transgender women who have a history of sex work, also done in the US, 51% of participants said they experienced physical violence in their lifetime. In our Zambian study, 68% of transgender women had experienced physical violence.

Chapter 4 discusses the magnitude of the problem and brings out the lived experiences of sexual and gender minorities in Zambia.

Non-state actors misapply the anti-sodomy laws in much the same way as state actors. For instance, one of the leading private newspapers run a series of reports against sexual and gender

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179 Transbantu Association of Zambia (TBZ) *Findings of Human Rights Violations Report 2013-2015* (2016) 15, quoting a victim of violence and abuse in Zambia. See also National Scientific research Centre & Panos Institute Southern Africa 'Combating HIV among men having sex with men in Zambia' (2016) 22.

180 Rich (n 178) 27.

181 TBZ (n 179) 3-13.

182 TBZ (n 179) 46.

183 USAID & FHI360 'Understanding the legal barriers to accessing HIV/AIDS services by key populations: Key findings from expert panel meetings' (2019) 11-12.

184 As above.

185 As above.

186 A Muller & K Daskilewicz 'Are we doing alright? Realities of violence, mental health, and access to healthcare related to sexual orientation and gender identity and expression in Zambia' (2019) 44.

minorities calling for violence as enforcement of the anti-sodomy laws.[187] It is in this regard that this thesis examines the magnitude and extent of the misapplication of the anti-sodomy laws in Zambia. Chapter 3 discusses in detail the misapplication of the anti-sodomy laws as a manifestation of their mischaracterisation.

1.4.3. Impact of the problem on sexual and gender minorities in Zambia

The mischaracterisation and consequent misapplication of anti-sodomy laws has macro and micro effects. The macro effect is that a legal and social environment has been created where discrimination, marginalisation and violent homophobic attacks on sexual and gender minorities are seen as legitimate and therefore perpetrated as briefly shown above. In this sense sexual and gender minorities are not seen as holders of human rights but rather as social deviants who deserve the attacks and other forms of human rights violations that are perpetuated on them. The micro effects are that specific rights such as health, education, dignity, as well as other specific aspects of life of sexual and gender minorities are affected in different ways that cannot even be voiced by them. The social and legal environment caused by the mischaracterisation fatefully means that sexual and gender minorities in Zambia do not have recourse to address the violations. In essence sexual and gender minorities are not only denied their sexual citizenship but all other forms of citizenship. On this aspect, the study will mainly focus on the micro effects of the mischaracterisation of anti-sodomy laws. Chapter 4 discusses in detail these micro effects -along aside Zambia's international and domestic human rights obligations. Perhaps, most notably, the micro effects of the problem, as discussed in Chapter 4, represents a breach of Zambia's domestic and international human rights legal obligations. How these micro effects can be mitigated is discussed in Chapter 5.

1.4.4. The inherent contradiction of heterosexual nationalism

As part of the problem, Zambia's construction of itself as a heterosexual nation suffers from two fundamental contradictions.

The first is that Zambia at the same time subscribes to uphold the human rights of 'everyone', within its Constitution and through its adherence to international human rights treaties, *and* subscribes to an exclusionary notion of citizenship which entails the violation of a segment of Zambian society – sexual and gender minorities.[188] The principles of equality and non-discrimination are fundamental such that the heteronormative identity that Zambia affirms does not have a sufficient margin of appreciation to support the legal, political and social environment that leads to the violation of the

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[187] 'Secret gay indaba' *The Daily Nation* 7 November 2017, 'Homosexuality business shocker' *The Daily Nation* 9 November 2017, 'Homosexuality is not Zambian' *The Daily Nation* 8 January 2018. All these stories were published as the main front pages story. In 2016 during the Constitution making process the paper had carried a series of stories inciting members of the public to rise against *"*inclusion of gay rights in the constitution*"*. The United States Government through there embassy in Zambia reacted to this stating that the paper had misrepresented facts. http://www.lusakatimes.com (accessed 26 December 2017).

[188] For a full discussion of the application of international human rights law in the context sexual minorities see, F Viljoen 'Sexual orientation as a challenge to the harmonized interpretation of international human rights law' in CM Buckley, A Donald & P Leach (eds) *Towards convergence in international human rights law: Approaches of regional and international systems* (2016) 156-193. And for a detailed discussion of sexual minority rights under the African human rights system see Murray & Viljoen (n 153).

rights of sexual minorities.[189] It can be argued that even though the site of citizenship in general is the nation state, the international human rights system guarantees rights that transcend the nation state. In essence the contention being that, by retaining anti-sodomy laws and misapplying them as described, heterosexual nationalism fails to recognise that we now live in a multicultural, multireligious and normatively diverse postmodern world where the diversity of sexual citizenship can still be part of nationhood through adherence to universal human rights norms and standards.

The second is: While Zambia professes to be a Christian nation, which gives rise to an expectation of adherence to the values of love, tolerance, forgiveness, empathy, inclusion, peace and non-violence, it advances the opposite through anti-sodomy laws. Instead of advancing hatred through anti-sodomy laws, Zambia should advance the central teaching of the scripture comprised of the fundamental Christian values highlighted above. These teachings of the scripture were well captured in a communication by the World Council of Churches (WCCZ) in 2009, commenting on the Anti-homosexuality Bill of Uganda, as follows:[190]

> Lord Jesus summarized the Ten Commandments in the two cardinal teachings- Love God with all your being and to love one's neighbour as oneself. According to Jesus Christ, all law and commandments were created to teach us to LOVE. Under conditions of human sin, law must provide a framework to protect the vulnerable and limit the misuse of power of individuals and groups in society. It should definitely not promote hatred […] from the experience of many nations, it is very clear that if such a bill [the anti-homosexuality bill] is passed into law, it will leave a lot of from for manipulation, abuse, blackmail and oppression of people.

In recent years, Pope Francis has weighed in on the need for the church as a body of Christ to embrace sexual and gender minorities as members of the Christian body, the Catholic Church, and as normal sexual citizens deserving of compassion, dignity and protection of their rights.[191] During the launch of sexual and gender minority website for Catholics, Pope Francis remarked that:

> Does God disown any of his children? God is Father and he does not disown any of his children. And 'the style' of God is 'closeness, mercy, and tenderness.' Along this path, you will find God. A selective church is not a holy mother Church, it is a sect.[192]

The above counter narrative embraces the Christian principles of empathy, compassion, love and acceptance with the human rights principles of inclusion, equality and non-discrimination. In other

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189 A Mwansa 'Law, religion and human rights in Zambia: Past, present and the practice' (2008) 8 *African Human Rights Journal* 554. It is worth noting that the jurisprudence of the European Court of Human Rights discusses the margin of appreciation in most of its decisions regarding sexual minorities. For instance, in *X and Others v Austria* Application 19010/07 the Court stated that 'when an important facet of an individual's existence or identity is at stake, the margin allowed to state will be restricted.'

190 'Pastoral letter from the WCCZ to President Yoweri Kaguta Museveni regarding the anti-homosexuality bill' 22 December 2009 https://www.oikoumene.org/resources/documents/letter-to-the-president-of-uganda-mr-yoweri-kaguta-museveni (accessed 20 November 2019).

191 'Pope Francis says he supports civil union for homosexual couples' *RIF International* 22 October 2020. https://www.rfi.fr/en/international/20201022-pope-francis-says-he-supports-civil-union-for-homosexual-couples-but-still-against-gay-marriage-catholic (accessed 2 November 2022).

192 'Pope Francis to LGBT People: God does not disown any of his children' Catholic News Agency 9 May 2022. https://www.catholicnewsagency.com/news/251180/pope-francis-to-lgbt-people-god-does-not-disown-any-of-his-children (accessed 2 November 2022).

words they centre human dignity thereby showing that heterosexual nationalism and the retention of anti-sodomy laws are inconsistent with Christianity and Zambia's constitutionally expressed values of equality, non-discrimination, human dignity, democracy and peace as stated in article 8 of the Constitution.

1.5. Limitation and Delineation of the study

1.5.1. Limitations of the study

This study is limited to the mischaracterisation, and misapplication of anti-sodomy laws in Zambia as a result of heterosexual nationalism as highlighted in the problem statement above.

This thesis notes that another major problem with anti-sodomy laws is their inherent discriminatory nature against sexual and gender minorities.[193] Hence even if the provisions were correctly characterised (not mischaracterised) and correctly applied, the problem would remain that they are intrinsically discriminatory in the sense that by criminalising consensual same-sex conduct in private between adults, they also de-humanise sexual and gender minorities by labeling conduct which is an expression their of intimacy and love as un-natural, immoral and worthy of punishment.[194] For purposes of this study, this thesis takes the view that whether sexual orientation and gender identity are a choice or not, it does not justify the retention of anti-sodomy laws, more so taking into account their impact on sexual citizenship.[195] However, this aspect of anti-sodomy laws in not the focus of this study, although by implication, aspects of it will be raised in the study. Hence the impact discussed in this study (see Chapter 4) are those resulting from the mischaracterisation and misapplication of the anti-sodomy laws in Zambia and not from their inherent discriminatory nature as such.

This thesis takes this approach because most of the literature focuses on the inherent discriminatory nature of the anti-sodomy laws and as such much a considerable body of knowledge and case law exists on that aspect. Rarely examined, however, is the mischaracterisation and misapplication of the laws and the consequent impact on the rights and lives of sexual and gender minorities. In fact, some scholarly works are also guilty of mischaracterisation of the laws, as when they construe anti-sodomy laws as laws against homosexuality and not against particular sexual conduct described in the provisions. When the academy does not draw this distinction between identity and conduct, it reinforces the perception that sexual and gender minorities are sexual deviants, a class of criminals and reduces their humanity to physical aspects of their sexuality. This is an issue worth correcting.

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193 This is highlighted in decisions like *Toonen v Australia, Com no.* 488/1992, UN Doc CCPR/C/50/D; *Lawrence v Texas* 539 U.S. 558 (2003); *National Coalition for Gay and Lesbian Equality v Minister of Justice* (1998) ZACC 15.

194 Amnesty International *Making love a crime: criminalization of same sex conduct in sub-Saharan Africa* (2013) 7-8.

195 E Stein 'Law, sexual orientation and gender' in J Coleman and S Shapiro (eds) *The Oxford handbook of jurisprudence and philosophy of law* (2002) 1011-1013.

1.5.2. Delineation of the study

In terms of time frame the study had a cut-oof point for events. It only looked at events –predominantly in Zambia as the country of focus– up to 30 July 2022. While events beyond that date may have been useful, they have not referenced to the inform the analysis and discourse of this study.[196] Suffice to say that events beyond 30 July 2022 would only bring the same themes and frames of heterosexual nationalism and the mischaracterisation of anti-sodomy laws in Zambia that are already well covered by the used past events.

The cut of mark for academic sources was 30 October 2022. This cut of date was meant to ensure that the study is as up to date with peer reviewed academic literature as much as possible.

1.6. Theoretical framework of the study

Heterosexual nationalism and the mischaracterisation and misapplication of anti-sodomy laws brings into light sexual citizenship theory in the context of the minority rights thesis, labelling theory in the context of queer criminology, decoloniality and coloniality. This thesis congregates these theories as the theoretical framework underpinning the study. Each chapter is informed by and grounded in one or more of these theoretical perspectives.

Briefly, in congregating these theories this thesis contends that: Colonialism changed the way pre-colonial Zambian polities and societies saw themselves in that the process incrementally made these societies identify themselves more with colonial values, practices, and ways of thinking. One of these identities was and remains the Christian identity. Once Zambian societies began to identify themselves as 'Christians' the identity became deeply entrenched in the national society and in individuals, such that in post-colonial Zambia, the identity reproduced itself into the current national and individual coloniality; going to the extent of the constitutional declaration of Zambia as a Christian nation. The national society continued to see itself as a Christian society which maintained the good aspects of African culture, and the individual continued to subscribe to the Christian and cultural mores

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[196] For instance, on 3 September a fashion event called the 'Lusaka July' where some models and attendees cross dressed. This sparked yet homophobic discourse to the extent that for the first time, a group of 'concerned citizens' matched to the Presidential house in protest against what they framed as 'the rise of homosexuality in Zambia'. The banners carried included slogans like 'arrest all gays' 'kill the gays' 'gays are dangerous to our children'. As usual the agents of heterosexual nationalism weighed in with the pentecostal church leadership not only condemning the cross dressing at the fashion event but also calling on the state to prosecute all homosexuals. The President of the Republic also issued a press statement reiterating that Zambia is a Christian nation and would not tolerate homosexuality as it was against the law. Like in past events, the discourse brings out the themes of Christian, cultural and moral heterosexual nationalism with all the discourse leaders mischaracterising the anti-sodomy laws. This time even the Catholic church weighed in speaking against sexual and gender minorities but the statement of the Bishop of Lusaka who issued it was quickly corrected by the official compassionate and inclusive position of the Church in line with Pope Francis guidance stated above. For an understanding of these events see https://ne-np.facebook.com/Kalemba.news/photos/a.347798849091008/1362098264327723/?type=3, https://www.losangelesblade.com/2022/09/23/zambia-president-reiterates-opposition-to-lgbtq-intersex-rights/, https://www.lusakatimes.com/2022/09/23/lgbtq-debate-of-hypocrites-philanderers-slanderers/, https://anglican.ink/2022/09/26/catholic-archbishop-of-lusaka-condemns-growing-influence-of-lgbt-in-zambia/ and https://www.lusakatimes.com/2022/09/06/we-are-not-promoting-gay-rights-says-pr-media-the-company-behind-lusaka-july/ (accessed on 3 November 2022). Some counter narrative was also made, for instance in a position paper, O Kaaba & P Sambo 'The constitutional status of gay people in Zambia' (2022) stated that sexual and gender minorities are deserve the same constitutional protection as other citizens in Zambia.

demanded by the national society. In this sense the post-colonial Zambian society, determined to produce an authentic identity, unsuspectingly produced a definition of good citizenship; one who is Christian, respects culture and has a sense of common or popular morality thereby producing the forms of nationalism discussed above- (coloniality and decoloniality). In this definition of good citizenship, non-heterosexual identities are excluded such that the state deems it just and fit to police sexuality by exercising bio-power for the sake of preserving the accepted sexual citizenship of the national society-(sexual citizenship). Those that are seen to break this law (sexual and gender minorities) are labelled as deviants- offenders of not only the law but also the national-societal mores-(Queer criminology and labelling theory). To the extent that sexual and gender minorities are labelled as deviants, the violation of their rights is seen legitimate, the anti-sodomy laws seen as necessary, and the minority rights thesis treated with exceptionalism- (minority rights thesis). Heterosexual nationalism and the retention of the anti-sodomy laws are therefore a representation of Zambian (individual and social) coloniality, a form of governmentality and a manifestation of both.

The minority rights thesis and sexual citizenship theory come in the context of Zambia as a democracy with a supreme constitution that declared the Republic a Christian nation. In this regard the principle of rule by the majority is used to justify the retention of anti-sodomy laws on the basis that the provisions express the aspirations of Zambians to be governed on Christian values. The deceleration of Zambia as a Christian nation in the Constitution suggests that heterosexual nationalism is part of Zambia's constitutionalism. The minority rights thesis is a theocratical perspective that contests the view that democracy is solely about majority rule.[197] It postulates that even in a democracy, government or the state has a duty to respect, protect and fulfil minority rights including sexual and gender minorities.[198] In the context of sexual and gender minorities, the minority rights thesis extends to the argument that even though sexual orientation and gender identity are not expressly stated as prohibited grounds of discrimination in international instruments and national constitutions, the provisions of these instruments and constitutions as living documents, can be read in an innovative and expansive manner to include protection of sexual and gender minorities.[199] To this end, the study subscribed to the postulations of John Stuart Mill, who adeptly theorised on the role of the state to avoid a tyranny of the majority and further to do no harm.[200] Mill's postulation further forms the foundation for the argument that the state in a democracy has no right to criminalise private acts that do not harm other citizens. The minority rights thesis was best illustrated in the decision of the Constitutional Court of South Africa in *Minister of Home Affairs v Fourie,* where it was stated:[201]

> Gays and lesbians are a permanent minority in society who have suffered patterns of disadvantage and are consequently exclusively reliant on the Bill of rights for their protection; the impact of discrimination on them has been severe, affecting their dignity, personhood and identity at many levels.

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197 G Pentassuglia *Minority rights, human rights: A review of basic concepts, entitlements and implementation procedures under international law* (2019) 12-25.

198 J Donnelly *Universal human rights in theory and practice* (2013) 270-320.

199 Murray & Viljoen (n 153) 89.

200 JS Mill *On liberty* (1859) 69-70.

201 (2005) ZACC 19, 2006. Cases such as the *Toonen* case can also be argued to have been decided on the minority rights thesis.

The African Commission can also be said to have pronounced itself on the minority rights thesis in *Legal Resources Foundation v Zambia,* when it held:[202]

> Justification […] cannot be derived solely from popular will, as such cannot be used to limit the responsibilities of states parties in terms of the Charter.

On this basis sexual citizenship theory is used to argue that sexuality is an essential part of citizenship in a democracy and therefore, should not be unjustly limited by the law. First introduced by David Evans who wanted to challenge the then existing constructionist theories of sexuality, the concept of sexual citizenship has now developed in such a way that it draws attention to various aspects of the sexuality of citizenship and its political dimension.[203] In brief, sexual citizenship theory posits that all citizenship is gendered and sexualised and therefore that law should protect the sex and gender expressions of citizens in both public and private places. In this regard it highlights the fact that certain groups of citizens have been stigmatised, marginalised, and discriminated against due to their non-conformity to constructed values of moral and decent sexual citizenship such as those in heterosexual nations like Zambia. These moral values include Christian moral ethics acquired through heterosexual socialisation.

The criminalisation of consensual same-sex sexual conduct between adults, as well as social and institutional exclusion are the most contested subjects in sexual citizenship discourses.[204] These forms of exclusion are based on the construction that normal sexual citizenship is heterosexual and most importantly the labelling of other forms of sexuality and expressions as deviant. In essence, and complementing the minority rights thesis, sexual citizenship theory holds that in a democracy, all citizens are equal and thus full citizenship participation cannot occur if others are forced to the margins on account of constructed majority views of sexuality.[205] In this regard Hekman explains:[206]

> The concept of sexual citizenship draws our attention to all kinds of social exclusions that the various sexual communities experience. These exclusions inhibit their political, social, cultural, and economic participation. The various constraints point to the necessity of queering all kinds of institutions. Simply allowing sexual minorities into these organizations on an individual basis does not challenge the heterosexist assumptions that govern most societies.

The global perspective of sexual citizenship provides a lens through which sexual and gender minorities are viewed differently in different political cultures while also demonstrating similar patterns of exclusion. For example, in most western (European) democracies, sexual and gender minorities have moved from seeking legal exclusion to now narrowly seeking social inclusion.[207] On

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202 (2001) ACHPR, Communication 211/98.

203 For a full discussion of the initial discourse of sexual citizenship see E David *Sexual citizenship: The material construction of sexualities* (1993)1-19. And for a detailed discussion of the current discourse and use of the concept see D Richardson 'Rethinking sexual citizenship' (2017) *Sociology* 208-224.

204 Donnelly (n 198) 275.

205 G Hekman 'Sexual citizenship' (2014) *The LGBTI encyclopedia* http://www.glbtq.com (accesses 10 July 2019).

206 As above.

207 All countries in the European Union have not only decriminalised consensual same-sex sexual conduct between adults but have deliberate policies on inclusion which include diversity in sexuality socialisation. See for instance 'Guidelines to promote and protect the enjoyment of all human rights by Lesbians, Gay, Bisexual, Transgender and intersex

the other hand, in most African states, particularly heterosexual nations, sexual and gender minorities have both legal and social exclusion as citizens and much worse are labelled as deviant citizens. The discourse on sexual citizenship in general highlights the point that other forms of citizenship are respected at the expense of sexual citizenship. For instance, Hekman points out that

> [t]he various aspects of citizenship enable a comparison of the importance a society gives to each. [For example], although most democracies have separated state and church, old traditions remain strong religious citizenship continues to receive wide acknowledgement and to exert powerful influence in education and politics, while denial or neglect of sexual citizenship in such areas remains the norm. [208]

The minority rights thesis and sexual citizenship theory thus contests heterosexual nationalism and its majoritarian based arguments for the justification and retention of anti-sodomy laws- as a form of democratic constitutionalism in Zambia. In advancing these two theories, This thesis argued that the function of law in a democracy is to protect both majority and minority rights.

As stated above, anti-sodomy laws in Zambia are not only a product of colonialism requiring a decolonialisation approach (discussed in Chapter 2), but they are also a sustained commodity of heterosexual nationalism (discussed in Chapter 3) requiring decoloniality. This is important because as scholars we tend to focus on, and blame, anti-sodomy laws and their impact, on colonialism rather than on coloniality. This thesis argues that infact, the manifest impact of anti-sodomy laws on sexual and gender minorities in Zambia presently, is more because of heteronormative coloniality than of colonialism or colonisation. Colonialism and colonisation introduced, in pre-colonial African societies, laws and patterns of thinking about the law and society. Coloniality is the manifest survival of these laws and the attendant patterns of thinking.[209] In this regard decolonisation and decoloniality were important to the study because the anti-sodomy laws have an etiology and legacy that is relevant to their present characterisation, which impacts on sexual and gender minorities.[210] Further, any reform of law requires an appreciation of the history, object and purpose of that law in relation to its current usage. To this end this thesis also employed decolonisation and decoloniality as related theoretical perspectives to contextualise the socio-legal history of the anti-sodomy laws.

Decolonisation as a conceptual framework and as defined in this study informed Chapter 2. Ideologically decolonisation is not a settled concept if not a contested one. [211] However, it is settled that 'it is not some naïve desire to return to a pristine, unblemished Africa before the arrival of colonialists'.[212] The concept has evolved and is used in different contexts. In the African context,

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(LGBTI) Person in the European Union' (2013) https://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/137584.pdf (accessed 2 November 2022). The jurisprudence of the European Court of Human Rights in recent cases such as *Beizaras and Levicka v Lithuania* (2020) ECHRt /41288/15, such highlights the level of protection and inclusion of sexual and gender minorities. AS SCU, EU members states feature among the most tolerant countries regarding sexual and gender minorities with acceptance level of up to 76 per cent of EU population. See 'The EU and LGBTI' (2020) https://op.europa.eu/webpub/com/factsheets/lgbti/en/ (accessed 3 November 2022).

208 As above.

209 Maldonado-Torres (n 17) 243.

210 See problem statement above.

211 C Himonga and F Dialo 'Decolonisation and the teaching of law in Africa with special reference to living customary law' (2017) http://dx.doi.org/10.17159/1727 (accessed 10 July 2019).

212 As above.

decolonisation was first used in a political structural sense, as the withdrawal by former colonial powers from their colonies and /or the struggle and consequent attainment of political and economic independence from colonial powers.[213] This definition is grounded in the fact that most African countries experienced settler and semi-settler colonisation. Thus, Darwin writes that the 'true meaning of decolonisation is the process of surrender by an imperial power' and that:

> [t]he hallmark of decolonisation became the surrender of political sovereignty over the peoples of Africa and Asia and the emergence of independent nation-states where once European administrators and settlers had ruled supreme. The 'third world' replaced the 'colonial world'.[214]

It can be noted that such structural definitions of decolonisation position both the colonised and the coloniser as the agents of decolonisation. However, this thesis contends that decolonisation should, be more than political and structural changes in the constitutional status of former colonised states. Otherwise, decolonisation would simply mean the end of colonialisation. Thus, over time, after the independence of most African countries and the birth of the 'third world' as Darwin puts it, the concept evolved in a way that other agents of decolonisation such civil society leaders, social movements and predominantly academics took centre stage and made decolonisation a discussive field of research and knowledge generation.[215] In this regards decolonisation was defined in less structural, and more ideological manner.[216] Smith notes in this regard that decolonisation, once viewed as the formal process of handing over the instruments of government, is now recognised as a long-term process involving the bureaucratic, cultural, linguistic and psychological divesting of colonial power.[217]

While it is not within the scope of this thesis to comprehensively discuss the evolution and usage of decolonisation as a conceptual frame, the common thread in the various perspectives is that it involves a rediscovery, an understanding, a restoration and validation of the pre-colonial cultures, rationalities, customs and laws in relation to colonialism and the disruptive effect that colonisation had on them.[218] For instance, Frantz Fanon, one of the leading voices on decolonisation, posits that that colonialism distorts, disfigures, and destroys the past and effectively transforms the present and future of oppressed people.[219] He further argues that decolonisation is a process of creating a national consciousness which allows restoration and validation of pre-colonial mentalities and structures.[220] It is in this perspective that this study defines and uses the concept of decolonisation. Thus, decolonisation in the study meant examining pre-colonial constructions of sexual diversity in the

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213 See J Darwin *Britain and Decolonisation: The retreat from empire in the post -war world* (1998) 5-17 and H Weaver 'Indigenous struggles for justice: Restoring balance within the context of Anglo settler societies' in M Reisch *The Routledge international handbook of social justice* (2014) 119-120.

214 Darwin (n 164) 6.

215 For a detailed discussion see Reisch (n 164). See also L T Smith *Decolonising research methodologies* (2012) xii, 21 and A Nigam *Decolonising theory* (2020) and D Ruthermund *The Routledge companion on decolonization* (2006) 1-2.

216 M Kohn & K McBride *Political theories of decolonisation* (2011) 24, 118. The body of knowledge on decolonisation has been growing with different themes and conceptions such as the decolonising the curriculum, decolonising social justice, decolonising economics, decolonising health systems and most recently decolonising constitutionalism.

217 Smith (n 215) 100 and Kohn & McBride (n 216) 24.

218 Smith (n 215) 21-26.

219 As above

220 In the context of sexual diversity, this this argues that such a restoration can only occur over time through non-heterosexual socialisation and in some cases resocialisation.

territory that is present day Zambia and the impact of the anti-sodomy laws on those constructions of sexual diversity. In this regard, decolonisation of the anti-sodomy laws meant understanding their cultural disruptive effective, or as Fanon put it the 'violence and complete disorder brought by colonialism and colonisation'.[221] Fanon and other decolonial scholars such as Nandy state that colonialism and colonisation disconnected pre-colonial societies from their ways of life and subsequent generations from their histories and changed their world view.[222] Chapter 2 therefore sought to 'recover' the pre-colonial ways of life in relation to sexuality and *re*right (pan intended) that history with a view of to counter what Msibi calls 'the lies we have been told'.[223] Smith affirms that decolonisation involves an examination of periods of time; The pre-colonial times, the colonised times and the post-colonial times.[224] This thesis sought to do just that. It can thus be said that decolonisation (of the anti-sodomy laws in this case) helps create an understanding of coloniality, and understanding coloniality makes it possible for decoloniality to occur. In taking this etiological approach of decolonising the anti-sodomy laws, this thesis also used the historical school of jurisprudence.[225] The historical school, similar to decolonisation, involves a methodological approach of examining the etiology of law.[226]

Viewed through the lens of its drivers, heterosexual nationalism, in a sense, has a decolonialisation effort – a contestation of what is seen as unAfrican and unZambian. However, when the anti-sodomy laws are decolonised in the context of this study, as done in Chapter 2, it is apparent that far from being a decolonisation effort, heterosexual nationalism is a form of coloniality. Coloniality is less visible than the socio-economic and political subjection of colonisation and can be therefore be misunderstood as a form of cultural patriotism when in fact a defence of cultural disruption. This thesis contends that had the African culture of tolerance towards sexual diversity survived colonialism and informed the law, the criminology of colonial and post-colonial African states such as Zambia would have been 'queered'. The value of decolonising the anti-sodomy laws in this study was therefore to underscore the invalidity of heterosexual nationalism as a form of coloniality, and its accompanying arguments for the retention of anti-sodomy laws. It was a quest to *re*right, as earlier stated, the history of African and Zambian culture so as to dismantle 'incorrect narratives' about sexuality, sexual diversity and the anti-sodomy laws. In the main, decolonising the anti-sodomy laws as seen in Chapter 2 shows that heterosexual nationalism and the anti-sodomy laws was inconsistent with the lived experiences of the colonised communities in Zambia.

Related to decolonisation, decoloniality was an important theoretical frame for this study. Notably, like decolonisation, decoloniality is not a singular theoretical school of thought, but a family of diverse positions that share a view of coloniality as the fundamental problem in modern day

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221 As above.

222 As above.

223 Msibi T 'Lies we have been told: On (Homo) sexuality in Africa' (2015) 58 *Africa Today* 56. Msibi contests the narrative that 'homosexuality' is unAfrican by discussing sexual diversity in pre-colonial African societies.

224 Smith (n 167) 25.

225 For a deeper understanding of the historical school, see M D A Freeman I*ntroduction to jurisprudence* (2001) 903-994.

226 As above.

Africa.[227] As used in this thesis, decoloniality is broadly a contestation of coloniality. In this regard, Shawa writes:[228]

> While juridical-political colonisation is a thing of the past, the long-standing ways of thinking and acting that have been perpetuated by colonialism still exist and require challenging. These long-standing ways of thinking and acting, are also known as coloniality.

Coloniality was therefore used to explain that heterosexual nationalism and the mischaracterisation of anti-sodomy laws represent theses long-standing patterns of thinking and acting that emerged as a result of colonialism and colonisation, and which now define culture, intersubjective relations, religious subjectivities and knowledge production well beyond the strict limits of colonial administrations.[229] Indeed in most Commonwealth African states, as in Zambia, coloniality is heteronormative, hence heterosexual nationalism in Zambia. Ndlovu-Gatsheni corroborates that 'as a product of colonialism in Africa, coloniality as a power structure and epistemological design is christian-centric, hetero-normative, patriarchal and racially hierarchised'.[230] In this sense, it can be argued that coloniality apart from being a product of colonialism is most prominently a product of post-colonial forms socialisation, meaning that colonial systems and patterns of thought (on sexuality to be specific) are ingrained in the mind and have continued to manifest in the up-brining of post-colonial generations through the agents of socialisation. The agents of socialisation in Zambia, as already stated above,[231] such as schools, churches and homes are heteronormative.[232] Heterosexual socialisation started with colonialism, when the culture of sexual diversity was disrupted. Post-colonial Zambia has continued with heterosexual socialisation thereby producing heterosexual nationalism which rejects the pre-colonial culture of sexual diversity. As such decoloniality, in my view, is a struggle to recreate the pre-colonial patterns of socialisation on sexual diversity in a 'post-modern' world. In other words, to contest heterosexual nationalism and the anti-sodomy laws, means countering the heterosexual socialisation that has been deeply engraved in social psyche of Zambia since the creation of the colonial state.

Maldonado-Torres states that, in surviving colonialism, coloniality is maintained through cultural patterns, books, common sense, in the self-image of people, in aspirations of self, in government rationalisations and in laws and policies.[233] All these sites of coloniality are heteronormative as discussed in Chapter 3. As post-colonial generations, when holding positions of power and different levels of decision making in the executive, judiciary, legislature, in churches and

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227 Ndlovu-Gatsheni (n 13) 13.

228 L B Shawa 'In defence of education that embodies decolonisation' in C H Manthalu & Y Waghid (eds) *Education for decoloniality and decolonisation in Africa* (2019) 91.

229 Maldonado-Torres (n 17) 245.

230 Ndlovu-Gatsheni (n 13) 11.

231 See n 67.

232 For instance, Ndlovu-Gatsheni (n 17) 11, writes that 'what is disturbing [about coloniality in Africa] is that African children and youth begin a journey of alienation from their African context the very moment they step into school, church and the university door. They begin to hate their progenitors as demons, they are taught that all knowledge they possessed before school or church must be forgotten. Preachers, teachers, and lecturers produced by colonially constructed institutions exist as lost children of coloniality.'

233 Maldonado-Torres (n 17) 245.

school, reproduce colonial –or rather continue with– colonial heteronormative governmentalities. Describing this aspect of coloniality Ruthermund states the following:[234]

> There is a complex legacy of colonial rule, which would escape our attention if we stopped at that point. In most cases the national elites that replaced the colonial rulers took over the state as a going concern with all its instruments of governance. They also accepted the boundaries of the colonial states as if they were 'natural' ones. Programmes drafted by national movements before the 'transfer of power' were often shelved in the interest of consolidating the new states. Lifestyles adopted in colonial times often persisted for a long time.

In similar light, Simukungwe states that coloniality 'is a complex web of internalised oppression created by colonisation, which survived juridical-political decolonisation'.[235] Heterosexual nationalism and the retention of anti-sodomy laws in Zambia represent this after life of colonialism described by Ruthermund.

Labelling theory explains that the mischaracterisation of anti-sodomy laws is due to the social label of sexual and gender minorities as deviant citizens. The labelling process starts with heterosexual socialisation sustained through coloniality as explained above. Once labelled as deviants, sexual and gender minorities are not seen as sexual citizens requiring protection but as criminals in the criminal justice system, with anti-sodomy laws serving as the basis of criminality.[236] Durkheim, attributed as the father of labelling theory and deviance, posited that 'crime is not so much as a violation of a penal code as it is an act that outrages society through deviation from a constructed cultural norm'.[237]

Labelling theory holds that deviance of a class of citizens in society is a construction by those who label them as deviant.[238] Deviance is a way of 'othering' in essence. Becker explains that

> social groups create deviance by making rules whose infraction creates deviance, and by applying those rules to particular people and labelling them as outsiders. From this point of view, deviance is not a quality of the act the person commits, but rather a consequence of the application by other of rules and sanctions to an 'offender.' The deviant is one to whom that label has been successfully applied; deviant behaviour is behaviour that people so label.[239]

Labelling theory and deviance further crucially explain that deviance is a construction of power figures in society such as Politicians, religious leaders, traditional leaders and the business ruling class, created as a form of social control and maintenance of power.[240] Labelling theory underlines the importance of who applies the label, the validity of the label and the impact of the label. In the context of Zambia my analysis is that those who create and apply the label of deviance on sexual and gender minorities, are also the primary actors and discourse controllers of heterosexual nationalism – political, religious

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234 Ruthermund (n 215) 188.

235 M Simukungwe 'Universities as sites for advancing education for decolonisation: The case of Zambian Universities' in C H Manthalu & Y Waghid (eds) *Education for decoloniality and decolonisation in Africa* (2019) 76.

236 Leslie (n 175) 110.

237 E Durkheim *Suicide* (1897) 97-105.

238 J Knutsson *Labeling theory: A critical examination* (1977) 18.

239 H Becker *The outsider* (1973) 9.

240 As above.

and to some extent traditional leaders. Those who enforce the label are secondary actors under the control of the primary actors such as the police, medical centres and general citizens who are religious inclined and heterosexual socialised. Sexual and gender minorities are the sexual citizens impacted by the label. In this sense labelling theory, in my view, intersects with Foucault's theory on *government* and governmentality. When labels of deviance were/are created and applied as a form of social control on sexual citizenship, in essence they became/become a form of *government* as defined above. One of the impacts is that the label will influence the behaviour and self-identity of the labelled person or group[241] (sexual and gender minorities in this case) which is referred to as secondary deviance, or *sexual governmentality* as defined in the Foucauldian sense above.[242] In this regard the theory was employed to examine the deviant label attached to sexual and gender minorities and the impact of the label in the interpretation and application of anti-sodomy laws in Zambia. It explains that the stigma and discrimination on the basis of sexual orientation and gender identity are products of the label of deviance which is deeply engrained during the process of heterosexual socialisation to an extent that human rights exceptionalism appears to be a valid legal-political position.[243] In Zambia's heterosexual nation identity, religious nationalism is so strong that the label given to sexual and gender minorities as deviants seems incontestable. The mischaracterisation and misapplication of anti-sodomy laws as a social instrument to punish this deviance thus appears to be legitimate. In this regard, decriminalisation becomes an aspiration to be perused but never attained. In employing labelling theory, this thesis argues that the first step in countries that decriminalised anti-sodomy laws, was to shift the paradigm from labelling sexual and gender minorities as social deviants to their recognition as equal citizens with rights and dignity worthy of protection. For instance, Chapter 5 shows that in the UK, the de-labelling process started with the Wolfenden Committee report were consensual same-sex acts were framed outside the label of deviance to that of normal sexual citizens whose form of intimate expressions in private was not a subject for criminal law.[244]

Labelling theory with respect to sexual minorities developed its own theoretical frame in *Queer criminology.* Queer criminology is a particular theoretical and practical approach (within labelling and deviance theory) that seeks to highlight and draw attention to the stigmatisation, criminalisation and in many ways the rejection of sexual and gender minorities as sexual citizens within the criminal justice system.[245] As will be seen throughout the study, queer criminology is more than simply adding

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241 G Mead & H Becker *Labelling theory: social constructionism, social stigma and deinstitutionalisation* (2013) 33.

242 See definition in section 1.2. D Matza *On becoming deviant* (1969) 165-167, described the process of secondary deviance or sexual governmentality vividly as follows:

> In shocked discovery, the subject now concretely understands that there are serious people who really go around building their lives around his activities—stopping him, correcting him, devoted to him. They keep records on the course of his life, even develop theories on how he got that way. Pressed by such a display, the subject may begin to add meaning and gravity to his deviant activities. But he may do so in a way not especially intended by agents of the state.

243 This is evident from the countless time that African leaders, including former and current Zambian Presidents have attached the label of deviance to sexual and gender minority and therefore conclude that their rights are part of human rights. See n 80 and 147. See also Jjuuko, Viljoen, Gloppen & Msosa (n 83) who argue that human rights exceptionalism is used in African queer lawfare as all-purpose political currency for myriad and political actors, with domestic sexual and gender minority rights activists portrayed as foreign agents and discredited as proxies.

244 See section 5.2.1 in Chapter 5.

245 M Ball 'Queer criminology, critique and the art of "art of not being governed*"* (2014) 21 *Critical Criminology International Journal* 22.

sexuality or gender as a variable to research. Buist and Lenning state that 'queer criminology seeks to both move sexual and gender minorities from the margins to the centre of criminological and legal inquiry, and to investigate and challenge the ways that the criminal justice system has been used as tool to single out and oppress sexual and gender minorities'.[246] Queer criminology developed from the recognition that the salient characteristics and human experiences of sexual and gender minorities were ignored in mainstream sociology and criminology research to the effect that they were never moved from the position of deviance to a position of victimisation or vulnerability.[247] Thus, queer criminology is based on the protest that heterosexual and cisgender people make laws about sexuality for queer people without regard to queer lived experiences. Anti-sodomy laws introduced in Zambia through colonisation and without regard to the culture of sexual diversity in pre-colonial times, as discussed in Chapter 2 are an example of such laws. In this regard even though queer criminology as a theory does not rhetorise that 'queer laws, made by queer people, for queer people', in practice, as a form of activism, it does contest the making and use of criminal law that negatively impacts on queer lives, ignores their lived experiences and outrightly deny them of their sexual citizenship.[248] In this study queer criminology as a theoretical framework was therefore used to highlight how anti-sodomy laws are used in heterosexual nations to single out and oppress sexual and gender minorities under the label that they are deviants, thereby denying them of their rights as citizen in general and sexual citizens in particular. It is therefore through the eyes of queer criminology, as an offshoot of labelling theory, that the mischaracterisation of the anti-sodomy laws and its impact in Zambia as a heterosexual nation is discussed. Ultimately, queer criminology seeks to 'queer' the law and the criminal justice system. In so doing queer criminology as a theoretical frame aligns with sexual citizenship theory, the minority rights thesis and the need for decoloniality, thereby completing the congregation of the theocratical basis of this study. Chapter 6 makes recommendations regarding these perspectives as they relate to the mischaracterisation of anti-sodomy laws and their impact on sexual and gender minorities in Zambia.

1.7. Research questions

Arising from the discussion so far, the study poses the following primary research questions: Given its nature, to what extent does heterosexual nationalism influence the interpretation and application of anti-sodomy laws? This primary questions demand detailed understanding of heterosexual nationalism in a given context. To answer the question in the Zambian context, the study also seeks to answer the following underlying questions:

1. What was the original mischief to be prevented and purpose of the anti-sodomy provisions in Zambia? In answering this question, the thesis discusses legislation in the colonial and post-colonial eras, specifically after 1991.

2. How are the anti-sodomy provisions currently understood and applied in Zambia?

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246 C Buist and E Lenning *Queer criminology* (2016) 1.

247 As above.

248 B Woods 'Queer contestations and the future of critical "queer" criminology' (2013) *Critical Criminology* 6.

3. What is the impact of the current understanding and application of the anti-sodomy provisions on the human rights of sexual minorities in Zambia?

4. Would decriminalisation mitigate the impact of mischaracterisation of the anti-sodomy laws in Zambia, and if so, how? How can this be achieved?

1.8. Methodology and approach

The study has a single-country focus (on Zambia) and takes a desk-based socio-legal approach. The country focus is adopted due to its particular attention to the socio-legal aspects of the research.[249] In this regard the thesis examines the legal and non-legal elements that are at play in Zambia regarding heterosexual nationalism and the characterisation and impact of the anti-sodomy laws. Through this approach, general patterns of heterosexual nationalism can be better understood in terms of how they manifest in country settings. Commenting on the value of the socio-legal method, Jhiering states that 'one cannot understand what goes on in a factory by reading the Factories Act'.[250] In the same way, anti-sodomy laws cannot be understood by adopting an approach to their study that is divorced from the social factors that inspired, triggered and still underlie them such as coloniality. The subject matter of the study also invites inevitable comparative methodology with other jurisdictions and this is done in Chapter 5, which seeks to answer question 4 regarding whether decriminalisation would mitigate the impact of anti-sodomy laws. As such, lesson for decriminalisation were drawn from Botswana, India, South Africa and the UK as countries with comparable legal traditions with Zambia. The basis for each country selection is explained in detail in Chapter 5. However, the comparative engagement is minimal, and does not aim to present a comprehensive comparative picture.

The data collection methods varied according to and are determined by the research questions. Primarily, two methods of data collection were employed: desktop review of literature and discourse analysis.

For each of the questions a desk-top review of literature was conducted. This involved analysis of both primary and secondary sources of data. The primary sources include the Constitution of Zambia and legislation such as the Penal Code and Criminal Procedure Code. Parliamentary debates from the *Hansard* are also examined, particularly those informing the 2005 amendment to the Penal Code of Zambia. Court decisions from Zambia and other jurisdictions including decisions of international regional human rights bodies such as the African Commission on Human and Peoples' Rights (The African Commission) and the United Nations Human Rights Committee also form part of primary sources. Further the primary sources include commissioned reports from treaty bodies, organisations that work on the rights of sexual and gender minorities as well as concluding observations and general comments. Secondary sources of date comprise of books, papers, reports, journal articles and newspaper articles. As substantial information exists on the web, and as such internet sources have also been extensively used as secondary data.

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249 For a detailed discussion of country focus see R Kumar *Research methodology* (2014) 132-150.

250 R Dias *Jurisprudence* (2013) 128.

Discourse analysis in this thesis adopts Michael Foucault's approach of not only examining the social discourse regarding sexual and gender minorities using linguistics methods but rather looking at the discourse as institutionalised patterns of expressions and knowledge.[251] Thus, in Chapter 3, the discourse analyses manifestations of heterosexual nationalism and the mischaracterisation of anti-sodomy laws through events over time and categorising them in the specific themes. Defining discourse analysis in this sense, Williamson and Scifleet state:[252]

> Discourse analysis examines the discourse – the social 'story' at play. It examines the dominant and subordinate discourses on offer in society and explores notions of resistance and appropriation of discourses among various social actors. In doing so, discourse analysis not only captures something important about the social world, but also plays a key ethical and political role in showing how social phenomena are discursively constituted: it demonstrates how things come to be as they are, that they could be different, and thereby that they can be changed. Discourse analysis not only captures something important about the social world, but also plays a key ethical and political role in showing how social phenomena are discursively constituted: it demonstrates how things come to be as they are, that they could be different, and thereby that they can be changed.

Question 1 concerning the mischief/purpose of the anti-sodomy laws involves a desktop review of literature that speaks to the original purpose of the anti-sodomy laws and the 2005 amendments. Primarily parliamentary debates and reports as well as journal articles and books are used as sources of data. Question 1 informs Chapter 2 of the study.

Answering research question 2, which relates to the characterisation and application of the anti-sodomy provisions in Zambia, also involves desktop review. A major part of answering question 2 involved discourse analysis from 1998 when sexual diversity first became an issue in Zambia to 30 July 2022. Common themes are highlighted and presented in terms of how they inform and answer the research question. The Chapter also involves an analysis of court case records to see how the anti-sodomy laws are understood and applied from the point of arrest, prosecution and judgement.

The answers to question 3, which involves the impact of anti-sodomy provisions on the rights of sexual minorities in Zambia, is informed by data collected from commissioned reports by different international and local civil society and governmental organisations, on lived experiences of sexual and gender minorities in Zambia. The Chapter also uses treaties, concluding observations, general comments and international case law as primary data to highlight Zambia's human rights obligations towards sexual and gender minorities. The data informs Chapter 4.

Whether decriminalisation would mitigate the impact of anti-sodomy laws in Zambia mainly involves desktop review of literature and took a minimal comparative approach to draw lessons from countries that decriminalised sodomy and have similar legal traditions as Zambia. Data collected from previous questions also feed into answering question 4 which informs Chapter 5.

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251 For a detailed discussion see M Foucault *The archaeology of knowledge* (1972) 21-71.

252 K Williamson & P Scifleet *Research methods* (2018) 589.

The study is descriptive and prescriptive. It is descriptive because the main data collection and analysis method was desk-top review of literature. The study is prescriptive in its concluding chapter as it provides recommendations regarding the anti-sodomy laws and the treatment of sexual and gender minorities as sexual citizens in Zambia. In this regard discourse analysis was, and is fit, as stated by Sutherland, to study the contingent and hegemonic relations of power in their static as well as changing formations, patterns and manifestations.[253]

Lastly, my positionality as a legal practitioner and an activist who works with sexual and minorities in Zambia by representing them in court as well as providing other forms of legal support to organisations that work sexual and gender minorities brought perspective to the study. My experience has given me great platform for interaction with sexual and gender minorities in Zambia and exposure of their lived experiences. In this regard, this thesis employed the active observation method, at a minimal level, in so far as the issues are relevant to the study and do not prejudice the objective analysis of the other sources of information. The author's interaction with the legal process in terms application of the anti-sodomy laws of the Zambian Penal Code has allowed for first-hand observation of the level of discrimination, marginalisation and blatant human rights violations that sexual and gender minorities silently suffer in Zambia. Aware of this positionality, the thesis ensured objectivity in the analysis of data and in the writing.

1.9. Chapterisation

The study has six chapters.

Chapter 1 is the introduction of the study. It contains the background of the study, problem statement, methodology and data collection method employed. Crucially it also contains conceptual discussion on heterosexual nationalism and the theoretical underpinning of the study. In essence it lays the conceptual and methodological foundation of the study.

Chapter 2, in answering research question 1, takes a historical and decolonial approach and investigates the original mischief and purpose of the anti-sodomy laws as well as the amendments that followed in 2005. Very importantly the Chapter starts by investigating sexual and gender minorities in pre-colonial Africa generally and then Zambia in particularly. This investigation is provides a foundation to ascertain whether the anti-sodomy laws were introduced in response to pre-colonial sexual diversities. Predominantly the Chapter traces the history and rationale of the anti-sodomy laws from their first enactment in England to their introduction in Zambia, then Northern Rhodesia. Theocratically the Chapter is underpinned by decoloniality and queer criminology from a historical perspective.

Chapter 3 answers research question 2. Having discussed the rationale and colonial governmentality of the anti-sodomy laws, Chapter 3 discusses how the anti-sodomy laws are presently understood and applied/ enforced in Zambia. In essence the Chapter discusses the mischaracterisation and misapplication of the anti-sodomy laws in Zambia showing that the current understanding is not

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253 C Sutherland 'Nation-building through discourse theory' (2005) 11 *Nations and Nationalism* 185–202.

in sync with their original purpose discussed in Chapter 2. As a starting point the Chapter discusses the elemental character of the anti-sodomy laws to highlight the difference with their existential nature as a consequence of their mischaracterisation in Zambia. Reliance was placed on a discourse analysis of 'homosexuality' and counter related themes such as cultural, religious and moral nationalism. The data also involved case analysis of criminal matters that have been litigated under the anti-sodomy laws in Zambia. As the Chapter shows, the cases reveal a lack of understanding of sexuality and the elemental character of the anti-sodomy laws in Zambia. Theoretically the Chapter is grounded on labelling theory, sexual citizenship and queer criminology.

Chapter 4 answering research question 3, builds on Chapter 3 and discusses the impact of the mischaracterisation of the anti-sodomy laws on the rights of sexual and gender minorities. In this regard, the Chapter first discusses Zambia's domestic and international obligations with respect the rights of sexual and gender minorities. The fundamental point of the Chapter is that the violations arising from the mischaracterisation of the anti-sodomy laws breach Zambia's domestic and international human rights obligations with respect to sexual orientation and gender identity. In bringing out the impact and highlighting the lived experiences of sexual and gender minorities, Chapter 4 relies on commissioned reports of various organisations whose ethical process and methodology is well grounded. Theoretically the Chapter is based on the minority rights thesis and sexual citizenship.

Chapter 5 answering research question 4, examines whether decriminalisation can mitigate the negative impact of the mischaracterisation of anti-sodomy laws highlighted in Chapter 4. In this regard, the Chapter takes an inevitable comparative journey by briefly investigating how, and if decriminalisation has worked in other countries, thereby drawing common lessons for Zambia. Sexual citizenship, queer criminology and the minority rights thesis form the theocratical basis of the Chapter.

Chapter 6 forms the conclusion of the study and contains recommendations. The recommendations spring for the conclusion that a case has been made for the decriminalisation of the anti-sodomy laws in Zambia. Chapter 6 also discusses the need to transform the socio-legal environment so as to mitigate the impact of the anti-sodomy laws in the country.

Chapter 2: The etiology and rationale of anti-sodomy laws in Zambia

2.1. Introduction

One of the aims of this thesis is to demonstrate that anti-sodomy laws in Zambia are incorrectly characterised as laws against homosexual orientation, gender non-conforming identities and all other forms of human sexual diversity. In other words, against queerness rather than particular sexual conduct. To fully understand the anti-sodomy laws in their correct legal perspective, it is necessary to go back to the origin and the purpose for which they were first enacted. Accordingly, the purpose of this Chapter is to examine the origins and purpose of anti-sodomy laws and how they came to be enacted in colonial Africa and eventually in Zambia (which, as Northern Rhodesia, was among the last to codify colonial criminal law).

First, the Chapter discusses constructions of sexual diversity in pre-colonial African societies, generally, and Zambia, in particular. This background is set to demonstrate that by the time colonialism was starting, sexuality was diverse in Africa and sexual and gender minorities were not treated with the homophobia that came with the introduction of anti-sodomy laws. Against this background, the question is posed whether anti-sodomy laws in Africa were enacted to regulate the diverse sexual and gender practices that existed before colonial rule or whether there was another reason. Although the study focuses on Zambia, the aim of this thesis cannot be achieved without first looking at Africa, more generally, because of the social and political context within which pre-colonial and colonial Zambia existed and evolved. Broadly put, colonial and present-day Zambia is really a snapshot of pre-colonial Africa at a particular time. This part therefore, also questions the notion of cultural heterosexual nationalism in Zambia.

Second, the Chapter briefly examines the origin and purpose of anti-sodomy laws from their first enactment in England. In this regard the Chapter discusses the beginning of the secular regulation of sexual citizenship and how this form of regulation was exported to the African colonies including Zambia. In essence this part of the thesis examines the rationalities around sodomy in the different stages that anti-sodomy laws evolved. As such it also highlights the moral and religious governmentality[1] informing the laws up to the period of colonialism.

The Chapter answers the first research question and therefore goes further by showing that anti-sodomy laws in Africa and Zambia, in particular, were incidental to the codification of criminal law, which was part of the process towards full colonisation. Again, it is stressed that the enactment of the anti-sodomy laws in colonial Zambia cannot be discussed in isolation from what happened in other parts of colonial Africa. For instance, the Chapter discusses the debate that occurred between the colonial officials in East Africa significantly affected the Penal Code, and consequently the anti-sodomy laws, that Zambia enacted in 1931.

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[1] As stated in Chapter 1, the concept here is used to refer to governmental (executive, legislative and judicial) rationalisation and trends in decision making with respect to the role of law in society.

Last, the Chapter discusses the reasoning behind adopting the colonial Penal Code by the Zambia independence government in 1964 and the purpose of amending the anti-sodomy laws which saw the introduction of life sentence in 2005. Throughout the different parts, the Chapter does not lose its primary focus: to establish the origin and purpose of anti-sodomy laws so that their current mischaracterisation is put in perspective.

The Chapter takes a decolonisation approach as discussed in Chapter 1. Very broadly the point is that colonialism and the creation of the colonial state of Northern Rhodesia came with a new form of regulation and the responsibility of citizenship for the local 'African' inhabitants of the territory. As discussed below colonialism and colonialisation had a cultural disruptive effect in the sense that it was the beginning of the regulation of sexual diversity in a way Africans had never done so themselves. The British government's motivations and governmentality was not only political and economic, but it was also religious, for the socialisation of the African population into Christian mores, which was the value system of the colonial administration. With Colonial values systems deeply entrenched, Africa traditional value systems and world view gradually faded. Thus, realising that colonialism distorts, disfigures and destroys the past and effectively transforms the present as well as the future of oppressed populations, Rabaka, citing Fanon, argues that the process toward decolonisation involves the creation of a national consciousness.[2] In the context of sexual diversity, this Chapter argues that colonialism came with heterosexual socialisation and post-colonial rule created heterosexual nationalism, which can also be said to be a form of national consciousness, as discussed in more detail in Chapter 3. Therefore, decolonisation as well as decoloniality, entail contesting heterosexual nationalism through restoring pre-colonial histories on sexual diversity and through consistent non-heterosexual socialisation- the creation of a new non-heteronormative national consciousness. Smith notes that history is important for understanding the present and that reclaiming history is a critical and essential aspect of decolonisation.[3] In the main, decolonisation of the anti-sodomy laws revealed that these laws were and are inconsistent with the lived experiences of pre-colonial –subsequently colonised– African and Zambia societies. This Chapter sought to do that.

2.2. Sexual and gender diversity in pre-colonial Africa

2.2.1. Sexual and gender minorities in pre-colonial African societies

In this part the Chapter discusses sexual diversity and the existence of sexual and gender minorities in pre-colonial Africa as a foundation for establishing sexual diversity in pre-colonial Zambia. This approach is taken because sexual diversity and the existence of sexual and gender minorities in post-colonial Zambia has to be understood within the broader context of sexual diversity in pre-colonial Africa. The reason for this approach is that before the creation of border lines through colonialism, African societies and polities were nomadic due to war, draughts and other natural causes.[4] As African peoples moved, they carried their identity, culture and whole way of life into the territories in which they settled. As shown in this Chapter most of the inhabitants of colonial and present-day Zambia, are

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2 R Rabaka *Forms of Fanonism: Frantz Fanon's critical theory and the dialectics of decolonisation* (2011) 91.

3 L T Smith *Decolonising research methodologies* (2012) 31.

4 A Adepoju 'Migration in Africa: An overview' in J Baker & T A Aina (eds) *The migration experience in Africa* (1995) 87-91.

pre-colonial 'migrants' who settled in the territory having carried their culture and constructions of sexuality and gender with them.[5] Taylor notes that 'many of contemporary ethnic groups in Zambia arrived in the territory about 200 to 500 years ago eventually merging with and /or pushing out the initial Khoisan inhabitants who went further south'.[6] In essence, the territory that became Northern Rhodesia and now Zambia, was a snapshot of peoples from different parts of the continent who at that time were settled within the defined boarder lines of the territory.

As a starting point it is important to note that the geo-political territories that comprise African countries or states today are a product of topographic colonialism. Before colonialism Africa as a continent consisted of different independent kingdoms and less structured societies that each had their own religious, legal, political, economic and social systems.[7] Sexuality and gender were an integral part of these systems. As stated above, pre-colonial African societies were highly mobile and nomadic due to internal political splits, tribal wars, the search for new grazing lands and natural causes such as droughts.[8] For this reason, the reference to 'Africa' in this part of the study means the aggregation of societies that comprised the geo-political territory of the continent before colonial rule. At the 1885 Berlin Conference, the continent was partitioned and 'nations' were born with defined borderlines which made the African societies static not only in mobility but in cultural dynamism.[9] A new form of 'citizenship' was thereby created and imposed, which would change the rights and duties of individuals and societies forever. With the colonial boarders came a form of governmentality never yet experienced in the African tradition.

The narrative that homosexuality is un-African or that Africa is organically heterosexual, is the common expression of cultural heterosexual nationalism in African heterosexual nations. This narrative suggests that pre-colonial African societies were purely heterosexual societies, and that diversity of sexuality was exported from the West, and imported to Africa. Given the literature and the evidence of sexual diversity on the continent, it is apparent that the narrative about Africa's organic heterosexuality is a deliberate misrepresentation. Murray and Roscoe explain that the narrative of an organic heterosexual Africa is linked to the old narrative in anthropology regarding Africa as the home of 'primitive man'.[10] In this regard they elaborate:[11]

> [Among the many myths Europeans have created about Africa], the myth that homosexuality is absent or incidental in African societies is one of the oldest and most enduring. For Europeans, black Africans, of all the native peoples of the world, most epitomized "primitive man." Since primitive man was supposed to be close to nature, ruled by instinct, and culturally unsophisticated, he had to be heterosexual, his sexual energies and outlets devoted exclusively to their "natural" purpose: biological

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5 S D Taylor *Culture and customs of Zambia* (2006) 1-25 discusses how different pre-colonial tribal groups migrated from different parts of Africa and settled in present day Zambia carrying with them their culture and customs.

6 As above.

7 G Ayittey *Indigenous African institutions* (1991) argued that broadly, pre-colonial Africa had two types of political formation. The state like (Kingdom) formation which centralised power in kings and had administrative and judicial institution and the 'stateless' or acephalous societies which also had defined centres of power but were less structured.

8 Adepoju (n 4) 89.

9 T Pakenham *The scramble for Africa* (1995) 342-367.

10 S Murray & W Roscoe (eds) *Boy wives and female husbands: Studies in African homosexualities* (2001) 11.

11 As above.

> reproduction. If black Africans were the most primitive people in all humanity— if they were, indeed, human, which some debated— then they had to be the most heterosexual.

Murray and Roscoe further state that most anthropologists who conducted research on pre-colonial African societies had the notion of 'primitive African man' and as such they overlooked, explained away and sometimes suppressed or denied evidence of sexual diversity and in particular homosexual conduct and expressions. An example is the work of Pritchard, a respected anthropologist, who conducted ethnographic research on the people of Azande but mentioned nothing about the existence of male homosexuality in his work.[12] Another example is Alan Merriam who also stated that 'homosexual conduct was absent among Bala men' when all anthropological evidence showed the contrary.[13] Referring to this tendency by early anthropologists, Murray and Roscoe point go to point out:

> [u]nfortunately, rather than dispel the myth of African sexual exceptionalism, anthropologists have often reinforced it by not seriously investigating same sex patterns, failing to report what they do observe, and discounting what they report […] Other anthropologists, in Africa as elsewhere, have denied (or dismissed) the presence of homosexuality even when they observed it. When homosexuality is acknowledged, its meaning and cultural significance are discounted and minimized. By claiming that homosexual relations are solely due to a lack of women, for example, or are part of a short-lived adolescent phase, the possibility of homoerotic desire— that an individual may actually want and find pleasure in another of the same sex— is effectively denied. [14]

Epprecht corroborated the above point when he traced how different western authors from the pre-colonial to the early colonial period focused on a notion of African sexuality that was exclusively heterosexual and structured on the idea of reproduction and family.[15] He observed that evidence that showed the diversity of African sexuality was suppressed and sometimes simply attributed to African customary rituals and thereby explained away.[16] He adds that even African scholars who later wrote on sexuality in Africa tended to blindly agree with the narrative that Africa is heterosexual, such that the narrative became deeply entrenched and taken as unquestioned truth by policy and legislative makers.[17] Heterosexuality thus became one of the defining (but incorrect) feature of Africanness.[18]

What is clear is that the early research and writing about sexual diversity in Africa was done from the positionality of the researcher. Local African constructions of their diverse sexualities and gender were ignored or conveniently misinterpreted. The narrative that was created about African sexualities and gender was, therefore, not a reflection of local constructions and customs on sexuality but rather it was more of the expressed desire of the writer.

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12 E E Pritchard *Witchcraft, oracles and magic among the Zande* (1937) 18-22. The traditional Zande, as studied by Pritchard lies across the frontiers of present-day Sudan, The Democratic Republic of Congo and The Central Africa Republic. Murry and Roscoe (n 10) note that shortly before his death, Evans admitted the deliberate omission of writing about the sexual diversity of the Zande particularly the culture of same-sex marriage among men, where bride-prices were paid by the 'stronger male' to the family of the man being married.

13 As above.

14 As above.

15 M Epprecht *Heterosexual Africa? The history of an age of exploration the age of AIDS* (2008) 1-27.

16 As above.

17 As above.

18 C Ngwena *What is Africanness: contesting nativism in race, culture, and sexualities* (2019) 199.

Epprecht, Murray and Roscoe do not only challenge cultural nationalism's rhetoric of a heterosexual Africa, they go further to discuss and evidence sexual diversity in pre-colonial African societies. Murray and Roscoe reviewed the evidence of sexual diversity from all African regions; from the Hausa and Yoruba in West Africa; the Kikuyu, Mashoga, Mabasha and Magai in East Africa; and the Shona, Zulu, Khoisan, Herero Ndembu (of Zambia) in Southern Africa. They conclude that same-sex patterns in pre-colonial Africa, were not only widespread but diverse, and perhaps more diverse than in other parts of the world.[19]

Falk, a German anthropologist and explorer who was based in present day Namibia, documented homosexual, bisexual and transgender presence among the Ovambo of Southern Africa (Namibia and Angola) in the 1920s.[20] He described a practice called *soregus* whereby two individuals of the same or opposite sex entered into an intimate relationship.[21] As a rule, the two were supposed to mutually assist each other especially in economic matters. However, Falk writes that *soregus* was used as a way to establish homosexual relationships. Falk further wrote that same-sex sexual conduct among women and men was common through mutual masturbation called *okuripikapikisa*.[22] Oral sex and the use of an artificial crafted penis was common among women and anal intercourse was also prevalent among men (*okurareka 'mukuao*).[23] Regarding same-sex conduct among women he clarified that it did not only occur among single or widowed women, but that it occurred among married women as well. He also narrates the presence of *ovashengi,* transwomen and homosexual men who engaged in commercial sex work near the diamond mining area. In certain situations, men who worked in the mine, would go with a "kitchen boy" to the mines who would perform the duties of a wife. Regarding their decorum on sexual diversity, Falk writes:[24]

> Mention must be made of the rules of decorum that ban speaking about sexual doings, particularly if a member of another generation is present: "The act is allowed but speaking about it forbidden." And when in the evening perhaps two young boys leave the collective circle around the fire, supposedly to lock up a calf that is not yet in the corral, quick grins might fly across the faces of those remaining behind, but it will occur to no one to follow or watch them. That would contravene all norms of decorum. And if one encounters two such young chaps in the bush, one looks away and sees nothing.

Falk also recorded same-sex sexual conduct among the Khoisan. He noted that the practices and culture of the Ovambo and the Khoisan on sexuality was identical.[25]

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19 Murray & Roscoe (n 10) 9.

20 K Falk 'Homosexuality among the natives of southwest Africa' [translated by B Bradley & W Roscoe] in Murray & Roscoe (eds) *Boy wives and female husbands: Studies in African homosexualities* (2001) 187.

21 As above. In detailing his operations, Falk was contesting the earlier writing of G Fritsch who was also a German anthropologist based in Namibia. Fritsch had written that in his experience same sex relations never occurred and that the Khoisan and the Ambo people were close to nature.

22 As above.

23 As above. The term was also used to describe same sex intercourse among women. Other term used to describe same sex sexual intercourse was *okut-janda omuzu* and *onukara omuza*.

24 Falk (n 20) 154.

25 As above.

The Ovambo originated from territories in northeast Zambia and moved further South eventually settling in the Southwest of Namibia and a small group in Angola.[26] A small group remained and resides in the Southern Zambia close to the border with Namibia. They share close cultural, linguistic, and historical relationships with the Herero people found in both Zambia and Namibia (most predominantly in Namibia).[27] In this light, it can be argued that the Ovambo and Herero that remained in present day Zambia continued with and had the same culture and decorum regarding sexual diversity as those that migrated to Namibia. This argument is strengthened by the fact that E Colson found patterns of sexual diversity similar to that of the Ovambo and the Khoisan (who as early stated were among the earliest inhabitants of present-day Zambia) in the Southern Province of preset day Zambia among the Tonga and Ila speaking people who mixed and settled with the Ovambo and Khoisan on arrival in the territory. The work of Colson is discussed later below.

Epprecht gave a detailed account of sexual diversity among African men in Southern Rhodesia, present-day Zimbabwe.[28] He first highlights how anthropologists like, Van Onselen, Gelfand, Diana and Scarnecchia claimed that homosexuality was nonexistent among the Shona or in some instances explained away evidence of it by stating that it was situational and forced.[29] Epprecht reviewed in great detail archival and court documents in colonial Zimbabwe and provides evidence of homosexual relationships between males in different contexts and situations: from men who took other men or boys as wives in the villages or locations; those who engaged in transactional same-sex sexual conduct;[30] those who had relations in mining labour hostels and in prisons, and those who were in heterosexual marriages but still engaged in same-sex sexual conduct. With regard to homosexual relationships in the locations he states:[31]

> The dominant type of homosexual [relationship] echoed the heterosexual type of temporary marriage known in chiShona as *mapoto*. In these, the "wife" or *ngotshana* was usually a (real) boy […] The boy "was used" for domestic and sexual tasks just as a female wife would be, including cooking and fetching wood and water. In return "she" was supposed to receive protection by an older man in the essentially hostile and alienating environment of the location or labor camp, as well as gifts such as blankets, cigarettes, trousers, and petty cash. As with *mapoto* marriages, *ngotshana* marriages were generally transient affairs, typically ending as the boy grew older and confident enough to seek his independence or his own "wife." In some cases, *ngotshana* marriages ended when the boy found a new, more generous or loving protector. In others, the "wife" was sent away for demanding too many gifts.

Like the Ovambo of Namibia (and thus of Zambia), the Shona also had a culture of silence regarding homosexual relationships. Epprecht explains that these relationships were known in villages and in

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26 J Stokes *Encyclopaedia of the Peoples of Africa and the middle east* (2009) 530.

27 V Tonchi *et al Historical dictionary of Namibia* (2012) 330-331.

28 M Epprecht 'The "unsaying" of indigenous homosexuality in Zimbabwe: Mapping a blind spot in an Africa masculinity' (1998) 24 *Journal of Southern African studies* 4. For a full account of sexual diversity in Zimbabwe see M Epprecht *Hungochani: The history of a dissident sexuality in Southern Africa* (2006) in which he traces the history and culture of Southern Africa's sexual and gender identity to its modern rights-based movement.

29 M Epprecht '"Good God almighty, what's this!": Homosexual "crime" in early colonial Zimbabwe' in Murray and Roscoe (eds) *Boy wives and female husbands: Studies in African Homosexualities* (2001) 199.

30 As above. Regarding transactional sex, he details that some men who dressed as women would provide sexual services to other men or that sometimes sex would be demanded in place of payment of a debt.

31 As above.

most instances were frowned upon yet accepted.[32] He explains the reasons for the inadmissibility of homosexuality as follows:[33]

> The reasons for the inadmissibility of homosexuality can easily be explained without essentialist arguments about African nature. In precolonial Zimbabwe, as throughout the region, wealth was primarily measured in people. Shortage of people (labour power) was one of the principal constraints upon production. Children were thus valued as crucial economic and political assets, not merely little bundles of joy. Furthermore, producing children was the defining characteristic of social adulthood for both women and men. To remain childless or to be impotent was to remain a perpetual child oneself. Heterosexual marriage resulting in successful pregnancy was thus the vocation that children were taught from their earliest years.

For purposes of childbearing, heterosexual marriages were, therefore, a form of social condition for status, securing future income through bride price (lobola) and security in old age. 'To forgo all this and at the same time to elicit universal condemnation for the love of another man or woman was absurd and a dangerous choice in life'.[34] However, heterosexual marriages did not mean universal heterosexual orientation. Cultural mechanisms exited that ensured that sterile marriages could still appear fruitful as Epprecht further notes:[35]

> [A] man who felt queer in orientation and was repulsed by the very thought of sex with his wife, could invite her to take her own lovers (if she had not done so already in frustration or at her family's insistence). *Lobola* ensured that any offspring would be socially recognised as his and fictions about his own social manhood, with all the economic and political benefits that accrued to it, could be maintained regardless of his actual sexual feelings. In chiShona, this practice was known as *kupindira* or *kusihira rudzi*— "raising seed".

It is evident from the above account that customary law in Zimbabwe, as in other parts of Africa, had a way to deal with sexual diversity without victimizing the partners as is the case today. Goldin and Gelfand corroborate the practice of *kupindira* although they explain it in the context of 'impotency' (another term used to describe homosexual men in other cultures).[36] They clarify that only the man's brother or the son to his sister could be given the privilege of *mvumo*; to bear a child on behalf of another man.[37] They add that 'owing to western influence, this practice has largely disappeared'.[38]

Regarding language, Epprecht stated that the word used to describe homosexuality in Shona is *ngochani* and is linked to the 'Ma Zambezi' a generic term to describe the people of lower Zambezi valley such as the Sena, Chikunda and Tonga. This is very important as these groups are found in present day Zambia and as will be seen they are the groups that Elizabeth Colson referred to in her anthropological study as having homosexual relations in pre-colonial Zambia.[39] Epprecht concludes

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32 Epprecht (n 28) 6.
33 Epprecht (n 29) 200.
34 As above.
35 M Epprecht '"Bisexuality" and the politics of normal African ethnography' (2006) 48 *Anthropologica* 187.
36 B Goldin & M Gelfand *African law and custom in Rhodesia* (1975) 166.
37 As above.
38 As above.
39 E Colson *Marriage and family among the plateau Tonga of Northern Rhodesia* (1958) 139-140.

that homosexual relationships and intimacies existed before colonial rule; that during colonial rule homosexual relationships were not restricted to migrant labor hotels or prisoners and that homosexual relationships were not introduced by Europeans nor were they a function of racial capitalism.[40]

Although very little evidence exists, homosexual relationships also occurred among women in Southern Africa. For example, Kendall offers a historical to present day account of lesbian relationships in Lesotho.[41] She argues that the gendered nature of sexuality is such that most lesbian women have historically been in heterosexual marriages because of the high premium placed on a woman to marry and bear children for a man. Lesotho culture and tradition played a key role in that women were not allowed to remain single after the age of 16 and they had no identity outside marriage to a husband.[42] Traditional economics also played a role in the sense that a woman could not own property or be able to fend for or protect herself without a man, hence the 'need' for marriage. This cultural set up pressured lesbian women into heterosexual marriages.[43] The pressure for heterosexual family life in traditional economies seems to be common in pre-colonial African societies as Epprecht discussed in the context of Zimbabwe.[44] The overriding point, therefore, is that heterosexual marriages in traditional or pre-colonial African societies are not indicative and conclusive of organic heterosexuality.

The Zulu kingdom of South Africa also gives patterns of homosexual relationships. Controversially, some authors have written that Shaka, the warrior king of the Zulu, was gay himself.[45] Mkasi argues that due to the high premium placed on childbearing, and the patriarchal nature of Zulu culture, homosexual relations were discouraged explaining why Shaka was almost 'forced' to marry and bear a successor.[46] While her focus was on same-sex relations among women at particular sites in KwaZulu-Natal, she also briefly describes similar practices and patterns regarding same-sex relations observed by Epprecht among Ndebele in Zimbabwe.[47] This does not come as a surprise as the Ndebele and Zulu share the same *Nguni* culture. A large group of the Zulu peoples' moved up north to Zambia during the great scattering and formed the Ngoni kingdom of *kwa mutenguleni* under the leadership of Mpezeni in the Eastern province of Zambia.[48] While the patterns described by Epprecht among the Ndebele and by Mkasi among the Zulu have not been studied (as far as have been searched for this thesis) among the Ngoni, it would not be such a totalising argument to say that the Ngoni carried with them the same or similar cultural constructions of sexual diversity. To this day, the 'king' of the Zulu

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40 Epprecht (n 35) 200.

41 M Kendall '"When a woman loves a woman" in Lesotho: Love, sex and the (Western) construction of homophobia' in Murray & Roscoe (eds) *Boy wives and female husbands: Studies in African Homosexualities* (2001) 223.

42 Kendall (n 41) 230.

43 Kendall (n 41) 231.

44 Epprecht (n 26) 200. See also N Sudarka 'The status of women in indigenous African Societies' (1986) 12 *Feminist Studies* 97.

45 D Wylie 'Shaka and the myth of paradise' (1995) 22(1) *English in Africa* 19. See also M Gluckman 'The rise of a Zulu empire' (1960) 202 (4) *Scientific American Journey* 157.

46 L P Mkasi 'A threat to Zulu patriarchy and the continuation of community: A queer analysis of same-sex relations among female traditional healers at Inanda and KawNgcolosi, KwaZulu-Natal' (2013) University of KwaZulu-Natal, unpublished PhD thesis. See also N Masuku 'Folklore and its influence on the homophobic behaviour in the Zulu culture: A brief analysis of umamba kamaquba' (2015) *Southern African Journal of Folklore* Studies 128.

47 As above.

48 T J Thompson 'The origin, migration and settlement of northern Ngoni' (1981) 34 *The Malawi Society Journal* 9.

people in South Africa is called to grace the *nchwala* traditional ceremony that takes places every year in Katete, Zambia.[49]

Pre-colonial East African societies and those around the horn of Africa were also present with sexual diversity. For instance, Hallpike, who conducted field research among the Konso people in Ethiopia, found patterns of sexual diversity.[50] He reports of a category of men called *sagoda*, a general term to describe men who never married, were considered weak and wore women's clothes. He writes:[51]

> I was told that *sagoda* liked to play the passive role in sodomy, and the description I was given of the manner in which a *sagoda* would induce a man to perform this upon him in the night was so detailed that it could not have been invented. The question is whether normal men only practice sodomy with *sagoda* or among themselves. I am strongly inclined to think it is not confined to relations with *sagoda*.

Although the work of Hallpike has been criticised in the sense that most of the culture that he made appear to be exclusive of the Konso was actually common among other groups, his work remains an excellent example of recorded accounts of sexual diversity in pre-colonial African societies.[52] In any event the generalities only serve to show the extent to which African sexual diversities have been recorded.

Same-sex practices have also been recorded among Nuba peoples'[53] in the Nuba mountains in Kordodan, South Sudan.[54] Although they are predominantly Muslim, the Nuba peoples' are relatively uninfluenced by the 'outside world'.[55] As such it would be difficult to claim that homosexuality was as result of Western or other outside influence. Among the Nuba, gay men and transwomen were open about their identity and never married.[56] They were, however, regarded as weak and abnormal, hence during initiation ceremonies boys had to demonstrate that they were beyond this 'abnormality'. Nadel explains as follows:[57]

> The *ereda* dance contains an element typical in many societies of *rites de passage*. It demands that the young men dress up as women. They do so consciously, and everyone is aware of this meaning of their masquerades […] most significant of all, they paint their body with ochre, which in moro is associated with an intimate physiology characteristic of the female sex, menstruation. Let me add that for a man to dress like a woman is normally regarded as an admission of sexual abnormality, and that Moro homosexuals adopt female dress. For a short period, then, the young men about to be married identify

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49 See https://www.lusakatimes.com/2019/01/25/prince-mongosuthu-buthelezi-of-the-zulu-kingdom-to-grace-ncwala-ceremony/ (accessed 29 April 2022).

50 C R Hallpike 'The Konso of Ethiopia: A study of the values of a Cushitic people' (1972) 16(2) *African Studies Review* 150-151.

51 As above.

52 See H S Lewis 'Ethnographic studies' (1973) 16(2) *African Studies Review* 305-307.

53 Nuba peoples are various ethnic groups comprising of the Koalib, Nyima, Dilling Heiban, Tira, Moro and Otoro who live in the foothill of Nuba Mountain in Sudan. They speak different languages which belong to two unrated language families. Despite differences in language and some practices, their culture is similar with respect to sexuality, marriage and political organisation.

54 S Nadel *The Nuba: An anthropological study of the hill tribes in Kordofan* (1947) 242.

55 As above.

56 Nadel (n 54) 214.

57 Nadel (n 54) 242.

> themselves symbolically with those men devoid of normal sexual desire. The significance of their temporary transvesticism is abundantly clear from the context: it underlines the step which they are about to take; its exaggeration serves to throw into relief the transition from immaturity to full manhood.

This practice testifies to the fact that to some extent, some form of 'othering' did occur in traditional African societies. However, this cannot be compared to the stigma and discrimination that was later experienced with the coming of anti-sodomy laws. In fact, in most cases, custom had a way of dealing with 'problems' that arose from sexual diversity. For example, among the *Nyima, Koalib* and *Dilling* a young man was not allowed to marry before his elder brothers.[58] Cases arose where the elder brother was a queer and could not marry. Such cases would be dealt with by traditional courts which would quietly find a solution that would not bring disgrace to families.[59] This was similar to *kupindira* practiced among the Shona in Zimbabwe.

Nadel states that among the *Korongo* and the *Meskakin* groups which had 'widespread homosexuality and transvestitism', some men feared sexual intercourse with their wives as this would strip away their virility and strength for wrestling and spear fighting.[60] In fact young boys who did not show strength in traditional wrestling or spear fighting tournaments, or men who could no longer take part in these matches were seen as 'weaklings and cowards, and deserve[d] the compatible name of homosexuality.'[61] Some men would stay in the all-male cattle camps for long periods to avoid sexual contact with their wives. Due to their all-male nature the cattle camps were also used as a place of refugee by most homosexual male couples and transwomen. This practice illustrates yet again that although some form of stigma was attached to same-sex sexualities, traditional societies still had ways of dealing with sexual diversity.

In contrast to the Nuba, homosexual and gender diverse groups were not considered as weak or abnormal among the Azande, who were forest people occupying southwest Sudan, the Central African Republic and northeast Congo.[62] In many instances men would take older boys as wives in preference to women and this was considered normal. Quoting the later works of Pritchard, Murray and Roscoe state as follows:[63]

> Homosexuality is indigenous. [The] Zande do not regard it as at all improper, indeed it is very sensible for a man to sleep with boys when women are not available or are taboo [...] In the past this was a regular practice at court. Some princes may even have preferred boys to women, when both were available […] Men used to have sexual relations with boys as they did with wives. A man paid compensation to another if he had relations with his boy. People asked for the hand of a boy with a spear, just as they asked for the hand of a maiden of her parents.

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58 J W Sagar *Notes on the history, religion and custom of the Nuba* (1922) 137.
59 Nadel (n 54) 295.
60 Nadel (n 54) 299-300.
61 Nadel (n 54) 300.
62 Murray & Roscoe (n 10) 34.
63 As above. It can be noted that earlier the work of Pritchard (n 12) was criticised for having ignored or explained away the existence of homosexuality among the Azande. However, according to Murray and Roscoe (n 2), his later work sought to fix the misimpression as one of his wishes before his death.

Homosexual relations among females were treated differently from male homosexuality among the Zande. Although it was rare, sexual relations among women was considered evil due to myths that lesbian women also practiced bestiality with cats, a practice also believed to be done by witches.[64] Those who were discovered were scandalised and if married the husband would divorce and chase the wife from his *Harim*.[65] It is possible that same-sex relations were more prevalent than recorded due to the secrecy among couples for fear of being divorced or ostracized. Leila, notes that mutual masturbation among Zande women using objects was common but done in secret.[66]

In Kenya and Zanzibar same-sex patterns were found among Swahili-speakers around the coast. Writing in 1887, Haberlandt referred to homosexuality as 'contrary sex'.[67] His view was that same-sex sexual relationships could have been influenced by the presence of the Arabs, but there is no evidence to conclude with certainty that it was the case. Nonetheless, Haberlandt remains among the first to record same-sex relations among the Swahili people. Notwithstanding his views of probable Arab influence, Haberlandt states:[68]

> In born contraries of the male as well as the female sex exist. From youth on, the former show no desire for women and only find pleasure in female occupations, such as cooking, mat-weaving, etc. As soon as this is noticed by their relatives, they reconcile themselves without further ado to this peculiarity. The person concerned puts on female clothes, wears the hair braided in female fashion, and behaves completely as a woman […] In outward appearance, inborn contrary men are not distinguishable from male prostitutes, but the natives make a sharp distinction between them: the professional catamites are despised, while the behaviour of the inborn-contrary is tolerated as *amri ya mzungu* (the will of God). Contrary-sex aligned women are likewise not rare. Eastern custom makes it impossible, of course, to wear men's clothing, but they do it in the privacy of the home.

Evidently, in their own construction of sexual diversity, religion played a role in the sense that homosexuality and gender non-conformity was tolerated as the will of God. This is in sharp contrast to the Islam and Christian mores on sexuality, there by highlighting the cultural disruptive nature and effects of colonialism generally and religious based colonialism particularly.

Haberlandt went on to describe in detail the forms and manner of same-sex sexual conduct. The view that Arab presence had an influence on the local Swahili was probably based on the fact that he observed that Swahili female couples used the same type of greased sexual sticks employed by young married women in the harems of Arab men, who due to strict seclusion rules for women, found insufficient sexual pleasure.[69] The object in question was known to be an Arabic invention.[70]

Regarding language, both female and male homosexuals were referred to as *mke-si-mume.* It is noted, however, that the term *mzebe* and the Arabic derived term *hansi* were also used to refer to

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64 Ndale (n 54) 214.
65 As above.
66 R Leila *Sapphistries: A global history of love between women* (2009) 23-56.
67 M Haberlandt 'Occurrence of contrary sex among the negro population of Zanzibar' in Murray & Roscoe (eds) *Boy wives and female husbands: Studies in African homosexualities* (2001) 63.
68 As above.
69 Haberlandt (n 67) 64.
70 As above.

homosexuality.[71] At this point it can be stated that most African societies referred to sexual and gender diverse people differently but what has been the temptation by English writers is to fit those descriptions in the English language or in the Western construction of sexuality and gender.[72] This has led in some instances to misconstructions. In Bantu languages for instance, they mostly don't usually have *names* for things, instead they have *terms* that *describe* what a person is like by what they do.

Uganda which has in the recent past aroused the most controversy around homosexuality was home to perhaps the most institutionalised same-sex partnerships in Africa.[73] The Buganda Kingdom which was the largest in Uganda used to keep boys in the kings Courts to provide same-sex sexual services to visitors and the king himself. It was an open secret that King Kabaka Mwanga who ruled the Kingdom in the later part of the 19th century was gay and had formed intimate relationships with some of his subjects.[74]

Same-sex sexualities were recorded in many parts of West Africa as well. These include among the Dahomey Kingdom in present day Benin, among the Hausa and Yoruba in Nigeria and among the communities that live in the coast in Dakar, Senegal.[75] Writing in 1946, Davison describes night life in Dakar, which had same-sex brothels, stating that the city was the Paris of Africa were one could not be shy about his sexual orientation or gender identity.[76] West Africa was similar to the East, influenced by both Christianity and Islam. However, also in this part of the continent, diversity of sexuality was present before the introduction of Christianity and Islam.

A decolonial view of the continent shows not only the rich culture but also the different treatment of sexual diversity in pre-colonial African societies. The societies discussed above are not the only ones that presented evidence of sexual diversity in Africa. Many other pre-colonial African societies, polities or groups had the presence of sexual and gender minorities who at the time were not treated as a minority group nor were they marginalised.[77] That said, apart from establishing that sexual diversity was geographically widespread in Africa, the point of using the above groups is to illustrate its presence in culturally different and diverse societies. The treatment of sexual diversity was not the same in all African societies, but general patterns emerge as briefly stated below.

Before colonialism and the introduction of western religious mores, queer people were not treated with the 'othering'-type of stigma and discrimination that they face in modern day Africa. Diversity was accepted and as such people still lived without fear as members of the broader community. In this regard, this thesis contends that the acceptance (or at the very least non-discrimination) of sexual and gender minorities in pre-colonial African societies was rooted in the one

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71 For a fuller discussion of language use in sexual diversity among Swahili speaking People see D P Amory 'Mashoga, Mabasha, And Magai: "Homosexuality" on the East African Coast' in Murray & Roscoe (eds) *Boy wives and female husbands: Studies in African Homosexualities* (2001) 67-87.

72 B Goldin & M Gelfand (n 36) 71-72.

73 R Rao 'Re-membering Mwanga: Same sex intimacy, memory and belonging in postcolonial Uganda' (2015) 9 (1) *Journal of East African Studies* 1.

74 As above.

75 Murray & Roscoe (n 10) 89-134.

76 M Davidson 'A 1958 visit to a Dakar brothel' in Murray & Roscoe (eds) *Boy wives and female husbands: Studies in African Homosexualities* (2001) 67-87.

77 Murray & Roscoe (n 10) i-iv.

characteristic found in most of African societies: communalism. In a sense one can qualify it as 'ubuntu'. Olowu supports this and postulates:[78]

> African pre-colonial political organizations had some common important attributes. First, the state was concerned with the welfare of all its citizens. Some have gone ahead to label this as communalism, but the central notion was that the welfare of every member, rather than just a few within the community, mattered. Secondly, the society was organized for political purposes on the basis of lineage: thus the lineage connected the family to the state. This ensured the state of maximum popular support but also ascertained that state sanctions can be effectively communicated.

The turning point against tolerance of sexual diversity was the introduction of Christianity and the codification of colonial criminal laws. Homophobia, transphobia or queerphobia, stigma and discrimination came as a result of the labelling that sexual diverse people are deviant, immoral and sinful. As stated in Chapter 1 under 'labelling theory', religious and politically motivated labels have a profound influence on societies and this labelling impacts negatively on the sub-culture groups that are labeled as deviant. Homophobic labelling was complemented by the enactment of anti-sodomy laws. Not only did same-sex sexual relations now have a negative social tag, they also invited criminal sanctions.

In a sense it can be said that the creation of the colonial 'states' in Africa saw the beginning of a new way of living, that of colonial citizenship. As colonial citizens, Africans lost the power to regulate their own affairs as African culture was overthrown. Olowu observes:[79]

> Both within the colonial and post-colonial states, the official policy is to suppress and supplant the pre-colonial state, even though the latter was much better integrated in terms of norms, texture and structure.

In the colonial and indeed, the post-colonial state, the construction of life in general and sexuality and gender in particular, became subject to colonial laws and foreign mores based on a religion unknown to the African population. Through heteronormative colonial laws and nearly imposed religion, sexual diversity was, and sexually diverse citizens were labeled as deviant in the new colonial-states, and as such homophobia was born. Given that at the time, most anthropologists wrote of a heterosexual Africa, and given that there was in fact sexual diversity in Africa, two questions arise. Were the anti-sodomy laws meant to ensure that Africans 'remain' heterosexual? Or were the anti-sodomy laws in response to the prevailing patterns of sexual diversity that the colonial authorities subsequently observed? The answer to this question provides a clear picture of the purpose of the anti-sodomy laws in Zambia. As will be seen later in this chapter, the enactment of the anti-sodomy laws in Zambia cannot be discussed in isolation from the codification of English criminal law in colonial Africa. Before this is done, account has to be made of sexual diversity in pre-colonial and colonial Zambia.

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78 D Olowu 'The nature and character of the African state' (1994) 4. Paper presented at the 15th AAPAM round table, Banjul, The Gambia.

79 As above.

2.2.2. Sexual and gender minorities in pre-colonial 'Zambian' societies

The narrative that 'homosexuality is un-African' is localised as 'homosexuality is un-Zambian' and is mainly driven and spread by political, religious and traditional leaders. Sometimes the two narratives are conveyed to carry the same meaning, which is broadly based on the ideal of an essentialised Africa with common values and mores. Other times it is specific and purely nationalist. In this case it is stated to proclaim identity exceptionalism of a Zambia that is 'true to its heritage', 'pure in its morality' and resolute to preserve its heterosexual 'nature'. Having contested the broad narrative above, this part likewise contests the specific claim that Zambia is heterosexual in its heritage and nature. In this regard, this part points out examples of sexual diversity in pre-colonial Zambian societies.

Like most of pre-colonial Africa, the territory that is now Zambia was made up of different ethnic groups that differed in size, structure and organisation. The biggest of these groups was the Bemba Kingdom, extending all the way to the Congo, the Chewe kingdom extending into Malawi and Mozambique, and the Barotse Kingdom, reaching as far as Angola, Botswana and Namibia. Smaller chiefdoms such as the Ngoni, Ila and Tonga also had influence in the Barotse region. Most of these groups came or broke away from different parts of Africa where sexual diversity was culturally tolerated, accepted and managed, as discussed above. For example, the Ngoni was a breakaway group from the Zulu during the Shaka wars. The Tonga and the Ila of the Southern Province were part of the region that forms Mashonaland in Zimbabwe, which has been discussed by Epprecht. Due to this emigrational nature of pre-colonial African societies, it is not a coincidence that where patterns of same-sex sexualities in Zambia have been found, the groups can also be traced to other groups in Africa with similar patterns of diversity. Most of these are Bantu speaking groups.

One of the early records of same-sex patterns was made by Turner, a British ethnographer, who observed the Ndembu in Northwest Zambia around the early 1940's to the late 1950's. He described the existence of 'sexual dualism' as a practice where a person either plays dual gender or sex roles such as engaging in both homosexual and heterosexual intercourse.[80] The circumcision and initiation rites of the Ndembu also gave an indication of same-sex practices. The practice involved play with an older person's penis and sex conduct.[81] Only men who could have 'strong erections' would take part in these ceremonies. The rationale behind the practice was that it would strengthen the initiate's manhood by transferring the power of heterosexual desire and prowess into him.[82] In this way, it was believed that the initiate would stop or fail to develop same-sex desires.[83] A similar practice occurred

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80 V Tuner *The ritual process: structure and anti-structure* (1969) 75, 86, 90-93. However, Tuner cautioned that he did not sufficiently speak ndembu and would have preferred that his observations be translated into the ndembu language that the ndembu 'insider' could validate his work. K Poewe *Reflections of a woman anthropologist: No hiding place* (1982) San Francisco academic press, 172 also used the term 'dual sexuality' with respect to the people of Luapula in northern Zambia to 'refer to the fact that a person who is anatomically male, can play a female role.' However, a closer reading of Poewe's work shows a clear misinterpretation of the way the people used their sir names. The use of names that have a feminine and masculine denotation did/ does not carry with it any social/sexual implications with respect to gender roles among the Luapula people.

81 Turner (n 80) 90.

82 As above.

83 As above.

among the Luvale, Chokwe, Luchazi, Lucho and Lunda in Zambia.[84] These practices can be likened to the initiation rites of the Nuba of Sudan, discussed above. Although some differences exist in terms of the details, the hope or anticipation that the initiates will venture into heterosexual relations was at the core of all the ceremonies.

Same-sex desires, relationships and sexual conducted was also recorded among the Chewa in the region covering the borders of present-day Zambia, Malawi and Mozambique. Although he did not provide much detail about what he observed, Rangeley, a former colonial officer in Nyasaland, noted that same-sex desires, relationships and sexual conduct occurred among the Chewa. [85] A big tradition of the Chewa is the dance ceremonies called *gule wa mukulu,* performed by the *nyau* dancers, a group of male warrior dancers who wore masks and were fully covered with animal skin. The *nyau* dancer camps, located in the forests or bushes close to village burial sites, were known to be safe spaces for male couples in much the same way as the cattle camps of the *Korongo* and the *Meskakin* of Sudan discussed above.[86] The details are difficult to verify due to the secrecy with which these camps are run and where they are located, as 'outsiders' (non nyau dancers) are not allowed anywhere close to the camps. Apart from the *nyau*, other practices similar to that of the Ndembu in Northwest Zambia and the practice of the Nuba in Sudan occurred among the *chewa* and *tumbuka* of Eastern Province in present-day Zambia. For instance, during the initiation ceremony of young girls, a male figure called a *Fissi* (hyena) who would enter the lodge of female initiates and forcibly have sexual intercourse with them as a way of introducing them to womanhood.[87] The practice was meant to ensure that the initiates appreciate copulation with males and avoid all possibility of female same-sex desires. While the practice does not speak of female same-sex desire and conduct, it is a constructive acknowledgment that female same-sex desires and relationships were known to occur. That the practice dates back long before colonial rule is also telling of long-standing patterns of same-sex sexualities in pre-colonial Zambia. It must be stated that most of these practices have now been criminalised as harmful cultural practices.[88] The process of criminalisation started in the 1930s and only saw real success in the late 1990s due to efforts in response to the HIV/AIDS pandemic.

In the 1920's Dale and Smith gave a detailed account of the *Ila* speaking people of Southern Province near the border with Zimbabwe. They observed 'men who identified themselves as women and therefore dressed like women, did women's work and slept among the women but had no sexual relations with them.'[89] Homosexuality was also common among the *Ila* although it was considered dangerous because it was believed that regular intercourse would make a man pregnant.[90] According to Smith and Dale, 'homosexual perversions' are known 'among ba[the]-ila but whether congenital or acquired it is impossible to say'.[91] Notably they avoided to venture into the debate of whether

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84 Murray & Roscoe (n 10) 144.
85 W Rangeley 'Notes on the Chewa tribal law' (1948) *The Nyasaland Journal* 33-38.
86 As above.
87 As above.
88 'Undi's ban of bad cultural practices progressive' *Zambia Daily Mail*, 9 November 2018 http://www.daily-mail.co.zm/undis-ban-of-bad-cultural-practices-progressive/ (accessed 4 May 2020).
89 E Smith & A Dale *The ila speaking people of Northern Rhodesia* (1920) 274.
90 As above.
91 As above.

homosexuality is natural (congenital) or a choice (acquired) but interestingly they called it a sexual perversion.

Within Southern Province, not far from the Ila people, Colson recorded gender minorities among the *Tonga* referring to them as 'woman-man' and 'man-woman'.[92] She states that 'these people lived their entire lives not conforming to the gender roles expected of them' and that such situations were respected as the 'will of the ancestors.'[93] Colson states:[94]

> The *Tonga* are prepared to admit that an occasional person may ape the way of life of a person of the opposite sex […] I was able to record two instances at present. C who dressed as a man and claimed to be one was actually a woman. Another person living in Simuyobe chieftaincy who dressed as a woman, did women's work and carried burdens on the head as a woman does was plainly a man. Neither of these people was married [despite being advanced in age]. Informants attribute their behavior to the decree of some ancestral spirit.

The construction of gender non-conformity as the decree of the ancestors was within the context of the *Tonga* people's emphasis of gender roles taught from adolescent. From about 7 years old, boys and girls are taught the different masculine and feminine duties.[95] However, children were allowed to experiment with their sexualities. Colson reports that children, on the other hand, were allowed same-sex play and that some grew up preferring same-sex partnership.[96] On the other hand, due to the high premium placed on childbearing, homosexual relations were not commonplace.[97] This is a similar pattern to the Shona found around the same region in neighboring Zimbabwe.

The diversity of sexuality in pre-colonial Africa as well and Zambia, as discussed above, counters the narrative of cultural heterosexual nationalism. There is nothing unAfrican or unZambian about 'homosexuality'. What is unAfrican and unZambian is the coloniality of homophobia which started with the cultural disruptive impact of colonialism through anti-sodomy laws. The next section establishes whether anti-sodomy laws were specifically meant to respond to the diversity of sexuality in African societies or whether they were simply incidental to the codification of English criminal law and the value systems on which English law was based.

2.3. Reception and codification of anti-sodomy laws in Zambia

2.3.1. History of anti-sodomy laws and exportation to Africa

Throughout Commonwealth Africa, anti-sodomy laws were first introduced through the application of English criminal law, by extension of the Offences against the Persons Act and later by way of codification of English criminal law. In this part the Chapter briefly discusses the original intention of the anti-sodomy laws by tracing their initial enactment in England. This background is important to

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92 E Colson *Marriage and family among the plateau Tonga of Northern Rhodesia* (1958) 139-140.
93 As above.
94 As above.
95 Colson (n 92) 257-270.
96 As above.
97 As above.

answering the rationale for their inclusion in criminal codes that were introduced in African and other colonies of the British empire. As seen in this Chapter, this background has a bearing on the introduction of the anti-sodomy laws in Zambia.

It all started in the Bible.[98] In the Hebrew Bible, the city of Sodom was destroyed by God for the evil of its inhabitants.[99] The connection between Sodom as a city and sodomy as an offence as we know it came from the fact that all the male inhabitants of the city, young and old, wanted to 'have sex with the male angels' who visited Lot, a servant of God. Lot protests that the two are his guests and instead offers them his virgin daughters but the 'sodomites' refused threatening to do worse if he does not let then in. The angels then strike the sodomites and makes them blind so that they are unable to find Lot's door. After Lot runs away with his family the City is destroyed with burning sulphur. It can be argued that if all the men of Sodom gathered around Lot's house, then the men who were married to Lot's children were also part of the crowd. Further, taken literally, the passage suggests that all the men of Sodom were homosexual. Some theologians have argued that the sin for which Sodom was destroyed was the lack of hospitality for visitors which was very important in Jewish culture.[100] In this regard reference is made to a similar event in the book of Judges where Gibeah, a city of the tribe of Benjamin, was destroyed by other tribes of Israel because a mob of its inhabitants killed and raped women who visited them.[101] However, it is also worth noting that God planned the destruction of the cities way before the visits even happened.[102] In many other books of the prophets in the Bible the city of Sodom is referenced to demonstrate God's anger against all sin.[103]

The biblical books of 'the Law' such as *Leviticus* and *Deuteronomy* declare that 'a man shall not have sex with another man as he does with a woman because God hates that'.[104] This text goes further to prohibit sex between a woman and an animal, adultery and sex during a woman's monthly periods. The full passage draws attention to several issues. For instance, the text is very specific in the sense that it only prohibits sex amongst men and not women. With regard to women, it only prohibits bestiality but does not mention male bestiality. These 'laws' of Moses, as they are called, influenced the reasoning behind the anti-sodomy laws when they were secularised. Further it is clear that a whole range of sexual sin was prohibited and yet they were not subsequently criminalised, nor do they have any stigma attached to them in religious based heterosexual nationalist countries like Zambia. This highlights the subjectivity of religious based homophobic labelling and othering, as well as exposing the weaknesses of religious nationalism.[105]

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98 M Michael 'The offence of sodomy: England's least lovely criminal law export?' in C Lennox & M Waites (eds) *Human rights, sexual orientation and gender identity in the commonwealth: From history and law to development activism and transnational dialogue* (2013) 61.

99 The book of Genesis, 18-19.

100 For a full discussion on this see H J Toensing 'Women of Sodom and Gomorrah: Collateral damage in the war against homosexuality' (2005) 21 (2) *Journal of Feminist Studies in Religion* 61-74.

101 The book of Judges 19, 1-30

102 The book of Genesis 18-17.

103 The books of Deuteronomy 29, Isaiah 1,2 and 13, Lamentations 4, Amos 4-11, Zephaniah 2, Ezekiel 16 and Jeremiah 49.

104 Leviticus 18-22 and 20-13 all speak of the condemnation of men who have sex with men.

105 For a detailed discussion on the jurisdiction of ecclesiastical courts in England see R H Helmholz 'Judges and trials in the English ecclesiastical courts' in R H Helmholz (ed) *Judicial tribunals in England and Europe between 1200-1700* (2018) 102-115 and P D Jason 'The courts christian in medieval England' (2017) 4 *The Catholic Lawyer* 339.

The New Testament Books of *The Good News* (*Gospels*) and the *Apostolic Letters* also reference the city of Sodom with respect to same-sex sexual sins.[106] However, Jesus himself does not mention 'sodomy' or same-sex sexual relations in his teachings, but on several occasions mentioned adultery (a sin Sodom was guilty of) as sexual immorality and sin. Hence it can be argued that if sodomy was central to the message of the gospel of Jesus, he would have dealt with it as he did with other sexual subjects. In fact, his central message was not the condemnation of sin but the indiscriminate and all-embracing love of God for all sinners.

What is clear from the Old to the New Testament is that the Bible exclusively refers to same-sex sexual activity between males. It also talks about bestiality committed by a woman.[107] At the time of the death of Jesus, Christianity was seen as a small rabble movement in Roman occupied Jewish territory.[108] There was no Bible as we know it today. Under Roman rule, Roman secular law applied to all territories under its control, while the religious text as found in the Old and New Testaments applied only to the members of that religion without any formal legal force on secular citizenship. It was only in the third century AD, after the conversation to Christianity of Emperor Constantine, that the Roman Empire's view of Christian teachings changed.[109] An interrelationship developed between the leadership of the church and state with religious and state policy becoming one. At this point, Roman law was regulated sexuality through the *Lex Julia* which made it an offence for men of high social status to play a passive role in male same-sex sexual conduct.[110] Hence, *Lex Julia* did not in essence punish same-sex sexual conduct nor was it influenced by any religious teachings.[111] The Christian influence on secular laws regarding same-sex sexual conduct were first introduced by Emperor Justinian in the *Corpus Juris Civilis* (Justinian Code).[112] The Justinian Code introduced into law a New Testament-term from Romans 1:26, *contra naturam* ('contrary to nature').[113] Justinian interpreted Sodom's sin as same-sex sexual activity and an evil lust for it in line with Paul's letter to the Romans.[114] The penalty for sodomy in Justinian's Code was death by beheading.[115] Adultery also attracted death by beheading.[116] The two sexual offences were the first religious-based laws to attract

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106 The books of Mathew 11, Luke 17, Jude 1, 1 Corinthians 6, 2 Corinthians 12, Ephesians 4, 1 Peter 4 and Romans 13, 1 Timothy 1.

107 Leviticus 18 – 23.

108 M Vinzent 'Christianity: A response to Roman-Jewish conflict' in K Berthelot *Reconsidering Roman power: Roman, Greek, Jewish and Christian perceptions and reaction* (2020) 59.

109 S Haskins 'Influence of Roman same-sex laws on homophobia in Africa' (2014) 14 *African Human Rights Law Journal* 405.

110 D Boswell *Christianity, social tolerance and homosexuality: Gay people in western Europe from the beginning of christian era to the fourth century* (1980), explains that in ancient Roman society, gender roles were not dependant on biology (sex) but on social status. The normative gender roles for high class men included the penetration of others, namely women, children and slave, both male and female. There was no prejudice about the sex of the person penetrated. What was an offence was for a man of high class to play the passive role in sexual during sexual acts by allowing himself to be penetrated. See also C A Williams *Romans homosexuality* (2010) 140.

111 For a full discussion see Helmholz (n 105) and Boswell (n 110).

112 For a detailed account of the Justinian's Code see A Ciaralli & M Radding *The Corpus juris civilis in the middle Ages: Manuscripts and transmission from the sixth century to the juristic revival* (2007) and M Mass (ed) *The Cambridge companion to the age of Justinian* (2005).

113 Haskins (n 109) 407.

114 As above.

115 S P Scott *The enactments of Justinian: The Code* (1932) 9.

116 M Carnelley 'Laws on adultery: Comparing the historical development of South African common law principles with those in English law' (2013) 19 *Fundamina* 185.

the death penalty. Justinian's Code would later inform the phrasing of anti-sodomy laws as 'laws against the order of nature' as we know them today.

Justinian's Code became firmly established throughout the Roman Empire, and as Haskins observes, 'few changes seem to have appeared since then'.[117] The laws were introduced in England through the Roman Church under Canon law.[118] Canon law was an amalgam of 'the Bible', the writings of the church fathers, Justinian's Code, the canons of the Church Councils and the papal decretals.[119] The sins and offences of canon law were presided over by the ecclesiastical courts in England before the separation of church and state. The ecclesiastical courts paid no attention to sexual activity among women. As Godbeer and Winiarski put it, 'both clergy and law makers understood sex in terms of penetration' and therefore 'they found it difficult to conceive a sexual scenario that did not involve a penis along with a male to which it was attached'.[120] As will be seen, this somewhat narrow application changed when the regulation of sexual citizenship moved from the church to the secular courts through laws enacted by Parliament. In line with Justinian's Code and Roman Catholic Council canons, the overall view about sex as enforced by the ecclesiastical courts, was that it was a sacred act exclusively performed in the institution of marriage and served reproductive purposes.[121]

In 1532 Henry IV broke away from the Roman Catholic Church following which he moved the jurisdiction over the crime of 'sodomy' from the ecclesiastical courts to the secular courts through the enactment of the Buggery Act of 1533.[122] The Buggery Act was drafted in language and phraseology of the Justinian Code, defining sodomy as 'sex against the order of nature'.[123] The Buggery Act marked the formal beginning of the regulation of sexual citizenship by the state and was part of the wider reformation agenda to reduce the power and influence of the Church.[124] Despite the breakaway of the English churches from the Roman Catholic Church, Christianity remained the basis on which sexual citizenship was regulated, thus high-lighting the religious governmentality of the time. In this respect, the regulation of sexual citizenship by heterosexual nations today, is comparable to the situation in England in 1533. It is quite apparent that the intention of the Buggery Act is tied to the time and period of its enactment. As the church had been stripped of the jurisdiction over sodomy, a law had to be enacted by Henry IV's reformation Parliament to deal with the offence. The preamble of the statute thus made it clear the law was enacted because

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117 Haskins (n 109) 407.

118 As above.

119 H de Ru 'A historical perspective on the recognition of same-sex unions in South Africa' (2013) 19 *Fundamina* 233, citing H Hahlo & E Khan *The South African legal system and its background* (1968) 511.

120 R Godbeer & D Winiarski 'The sodomy trial of Nicolas Sension, 1677' (2014) 12 *Early American Studies* 404.

121 D F Greenberg & M H Bystryn 'Christian intolerance of homosexuality' (1982) 88 *American Journal of Sociology* 525-526.

122 The 1533 was not passed as a permanent Act. It was intended to 'endure until the last day of the next Parliament'. Time limiting statutes in this manner was not usual, but the reformation Parliament of Henry IV used it often as a way to carefully review the application of the laws that would expire at the end of Parliament unless explicitly continued by further enabling Acts. Johnson (n 10) above argues that even though the 1533 Act was explicitly continued at the end of Parliament, the process by which it was archived does not appear to be characterised by careful review. In 1540 it was stated that the provisions of the Act would last forever only to be repealed in 1553 under the reign of Mary who handed back the jurisdiction of buggery to the ecclesiastical courts. However, in 1562 Elizabeth I reinstated the 1533 Act in its original form and gave back jurisdiction to the secure common law Courts.

123 F Pollock & F W Maitland *The history of the law of England before the time of Edward* I (1898) 3-68.

124 P Johnson *Buggery and Parliament 1533-2017* (2018) 3.

> [t]here is not yet sufficient and condign punishment appointed and limited by the due course of the laws of this realm [to deal with the] detestable and abominable vice of buggery committed with mankind or beast.[125]

The Act did not define the ingredients of the crime of 'buggery' but stated that it was the 'unnatural sexual intercourse between mankind and mankind and beast'.[126] Unnatural sex between 'mankind' was not defined in the Act, but the criminal courts interpreted it to mean anal sex, oral sex or both between persons irrespective of their sex.[127] As with present laws, the sex and gender neutrality of the language of the Act meant that the offence was not restricted to homosexual intercourse or desire. This was confirmed in *Rex v Richard Wisemen*.[128] In that case Richard Wisemen was convicted for having anal intercourse with a girl of 11 years. The legal issue in the case included the age of consent of the girl and whether anal intercourse was 'unnatural sex' within the meaning of the Buggery Act. Despite his conviction for Buggery by the County Court, the question of heterosexual buggery needed the determination of a higher court. The question was therefore taken to the Queen's Bench Court, which decided that the act of heterosexual buggery 'is a crime exactly of the same nature, as well as it is the same action as if committed upon a male'.[129]

To this end, although the primary intention of Parliament was to deter and punish same-sex sexual intercourse among men, in keeping with the way the ecclesiastical courts applied the biblical law, the language of the Act was interpreted to mean that Parliament also intended to criminalise heterosexual sodomy.[130] However, the offending party still remained men due to the fact that the standard of proof for 'buggery' in either case was proof of ejaculation. What is unequivocal is that it was particular sexual acts (committed by men) that were criminalised and not the identity or orientation of the persons involved.[131] Some scholars have also suggested that Henry and his reformation Parliament indirectly wanted to weaken the influence of the church and diminish its public image.[132] To this end the provision that 'no person offending […] shall be admitted to his clergy' was a way that this indirect purpose was achieved.[133]

The Buggery Act of 1533 survived in its original form for almost three centuries in England, until 1828 when it was repealed and replaced by some provisions in the Offences against the Persons Act of 1828, itself repealed and replaced by an Act of the same name in 1861.[134] The Offences against the Persons Act should be understood within the context of the time at which it was first enacted. At

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125 Preamble of the Buggery Act, 1533.

126 Section 13, Buggery Act 1533.

127 One of the first cases which delt with this aspect was *Rex v Wisemen* (1716) KB 7740-775.

128 As above. Also see, C Christopher *Male homosexual desires in English discourse 1850-1920* (1994) 130, who discusses the *Wiseman* case in more detail.

129 As above.

130 J E Halley 'Reasoning about sodomy: Act and identity in and after *Bowers v Hardwick'* (1993) 79 *Virginia Law Review* 1721. See also *Wisemen* case (n 127).

131 As above.

132 Johnson (n 124) 3.

133 H M Hyde *The other love: An historical and contemporary survey of homosexuality in Britain* (1970) 39. See also F Makower *The constitutional history and the constitution of the church of England* (1895) 447.

134 Section 1, Offences Against the Persons Act, 1861.

the time Britain was debating codifying the criminal law without any success. In that vein in 1824, it was decided to consolidate different aspects of criminal law in as few pieces of legislation as possible. Therefore, between 1825 to 1828, 278 piecemeal statutes were repealed and streamlined into omnibus eight pieces of legislation known as the Peels Act.[135] The aim was to simplify and modernise criminal law in the face of the failing attempts to codify the criminal law in one piece of legislation. Peel himself stated in parliament that the law 'should be as precise and intelligible as it can be'.[136] Among the areas of criminal law he referred to, was offences relating to assault, violence and other affronts on human persons found in different Acts of parliament such as the Buggery Act. These were all consolidated into the Offences against the Persons Act, 1828.

As stated above, the Offences against the Persons Act was inspired by the desire to clarify and simplify the criminal law.[137] First, it changed the phraseology of the Buggery Act from 'the detestable and abominable vice of buggery' to 'carnal knowledge against the order of nature'.[138] Second, it reduced the sentence from death to 'death recorded' which was effectively 'life imprisonment'.[139] Halley notes that most significantly, the Offences against the Persons Act introduced the passive offender who 'permits a male person to have carnal knowledge of them' thereby directly making both homosexual and heterosexual sodomy an offence.[140] The Act also sought to ease the evidential burden of complainants by stating that penetration (instead of ejaculation) was sufficient proof of carnal knowledge in sexual offences. This was also indicative of the fact that men were the primary focus of the offence.[141] Later, this change in the burden of proof had a negative impact in sodomy cases, as to this day, even microscopic abrasions are taken as proof of sodomy. The present-day impact of this change in Zambia is discussed in Chapter 4. Despite the changes above, the substantive intention and effect of the law remained the same. It was still intended to criminalise, deter and punish particular anal sex between adults (heterosexual and homosexual), with the primary target being anal sex between males.[142]

From the above it can be argued that despite the relative 'modernity' of the Offences against the Persons Act, the rationale regarding the regulation of sexual citizenship remained the same as that in 1533 under the Buggery Act. The state still viewed criminal law as a tool for regulating human sexual behaviour; Christian moral ethic remained the basis on which the law against 'unnatural carnal knowledge' was based; same-sex sexual intercourse was still 'detestable and abominable' and a high punishment was a means of deterring the act. This is evident from a reading of the whole Act.

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135 The Peels Acts, named after their sponsor, Sir Robert Peel, were the first consolidated criminal law statutes in Britain in 1827. The continued refinement led to their repeal and replacement by the criminal law consolidation Acts.

136 L Surridge 'The offences against the Persons Act, 1828' in D Franco *Britain, representation and the nineteenth-century history* (2013) http://www.branchcollective.org/?ps_articles=lisa-surridge-on-the-offenses-against-the-person-act-1828 (access 4 May 2020).

137 Surridge (n 136) 1.

138 Section 15, Offences Against the Persons Act,1828.

139 Section 15, Offences Against the Persons Act,1828 as read with Section 3, Substitution of Death Act, 1828.

140 Halley (n 130) 80.

141 The reason for this ease in evidential burden was 'offenders frequently escaped justice because of the difficulty of proving emission of seed and hence proof of penetration was deemed sufficient'. This was however, not only in respect to buggery but other sexual offences such as rape. Johnson (n 124) 6.

142 Halley (n 130) 79-80.

Many scholars reference the 1861 Act as responsible for the changes discussed above when in fact it was the earlier 1828 Act that occasioned the changes.[143] However, the intention to simplify the criminal laws continued as the Peels Acts, though a step in the right direction, were seen as 'in need of serious improvement'.[144] In 1861 the Peels Acts were repealed and replaced by improved versions which were collectively called 'The Criminal Law Consolidation Acts of 1861'.[145] The 1828 Offences against the Persons Act was thus repealed and replaced by the 1861 Act which gave clarity to the penalty for 'buggery' by stating that it was for a term of not less than fourteen years to life imprisonment.[146] The other provisions on 'buggery' remained substantively the same as in the 1828 Act.

Interestingly, from the point of view of this thesis the 1861 Act came into force at about the same time as the 1861 Indian Penal Code, although the drafting of the Offences against the Persons Act was completed in 1837. A closer look at both the 1828 and 1861 provisions of the Offences against the Persons Act shows a striking resemblance with the 1861 Indian Penal Code. This provides further insight into the purpose of the provisions. In his speech to the Law Commission introducing the full text of the draft Indian Penal Code, Thomas Macaulay, the drafter of the Code, stated:[147]

> Clause 361 and 362 relate to an odious class of offences respecting which it is desirable that as little as possible should be said ... [We] are unwilling to insert, either in the text or in the notes, anything which could give rise to public discussion on this revolting subject; as we are decidedly of opinion that the injury which would be done to the morals of the community by such discussion would far more than compensate for any benefits which might be derived from legislative measures framed with the greatest precision.

The above passage comes from the culture of silence promoted by jurists and parliamentarians tracing all the way back to 1533. It reveals the tone of detestability, unspeakability and abomination with which the 1533 Act was passed. In other words, the intention of the provisions in the 1861 Indian Code and the 1861 Act can be traced to the 1533 Buggery Act as already mentioned. This is collaborated by a passage in *R v Burstow* when much later Lord Steyn, commenting on the interpretation of the Criminal Law Consolidated Acts of 1861, stated:[148]

> If any question should arise in which any comparison may be instituted between different sections of any one or several of these Acts, it must be carefully borne in mind in what manner these Acts were framed. None of them was re-written; on the contrary, each contains enactments taken from different Acts passed at different times and with different views, and frequently varying from each other in phraseology, and [...] these enactments, for the most part, stand in these Acts with little or no variation in their phraseology, and, consequently, their differences in that respect will be found generally to remain in these Acts. It follows, therefore, from hence, that any argument as to a difference in the

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143 Some amendments were made in 1837.

144 For instance, in 1837 amendments were made to the Act which abolished the death penalty for *post*-quickening abortion. In the 1828 Act there was no distinction between *pre*-and -*post* quickening abortions.

145 Other Acts were the Accessories and Abettors Act, the Criminal Statutes Act, the Larceny Act, The Malicious Damages Act, the Forgery Act and the Coinage Act.

146 Section 61, Offences against the Persons Act, 1861.

147 *Report of the Indian Law Commission on the Penal Code* (1837) 3990-3991.

148 (1997) Cr App 14 https://publications.parliament.uk/pa/ld199798/ldjudgmt/jd970724/irland02.htm (accessed 6 April 2022).

> intention of the legislature, which may be drawn from a difference in the terms of one clause from those in another, will be entitled to no weight in the construction of such clauses; for that argument can only apply with force where an Act is framed from beginning to end with one and the same view, and with the intention of making it thoroughly consistent throughout.

By 1861, the British government not only had the intention of regulating sexual citizenship in Britain and India, but they also wanted to create other citizens or subjects, by expanding their empire to Africa. As such, about the same time British explorers and missionaries had already started exploring African territories and setting up missions. The message of Christianity, civilization and protection from the slave trade did not reveal the ulterior motives of conquest and cultural disruption tied to late 20th century colonialism.[149]

From the above one important observation can be made: The nature of governmentality that led to the enactment of the 1861 Act was the same as what manifested in the African colonies including Zambia. First, it was to ensure that sexual citizenship (colonial citizenship) is regulated through the law to exercise bio-power. In this context the British criminal law was believed to have a civilizing effect on the native inhabitants of Africa. Second, it was to simplify the criminal law by way of codification after seeing some success in India. Some historians have argued that in essence Indian and African colonies were mere passive laboratories for the codification project that failed in Britain.[150] However, as will be argued in the section that follows, codification of criminal law was beyond being experimental, it was incidental to colonialism.

To conclude this part: What started as a sin in the Bible became a criminal offence under the jurisdiction of the nation state, first in England, and subsequently in its colonies, as part of the exports of the colonial project. Because the 'sin' was committed by men, the ecclesiastical courts, which first had jurisdiction in the (Biblical version narrative) over the crime applied it exclusively against men.[151] This trend continued even after the state took over jurisdiction following the separation from the church and the enactment of the Buggery Act and, subsequently, the Offences Against the Persons Act. Both homosexual and heterosexual sodomy were offences under the laws. The introduction of the passive participant, whether a man or a woman, who permits a person to have carnal knowledge of them, made this clearer. The net result is that the original intention and purpose of anti-sodomy laws in Britain was to deter and punish anal sex between persons (though targeted at men) and between a person and a beast. It must be acknowledged at this point, that despite the original intention, the laws were and remain inherently discriminatory against sexual and gender minorities. However, as stated in Chapter 1, this aspect of the anti-sodomy laws has been dealt with by other scholars and it is therefore not the focus of this thesis.

Other laws of Britain can be referenced to demonstrate the British government's rationality and intentions. For instance, in 1661 the British Parliament enacted legislation to 'regulate and ensure the better government of the navy' and in so doing came up with articles dealing with a number of issues,

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149 See F D Lugard *The dual mandate in British tropical Africa* (1922), who explains the reasons for the British conquest of its African territories and the strategies used.

150 H F Morris 'A history of the adoption of codes of criminal law and procedure in colonial Africa 1876-1935' (1974) 18 (1) *Journal of African Law* 11.

151 Greenberg & Bystryn (121) 526.

one of which was morals among men at sea.[152] Among the moral issues regulated was 'the unnatural and detestable sin of buggery or sodomy' the commission of which attracted the death penalty.[153] The formulation of the offence reflected the sentiment of the general criminal law and was expressive of the fact that men were a primary target. However, Burg notes that there was no indication that the prohibition against sodomy reflected a response to homoeroticism that was running rampant in the navy.[154] In this regard it can be argued that deterrence was the motivation. As will be seen later, deterrence of sodomy among British soldiers was one of the arguments for sodomy provisions in African colonies.

Another law indicative of the intentions of the British Parliament regarding anti-sodomy laws is the Matrimonial Causes Act of 1857, which provided that a wife could present a petition for divorce on the grounds that her husband had committed sodomy.[155] Notably, this provision was not part of the Matrimonial Causes Bill, which primarily focused on adultery, but was inserted by the House of Commons at Committee stage. Actual conduct of sodomy was not necessary for the wife to establish but she would have to provide sufficient evidence that the Court would 'deem it as having occurred'.[156] The Act did not specify the sex of the partner to the husband. However, when the Act was reviewed in 1937, an amendment made it clear that the legislature primarily meant the husband engaging in same sex-sexual intercourse although heterosexual sodomy was also a ground under the same provision.[157] Not only is this telling of the primary subject for the anti-sodomy laws, but it also shows that the rationale for the regulation of sexual citizenship in this context went beyond the realm of criminal law. Another important aspect to note about the 1937 Matrimonial causes Act, is that it was enacted during the time that the colonial Penal Code for Zambia was also enacted. This points to a conclusion that the reasoning and intention for sodomy in the 1937 Matrimonial Causes Act and the Zambian Penal Code of 1935 (discussed in detail below) was the same.

What is clear from the above is the rationale the British colonial Parliament had regarding the regulation of sexual citizenship at the beginning of the colonial project and more importantly during the enactment of the Criminal Code. The next part deals the actual codification process and coming into force of anti-sodomy laws in Africa as they finally trickled down to Zambia.

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152 The title read, An Act for the Establishment of Articles and Orders for the regulating and better Government of His Majesties Navies of war and forces at Sea, 1661. Article 30 of the orders directly dealt with sodomy at sea.

153 For a full discussion of this subject see B R Burg *Boys at Sea: Sodomy, indecency and Courts martial in Nelsons Navy* (2007).

154 As above.

155 Section 73, Matrimonial Causes Act, 1857.

156 Johnson (n 124) 9.

157 Johnson (n 124) 11. Heterosexual sodomy as a ground for divorce was discussed in *Bampton v Bampton* (1959) 2 All ER 766. In that case the Husband had committed anal intercourse with several women and the question that arose was whether the wife could petition for divorce on grounds of adultery and sodomy as provided in the Matrimonial Causes Act. The House of Lords held that a wife could petition for divorce if the husband is had committed sodomy with another woman and could provide sufficient proof for the court to come to a conclusion that sodomy had indeed occurred.

2.3.2. Codification of English criminal law in Africa: Rationale for criminal codes and anti-sodomy provisions

This part demonstrates that the drafting of the criminal codes and the decision making regarding both the process of codification and the contents of the criminal codes took place purely at political and administrative level thereby excluding the African local populations from providing any level of input. The point to be made is that the criminal codes in general and particularly the anti-sodomy laws were a despotic imposition of English values and culture through the common law and legislation. Common law, it must be noted, is simply the body of English customs, principles and rules developed over time, judicially approved and expressed.[158] This planted the seed for heterosexual nationalism as colonial authorities did not consider the culture and custom of the local African populations regarding sexual diversity.

Before the codification of English criminal law in the African colonies, the British colonial authorities relied on English common law in the administration of criminal justice. In *Wallace-Johnson v R* the English House of Lords stated that codification was simply the proclamation of existing law in a statutory form.[159] Thus, the codification of criminal law was in essence the continuation by statute of already existing criminal law principles of common law. Among the common law criminal offences were the crimes of bestiality and sodomy which were later included in the Offences against the Persons Act in 1828 and continued with the amendment of 1861. Further, by extension of the application of English law, the 1861 Offences against the Persons Act applied in some African and other British colonial territories.[160] However, the local colonial authorities and courts faced serious challenges using the common law and criminal statutes that applied by extension, such as the Offences against the Persons Act. The challenges included insufficient criminal law source material and lack of expertise in the colonies to apply the many English criminal law principles and statutes.[161] As such, even though common law and the Offences against the Persons Act saw the first introduction of anti-sodomy laws in Africa, it was the codified penal legislation that had the first and most lasting impact.

The codification of the criminal law was seen, by the colonial office in London, as the cure for the local challenges in the administration of criminal law in the African colonies.[162] However, this was not straight-forward because Britain itself had for a long time attempted and failed to codify the criminal law. The repeated failure to codify criminal law in the 19th century has been described as a reflection of 'codiphobia' a term originally coined by English law commissioner Andrew Amos to describe 'the chauvinistic tendency to see codification as alien to English legal tradition, which favours adaptability above continentalist rigidities'.[163] While some English legal theorists held the view that

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158 *Black's Law Dictionary* (1968) 460.

159 [1940] 1 ALL ER 241.Thus, the codification of criminal law in the African colonies was the continuation by statute of the existing criminal law principles of common law.

160 Sections 6 and 8 of the Foreign Jurisdictions Act, 1890 made English criminal law applicable in the colonies of Africa and gave jurisdiction to local Colonial Courts to apply it.

161 Morris (150) 6.

162 K I Weldesellasie 'The development of criminal law and criminal justice in Africa from pre-colonial rule to the present day' in C Jalloh & I Bantekas (eds) *The International Criminal Court and Africa* (2017) 247.

163 B Wright 'Self-governing codification of English criminal law and the empire: The Queens Land and Canadian experiences' (2007) 26(1) *University of Queens Land Law Journal* 40.

codification was better for the modernisation of criminal law,[164] some jurists, judges and barristers wanted to maintain the common law system.[165] The philosophical debate surrounding codification in Britain in the late 18th and most of the 19th century had a great impact on the codification of criminal law in British colonial Africa and the inclusion of anti-sodomy provisions in all the draft and final codes that went to those territories.

The most influential legal theorists on English criminal law reform during the late 18th and 19th century were Sir William Blackstone and Jeremy Bentham. Blackstone generally favoured the common law system arguing that it had a unique quality to refine the law through judicial decisions over a period of time, unlike the inflexibility of a static piece of legislation which would not be easily amended by parliament.[166] Bentham, on the other hand, favoured radical codification of criminal law arguing that the common law was 'needlessly complex and the product of chance litigation and self-serving judges'.[167] Bentham articulated that the aim of the 'science of legislation was the full codification of criminal law that left no *terra incognita*, the complete definition of offences and liability, set out with such clarity so that the average person would understand it and the average judge would be unable not to'.[168] It was Bentham's views that the British colonial office in London found attractive for the African colonies. As such the colonial office decided that criminal law would be codified for the African colonies.[169] Wright argues that 'from this perspective their [the colonial office] codification decisions can also be understood as fitting within modernising trends around the exercise of state power and new forms of authority, described by Weber as formal *legal rationality*, by Foucault as *governmentality*, and by historians such as Corrigan and Derek Sayer as *state formation*.'[170]

At the time various criminal codes already in existed in other colonies such as India, Canada and Australia. As will be seen, these codes were simply adopted for different colonies without local input. In Zambia, the Penal Code was based on the Queensland Code, which included sections on 'unnatural offences', Zambia's anti-sodomy law today.[171] A brief account of the Queensland Code is necessary at this point for a better insight into how its provisions came to be and the rationale behind them. While the debate and attempts for codification or at the very least consolidation continued in Britain, the necessity for a codified criminal law in the self-governing white settler colonial territories such as Canada, New Zealand and Australia (primarily the state of Queensland)[172] was less contentious and in many respects welcome.[173] Wright states that codification was significantly about public policy,

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164 One of the leading supporters of codification was Jeremy Bentham, who coined the term codification and saw it as a way of modernising the English criminal law. See J Bentham *A comment on the commentaries and a fragment on government* (1776) in which he criticised the resistance to codification by William Blackstone.

165 As above.

166 As above.

167 For a full articulation of Bentham views on law and codification see J Bentham *Introduction to the principles and morals of legislation* (1871) 158-239 and for a full discussion on the debate regarding the codification of English criminal law see L Farmer 'Reconstructing the English codification debate: The Criminal Law Commissioners, 1833-45' (2000) 18 *Law and History Review* 397, 400.

168 Bentham (n 167) 158.

169 A J Kerr 'The reception and codification of systems of law in Southern Africa' (1958) 2 *Journal of Law* 82.

170 Wright (n 163) 41.

171 As above.

172 The state of Queensland was one of the most influential states in federal Australia and it set the trend for most legal and social reform.

173 The final effort at English codification came from James Fitzjames Stephen. Although considering himself a Benthamite, J F Stephen had conservative inclinations, favouring pragmatism to conceptual abstraction, and saw judicial

political ordering and constitutional change which were matters that went well beyond questions of more efficient crime management.[174] With these motivations the Queensland Parliament tasked Samuel Griffith to draft its criminal code in 1896.

The draft Criminal Code was completed in 1897 and after a few modifications by the Queensland Parliament, it was passed into law in 1899. O'Regan notes that in drafting the Code, Griffith consulted several other draft criminal codes mainly the New York Penal Code, Stephens draft Code[175] and the Italian Penal Code of 1888, also known as the Zardanelli Code, named after the Italian justice minister associated with it.[176] According to O'Regan, Griffith himself stated that 'I have derived very great assistance for this Code, from Zardanelli's Code which, I considered to be the most complete and perfect Penal Code in existence'.[177] Both the Italian Code and Stephens draft Code contained 'anti-sodomy' provisions which Griffith reformulated and included in his Code in keeping with the demands of the English common law.[178] The anti-sodomy provisions, cited as section 208 and 209, stated as follows:

> **Unnatural offences**
>
> 208. Any person who –
>
> *(1)* Has carnal knowledge of any person against the order of nature; or
>
> *(2)* Has carnal knowledge of an animal; or
>
> *(3)* Permits a male person to have carnal knowledge of him or her against the order of nature;
>
> is guilty of a crime, and is liable to imprisonment with hard labour for fourteen years.

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discretion as inevitable and desirable. This is reflected in his cautious 1878 draft code where little intruded on the interpretative power of judges. All offences were codified but defences were left to the common law. While Stephen won approval from the Attorney General and the Lord Chancellor, and a Royal Commission was charged with converting his draft into a Bill, the project had lost momentum by the time the Bill, the Draft English Code bill was introduced in 1880. In the meantime, The Lord Chief Justice Cockburn issued a devastating critique, somewhat disingenuously declaring the proposal inconsistent with the ideal of codification, suggesting that no Code was better than a half-baked one. This ended the prospects of a criminal law codification in England, perhaps forever. See Farmer (n 154).

174 Wright (n 163) 40.

175 Originally James Fitzjames Stephens was asked by the colonial office in England to review the code drafted for Jamaica by Robert S Wright in 1870. The review had particular consequences with respect to anti-sodomy laws in that Wright distinguished between consensual and nonconsensual same-sex conduct. Further Wright proposed a maximum of two years for 'unnatural sex with consent'. Stephens strongly rejected these provisions and instead proposed 10 years for 'sex against the order of nature' without distinguishing between consensual and nonconsensual same sex conduct. Stephen's recommendations were accepted by the British Parliament and the Code was sent to the colonies and became the basis for the Penal Codes of some African colonies such as Ghana. Stephens work resulted to him being requested to draft his own Penal code by the Lord Chancellor's Office. This Code was meant to be the basis for another attempt to Codify English criminal law for the Britain itself and was introduced in parliament in 1880. Although Stephen's draft code was never adopted as law, it was influential and was the basis on which other codes were drafted including-with limited-reference the Queensland Code. However, with respect to the anti-sodomy laws, it was Stephens draft code that influenced the Queensland code and many others. See Johnson (116).

176 R O'Regan 'Sir Samuel Griffith's Code Criminal Code' (1991) 7 *Australian Bar Review* 141.

177 As above.

178 As above.

Attempt to commit unnatural offences

> 209. Any person who attempts to commit any of the crimes defined in the last preceding section is guilty of a crime, and is liable to imprisonment with hard labour for seven years.

As will be discussed later in this Chapter, the provision is exactly the same as what exists in Zambia today, except for the punishment which was increased to life imprisonment. Ironically, the original draft sent by Griffith to the Queensland Parliament provided for life imprisonment as the punishment for 'sex against the order of nature'.[179] Life imprisonment was seen to be too severe for the purpose of the provision as a sexual offence meant to deter sodomy.[180] The punishment was therefore reduced to 14 years as this was seen to be sufficient for the object and purpose of the provision.[181] The rationale or purpose of the provision was therefore to deter and punish same-sex sexual conduct among men and further ensure that heterosexual sodomy is deterred.[182] Although the provision was drafted in gender neutral language, at the time it was not imagined that women could be capable of sex against the order of nature.[183] According to Griffith himself, following Stephen's reasoning, the 'section was meant to prevent the immoral crime of sodomy and bestiality'.[184] Han and O'Mahoy note that in his explanatory notes, Griffith did not go beyond the need to deter acts of sodomy among men and bestiality.[185] It can, therefore, be argued that the provision was never meant to criminalise *homosexual identity* nor was it meant to be a tool for discrimination against sexual minorities in the manner that exists in former British African colonies today. In essence it can be said that the original governmentality with respect to sexual minorities was not to effect a policy of discrimination and the violation of the rights of sexual and gender minorities. Whether this rationality was the same during codification in African colonies is discussed below.

The trajectory of opposition and challenges in the codification of criminal law faced in Britain and many of its western settler colonies was nonexistent in the African colonies. Despite the political and philosophical debates and failed attempts at codification at home, the idea to codify criminal law in Africa colonies was unanimously shared. In this regard Morris states:[186]

> [a] codified body of criminal law and procedure, replacing the English common law and statutes of general application (as modified piecemeal by local Ordinances), had a great appeal to administrators, government law officers, judges and magistrates, and, whatever their differing views as to the respective merits of codes on the Indian, or more purely English, model, they were virtually all agreed that the introduction of such codes [in Africa] was an essential measure of reform. This is hardly surprising in view of the difficulties experienced by judicial officers, of whom the majority were the lay magistrates

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179 J Finn 'Codification of the criminal law: The Australasian parliamentary experience' in B Godfrey & G Dunstall (eds) *Crime and Empire 1840-1940: criminal justice in the local and global context* (2005) 224, 237.

180 As above.

181 As above

182 As above. See also Wright (n 163) 46.

183 Godbeer & Winiarski (n 113) 404.

184 E Han & J O'Mahoney *British colonialism and the criminalization of homosexuality: Queens, crime and empire* (2018) 32.

185 As above.

186 Morris (n 150) 7-8.

> of the administrative service, in applying the uncodified English law without an adequate supply of text-books or English law reports.

With the decision firmly made, the British colonial territories in Africa saw the introduction of criminal codes in the first half of the 19th century.[187] Different colonies received and adopted different codes. This part focuses on those colonies that codified their criminal law based on the Queensland Code which eventually came to Zambia. With some detail, this part of the Chapter demonstrates that the drafting of the Codes and the decision making regarding both the process of codification and the contents of the criminal codes took place purely at political and administrative level thereby excluding the African local population from providing any level of input. African traditional criminal law and systems were simply ignored. As earlier stated, the point to be made is that the criminal codes in general and particularly anti-sodomy laws were a despotic imposition that sowed the seed of heterosexual nationalism as the British colonial authorities did not consider the culture and custom of local African populations regarding sexual diversity and the existence of sexual and gender minorities.[188]

The first was Nigeria and specifically the protectorate of Northern Nigeria. In 1901, the colonial administration of Northern Nigeria, adhering to the desire of Britain to codify criminal law in Africa, decided to codify its criminal law and procedure.[189] As such, the Chief Justice, Lord Gullan, drafted two codes, the first being the Criminal Procedure Code based on the Gold Coast Code of 1876 and the second, the Penal Code, based exclusively on the Queensland Code of 1899. The Penal Code was enacted in 1904 and contained the same anti-sodomy provisions as the Queensland Code. In 1916 when the Protectorate of Northern and Southern Nigeria were amalgamated the Criminal Procedure Code and the Criminal Code of Northern Nigeria were adopted.[190]

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187 There was some opposition by African nationalists opposed to colonial rule. According to Morris (n 107 above) a criminal code suggested to them imposition of a harsher body of law which impose heavier penalties and gave the colonial authorities greater opportunity to repress them. Moreover, there was one question which the colonial authorities were failing to answer; why should the British authorities be so keen to introduce a codified criminal law into their colonies when they apparently had no wish to enjoy its benefits in their own country?

188 L Sebba 'The Creation and evolution of criminal law in colonial and post-colonial societies' (1999) 3 *Crime, History & Society Journal* 87-88.

189 W H Woodward *A short history of the expansion of the British Empire: 1500- 1902* (1903) 306. See also V Essien 'The northern Nigeria penal code: A reflection of diverse values in penal legislation' (1983) 5 *Journal of International and Comparative Law* 88-94.

190 The protectorate of Southern Nigeria following a recommendation by the British High Commissioner who preferred that the Criminal Code be based on the Indian Code as it seemed to him to have been more successful. However, the legal office of the British Secretary of State was opposed to enacting a Code based on the Indian Code and instead preferred, in the interest of uniformity with Northern Nigeria, that Southern Nigeria adopts the Code enacted in Northern Nigeria. The debate between the legal officers of the Secretary of State and the High Commissioner went on without bearing fruit. The Secretary of State who himself could have made the decision decided to defer the matter preferring that Lord Lugard, who was Governor of Southern Nigeria, has the final say. However, in 1914, before any decision was taken Northern and Southern Nigeria were amalgamated and thus the law operative in the two territories had to be merged. Criminal Procedure was not a problem as they both had the same Criminal Procedure Code based on that of the Gold Coast. Criminal law was problematic in that the draft code was rejected by colonial officials from the South as it was basically a reproduction of the Northern Nigeria Penal Code. After much debate among the colonial officials an agreement was reached, the Code was adopted and enacted in 1916. It was basically a redrafted form of the Northern Nigeria Penal Code modelled on the Queensland Code with the same anti-sodomy provisions.

The imposition of a criminal code was the same in Colonial East Africa which comprised Kenya, Uganda, Zanzibar and Tanganyika. Initially the Indian Penal Code applied in colonial East Africa.[191] However, it was not popular among the European settlers in East Africa, who in 1905 petitioned the Secretary of State against being subjected to 'laws intended for coloured populations despotically governed and claimed their right to have the English common law applied to them as subjects of the King of England'.[192] The petition was rejected for among other reasons, that if the Code enabled its application to be entrusted in the hands of lay Magistrates while its sole reliance was placed on English common law for Europeans, the colonial administration would have to appoint professionally trained judicial officers, which would come at great cost.[193] In a concluding note, the colonial office in East Africa also stated that the petitioners greatly overestimated the difference between the Indian Penal Code and the criminal law principles of common law.[194] Morris and Read, who provide a detailed account of the codification and application of English criminal law in East Africa, argue that despite the objections, the Indian Penal Code operated satisfactorily in the territory and was generally accepted by the local Bar and Bench.[195]

The trajectory changed in 1923 when the courts of Kenya and Tanganyika made decisions that had questionable sentences and outraged the white population in East Africa.[196] They blamed the 'unjust' decision on the application of the Indian Code.[197] To ease the anger and public outcry of the European settlers, the Colonial Office in London decided that a new Criminal Procedure and Criminal Code be drafted for East Africa to replace the existing Indian Codes. Morris documents that two Codes were sent for consideration, the Criminal Procedure Code of the Gold Coast and the Penal Codes of Nigerian and St Lucia.[198]

Kenya took the lead in drafting of the criminal codes which were subsequently adopted in Uganda and Tanganyika. The Chief Justice of Kenya was opposed to the replacement of the Indian Code, and the Governor of Kenya complained that he had a shortage of legal human resource for the drafting of the Codes and requested that a full-time person be sent from London to finalise the drafting of the Codes.[199] Alarmed by the situation, the Secretary of State wrote to the Governors to speed up the process of drafting the Codes indicating that 'an admirable Code was already done in Nigeria' and requested that East Africa adopts this Code instead of attempting to 'manufacture new Codes of its own'.[200] The British Parliamentary Under Secretary of State was concerned with the ability of the Kenyan colonial authorities to draft the Code quickly and so in consultation with the Secretary of State, they decided that the Criminal Code be drafted in the Colonial Office in London and be sent for

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191 In Zanzibar as early as 1867, in Kenya and Uganda by an Order in Council in 1897 and in Tanganyika in 1920.

192 Morris (n 150) 13.

193 As above.

194 As above.

195 H F Morris & J S Read *Indirect rule and the search for justice: Essays in East African legal history* (1972) 4.

196 As above.

197 The case involved an English farmer who was charged and convicted with assault occasioning grievous bodily harm. The employee later died, and the accused was sentenced to two years in prison. The decision was seen as unjust by the white settlers because they believed they had the right to discipline their workers who stole or erred by beating them. Morris & Read (n 176) 120-121.

198 Morris (n 142) 15-16.

199 Morris & Read (n 195) 122.

200 As above.

enactment in East Africa. Nyasaland, now Malawi in Southern Africa, was also included on the list that would adopt this Code, but Northern Rhodesia was excluded from the list of colonies that would have a codified criminal law.[201]

In 1925 the model Penal Code for East Africa and Nyasaland was completed by the colonial office.[202] It was solely and principally based on the Nigerian Penal Code.[203] The Code was sent to the territories for suggestion on amendments necessary to meet local circumstances, but it was added that 'such amendments were not to involve any departure from the principles on which the draft is based'.[204] This instruction highlights the fact that the intention of the Codes was not to be in harmony with African values or traditional criminal law systems, but rather that the principles on which the code were made be the primary basis for the regulation of citizenship in the colonies. The draft Penal Code was discussed at a conference by the Attorneys General of East Africa and Nyasaland who could neither add nor subtract as they were bound by the directive not to touch the principal substance of the Code.[205] Despite the misgivings of the Bar and Bench in East Africa over the draft Code, the three territories enacted identical versions of the Penal Code in 1930.[206]

In the Southern Africa colonies of Nyasaland and Northern Rhodesia, the situation was different from that in Colonial East Africa, as the Indian Code did not apply before the new codes. What applied before codification was the English common law and statutes of general application such as the Offences against the Persons Act.[207] However, as earlier stated, when the Colonial Office in London decided that Colonial East Africa should have a new criminal code and stop using the Indian Code, Nyasaland though in Southern Africa, was included on the list. Ironically Northern Rhodesia was left out notwithstanding the fact that the two colonies were similarly circumstanced in terms of political organisation, culture and background.[208] The Chief Justice of Malawi was opposed to the introduction of a codified criminal law stating that the English common law was sufficient for the territory. However, the Colonial Office was adamant and, in 1930 Nyasaland also enacted its own criminal code based on the Code drafted for colonial East Africa.[209] In 1931 Northern Rhodesia enacted its own criminal code based on the Tanzania Code.[210] The next section will discuss the codification process of the criminal code in Northern Rhodesia (Zambia).

The point of the above detailed discussion is to demonstrate that the criminal codes generally enacted in Africa and eventually in Zambia were debated at colonial official and administrative level without input from the local inhabitants and without regard to their customs culture or traditional

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201 Morris (n 150) 16-18.

202 Han and O'Mahoney (182) 84.

203 Morris & Read (n 176) 122.

204 Morris & Read (n 176) 123.

205 Morris (n 150) 16-17.

206 A few minor differences exited, for example in Kenya trial by jury was included for European settlers. However, in substance the Codes were identical with the same offences and the same penalties. Zanzibar later enacted a code in 1934 which was identical to the Kenya code.

207 Morris & Read (n 176) 128.

208 Nothing much has been found in the literature as to why Malawi was put on the list together with East colonial African territories and why Zambia was left out.

209 See n 73.

210 J Hatchard 'Crime and punishment in Zambia' in M Ndulo (ed) *Law in Zambia* (1984) 163-64.

criminal law systems. The criminal codes were merely imposed on the local populations and represent an imperious regime in the administration of criminal justice in colonial Africa. Crimes such as sodomy were created and imposed without regard to the culture around sexual diversity in the territories. An important point to note is that substantive provisions such as anti-sodomy provisions were not discussed in isolation and therefore the far-reaching impact of these laws was never contemplated nor was it a concern of the colonial authority. As seen above, the colonial governmentality for the codification of criminal law in Africa was legal convenience and political preference of the different administrative players and not the relationship between law and the society it was meant to govern.[211] In short, the criminal law was not a codification of African customs but rather a codification of English customs expressed in colonial language as the 'common law'. While this imposed law may have been 'common' to the colonial government, it was strange and foreign to the local population. It was in essence a legally constructed coup d'état– an overthrow of African culture in the name of legal development and cultural imperialism in the name of civilization.

The above 'story' of the codification of criminal law in Africa shows that the purpose of anti-sodomy laws for territories that based their codes on the Queensland model was never expressly stated to the African colonies. However, it can be inferred from the birth of the provision as discussed above, that it was meant to deter and punish consensual same-sex sexual conduct between adults persons (heterosexual and homosexual), primarily targeting male same-sex sexual conduct in Britain and by implication of imposition, in Africa. This conclusion is supported by the fact that the Queensland Code which was imposed on Zambia was drafted to ensure that the principles of English criminal law are maintained.[212] Han and O'Mahoney state that following its drafting and enactment, the Queensland Code become the model for the codification of English criminal law in the Asian and African colonies.[213] Therefore, is not unsafe to conclude that the intention for anti-sodomy laws as contained in the Queensland and other codes in African colonies was the same as that in Britain. The codes were not introducing a new criminal law because the English common law and statutes like the Offences against the Persons Act already applied. They were simply consolidating the criminal law in one criminal statute.

2.3.3. Codification of criminal law in Northern Rhodesia: The coming into force of the anti-sodomy laws

As stated in the preceding section, Northern Rhodesia codified its criminal law in 1931 based on the Tanganyika Code, which itself was based on the Nigeria Code (which was identical to the Queensland Code). The criminal law applying before 1930 was English common law and the Statutes that applied by extension, such as the 1861 Offences against the Persons Act. The anti-sodomy laws in Northern Rhodesia were therefore first introduced through the common law and by statue through the application of the Offences against the Person Act. The rationale was simply to extend the application of English law in the colonies under what Lugard termed the 'dual mandate' and not much a response to the need to regulate sexual diversity in Northern Rhodesia or throughout Africa.[214] However, the

211 Lugard (n 141) 516-536.
212 O'Regan (177) 141.
213 Han & O'Mahoney (184) 4.
214 As above.

manifest and lasting impact of anti-sodomy laws came after the codification of criminal law through the Penal Code in Zambia.

Notwithstanding its exclusion from the list of territories to codify their criminal law, Northern Rhodesia had representation at the Conference in East Africa where the Codes were being discussed by the Attorneys General of Colonial East and Southern Africa. The colonial authorities in Northern Rhodesia were, therefore, up to date on what was happening regarding the drafting of Codes. In Northern Rhodesia itself the view was that a codified criminal law would be advantageous but as in the other territories, some colonial officials felt that the 1861 Indian Penal Code was the best model.[215] The argument behind adopting the Indian Code was that it was more suited to Northern Rhodesia since the jurisdiction had lay magistrates to administer the criminal law.[216] Others argued that the criminal code be based on the Nigerian criminal code which followed the Queensland Code, as this was closer to the Common law which the judicial officers were already familiar with.[217] These debates could not go far since codification was not a subject proposed for Northern Rhodesia before 1930. Another reason codification was not discussed was the possible amalgamation of East Africa, Central Africa and some parts of Southern Africa, including Zambia that was being discussed under a Commission set up for that purpose called the Hilton Commission.[218]

In 1927, the Colonial Office in London set up the Hilton Commission 'to look into closer union and association between the territories of East Africa, Central Africa and some parts of Southern Africa (Nyasaland and Northern Rhodesia)'.[219] Hence, any decision regarding the codification of criminal law in Northern Rhodesia was suspended by the Governor and the Chief Justice pending the recommendations of the Hilton Commission. The suspension was made because one of the terms of reference of the Hilton Commission was to 'look into the possibility of a political federation of the territories in East and Central Africa with the possibility of a federal legislative Council and a uniform law'.[220] Although the majority of Commissioners recommended that Nyasaland and Northern Rhodesia be associated with East Africa within a federation, the Chairperson argued that due to already exiting economic, cultural and political connections, Nyasaland and Northern Rhodesia be associated with Southern Rhodesia.[221] The colonial office agreed with the Chairperson and decided that close links between Nyasaland (Malawi), Northern Rhodesia (Zambia) and Southern Rhodesia (Zimbabwe) was more economically viable and cost effective for the British Government.[222] With the prospect of a federation or some form of political union rejected, the local colonial authorities in Northern Rhodesia recommended that its criminal law be codified as codification would align Northern Rhodesia with Nyasaland which had just enacted a code and Southern Rhodesia which already had a code.

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215 *Colonial Office dispatch* No. 822/3/17040, 5 March 1927.

216 As above.

217 Hatchard (n 210) 163.

218 Royal Institute of international Affairs 'The Hilton-Young and the Wilson Report on East Africa' (1929) 6 (10) *Bulletin of International News* 3-13.

219 As above.

220 *Report of the Commission on Closer Union of the Dependencies in East and Central Africa* (1929) 2-8.

221 As above

222 The recommendation led British government to consider a federation of Southern Rhodesia, Northern Rhodesia and Nyasaland which was eventually established in 1957 under the Rhodesia and Nyasaland Federation Act, 1957.

In 1930 the process of drafting the criminal code started. The Colonial Office sent the Tanzanian Code as a model on which the code in Northern Rhodesia should be drafted. The Chief Justice felt that the Code should abolish completely the use of common law principles arguing that a good code should be complete in itself.[223] The Governor and the Attorney General disagreed with the Chief Justice arguing that 'the code would be exhaustively examined by those who administer it before they have recourse to English Law […] but it is a mistake to abolish at a single blow the elasticity for which the English system is famous and entirely to repeal it by a Code the value of which has not yet passed the test of experience'.[224] The draft Code was finished in 1931 and following consideration by the Colonial Office the Code adopted was identical to the Tanganyikan criminal Code.[225] In the same year it was enacted into law and that marked the beginning of the legacy of anti-sodomy laws in Zambia. Sections 155-158 of the Code provided as follows:

> **Unnatural offences**
>
> 155. Any Person who –
>
> *(1)* Has carnal knowledge of any person against the order of nature; or
>
> *(2)* Has carnal knowledge of an animal; or
>
> *(3)* Permits a male person to have carnal knowledge of him or her against the order of nature;
>
> is guilty of a felony and is liable to imprisonment for fourteen years.
>
> **Attempt to commit unnatural offences**
>
> 156. Any person who attempts to commit any of the crimes defined in the last preceding section is guilty of a crime and is liable to imprisonment for seven years.
>
> **Gross indecency**
>
> 158. Any male person who, whether in public or private, commits any act of gross indecency with another person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony and is liable to imprisonment for five years.

The provision is word for word with the provisions of the Queensland Code, on which the Nigerian and later Tanganyikan Codes were based.[226] The provision planted the seed for the stigmatisation and

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223 Morris (n 150).

224 *Colonial Office Dispatch* No. 882/25/25402, June 19, 1930.

225 The Criminal Procedure Code was enacted in 1933 and it too followed the Tanzania Criminal Procedure Code. The British Secretary of State had initially wanted it to be based on the Nigeria Procedure Code which was different from the Tanzanian one. However, on his visit to Zambia in 1933 he agreed with the Governor that the circumstances in Zambia were different from those in Nigeria and the Tanzania Criminal procedure Code was best suited for Zambia.

226 Interestingly sections 155 to 158 in the Zambian Code are the exact same as those in the Botswana Penal code although Botswana received it law from the South through the Roman-Dutch Common law prevailing in South Africa.

discrimination of sexual and gender minorities, a 'reality' they never previously experienced and from which their culture protected them.

Like in other African colonies, the debate on substantive content of the Criminal Code was held at administrative and political level with the purpose for the Criminal Code having nothing to do with a 'lacuna' in African traditional criminal law or the culture of the local African population. As with the whole Code, section 155 was an imposition of English culture, values and customs in the name of the need for a codified criminal law embedded in 'civilising' mission of colonialism. It criminalised what was not an offence in the Zambian way of life. Hatchard corroborates this point by stating:[227]

> The settlement of the territory by the British South Africa Company in 1894 brought with it, for the first time, English law and courts including the English penal sanctions of the time. From the point of view of the criminal law, the settlement brought about a profound change in emphasis for the English idea of punishment for a crime was by no means the approach found under customary laws […] the underlying purpose of customary law was to compensate the victim of the act or his family, to repair any loss suffered and to restore good relations between the parties.

As a guise that the colonial government was alive to local custom and culture, African traditional courts were maintained in the administration of criminal law. This was under the Native Courts Ordinance, now the Local Courts Act.[228] However, section 12 of the Ordinance provided as follows:

> Any offence under the African customary law, where such law is not repugnant to natural justice or morality, may be dealt with by a local court as an offence under such law notwithstanding that a similar offence may be constituted by the Penal Code or by any other written law. Provided that such local court shall not impose any punishment for such offence in excess of the maximum permitted by the Penal Code or by such other written law for such similar offence.

In this respect African/Zambian customary law was still subject to the English morality of the time under the repugnancy clauses, which also existed in other colonial African territories.[229] It can therefore be argued that through the law, the colonial government wanted to and successfully imposed English customs and values which were at variance with the African/ Zambian customs. This can be seen from the fact that courts throughout the British African colonies were required to apply two distinct tests to determine: First if the custom was inconsistent with the Common Law or any European legal system, and second if the practice was 'obviously immoral in its incidence'.[230] At the time,

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227 Hatchard (n 210) 163.

228 Chapter 29 of the Laws of Zambia. The Native Courts Act was repealed at independence but only the name changed when it was re-enacted by the independence government. The repugnancy clause still exists with the exact wording. The High Court Act, Chapter 27 of the Laws, also introduced a repugnancy clause in 1995 under section 14 which adds addition that customary law should not be repugnant to *equity, good conscience* apart from the original *morality* and *Natural justice* found in the Local Court Act.

229 See Goldin & Gelfand (n 36) 65-70. In Colonial East Africa the wording used was 'not repugnant to justice and morality'. In Bechuanaland (Botswana) the provisions read as 'repugnant to morality, humanity or natural justice of injurious to the welfare of the natives. And in the Republic of South Africa the relevant phrase was 'opposed to the principles of public policy and natural justice'.

230 Goldin & Gelfand (n 36) 69. This is also demonstrated in Zimbabwe leading case of Tabitha *Chikuku v Chidano* (1922) SR 55.

English values, based on Christian moral ethics, were totally opposed to any form of sexual diversity. Hence, the local Zambian population could not argue that their customs did not criminalise same-sex sexual conduct as this would still be caught up in the repugnancy clause and therefore subject to prosecution under the Penal Code.

The relationship between African customary law and the Penal Code was illustrated by the Northern Rhodesia High Court in *R v Mubanga and Sakeni*.[231] In that case, two men who were Christians, refused to supply finger millet meant for worship of the tribal spirits during a special ceremony and persuaded other Christians to do the same. They were brought before a Native Court (the predecessor of the 'Local Court'), which found them guilty of breaching Bemba customary law. When the matter went to the Northern Rhodesia High Court, it was held that even though the customary law in question was well established among the Bemba, it was repugnant to natural justice and inconsistent with the Penal Code. The finding of guilt against the accused was therefore reversed. This case demonstrates the gradual weaking of African customary law by English law. The crucial point to be noted here is that the colonial authority expressly intended to disrupt and get rid of African culture and customs especially if it did not meet the values test to determine when customary law could be applied under the repugnancy clause. Sexuality and sexual diversity fell into the category of repugnant customs and way of life. It is in this sense that the anti-sodomy laws had a cultural disruptive impact. This is best illustrated in the Nigerian case of *Eugene Meribe v Joshua C. Egwu,* in which the colonial court declared the Ibo custom of 'woman to woman marriage' repugnant and unlawful.[232] In that case a woman contracted a woman-to-woman marriage with a younger woman, paying the bride price in line with custom. Some of her relations contested the fact that the adopted children of the woman-to-woman marriage would be entitled to inheritance. Instead of dealing with the substantive issue, the court focused on the nature of the marriage and nullified it on the grounds that the marriage was repugnant to English law, good conscience and morality.[233] Invoking the repugnancy clause, the English judge presiding over the matter in the Nigerian High Court stated in his decision:[234]

> In every system of jurisprudence known to us, one of the essential requirements for a valid marriage is that it must be a union of a man and a woman thereby creating the status of husband and wife. Indeed, the law governing any decent society should abhor and express its indignation of a 'woman to woman' marriage.

Commenting on the decision and its impact in Africa, McNamara argues that in 'finding the traditional custom repugnant to colonial law, and outlawing the practice, the British colonial court destroyed a traditional custom and imposed hetero-normativity upon the natives'.[235] Decisions like this deterred queer practices in Africa and gradually created negative attitudes towards their own customs in African traditional societies. Long writes that 'the repugnancy clauses and the codification of criminal law re-

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231 (1959) II R & N 169.
232 (1976) 1 ALL NLR 266.
233 As above.
234 As above.
235 C T McNamara 'Silent, spoken, written and enforced; The role of law in the construction of pot-colonial queerphobic states in Africa' (2018) 51 *Cornell International Law Journal* 522.

wrote African customary law, either in the image of the colonial authority or in the image of what they believed the "native" should be'.[236]

Turning to the purpose of the Code in the context of sexual diversity in Zambia, it has already been seen that the local population was not consulted and was not afforded any opportunity to provide input in the Code. It has also already been seen that African sexual diversity was subject to the repugnancy clauses. The inference is that even though there was no specific legislative debate on the regulation of sexual diversity through the anti-sodomy provisions in the Penal Code in Zambia, the Code itself was a means of criminalising African customs that were not in line with the Christian moral ethic, as interpreted by English Common Law. Hence, the original intention of the anti-sodomy law in England which was to 'deter and punish sex against the order of nature', among men primarily, was imported into Zambia with the enactment of the Code. This can be seen from the rule of interpretation stated in the Code itself as follows:[237]

> This Code shall be interpreted in accordance with the principles of legal interpretation obtaining in England and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith.

This self-speaking interpretation clause expresses the fact that the colonial authority meant that the anti-sodomy laws, like all provisions of the Code, should be applied in the same way as they were in in England. This point was stressed in *Director of Public Prosecutions v Chirwa*, where the Chief Justice stated:[238]

> The Penal Code is in fact a codification of a considerable portion of the criminal law in England for application to Zambia. It does not follow that in all cases the legislature intended entirely to follow the English law, both statute and case, but substantially it did so intend. It is therefore not strange that [the interpretation section] was introduced. It was in the nature of a slip rule to cover the fallibility of draftsmen.

The implication of above decision is that prosecution of accused persons under section 155 would be based on the common law ingredients of the offence. The ingredients of the offence, the *actus reus* (action) and the *means rea* (intention) did not include establishing the sexual orientation or gender identity of the person accused as discussed in more detail in Chapter 3. As already stated above 'carnal knowledge against the order of nature' meant anal sex and this did not exclude heterosexual anal sex. In essence, therefore, what was criminalised and what was meant to be criminalised was *specific sexual conduct* and not *homosexual or gender identities*. What was meant to be deterred was same-sex sexual conduct by men primarily because non-reproductive sex was viewed as sinful, deviant and therefore criminal.

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236 S Long 'Before the law: Criminalizing sexual conduct in colonial and post-colonial southern African societies' (2003) https://www.hrw.org /reports/2003/safrica (accessed 6 April 2020).

237 Section 2, Northern Rhodesia Penal Code 1931.

238 (1968) ZR 28.

2.4. Anti-sodomy laws in independent Zambia

2.4.1. Enactment of sodomy laws at independence

Zambia gained its independence from Britain in 1964. As with most independence governments in immediate post-colonial Africa, the Zambian government continued all the laws passed during colonial rule with very little if any subsequent changes. This inevitably included the Penal Code and, therefore, also the anti-sodomy provisions. Thus, while colonialism had a disruptive political and cultural effect, independence did not re-establish the political or cultural institutions of African states that pre-existed colonial rule. This Chapter argues that two factors are predominantly responsible for continuity of colonial structures, systems and world views which include perceptions about and laws on sexuality. These are coloniality of power and coloniality of the mind. With regard to coloniality of power, which is the survival and maintenance of colonial systems and structures of power, this thesis contends that the post-colonial African state, including Zambia, was designed to exist and grow on the political, legal and economic structure of the colonial state rather than on the re-establishment – to whatever degree – to pre-colonial systems and constructions of life. For example, during the debate for Zambia's independence in the British Parliament, the main issue about the Northern Rhodesia's Independence Bill was how the new country, Zambia, would have a constitutional, legal and economic order that would be based on the western model of governance.[239] During the second reading of the Northern Rhodesia Independence Bill, its sponsor, the Under Secretary of State for Commonwealth Relations and the Colonies, Mr John Tilney, stated as follows:[240]

> The Bill provides for the ending of Her Majesty's jurisdiction in Northern Rhodesia on the 24th October of this year. Northern Rhodesia will that day become the independent Republic of Zambia. It is surprising to many how short the connection between our two countries has been. While this era ends, it is the future that we should look. Zambia will be the first of our dependencies to negotiate with us a Republican status for independence[...]But it has been done with propriety and courtesy to Her Majesty, and above all, with the desire for continuing links with Great Britain and the Commonwealth. Zambia wishes to have an executive President with wide powers, giving firm and effective leadership. But that does not mean dictatorship. There are many checks and balances. Though the present Constitutional Council will disappear, its functions will be carried on by a judicial tribunal. The existing Bill of Rights is carried forward and entrenched with special arrangements for its enforcement. The judiciary will be independent. Public prosecutions should be effectively separated from politics. There will be a Public Service Commission for the Civil Service [...] I believe that all hon. Members will rejoice with the people of Zambia that this ancient House this day has set in motion a parliamentary and legal process that will bring not only independence to old friends, but will prepare the way for the entry of the newest member of our great Commonwealth of Nations.

As can be seen, the independence of Zambia was not imagined or fashioned towards a return to pre-colonial systems but towards the continuity of colonial political and legal systems of power. This

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239 Hansard of the UK Parliament on the independence of Zambia https://api.parliament.uk/historic-hansard/commons/1964/jul/07/zambia-independence-bill (accessed 28 November 2022).

240 As above.

included continuity of legislation such as the Penal Code and, consequently, anti-sodomy laws. Once the Independence Bill was passed and independence gained, the leaders followed the trajectory set in the British Parliament. In relation to sexual diversity, there was no return to the culture of tolerance and acceptance. Rather, the regulation of sexual citizenship by the independence government continued with the same governmentality with which the anti-sodomy laws were passed in 1533 in England. Grosfoguel argues that it was a myth that new independent African states would re-establish pre-colonial structures and constructions of life, stating that

> [o]ne of the most powerful myths of the twentieth century was the notion that the elimination of colonial administrations amounted to the decolonization of the world. This led to the myth of a 'postcolonial' world. The heterogeneous and multiple global structures put in place over a period of 450 years did not evaporate with the juridical-political decolonization of the periphery over the past 50 years. We continue to live under the same 'colonial power matrix.' With juridical- political decolonization we moved from a period of 'global colonialism' to the current period of 'global coloniality.[241]

Coloniality of power was made possible by coloniality of the mind, which as already stated in Chapter 1, can generally be defined as the retention of colonial mindset, governmentality and world view.

Like most pre-colonial African territories, Zambia was rich in diversity. However, it is important to note that pre-colonial African societies were not static. As different groups moved and settled in new territories, their culture was influenced by other cultures, and with time evolved. This notwithstanding, the main aspects of their culture and traditions remained the same. The culture of acceptance of gender and sexually diverse people is an example of an aspect of culture which remained the same. It was only after colonialism and the introduction of a new form of government that cultural interruption occurred. The cultural disruptive nature of colonialism was gradual. As seen through the facts in *R v Mubanga and Sakeni* the older generation resisted the change which colonialists brought but gradually the younger generation was more accepting of colonial value systems.[242] My contention is that there was a shift in the socialisation of children during colonialism. While the older generation was socialised under African traditional value systems, which were tolerant of sexual diversity as already discussed, some of the younger generation, for example those who went to missionary schools, were socialised under Christian mores. Socialisation under Christian mores meant heterosexual socialisation which was intolerant to sexual diversity. It was this younger generation – who went to mission schools and socialised under christian mores – which eventually became the African elite and led the struggle for independence.[243] While this elite succussed with decolonisation through independence, their heterosexual and other forms of colonial socialisation was uninterrupted and manifested in coloniality and the rise of heterosexual nationalism. In other words, decolonisation and independence did not have a resocialisation effect. Speaking to this point Ndlovu-Gatsheni posits that

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241 R Grosfoguel 'The epistemic decolonial turn: Beyond political-economy paradigms' (2007) 2 *Cultural Studies* 219.

242 See note n 231. T Ranger 'The invention of tradition in colonial Africa' in E Hobsbawm & T Ranger (eds) *The Invention of tradition* (1983) 211, however, argues that African societies did not resist the introduction of colonial laws and as such were co-participants in the construction of the colonial state and the mindset that came with it. While it is not within the scope of this thesis to discuss the level of resistance of African societies, cases such as the Mubanga case highlight the fact that there was some of resistance.

243 See 1.3.2 in Chapter 1 where the effect of Christian and heterosexual socialisation of liberation struggle leaders is discussed.

while African liberation leaders gained independence and started building the post-colonial state, they were unable to do so outside coloniality as they continued with the colonial mindset, laws, political structure and world view.[244] In this way, coloniality represents the highest level of colonialism and colonization.[245]

It is also important to note that the liberation struggle itself was for self-determination and not a quest for a return to the African traditional ways of life. It was to self-govern but using the very institutions, systems and laws that were established under colonialism. In any case, colonialism had successfully integrated Africa and the states it created into the global economic system, therefore, there was no going back to the old system.[246] The post-colonial development agenda was tied to the continuity of colonial laws, economic policies and institutions. What lacked, however, was to harmonize African custom with the received law in a manner that did label African customs as repugnant. Ironically, even the repugnancy clauses in the law were retained at independence and remain to this day, thereby highlighting the depth of coloniality.[247]

2.4.2. The 2005 amendment: mischief and rationale

The anti-sodomy provisions, which had been enacted in 1931, survived through independence until the amendment of the Penal Code in 2005. The amendments were substantial. As seen above, section 155 of the Zambian Penal Code provided for a maximum of 14 years imprisonment for 'carnal knowledge against the order of nature'. The 2005 amendment dramatically increased the penalty to a minimum of 15 years and a maximum of life imprisonment. The maximum penalty for attempted 'carnal knowledge against the order of nature' under section 156 was increased from 15 years to life imprisonment. Another change brought about by the 2005 amendment was the introduction of 'gross indecency' among females whether in public or private.[248] Previously only gross indecency among males was criminalised under section 158. However, the amendments did not provide any clarity on what constitutes 'carnal knowledge against the order of nature', 'attempted carnal knowledge' or 'gross indecency'. However, based on the discussion above regarding the intention for criminalisation of sodomy in Britain and the fact the Zambian Penal Code was meant to be interpreted in line with English law, it can be inferred that canal knowledge against the order of nature entails anal sex.

One of the most significant amendments introduced in 2005 was the criminalisation of 'carnal knowledge against the order of nature with children', attempted carnal knowledge with children and gross indecency in public or private with children. A conviction under any of the offences with a child not only constituted 'defilement' under section 138 but settled as aggravating factor for the person convicted to receive the maximum penalty of the offence. The 2005 amendments were inspired by moral panic based on reports of child sexual abuse as stated in the statement of Minister of Justice in

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244 S J Ndlovu-Gatsheni 'Geneologies of coloniality and the implications for Africa's development' (2015) 3 *African Development* 13.

245 N Maldonado-Torres 'On the coloniality of being' (2007) 21 *Cultural Studies* 240.

246 J D Settles 'The impact of colonialism on the African economic development' (1996) *University of Tennessee Honors Thesis Project* 182.

247 C O Akpamgbo 'Woman to Woman marriages and the repugnancy clauses: A case of putting old wine into new bottles' (1977) 14 *African Legal Studies* 87.

248 Section 158 (2) Penal Code, Chapter 87 of the Laws of Zambia.

below. According to Huang and Kane, moral panics are a mass social phenomenon in which a real or perceived social problem is transformed in the popular consciousness into an existential threat to the very fabric of society.[249] Chen states that moral panics are episodes, often triggered by alarming media stories, about an existential threat to society from the actions of a deviant group.[250] In Zambia, at the time, the moral panic arose from the fear that children were at risk of sexual abuse of different kinds including from sexual and gender minorities.[251] Against this background, the executive decided to toughen sexual offences in general and with respect to children, in particular. This can be seen from the *Hansard*, when the Minister of Justice and Attorney General introduced the amendments in Parliament, is reported as stating as follows:[252]

> Mr Speaker, I beg to move the Bill entitled the Penal Code (amendment) Bill […] the Bill has been necessitated by increased reports of child related sexual abuse. These offences have resulted in children suffering serious injuries, and in some cases dying at the hands of criminals who have committed these abhorrent crimes. The proposed Penal Code Amendment Bill seeks to domesticate, in part, the Convention on the Rights of the Child and provide for stiffer penalties aimed at deterring offenders who commit heinous sexual offences.

As seen above, the effect of the amendment was indeed that the penalty for 'carnal knowledge', 'attempted carnal knowledge' and 'gross indecency' was increased, and the introduced maximum penalty was made mandatory for those who committed any of the offences with children. In fact, the penalty for all other sexual offences such as rape, defilement and indecent assault was increased by the 2005 amendment. Strangely when dealing with the provisions regarding 'carnal knowledge' and 'gross indecency', Parliament did not even discuss the regulation of same-sex sexual intercourse at any length. The only reference that was made was with regard to the inclusion of 'gross indecency' among women and even under this amendment, the moral panic with respect to the protection of children was the motivation. Previously, section 158 only provided that 'any male who, whether in the public or private, commits an act of gross indecency with a male child or person' will be guilty of a felony and liable to a term of not more than 5 years imprisonment. The provision did not criminalise 'gross indecency' by a female with a female child or other person (male or female) and this was seen as a gap in the law. In this regard the leader of the opposition, Edith Nawakwi, stated during the parliamentary debate: [253]

> Mr Speaker, whereas homosexuality and gay behavior has been clearly defined under this law [section 158], there is no reference to women who may be abusing the boy child. I would have wanted that also to be an offence under this law. Whereas the other two offences [155 and 156] are very clear, I would like those women who abuse boy children to be treated as offenders because truly, they are also offenders under this law.

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249 H Huang & S Kane 'The emotional psychology of moral panics: A cognitive neo-associationistic perspective' (2019) *Journal of Psychology* 1.

250 S Cohen *Folk devils and moral panics* (2011) 1-2.

251 L Matakala 'The legal and practical challenges of addressing child sexual abuse through Zambia's formal and traditional justice system' (2012) Danish Institute of Human Rights 10-12. See also J Thompson & F Simmonds *Rape sentencing study: Statutory sentencing provisions for rape, defilement and sexual assault in East, Central and Southern Africa (2012) 9.*

252 Parliament of Zambia *Hansard* 9 September 2005.

253 Parliament of Zambia *Hansard*, 9 September 2005.

The outcome of this submission was that section 158(2) was introduced, which effectively criminalised gross indecency by a female person with a female (or male) person with increased punishment if the victim was a child. The primary intention and motivation of Parliament was not to regulate female same-sexual intercourse.

Due to the perceived morality of the 2005 Bill, the legislature simply agreed to introducing provisions relating to children in sections 155, 156, and 158 and further increase the penalty to deter not only the commission of these crimes generally but against children in particular. What can be seen from the 2005 amendment is the intention to regulate sexual citizenship perceived to be deviant. Although sexual and gender minorities were not the primary target, the perception of deviance against them is telling from the fact that only the anti-sodomy provisions and the provisions on aggravated rape saw the introduction of life imprisonment as the maximum sentence.[254]

2.5. Conclusion

This chapter investigates and discusses the origins and purpose of anti-sodomy laws. In so doing it finds that the original purpose for anti-sodomy laws was to deter and punish particular sexual conduct; anal sex and bestiality. Although the primary target of the laws were men, heterosexual sodomy was also criminalised. Even with heterosexual sodomy, the woman would be the passive participant who allows 'a male person to have carnal knowledge of her'. The net intention was therefore to deter and punish anal sex among persons as it was seen to be 'unnatural' or 'against the order of nature.' The basis of the law was the Bible story about the men of Sodom and other Judeo-Christian passages in the Bible prohibiting 'sexual immorality'. The religious/Christian rule of Britain under the rule of Henry IV of England was the first to secularise the regulation of sexual citizenship and this form of governmentality continued until the late 1960's when the law was repelled in England. However, through colonial rule anti-sodomy provisions alongside the religious foundation on which they were enacted were transported to Africa and continue to this day.

Zambia (then, Northern Rhodesia) had its first Criminal Code enacted in 1931. As was seen, the Code was formulated purely at the political and administrative level, without any local participation or input in the development of its contents. The Criminal Code of Zambia, like all others of colonial Africa, was, therefore, not a response to the social circumstances or needs of African populations. The codes were simply positive law imposed by the sovereign and transplanted to African soil, to be followed by the African subjects without question. For this reason, the purpose of the anti-sodomy laws cannot be traced to the Zambian local situation regarding sexual diversity but rather to the prevailing constructions of sexual diversity in from the time of Henry the IV to codification of criminal law in Africa. As demonstrated above, the law was never intended to criminalise homosexual identity or orientation as it is characterised presently. In fact, even in its current form the law, although inherently discriminatory against sexual and gender minorities, does not require sexual orientation or gender identity for a conviction to be upheld. The next chapter discusses how, despite the history,

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254 With regard to rape and other sexual offences with respect to women, the Parliament stated that the Bill should also aim to implement some provisions of the Convention on the Elimination of Forms of discrimination against Women. Hansard, 9 September 2005.

original purpose, and phraseology of the law, it is mischaracterised and misapplied as a law against identity rather than conduct in Zambia. The impact of this mischaracterisation on the rights of sexual and gender minorities is discussed in Chapter 4.

Although sexual and gender minorities and sexual diversity have always been part of the fabric of Africa, colonialism in general and particularly the enactment of anti-sodomy laws coupled with the religious influence of the missionaries on the government, the narrative that 'sexual diversity/homosexuality' is un-African eventually became entrenched. The extent of this entrenchment is that heterosexuality became the defining feature of African sexuality. In other words, by disrupting the culture of sexual diversity in Africa, colonialism created new systems and mores on which African societies and people would be socialised and live by. Tuhiwai-Smith, quoting Fanon, describes this cultural disruptive nature of colonialism as 'violence':[255]

> Imperialism and colonialism brought complete disorder to colonized peoples, disconnecting them from their histories, their landscapes, their languages, their social relations and their own ways of thinking, feeling and interacting with the world. It was a process of systematic fragmentation which can still be seen.

It is in this regard that decolonial scholars urge for decolonisation and decoloniality. As stated in Chapter 1, post-colonial Zambia has continued with heterosexual socialisation thereby producing heterosexual nationalism which rejects the pre-colonial culture of sexual diversity. Heterosexual nationalism is therefore a product of heterosexual socialisation which has its roots in christian socialisation and the assimilation by African independence leaders, in British culture, laws and mores. Decoloniality is therefore seeks to recreate, to some level, the pre-colonial patterns of socialisation on sexual diversity in a post-modern world. In other words, decoloniality seeks to be disruptive of coloniality in the same way colonization was disruptive of the culture of tolerance of sexual diversity in pre-colonial African societies. This presents practical challenges, as it is unpragmatic to seek for a return to an unblemished Africa before the arrival of colonialists. In regard, human rights as a universal ideal and human rights law, provides the bridge that enables societies and governments to respect the rights of citizens and governments to respect their sexual citizenship while creating a system of tolerance akin to pre-colonial systems of socialisation.

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[255] Linda Tuhiwai-Smith *Decolonising methodologies: Research and indigenous people* (2012) 29.

Chapter 3: The mischaracterisation and misapplication of anti-sodomy laws in Zambia

3.1. Introduction

Chapter 2 discussed the origins and purpose of the Zambian anti-sodomy laws. What emerged is that the anti-sodomy laws were meant to criminalise particular sexual conduct. Although being inherently discriminatory against sexual and gender minorities and leaning against men, the anti-sodomy laws as enacted were designed to apply to both homosexual and heterosexual sodomy. In essence, the history of the anti-sodomy laws highlights the fact that they are not laws against queer identity or queerness as such. Another important lesson to be drawn from Chapter 2, which has a bearing on this chapter, is that the fact that, although a diversity of sexualities existed in pre-colonial Zambian and other African societies, the anti-sodomy laws were not enacted as a response to this diversity. Rather, they came about as a consequence of exerting and consolidating political and administrative control on Africa, as part of the wider project of British colonialism.[1] Colonial codification of English criminal law in colonial settings served as a pillar in this process. The continued existence of these laws illustrates coloniality.

Building on Chapter 2 this Chapter discusses how the anti-sodomy laws are presently understood and applied in Zambia. In this regard this Chapter answers research question 2 posed in this thesis regarding the mischaracterisation and application of the anti-sodomy laws in Zambia.

Structurally, the Chapter first discusses the elemental character of 'carnal against the order of nature' as a criminal offence in terms of section 155 and 156 of the Penal Code. This Chapter examines the *actus reus* and the *mens rea* of the offence to demonstrate that, from a criminal law perspective, sexual orientation and gender identity are not elements of the offence. While the elemental nature and character of the offence does not require the establishment of sexual orientation and/or gender identity, the provisions are incorrectly taken to censuring homosexuality and that they apply exclusively to sexual and gender minorities. The Chapter demonstrates this mischaracterisation in both the public domain and within the criminal justice system. To show the mischaracterisation in the public domain, a media discourse analysis was conducted, and the findings are presented here. From the public domain the Chapter goes further to show how the state interprets and applies the laws. It establishes that the societal mentality regarding sexual and gender minorities and the attendant mischaracterisation of anti-sodomy laws is the same as that of the executive and judicial arms of the state. Several instances are cited where anti-sodomy laws were referenced as the basis of certain state decisions and how these highlight the mischaracterisation and misapplication of the laws. For instance, when South African

[1] L Tuhiwai-Smith *Decolonising methodologies: Research and indigenous people* (2012) 29.

media personality, Somizi, was not allowed to travel to Zambia and threatened with arrest upon arrival, the government said that it was because 'he is a gay man and homosexuality is illegal in Zambia'.[2]

The criminal justice system provides perhaps the most flagrant mischaracterisation of the laws. This is because as the pillar of justice, it is within the system that the laws are supposed to be correctly interpreted and applied. However, this Chapter shows that the criminal justice system in Zambia is not insulated from state sponsored homophobia, nor is it immune from the mischaracterisation existing within the public discourse. The Chapter starts by highlighting the perception and attitudes of the police towards sexual and gender minorities on the one hand and their understanding of anti-sodomy laws, on the other. The impact of the perception by the police and understanding of the law and of sexuality is observed from the construction and prosecution of cases. In this regard, five cases in the Chapter are cited to demonstrate the mischaracterisation and misapplication in the criminal justice system. As discussed more fully below, in most of the sodomy cases non-consensual anal examinations are conducted and medical examination reports presented. These medical examination reports are used as corroborative evidence that penetration occurred. While this application of the *cautionary rule* is arguably helpful to both victims and accused in most sexual offences, this chapter shows that for sodomy cases the reports have been incorrectly used to convict accused persons based on their perceived or actual sexual orientation.

In essence, this Chapter shows that there is a connection between the public domain, official state governmentality, the construction of cases by police and the overall prosecution of cases in the criminal justice system. These highlight the macro and micro nature of heterosexual nationalism in Zambia. As a foundation, this Chapter sets the background for Chapter 4, which shows that the mischaracterisation in both the public domain and in the criminal justice system, coupled with state sponsored homophobia, results in the violation of the rights of sexual and gender minorities in Zambia. These violations, such as denial of medical treatment, education and work, are seen as a legitimate based on the misplaced understanding that it would be illegal to provide such services to 'homosexuals.' Permeating through the Chapter is labelling theory, sexual citizen ship, coloniality and the need for a queer criminology is discussed by way of the conclusion.

3.2. The elemental character of 'carnal knowledge against the order of nature' as a criminal offence in Zambia

3.2.1. The *actus reus*

The nature and character of any criminal offence is based on and can be understood from the elements making up that offence. In the English common law tradition, on which Zambia's substantive criminal law is based, an offence has two basic elements: the *actus reus* and the *mens rea*.[3] The *actus reus* is the act done by the person in the crime, while the *mens rea* is the person's mindset in relation to the

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[2] 'Somizi is not welcome in Zambia, Government says' Lusaka Times 21 July 2020 https://www.lusakatimes.com/2019/06/21/somizi-is-not-welcome-in-zambia-government-says/ (accessed 3 July 2020).

[3] In *Miller* (1983) 2 AC 161 Lord Diplock suggested that instead of using the Latin terms, the criminal law system should adopt- 'the conduct of the accused and his state of mind'. However, his suggestion never gained ground and the Latin terms remain in use in under English common law to this day. Similarly, in the Zambian criminal law system the Latin terms are preferred and continue to be used without any sign of an English terminology developing.

act. The use of the two Latin terms in English criminal law developed from the principles stated by Edward Coke, that '*actus non facit reum nisi mens sit rea*' meaning 'an act does not make a person guilty unless their mind is also guilty'.[4] This part demonstrates that neither the *actus reus* nor the *mens rea* elements of the anti-sodomy provisions in Zambia requires the establishment of the sexual orientation or gender identity of the persons accused. It shows that the elements of the offence apply, alike and equally, to heterosexual, homosexual and gender non-conforming persons. The Latin terms *actus reus* and *mens rea* are used here primarily because they are the terms adopted by the Zambian legal system and best describe the elements of the offences as developed by case law.

As already stated, the *actus reus* refers to the conduct or action done by the person accused or convicted of a crime. It also describes the harm done to the victim.[5] In essence the *actus reus* is the physical act or conduct element of an offence. In order for the *actus reus* to exist, the conduct must first be prohibited by the criminal law in clear terms.[6] This is based on the principle of legality which holds that 'criminal offences should be clearly defined to enable citizens who want to be law abiding to live confidently knowing that their conduct is not breaking any law'.[7] The principle is expressed in the Zambian Constitution under article 18(8), which states that 'no person shall be [tried and] convicted of an offence unless that offence is defined and the penalty is prescribed in a written law'. As an aspect of the rule of law, the principle of legality entails that a law cannot be interpreted or applied outside the objectives and intention for which it was made, nor can it be given a meaning beyond its elemental characteristics.[8] To this end, the principle of legality not only defines acts that constitute criminal citizenship, but it also protects citizens from suffering criminal sanctions that are not stated in the law. With respect to anti-sodomy laws, this entails that they should not be interpreted or applied outside their elemental character. As discussed later in this Chapter, the regulation of sexual citizenship through anti-sodomy laws in Zambia goes against the principle of legality both as an abstract principle of law and as a constitutional provision.

Sections 155 and 156 of the Penal Code prohibits 'carnal knowledge against the order of nature' and 'attempted carnal knowledge against the order of nature' respectively. It goes without saying that for the offence to be committed at least two adult persons, one of them a male, must be involved. The 'order of nature' itself is not defined but as seen in Chapter 2, the drafters primarily meant anal intercourse. Thus, the *actus reus* for the offence varies based on the party. For the active participant the *actus reus* is actual anal penetration of the passive participant.[9] A seen in Chapter 2, the standard of proof that the act occurred was ejaculation but due to the difficulties of proving that ejaculation occurred, the standard of proof was changed to penetration for all sexual offences under the Offences against the Person Act, 1824.[10] The provisions of the Offences against the Persons Act were adopted in the Queensland Criminal Code, on which the Zambian Criminal Code was based and therefore

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4 S Sheppard *The selected writings and speeches of Sir Edward Coke* (2003) 124.

5 J Herring *Criminal law text, cases and material* (2012) 132.

6 R A Duff 'Responsibility citizenship and criminal law' in S Green & R A Duff (eds) *Philosophical foundations of criminal law* (2011) 127.

7 Herring (n 5) 9.

8 P Christina *The principle of legality in European criminal law* (2015) 3-5.

9 Carlan, Nored & Downey *A brief introduction to criminal law* (2016) 129.

10 P Johnson *Buggery and Parliament 1533-2017* (2018) 3

Zambia's anti-sodomy provisions. Hence, in *R v Yohanni Mprokoso,* the Court of Appeal guided as follows:[11]

> In sexual offences, to prove that sexual intercourse took place, it is necessary to prove penetration or partial penetration.

Penetration itself is procedurally established by conducting a medical examination on the anal area of the passive or permitting participant.[12] In this regard, the *actus reus* for the willing passive participant is that they 'permit' the penetration to occur. In criminal law terms this amounts to an 'omission in spark' referring to situations where a person freely allows another person to do something to them.[13] It must be noted that where there is no permission under section 155, the person doing the penetration is usually charged with rape as well as sodomy. However, non-consensual sodomy is not within the scope of this study.

From a strict criminal law point of view, when establishing the *actus reus*; that the active participant had penetration of a person or that the passive participant permitted penetration to occur, the sexual orientation or gender identity of the persons involved is not a relevant consideration. The provision itself underlines this by expressly stating that the crime is committed if 'any person' penetrates another person or permits a *male* person to have carnal knowledge of *him* or *her*' – signifying that the conduct can either be heterosexual or *homosexual* (in this case between two men) consenting partners. Two aspects stand out with regard to the actors in the offence. First, the generality of the provision in stating that 'any person' means and can only mean 'any person'. This means heterosexual, homosexual, gender non-conforming and all other categories or identities of human sexuality are included. It therefore rules out the exclusive applicability of the provision to sexual and gender minorities. Second by stating that 'permits a male person to have carnal knowledge of *him* or *her* against the order of nature' signifies both homosexual and heterosexual sodomy. In essence the provision is indiscriminate regarding sexual orientation or gender identity and by its exact drafting, rules them out as an element to establish the *actus reus*. In simple terms, penetration or its permission is not a subject of sexual orientation or gender identity as far as the offence is concerned. But active partner is understood to be biologically the act of a male as it describes the act of penetration not the mindset, motivation or identity of the penetrator.

Once the act of penetration is established by the prosecution, there is no need to venture into the sexual orientation or gender identity of the persons involved as this does not add any value to the fact that it occurred. Similarly, it is not a defense for the person accused under anti-sodomy laws to rely on their sexual orientation or gender identity, in this respect, for example that they are a cis-gender heterosexual couple. Thus, on a clear interpretation of the laws, a cis-gender male having anal intercourse (penetration) with a cis-gender female consensually amount to 'canal knowledge against the order of nature' and therefore is an offence. In essence the language of the prevision is blind to the sexuality or gender identity of the actors with regard to the *actus reus*. A leaf can be taken from the decision in *Robinson v California*, where the US Supreme Court held that a law making it illegal to be

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11 (1832) NRLR 152.

12 The legality and human rights implications of forced anal tests is discussed in another section.

13 For a detailed discussion of an 'omission in spark', see Herring (n 5) 9.

a drug addict was unconstitutional because the mere status of being a drug addict was not an act or form of conduct amounting to an *actus reus* and therefore not a criminal offence.[14] Similarly being a sexual or gender minority person is not an act nor a form of conduct and therefore, is not an element of the anti-sodomy provision.[15]

In light of the above, the *actus reus* for 'sex against the order of nature' (anal penetration and its permission) cannot in law be validly and exclusively associated with sexual and gender minorities. Several studies have shown that oral and penetrative anal sex are not conduct unique to sexual minorities, rather they are just as commonly practiced among heterosexual couples in Africa, Zambia included.[16] Framed within public health and HIV perspective, the footnoted research data on heterosexual anal intercourse reveals that it is highly prevalent and thus a common conduct based on shared human desire. As will be seen, the misconstruction of sexual orientation and gender identity as being synonymous with sodomy, has reduced sexual and gender minorities to mere 'sodomites' and is responsible for the mischaracterisation of anti-sodomy laws.

3.2.2. The *mens rea*

The *mens rea* (guilty mind) refers to the culpable mindset of the accused or convicted person in relation to the offence.[17] Different offences have different *mens rea* namely intention, recklessness and malice. From a criminological perspective, the various type of *mens rea* all signify a deviant mindset that ordinary citizens do no generally possess.[18] The *mens rea* required for a conviction on a charge of sodomy under section 155 is *intention* and *permission* and this is expressed in the form of consent by both persons to engage in penetrative or receptive anal sexual intercourse.[19] In this regard, the *mens rea* for the active participant is the intention to penetrate the passive participant, while the *mens rea* for the passive participant is willingly granting permission for the penetration to occur.[20] Herring states that in the 'context of sexual offences consent means one or more of three things: To forgo one's complaint against another's action on them, to intend and permit the other to act in a particular way or to fail to voice opposition towards a particular act being done to oneself'.[21] The *mens rea* for sodomy fits all three of these criteria.

As is the case with the *actus reus*, neither sexual orientation nor gender identity are relevant to establish the *mens rea*. The text of the law speaks for itself that 'any person who permits a male

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14 (1962) US 660.

15 See *Hardwick v Bowers* (1986) 478/US/186.

16 Avert *HIV and AIDS in Zambia: Country Report* (2018) https://www.avert.org/professionals/hiv-around-world/sub-saharan-africa/zambia (accessed 4 September 2020). I O Morhason-Bello *et al* 'Reported oral and anal sex among adolescents and adults reporting heterosexual sex in sub-Saharan Africa: a systemic review' (2019) *Reproductive Health Journal* 1 https://reproductive-health-journal.biomedcentral.com/track/pdf/10.1186/s12978-019-0722-9 (accessed 1 June 2020). B N Owen *et al* 'How common and frequent is heterosexual anal intercourse among South Africans? A systematic review and meta-analysis' (2019) *Journal of the International AIDS Society* 20 http://www.jiasociety.org/index.php/jias/article/view/21162 (accessed 2 June 2020). Baggaley 'Heterosexual anal intercourse: A neglected risk factor for HIV? (2013) *America Journal of Reproductive Immunology* 69 https://onlinelibrary.wiley.com/doi/pdf/10.1111/aji.12064 (accessed 4 September 2020)

17 The direct Latin interpretation is 'guilty mind'.

18 R Perkins 'A rationale of mens rea' (1939) 52(2) *Harvard Law Review* 907.

19 See Carlan *et al* (n 9).

20 *Hatch Brill v The People* (2017) CAZ/09/03/2016.

21 Herring (n 5) 540.

person to have carnal knowledge of *him* or *her* against the order of nature […].' It is clear that the person permitting, having formed the intention to permit, can either be a male, female, heterosexual or homosexual person. The provision in its own language therefore 'stresses' the fact that the mental element of the offence is not a subject of human sexual orientation or gender identity.

The ability or capacity to form the intention and grant permission for the occurrence of sodomy as a consensual sexual act among adults, is not unique to sexual and gender minorities. As seen from the research on heterosexual anal intercourse referenced earlier, consensual anal intercourse is common among heterosexual couples.[22] In some instances, heterosexual couples preferred anal intercourse.[23] Therefore, to suggest that only sexual and gender minorities have the mental capacity and physical desire to engage in sodomy as a sexual act is not only fallacious but also deliberate ignorance. As Lucas and Fox puts it, the *mens rea* for sodomy is actually a normal and common human desire resulting in common human sexual conduct.[24] To take it a bit further, an examination of some adult websites showed that heterosexual anal intercourse has almost the same number of views and comments as heterosexual virginal intercourse.[25] Adult websites are good data source for this point as they constitute among the most visited sites on the internet in Zambia and the world over.[26] It can therefore be argued that a mindset common to humanity cannot be given the label of deviance and assigned to one minority group. This also shows that the majority morality argument is flawed because the general sexually active population practices anal intercourse.

3.3. Mischaracterisation of the anti-sodomy laws in the public domain in Zambia

3.3.1. Media construction of anti-sodomy laws and sexual diversity

The anti-sodomy laws, their characterisation and interpretation need always to be placed and seen within the social context in which they exist. Context is important because it highlights the social, political, religious and sometimes economic determinants of the application of the laws. In most African countries including Zambia, heterosexual nationalism and its constituents define the existential character of anti-sodomy laws irrespective and in disregard of the elemental criminal law character discussed above. With this in mind, this part of the Chapter discusses how the anti-sodomy laws are understood in Zambia as part of reinforcing heterosexual nationalism. The data is based on discourse analysis of participatory media coverage of five critical events which highlight the conversation on sexual diversity and the anti-sodomy laws in Zambia as a heterosexual nation. Citing five different events over time, the period covered is from 1998 to 30 July 2022.

Discourse analysis itself has many theoretical frames that continue to develop in different fields. As promised in Chapter 1, the Foucauldian approach was taken with regard to the discourse

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22 Owen *et al* (n 16) 20.

23 As above.

24 D Lucas & J Fox *The psychology of human sexuality* (2017) 11.

25 See https://www.pornhub.com/video/search?search=anal, https://www.xvideos.com/?k=anal and https://xhamster.com/search/anal+fuck (accessed 14 July 2020).

26 This information was compiled by a number of sites such as https://www.businessinsider.com/internet-users-access-porn-more-than-twitter-wikipedia-and-netflix-2018-9?IR=T,https://www.gadgetsnow.com/slideshows/10-most-popular-websites-in-the-world/photolist/74077594.cms, https://www.cxotoday.com/news-analysis/lockdown-blues-adult-websites-more-popular-than-amazon-and-netflix/ (accessed 8 June 2022).

analysis for this thesis. In this regard, the elements most frequently occurring in the discourse on sexual diversity and the law are singled as expressive of the ontological and epistemological standing of Zambian society.

The starting point is to note that the Zambian media's knowledge of anti-sodomy laws and of sexual and gender minorities is very limited. This impacts adversely on their ability to construct positive, or at least make objective, representations of sexual and gender minorities. In many instances, anti-sodomy laws are mischaracterised and referenced as laws against 'homosexuality'. Homosexuality itself is narrowly and mistakenly understood to be same-sex sexual conduct; particularly anal sex among men and the use of sex toys among women.[27] The Zambian media's understanding of anti-sodomy laws and of sexual diversity is captured in a report of the Zambia National HIV/AIDS and Tuberculosis Council (NAC). Between 2018 and 2021, the NAC carried out trainings of journalists in the leading national and community-based media houses across the country. The training were framed in the public health context under the title 'Role of the media in promoting the rights of key populations in Zambia'.[28] To capture the media's construction of sexual and gender minorities, a word association exercise was conducted where the 150 journalists across the 10 provinces of Zambia were asked to associate different words which included 'sex-worker', 'homosexuality' and 'gay person'. 138 participants out of 150 associated homosexuality and gay person with negative and de-humanising words. The words recorded were 'sinner' 'demon possessed' 'mentally disturbed' 'Abnormal' 'animal' 'uncultured' 'criminal' 'evil' and 'lover of man'.[29] Typically, sexual and gender minorities are viewed through one of the lenses of heterosexual nationalism where they are either medicalised, de-humanised, de-spiritualised, stereotyped or in some way given the labeled of deviance. As will be seen, these constructions coincide with the general public view of sexual and gender minorities. In this light, the major challenges indicated in the report of the training are: Lack of general understanding of the elemental nature of anti-sodomy laws which lead to reports mischaracterising them as laws against homosexuality/ homosexual identity; Lack of any understanding of sexuality or sexual diversity which lead to media constructions of all sexual and gender minorities as homosexuals; and the labelling of homosexuality as a deviant sexual practice by choice.[30] A report by the Other Foundation corroborates this observation:[31]

> Mass media, despite *limited knowledge of LGBTI issues*, strongly contributes to shaping public opinion on LGBTI human rights in Zambia […] Debates on the human rights of LGBTI people tend to appear in mainstream media when LGBTI people have been arrested, or during political campaigns. Media coverage – that so powerfully influences attitudes and mindsets – maintains *narrow perspectives* on LGBTI human rights in the public sphere. In one report, the state-owned Zambia National Broadcasting Corporation (ZNBC), privately owned Muvi TV, and several newspapers carried a story in which they consistently called an intersex baby bisexual.

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27 National AIDS Council of Zambia (NAC) *Media national engagement report on key population and human rights in Zambia* (2019) 3-7.

28 As above.

29 As above.

30 As above.

31 The Other Foundation *Canaries in the Coal mine: An analysis of the spaces for LGBTI activism in Zambia-Country Report* (2017) 17 http://theotherfoundation.org/wp-content/uploads/2017/02/Canaries_Zambia.pdf (accessed 20 July 2020) (emphasis added).

In short, limited understanding of sexuality and the anti-sodomy laws impacts negatively on the quality of reporting and in turn leads to society being poorly informed and educated on the subject. Consequently, public discourse in participatory media tends to be ill informed, homophobic and misguided, and thus perpetuating an incorrect narrative and labels about sexuality and gender non-conformity.

Arguably, the reason for the media's poor understanding is that journalists live and come from the same heteronormative society in which everyone lives, and as such even though media objectivity can be professionally demanded, it is rarely supplied when it comes to sexual diversity. Alwood, who extensively researched on media representation of sexuality supports this point by stating the following:[32]

> Media objectivity is just a myth. Journalists think that they can leave aside their prejudices and stereotypes and communicate the truth (and we even imagine that we know what the truth is). But the majority of things we see are a result of the long filtering process which determines what will become news. In the course of this process, the *heterosexual assumption or heteronormativity* became the fundamental perspective of the news.

In other words, media training does not change the prejudices of heterosexual socialisation in media personal. The discourse analysis that follows confirms the above conclusions.

Sexuality and the applicability of anti-sodomy laws first became a major public issue in Zambia in 1998. This was triggered by an interview-based article published by the *Post* newspaper, in which Francis Chishambisha, a 25 year old college student, publicly came out announcing that he was gay and also expressed his lived experiences of mental anguish, constant human rights violations and helplessness.[33] He also announced that he intended to form an organisation called the Lesbian, Gay, Bisexual and Transgender Association (LEGATRA).[34] The story was published on the front page of the *Post* newspaper and covered three pages with his full name and photo. The background to the article is that Chishambisha walked to the *Post* newspaper offices, told the reporters that he was gay and asked if they could interview him and cover his life story. According to Long, the reporters leaped at this chance to report on homosexuality for the first time in Zambia and thus covered the story.[35] While the inside story was moving and about his challenges as a gay person in Zambia, the headline focused on his sexual experience captured as 'I'm 25, gay and with 33 partners' with a sub headline 'I'm gay and enjoying it'.[36] What followed was an unprecedent public anger from all sections of society. Arguably this discourse mapped the narrative for future discourses on sexual diversity in Zambia.

The public discourse was characterised by anger, hate and exclusion of sexual and gender minorities which consequently drove them into hiding due to fear of persecution and prosecution.[37] As

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32 R Kumar *Media representations of homosexuality: 1970-2000* (2003) 13 quoting E Alwood *Straight news: Gays, Lesbians And the news media* (1996) 1-15. (authors emphasis).

33 'I'm 25, gay with 33 partners; And enjoying it' *The Post Newspaper* 14 July 1998.

34 As above.

35 S Long *More than a name: State-sponsored homophobia and its consequences in Southern Africa* (2003) 34.

36 See n 33.

37 Long (n 35) 35.

in most heterosexual nations, political leaders where prominent in the discourse. The Vice President and eventually the President weighed in on the outrage and condemnation of sexual and gender minorities as discussed below. For months the discourse went on with the print media as the medium of expression. An important factor playing in the discourse was that at the time, *The Post* was the only independent (private owned) newspaper in Zambia while the rest where wholly owned and controlled by the state. Four interrelated themes dominated the discourse: religious nationalism, cultural nationalism, medicalisation and human rights exceptionalism. Each of these themes was framed in relation to the anti-sodomy laws as laws against homosexuality in Zambia. In this regard all sexual and gender minorities were categorised as homosexuals, and homosexuality was classified as a sexual practice that is illegal due to its immoral, sinful and unAfrican nature. Human rights organisations and other civil society actors who tried to offer a counter narrative were stigmatised as 'money loving agents of the West'.[38]

Religious nationalism manifested through the voice of church and political leaders. The rhetoric was grounded on Zambia being a Christian nation and therefore 'the laws of the land should protect people from homosexuality as it is unbiblical'.[39] For example, hardly two days after the article was published, the Archbishop of the Church of God, John Mambo, gave a press statement that 'homosexuality cannot be an issue of human rights because it is against the teaching of the Bible'.[40] Several religious leaders weighed in and gave similar statements urging the government to maintain Zambia as a Christian nation and enforce its laws against 'homosexuality'.[41] After remaining silent for much of the discourse, the then president, Fredrick Chiluba chose the occasion of Zambia's Independence day to address the nation and in his speech proclaimed that 'homosexuality is the deepest level of depravity, it is unbiblical and abnormal'.[42] Expressing heterosexual nationalism rhetoric he further went on to say that 'my government would never recognise homosexuality and I challenge Western governments to show me how something sinful and abnormal should be accepted in a christian nation like Zambia'.[43] Controversially missing from the voices of the church was the Catholic Church which has the largest following of Christians in Zambia.

Cultural nationalism was expressed in terms of the 'homosexuality being unAfrican and an attempt by Western democracies to impose their values on Zambia'.[44] For instance, when asked to give the official government position on the article, the then government spokesperson stated that 'homosexuality is un-African and an abomination to society which would cause social decay'.[45] Traditional leaders also unanimously encouraged the government to enforce the anti-sodomy laws as

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38 'Norwegian envoy supports gay movement' 18 September 1998, 'Are donors gay' 22 October 1998, 'Gay rights no condition for Japanese aid' *The Times of Zambia*.

39 A Van Klinken 'Homosexuality, politics and Pentecostal nationalism in Zambia' (2014) 20 *Journal of Christian Studies* 264.

40 'Mambo attacks Zulu for defending homosexuals' *The Post* 16 July 1998.

41 The reactions by different church leaders were captured in a series of newspaper articles with the same title published over a period of 7 days. See 'Cry our beloved country: Homosexuality is evil' *The National Mirror* 1-7 November 1998.

42 Presidential Address on the occasion of Zambia's 34th Independence Day 24 October 1999. See also 'Chiluba blasts gays' *Times of Zambia* 19 October 1998.

43 As above.

44 'More condemn gay movement formation' *Times of Zambia* 2 September 1998.

45 'Gay grouping thrown out' *Zambia Daily Mail* 3 September 1998.

a way of protecting Zambia's traditional values. The most outspoken was the Tonga Traditional Association which went further by accusing the government of encouraging lawlessness by not prosecuting homosexuals and called on government to deregister organisations that showed sympathy towards sexual and gender minorities.[46]

Conjunctive to cultural nationalism was human rights exceptionalism and, in some instances, relativism. Taking a human rights exceptionalism and relativism stance, the Zambia Human Rights Commission (ZHRC) stated the following:[47]

> [T]his is not one of our priority concerns. We are concerned with pressing issues, including poverty and prisons. Human rights have to be balanced […] the rights of children have to be balanced against the rights of gays. It is appropriate to consider levels of development of countries. For us the timing is wrong.

In taking this relativist and uncharacteristic stance for a National Human Rights Institution (NHRI) the ZHRC condemned Western democracies which it accused of 'not taking the idiosyncrasies of a given society into account'.[48] The Law Association of Zambia (LAZ), through its President, gave a statement to the effect that homosexuality was illegal under the Penal Code and was 'not a human rights issue because it was unnatural'.[49] The University of Zambia (UNZA), acting as custodians of knowledge and trusted by the public as such, reiterated the position of LAZ issuing a press statement that:

> [r]ights have to be natural and anything not deriving its legitimacy from the natural phenomenon cannot be said to be a right. Social irresponsibility has extended to unthinkable levels that perverts and sadists are busy lurking in the dark bringing ideas against moral standards in the country all in the name of democracy and human rights [...] Every society has minimum standards of acceptable behaviour and for those championing homosexuality, their filthy practices should not be condoned at all. [50]

Exceptionalism and relativism were taken to another level when the Office of the Registrar of Societies (ORS) blatantly refused to register LEGATRA, stating that it was an 'illegal organisation because homosexuality is a criminal offence in Zambia' and adding that he could 'not register LEGATRA any more than he could a satanic organisation'.[51] As a department under the Ministry of Home Affairs, the ORS could, arguably, not have made a contrary decision because the Minister of Home Affairs had earlier issued a statement to the effect that the anti-sodomy laws of Zambia meant that 'anyone who tried to register an organisation promoting homosexuality would be arrested'.[52] This mischaracterisation of anti-sodomy laws was repeated by the Zambia Police Spokesperson and validated by the Minister of Justice who issued that 'registration of such an association [supporting sexual and gender minority rights] is in itself a crime'.[53] Some media houses fueled this narrative by

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46 'Arrest ZIMT officials' *Times of Zambia* 22 October 1998.
47 Long (n 35) 44 quoting Chairperson of the Zambia Human Rights Commission.
48 As above.
49 'Gays risk prosecution warns LAZ' *The Times of Zambia* 18 September 1998.
50 'University of Zambia Dean of Student Affairs says that homos shouldn't corrupt Zambia' *The Post* 29 September 1998.
51 Long (n 35) 69.
52 'Zambia issues warning on gay associations' *The Herald*, Harare 5 September 1998.
53 As above.

carrying out what they called 'man in the street surveys' asking residents of Lusaka about their views on homosexuality and if it was desirable for homosexuals to set up an organisation to 'protect' their rights. In this regard the article reported as follows:[54]

> A cross-section of the public interviewed during a random survey seem to be in unison that such a move is unacceptable and should not be encouraged in any way as it would merely be perpetuating a vice. The outraged people noted that although homosexual and lesbian organizations might be in existence elsewhere, it was totally alien in Zambian society and everything should be done to ensure it did not take off.

Such reports, arguably propaganda by state owned media, meant that those who wanted to offer a counter discourse would be shut out or vilified. For instance, the Zambia Independent Monitoring Team (ZMIT), a local human rights organisation that focused on elections, issued a statement that 'Gay people just like lesbians, are normal people and are entitled to fundamental human rights and should not be discriminated against'.[55] The ZMIT leader Alfred Zulu and other employees were mocked and received death threats.[56] ZMIT which sought to carry LEGATRA under it wings became the subject of a funding inquiry. As Long notes, 'eventually –and perhaps most dangerously– the controversy became one of how civil society in Zambia was funded.'[57] This led to a near diplomatic incident when the Norwegian ambassador to Zambia was summoned and questioned by the Minister of Foreign Affairs regarding its funding of ZIMT.[58] A year later in 2000, ZIMT was deregistered and ceased to exist.

The discourse also medicalised sexual and gender minorities as persons with mental disorders, abnormal and in need of psychiatric medical attention. One organisation prescribed what it called 'sex therapy for the mental sickness of homosexuality'.[59] The most notable statement under this discourse came from the respected former president Kenneth Kaunda who said that 'they are sick, in my opinion and they should be helped back to normalcy'.[60] As discussed in Chapter 1, the exact words were used by former President Edger Lungu in December 2019. Kaunda's statement is demonstrative of the influence of public opinion and the role played by the media in driving heterosexual nationalism. When the public outrage first ensued against sexual and gender minorities, Kaunda was sympathetic and playing the role of father of the nation, he urged Zambians to 'cool down, homosexuality is here to stay. Let us think about the question of how to handle our brothers and sisters'.[61] A damning headline in *The Post* stating 'KK defends homos' carried his statement and presented him as a disappointing leader.[62] Kaunda was condemned by religious and Political leaders, with one stating that 'it took just one ill-timed, ill conceived, ill-advised statement uttered in probably less than one minute to invalidate

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54 'Homo Party? Not here!!!' *Sunday Times* 6 September 1998. Another headline screamed 'Homos, Lesbians, go to hell !!!!" *Zambia Daily Mail* 1-7 November 1998, with a violent urging the Registrar of Societies to 'kick the asses of lesbians if they dared enter his office to register their sinful organisation.'

55 'Zulu defends homosexuals' *The Post* 15 July 1998.

56 Long (n 35) 39.

57 Long (n 35) 46.

58 'Zambia: Lomoy summoned over homosexuals' *allAfrica,* 19 November 1998. (accessed 18 June 2020).

59 'Homosexuality: Christian counselling is the answer' *Zambia Daily Mail*, September 1998.

60 'Homos are sick, charges KK' *The Post* 23 October 1998.

61 'Kaunda defends homos: The issue is here to stay' *The Post* 12 October 1998.

62 As above.

Kaunda's claim to 74 years of wisdom'.[63] With his legacy threatened, this backlash made Kaunda retract his statement and in later years would speak about the sinfulness of homosexuality, and encouraged African leaders to continue criminalising it.[64] For instance, at a meeting of former heads of State as 'Champions of an HIV-free generation' Kaunda controversially stated that homosexuality was against Gods commandments and that African leaders should advocate for laws that prohibited such wicked vices especially in Zambia which is a Christian nation.[65] Former president of Botswana Festus Mogae, who was chairperson of the group had to respectfully respond by saying that 'the champions' had not come to Zambia to promote homosexuality.[66]

Notwithstanding the negative homophobic representations, the government was still under pressure in parliament to state the position of the law regarding homosexuality in Zambia. The leader of government business in the House and also Vice President gave a typical heterosexual nationalism statement:[67]

> People defending the rights of homosexuals will face jail because the Penal Code prohibits homosexuality. If anybody promotes gay rights after this statement, the law will take its course. We need to protect public morality. Human rights do not operate in a vacuum […] an association formed to further the interest of homosexuals can never be registered in Zambia...[T]hose who will persist in championing the cause for homosexuality activities in Zambia risk being arrested.

According to Long after this statement, gay and lesbian persons who gave their names to LEGATRA in the hope that the Association would provide them some support went into total hiding for fear of arrests.[68] Francis own construction of the discourse was expressed as follows:[69]

> I was alone and I wanted not to be, and I wanted to help others not to be. I found out that being alone was illegal. Wanting not to be alone was criminal. Wanting to help others was the worst crime of all.

A similar discourse occurred in 2017. In March of that year, the Fédération Internationale de Football Association (FIFA), following advice from its Independent Human Rights Advisory Board, made a commitment to 'make equality a reality'.[70] In this regards article 4 of the FIFA Statute, which was previously criticised for being narrow was amended to states as follows:[71]

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63 'The high price of homosexuality' *The Times of Zambia* 20 October 1998.

64 'KK says no to homosexuality' *The Lusaka Times* 20 0ctober 2010 https://www.lusakatimes.com/2010/10/20/kk-homosexuality (accessed 20 June 2020).

65 As above.

66 As above. Notably one of the mandates of the champions is to ensure laws and policies don't not live behind any part of the population especially sexual and gender minorities who are marginalised in health policy and National HIV responses.

67 *Parliamentary statement of the Vice President and Leader of government business on governments position of homosexuality in Zambia* 22 September 1998.

68 Long (n 35) 40.

69 IGLHR Report 1999 quoting Francis Chishambisha.

70 *Diversity and anti-discrimination at FIFA* (2017) 3 https://resources.fifa.com/image/upload/diversity-and-anti-discrimination-at-fifa.pdf?cloudid=zxfj6wm19g7tgk0yfw8t (Accessed 25 June 2020) This came after a long struggle and criticism of FIFA for its 'weak' position on discriminatory practices such as race, sexual orientation and gender identity in Football.

71 Article 4, *The Statute of FIFA* (emphasis added).

> Discrimination of any kind against a country, private person or group of people on account of race, skin colour, ethnic, national or social origin, gender, disability, language, religion, political opinion or any other opinion, wealth, birth or any other status, *sexual orientation* or any other reason is strictly prohibited and punishable by suspension or expulsion.

The amendment was meant to ensure that FIFA as a non-state actor respects international human rights standards as an Association with 'global reach and influence which plays an active role in promoting sports as a vehicle for social development and fighting discrimination in all its forms.'[72] As one of its strategic steps to actualise this commitment, FIFA required its affiliate Football Confederations and National Associations such as the Football Association of Zambia (FAZ) to compulsorily adopt clauses on non-discrimination in terms of articles 3 and 4 of its Statute. However, due to the inclusion of sexual orientation as a prohibited ground of discrimination the whole clause was contested in Zambia and what was meant as an important human rights development strategy by FIFA ended up being a debate on homosexuality and its legality in Zambia.[73] What followed was a heated discourse that again highlights heterosexual nationalism in Zambia and the mischaracterisation of anti-sodomy laws, with the media as the main driver. In a sense it was a repetition of what happened when former UNSG Ban Ki-Moon visited Zambia where his call for non-discrimination including on the basis of sexual orientation and gender identity was taken to mean 'decriminalisation and promotion of homosexuality'.[74] The discourse that followed the UNSG's statement is already discussed in Chapter 1 when highlighting the general nature of heterosexual nationalism and thus not repeated in this Chapter. Two mean themes came out of the discourse regarding FIFA's call: Religious nationalism and human rights exceptionalism, and both were centered around the narrative that 'homosexuality is illegal in Zambia.'

The discourse centered on religious nationalism was typically argued in terms of Zambia being a Christian nation. Several religious leaders, together with football executives condemned the instruction by FIFA as one that undermined Zambia's devout Christian beliefs which are protected by anti-sodomy laws.[75] The FAZ Secretary General said that 'the Association could not go against the laws of Zambia as a Christian nation and will ensure that the laws of football do not conflict the laws of Zambia'.[76] Speaking on behalf of church leaders, the President of the Independent Christian Churches of Zambia retorted that 'if FAZ agrees to the clause banning discrimination against gays it

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[72] This is based on Article 3 of the Statute of FIFA which Commits to respect and promotes International human rights standards. In particular FIFA was motivated by the desire to actualise the aspirations in the Universal Declaration of Human Rights emphasising Articles 1,2 and 7. See also *FIFA Good practices guide on diversity and anti-discrimination* (2018) 10. https://img.fifa.com/image/upload/wg4ub76pezwcnxsaoj98.pdf (accessed 26 June 2020).

[73] 'Zambian gay rights dispute erupts over football' *News 24* https://www.news24.com/news24/africa/news/zambian-gay-rights-dispute-erupts-over-football-20170220 (accessed 25 June 2020).

[74] This aspect is discussed in more detail in chapter 1. See Speech of the former UNSG Ban Ki Moon, delivered to the Parliament of Zambia on 24 February 2012. https://www.un.org/sg/en/content/statement/secretary-general-remarks-national-assembly-republic-zambia (accessed 6 September 2019).

[75] 'outrage over attempt to block anti-gay discrimination in Zambian football' *Mamba online* *https://www.mambaonline.com/2017/02/20/outrage-attempt-block-gay-discrimination-zambian-football/* (accessed 20 June 2020).

[76] Ponga Liwewe speaking with CGTN news https://www.youtube.com/watch?v=zKnXo1Z7TZU (accessed 26 June 2020).

will be inviting the wrath of God'.[77] A prominent Zambian football executive summed up the discourse saying that:[78]

> Zambia is a Christian nation and any instructions from FIFA which will conflict with Christianity are not welcome. FAZ cannot go against what is in the law of the land. If FIFA imposes sanctions on Zambia, we shall play in our local league. There is no room for homosexuality in Zambia or in Zambian football.

After months of debates the FAZ Council finally amended the Association's constitution discrimination clause leaving out sexual orientation and maintaining that including it would be contrary to the anti-sodomy laws and Zambia's Christian values.[79] The adopted clause included all the other prohibited grounds of discrimination proposed by FIFA and somewhat carefully adding '[…] or any other status recognised by Zambian law'.[80]

The different reactions to FIFA's proposal clearly reveal that the principle of equality and non-discrimination, especially on the basis of sexual orientation is misunderstand by both the public and the media. One media house created the narrative that 'FAZ was seeking to introduce gay and lesbian rights through sports' and further that the move was 'a challenge to the president as it came two weeks after the National Day of Prayer'.[81] In essence all domestic media representation could only be coded as negative and narratively mischaracterising of the anti-sodomy laws. Some Positive and objective representation on the subject were made but all these came from foreign online media which do not have any audience in Zambia and therefore do not play a role in the discourse in the country.[82] However, despite the objective and non-homophobic tone, these reports like the local news also mischaracterised anti-sodomy laws as laws against homosexual identity in Zambia.[83]

As in most cases any counter narratives that were made did not receive any attention. One such counter narrative came from Kasonkomona[84] a sexual and reproductive health activist who argued that the Pentecostalism was misleading the public on human rights issues. He further countered that 'the constitution says the rights of all should be respected, so let the rights of sexual minorities be respected' adding that 'I don't think FAZ should feel that they are doing something wrong, they are not asking people to have sex. It not a sin to be gay'.[85] As an active observer, the author was personally

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77 See *News 24* n 71.

78 Masha Chilemena speaking with CGTN news. https://www.youtube.com/watch?v=zKnXo1Z7TZU (accessed 26 June 2020).

79 'Zambian football is the winner' *Zambia Daily Mail* 29 March 2017. http://www.daily-mail.co.zm/faz-agm-zambian-football-is-the-winner/ (accessed 26 June 2020).

80 Article 3 *Football Association of Zambia Constitution* 2017.

81 'FAZ seeks to introduce gay rights in local league' *The Zambian Reporter* 20 October 2016 https://zambiareports.com/2016/10/20/faz-seeks-introduce-gay-rights-local-league-proposes-disband-div-two-three/ (accessed 26 June 2020).

82 For example 'Zambian FA to amend law on discrimination' https://www.farenet.org/news/zambia-fa-amend-law-discrimination-sexual-orientation/ 'Zambian football association proposes gay non-discrimination' https://www.outsports.com/2017/2/20/14673186/gay-soccer-zambia-policy-fifa 'Zambian football bosses are considering gay protection clause' https://www.pinknews.co.uk/2016/11/21/zambia-football-bosses-consider-gay-protection-clause/ (all accessed 27 June 2020).

83 As above.

84 See 5.4 below.

85 See *News 24* (n 73).

interviewed, and referring to the FIFA constitution argued that 'the FIFA constitution is in line with international human rights standards and [therefor] it is perfectly alright that FAZ should include a clause which prohibits discrimination on the basis of sexual orientation'.[86] However, these counter narratives were whispers in a large homophobic concert hall and hence could not be heard or noticed.

3.4. Executive action: A governmentality of mischaracterisation and misapplication

Heterosexual nationalism and the mischaracterisation of anti-sodomy laws also manifest in arbitrary government decisions and actions outside the criminal justice system. Citing instances where the anti-sodomy laws have been referenced and used in the execution of government decisions, this part of the thesis demonstrates the misapplication of the anti-sodomy laws as a manifestation of their mischaracterisation in Zambia. The actual impact of the mischaracterisation on the rights of sexual and gender minorities is discussed in Chapter 4. Here, the Chapter only seeks to underscore the manifest nature of heterosexual nationalism as government rationality in relation to the mischaracterisation of the anti-sodomy laws.

In July 2019, the government through the Ministry of Religion and National Guidance issued an executive order to stop Somizi Mhlongo from entering Zambia. Somizi was invited by a private entertainment enterprise to perform at its annual Lusaka July festival. However, the government stated that even if Somizi was invited as a fashion icon and musician to a private event, he could not be allowed entry in Zambia because 'he is gay and being gay is a criminal offence in Zambia'.[87] The government's decision was based on the mischaracterisation that anti-sodomy laws are laws against homosexual orientation and in this regard the executive decision was seen as an application of the laws.[88] Filtering through this governmentality was religious and moral nationalism which is evident from the fact that Cabinet chose the Minister of Religion and National Guidance to be the face of its position. At a press conference addressing the issue, the Minister stated:[89]

> We shall not allow such an individual [Somizi Mhlongo] because homosexuality is a crime. Every country has laws. Here in Zambia, we have a constitution that guides citizens on morals and its christian values. We do not condone gayism or homosexuality and this is a crime. Inviting people like that means that we are slowly accepting the vice. We must guard against such foreign influences as they pose a risk of disturbing our social fiber as a Christion nation.

The statement expresses all the essential characteristics of heterosexual nationalism referencing religious, moral and cultural heterosexual nationalism in relation to the character of the anti-sodomy laws in Zambia. It also defines sexual citizenship within the limited scope of religion and culture, labelling other forms as criminal and deviant.

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86 See also 'Zambian lawyer defends FAZ gay clause' 20 November 2016 BBC World Service https://www.bbc.com/sport/football/38044185 (accessed 24 June 2020).

87 'Somizi not allowed in Zambia' *New Diggers Zambia*, 21 July 2019 https://diggers.news/local/2019/06/21/somizi-not-allowed-in-zambia-sumaili/ (accessed 3 July 2020).

88 As above.

89 'Somizi is not welcome in Zambia , Government says' Lusaka Times 21 July 2020 https://www.lusakatimes.com/2019/06/21/somizi-is-not-welcome-in-zambia-government-says/ (accessed 3 July 2020).

The reference to and purported application of the anti-sodomy laws outside the criminal justice system took a step further in 2019 when a directive was issued to the two Research Ethics Boards in Zambia, the University of Zambia Research Ethics Committee (UNZA-REC) and Centre for Research Ethics (CRE), 'not to issue ethical clearance for research relating to sexual and gender minorities as they are a criminalised population'.[90] The issue was taken to the office of the Attorney General, but due to the confidentiality of the correspondences the opinion of the Attorney General was not made public. However, in a bid to control and limit the nature of research relating to sexual and gender minorities, the government through the Ministry of Health, stripped away the power to grant ethical clearance certificates on the subject from all Research Ethics Review Bodies, and a constructive notice was issued to the research community in Zambia to the effect that all research relating to some key populations, specifically sexual and gender minorities, must be reviewed by the National Health Research Ethics Board under the Ministry of Health.[91] Effectively, the decision was a latent limitation of academic freedom and the production of knowledge in the name of preserving the legality and integrality of research. The decision was made following the conviction of two gay men who were found guilty under section 155 of the anti-sodomy laws in late 2019. As such controlling and limiting research on sexuality and sexual diversity was one of the decisions made by the government to ensure that 'homosexuality is not promoted in Zambia'.[92]

The two government actions discussed above exemplify decisions made from moral panic. They fit in Cohens theory and definition of moral panic who states that it is 'widespread fear, most often an irrational one, that someone or something is a threat to the values, safety, and interests of a community or society at large'.[93] In the case the basis of the fear was that homosexuality will be introduced in Zambia or at the very least become prevalent in Zambia. True to Cohens theory, the moral panic in Zambia was 'perpetuated by the news media, fueled by politicians and resulted in the executive branch decisions that targeted the source if the panic'.[94] Crossman adds that moral panic is often centered around people who are marginalised in society due to their race, ethnicity, class, sexuality or religion.[95] As such moral panic relies on the negative labeling of these marginalised groups, in this case the homophobic labeling of sexual and gender minorities as criminals as well as social and religious deviants. The decisions where thus seen not only as an application of the anti-sodomy laws but also as a performance of government responsibility to ensure social control and maintain moral citizenship.

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90 Minutes of the National Health Research Ethics Board, January 2020.

91 See https://www.nhra.org.zm/nhreb-sitting-schedule (accessed 3 July 2020) The National Health Research Ethics Board is a Statutory board created to oversee ethics in health research relating to human subjects. It falls under the Ministry of Health. It is not however, not the only body with the power to issue ethical clearance but has the statutory Power to oversee all the other bodies.

92 See n 87.

93 For a full discussion see S Cohen Folk *devils and moral panics* (2002) 1-12.

94 As above.

95 A Crossman 'A sociological understanding of moral panic' (2019) *The Thought* 1-2.https://www.thoughtco.com/moral-panic-3026420 (accessed 9 June 2022).

3.5. Mischaracterisation and misapplication of anti-sodomy laws in the criminal justice system in Zambia

3.5.1. Attitudes and perceptions of law enforcement officers towards sexual and gender minorities

Outside public discourse and executive misapplication, the mischaracterisation of the anti-sodomy laws is most significantly experienced by sexual and gender minorities in the criminal justice system. In many instances cases are reported, criminal dockets are opened and later withdrawn at the early stages of the prosecution due to the realisation that the charges cannot stand.[96] However, by the time the cases are withdrawn, much suffering and harassment at the hands of the police and court officials would have been experienced by accused sexual and gender minority persons.[97] Other times, the cases proceed and go through the whole trial and court process with varying decisions. This part discusses the mischaracterisation of anti-sodomy laws in the criminal justice system in Zambia. Citing 4 different cases this part shows that the investigation and prosecution of sodomy cases in the criminal justice system is done with the mischaracterised view that the anti-sodomy laws are laws against homosexual orientation/ identity and apply exclusively to sexual and gender minorities.

As front liners in the criminal justice system, the attitude of the police towards sexual and gender minorities is an important factor in the proper enforcement of anti-sodomy laws. As is the case with journalists, the attitude of police officers is defined by their knowledge about sexuality and of sexual and gender minorities as people. However, just like the journalists and the media as a social institution, the police in Zambia, do not have a working understanding of sexuality, gender and the elemental characteristics of anti-sodomy laws.[98] In the application of anti-sodomy laws, the police as a state institution, exhibit the same level of ignorance, prejudices and negative attitudes exhibited in the public domain towards sexual and gender minorities.[99] With respect to sexuality and gender, a study by Pierre reported as follows:[100]

> Generally, officers lack sufficient understanding on the subject of homosexuality. From their reporting, the respondents were confusing homosexuality with sodomy (which is a crime under the Zambian laws). Asked to explain what homosexuality is, 15 out of the 16 officers in charge of 16 Police stations in Lusaka described homosexuality as 'a man having anal sex with another man' and only one said 'when two men decide to stay together as boy-friend and girl-friend'.

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96 For a series of these cases see https://www.humandignitytrust.org/country-profile/zambia (accessed 6 July 2020) and Transbantu Association of Zambia *Findings of Human Rights Violations Report 2013-2015* (2016) 15.

97 S Pierre 'Exploring discourses and actions of othering homosexual citizens by officers of the Zambia Police service in Lusaka, Zambia' unpublished master's dissertation, Van-Hall Larenstain University of Applied Science, 2013 31-33.

98 Pierre (n 97) 25.

99 Long (n 35) 41.

100 Pierre (n 97) 25-26.

Further, just as in the public domain, police officers misunderstand all sexual and gender minorities to be homosexuals. This finding is corroborated by a study of the Panos Institute for Southern Africa. The study concludes as follows:[101]

> This lack of understanding of homosexuality by the police officers may be the cause for confusing homosexuality with sodomy. Sodomy (anal sexual intercourse) is a serious offence under the laws of Zambia. Therefore, if the understanding of homosexuality by the officers is that homosexuality is tantamount to sodomy, then this discourse criminalises homosexual persons in the eyes of the police systems. This could be one of the reasons that may make police officers prejudicial when dealing with homosexual persons. It is important therefore that officers are provided with the right information that does not frame homosexual persons as criminals.

What is evident is that the police have the same lack of understanding about sexual diversity, gender non-conformity and the law as the public. The two quotes above also show that the lack of understanding trickles down to their characterisation of anti-sodomy laws which are seen as laws against 'homosexuality' (sexual orientation and gender identity). Corroborating this point, COC-Netherlands reports as follows:[102]

> Many people including police officers in Zambia mistakenly think that homosexuality is a crime under the Zambian laws. There is, however, no law in Zambia that suggests that homosexuality as a crime. What is crime is anal sex, which is sodomy and that is what is confused with homosexuality.

Consequent to the above, the 'enforcement' of anti-sodomy laws is exclusively, though wrongly, effected against sexual and gender minorities. In this regard Long records the following:[103]

> In contemporary Zambia […] these provisions remain a serious concern. Colonel C. Musemba, Superintendent of Crime of the Zambian National Police, told our researcher that "there is no doubt that these so-called gays and lesbians are the people at issue in this law [Section 155]"-although in fact the law seems directed at heterosexual sodomy as well.

The mischaracterisation of anti-sodomy laws and the lack of understanding of sexuality by police are tied to the foundational perceptions that they have of sexual and gender minorities. As is the case for members of the general public, attitudes and perceptions of the police regarding sexual and gender minorities are informed by their heterosexual socialisation.[104] As stated in Chapter 1, heterosexual socialisation is largely based of religious, moral and cultural nationalism. In this regard, Pierre explains:[105]

> The perceptions that an individual has on a subject matter will influence their actions. Part of this study sought to find out the perceptions that police officers have of homosexual persons. The perceptions were only studied at individual level. The study findings indicated that the perception that many officers

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101 Panos Institute *HIV prevention for sexual minority groups in Zambia* (2014) 34.

102 COC-Netherland Zambia report 25-26. https://www.coc.nl/search-meq=zambia (accessed 7 September 2020).

103 S Long 'Before the law: Criminalizing sexual conduct in colonial and post-colonial southern African societies' (2003) 11 https://www.hrw.org /reports/2003/safrica (accessed 6 April 2020).

104 T Milies-Johnson 'Confidence and trust in police: How sexual identity difference shapes perceptions of police' (2013) 25 (2) *Current issues in criminal justice* 688.

105 Pierre (n 97) 32.

> have of homosexual persons border on religious and social-cultural beliefs. Mainly the officers perceived homosexual persons as sinners who should not be allowed to exist in the Zambian society as their behaviour is foreign and destroys the morals and culture of the Zambian society.

The treatment that police officers give to sexual and gender minorities is testimony to the above statement. Rather than act professionally, most police officers treat sexual and gender minorities with hostility and violence as they are viewed as criminals.[106] To borrow the phrase 'adding insult to injury' the actions of the police towards sexual and gender minorities are also often influenced by political leaders. Commenting on this point, Pierre points out:[107]

> Generally, the officers reported political interference as the major factor that influences their law enforcement activities against homosexual persons. Both junior and senior officers reported to experience pressure when dealing with homosexual related offences. Constitutionally, Zambia was declared a Christian nation in 1991. With this pronouncement came the promise that the nation will be governed through biblical principles. Successive governments have tried to live to this declaration to fulfill society's expectations. Therefore, according to the Zambian government anything that is not Christian is not Zambian. This discourse has overtaken the discourse of reason that may accommodate the spirit of give and take. Using this discourse, politicians, the church and the media have mainstreamed leadership processes that have vilified homosexuality.

In conclusion, police office's negative perceptions and attitudes towards sexual and gender minorities plus the politically sponsored homo-and-transphobia creates an environment where the mischaracterisation of anti-sodomy laws and the consequential violation of the rights of sexual and gender minorities is seen as legitimate. In this way, abuses go unchecked, and even though most cases may not see the court room or be in the public spotlight, the accused persons suffer at the hands of the police who extort large sums of money to have their cases cleared.[108] Sadly, even in the absence of actual acts of sodomy, most sexual and gender minorities prefer to pay so as to avoid further victimisation.[109] The cases that follow highlight how the police and the judiciary have dealt with anti-sodomy laws with respect to sexual and gender minorities in Zambia.

3.5.2. The case of the 'Facebook lesbians'

A matter that came to be known as the case of the 'Facebook lesbians' perhaps best exemplifies the above discussion regarding the lack of understanding of sexuality on the part of the police, combined with the mischaracterisation and misapplication of anti-sodomy laws in Zambia. Two female friends posted photos of themselves on Facebook. In these photos, they were seated close to each other. Because of their short hair, they were stereotyped as lesbians and as such, the police made a call on

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106 Long (103) 12.
107 Pierre (n 95) 38.
108 Transbantu Association of Zambia (TBZ) *Findings of Human Rights Violations Report 2013-2015* (2016) 15.
109 As above.

the general public to report them for arrest under the anti-sodomy laws.[110] The statement made by the Zambia police spokesperson reads as follows:[111]

> There is a picture trending on social media where two girls are reported to have been in an intimate relationship. I wish to state that police officers have taken a keen interest in the story. Officers in the cybercrime's unit have instituted investigation in the matter. We therefore call on members of the public with information that may be helpful in the investigations to report to the nearest police station. *In Zambia it is an offence for people of the same sex to engage in intimate relationships or a sexual affair.*

It remains telling that the police service issued a public statement seeking for information from the general public, based on stereotypes and prejudices. To illustrate the point more graphically and perhaps show the level of mischaracterisation, the picture that invited the police inquiry is inserted below:

The story attracted significant media attention where the girls were labeled as 'deviants' and 'daringly evil' by most participants on participatory social media platforms.[112] Even assuming that the two were in a relationship, there was no legal basis for the police to investigate the commission of a crime under the anti-sodomy laws based on the posted picture.

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110 'Zambia police launch investigations into the case of two Zambian lesbians' *Lusaka Times*, 1 December 2018. https://www.lusakatimes.com/2018/01/30/police-launch-investigations-case-two-zambian-lesbians/ (accessed 20 November 2022).

111 The story attracted huge media attention and was carried by several print and online media. https://www.intomore.com/impact/lesbian-couple-in-zambia-hunted-by-police-after-intimate-facebook-photos-go-viral, https://zambiareports.com/2018/01/30/police-hunt-suspected-gay-couple/, https://www.nation.co.ke/news/africa/Zambian-police-hunt-lesbian-couple/1066-4286790-vo2bfdz/index.html, https://diggers.news/local/2018/01/30/police-hunt-for-lesbian-couple/ (all accessed 2 February 2018). (emphasis added).

112 As above.

The matter was prosecuted but having been such a public issue , it highlights the stereotyping of sexual and gender minorities and the of mischaracterisation of the anti-sodomy laws. Apart from mischaracterisation, the case also represents a very rare instance where the anti-sodomy laws were referenced against women in Zambia.

3.5.3. *The People v Philip Mubiana and James Mwape*

The case of *The People v Philip Mubiana and James Mwape*[113] highlights the extent to which public discourses about sexual minorities and the anti-sodomy laws influence the construction and prosecution of cases. In that case, two men, Mubiana and Mwape, were arrested following a statement by the then Minister of Justice Wynter Kabimba urging the public to 'report all homosexuals to the police'.[114] Following the call by the Minister, a member of the family of one of the accused reported to the police that the two men were in a homosexual relationship as they were often together. The two accused were arrested and detained in the rural outskirts of Zambia's Central province, solely based on their homosexual orientation and charged under section 155 of the Penal Code for 'committing carnal knowledge against the order of nature' even though no actual sexual acts of anal were reported or in any way evidenced. Each of them was also charged for 'permitting the other to have carnal knowledge of him against the order of nature'.[115] They were detained for weeks before they were released on police bond (bail before trial).[116] However, within days of bond release, they were picked up and beaten by an angry mob of community members who then took them back to the police station claiming that they had the right to effect a citizen's arrest and demanded that the two accused be detained. The police revoked their bond and detained them again claiming that, their being together at a public place was evidence of their homosexuality.[117] The second detention highlights the prejudicial mentality of the police which fed into the case construction and its prosecution.

The case was constructed solely on the basis of the sexual orientation of the two accused without any evidence of actual acts of sodomy.[118] During trial the only evidence produced was that the two were often together and that one of them had 'come out' to a close member of his family that he was gay. To establish actual sexual intercourse, the prosecution sought to rely on the medical report made during investigations, during which both the accused men were forced to undergo physical penal and anal examinations.[119] The tests were deemed inconclusive of any anal penetration due to the fact

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113 (2013) 1B/01/2013 (*Mubiana* case).

114 The call was made during a speech at a political fundraising dinner for the ruling party. See https://www.lusakatimes.com/2013/04/22/kabimba-urge-zambians-reject-and-denounce-people-and-institutions-championing-homosexuality/ (accessed 7 July 2020) and https://oblogdee.blog/2013/04/22/zambian-justice-minister-seeks-to-justify-persecution-of-gays/ (accessed 7 July 2020).

115 *Mubiana* case (n 113) 1-2.

116 Amnesty international did a watching brief of the case and state in their report that the two accused were denied food and subjected to degrading and inhuman treatment. https://www.amnesty.org/en/latest/news/2014/02/zambia-end-state-sponsored-persecution-same-sex-trial-reaches-verdict/ (accessed 8 July 2020).

117 As above.

118 *Mubiana* case (n 113) 5.

119 *Mubiana* case (n 113) 7.

that the abrasions found were normal for a number of reasons such as constipation.[120] The Magistrate recorded the following:[121]

> PW5 who was the medical officer who examined the two accused told the court that his physical findings could be caused by many other reasons among them constipation, congenital anal structure and other conditions. He concluded however, on the medical report form (MRF) that, his findings were consistent with the allegations of sodomy although he added that it was not possible to tie it to sodomy alone without forensic examination.

The finding written on the medical report form was largely due to the way the form is designed and the nature of the medical examinations, which do not give medical officers room to give a narrative of their observation.[122] Notably, the medical examination in this case was physical and not forensic (microscopic) as most examinations are today. This notwithstanding, according to the state, the *actus reus* of the offence was the homosexual orientation of the accused men. To the arresting police officer, homosexual orientation signified anal sexual intercourse, and, even if the medical examination report referred to above was not conclusive, to him it did not rule out anal intercourse as the reason for the abrasions.[123] The prosecution further argued that the *mens rea* was 'the choice to be gay' that the two men made.[124] This construction of the case contradicts the elemental nature of the anti-sodomy laws and instead mischaracterises them as laws against homosexual identity. Actual acts of sodomy are taken as a given rather than being the evidential foundation of the case.

The defense argued that perceived or actual homosexual identity was not a criminal offence under section 155 and that what the prosecution needed to establish was that the two accused persons committed actual acts of sodomy.[125] Further, the defence argued that, for a conviction to stand, the act of sodomy should be corroborated by another person, in line with the evidential requirement in all sexual offences in Zambia.[126] Corroboration of sexual intercourse is a vital requirement in the successful prosecution of sexual offences.[127] After hearing both sides, the Magistrate Court dismissed the state's case on the basis that there was no corroboration of the sexual acts alleged and further that the testimonies of the witnesses was contradictory in some parts. Analysing the evidence in this regard, the Court concluded:[128]

> I am satisfied that although the statements are presented slightly different, the substance of the content is the same and it came from PW1. My doubt is just on PW4's statement that PW1 told him that the argument between the accused persons was that A1 felt that A2 was having sex with him too much. This doubt is because all the four witnesses who were present at the police station did not depose to this. At this point however, sight should not be lost that PW1 [the complainant] never saw the accused

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120 As above.

121 *Mubiana* case (n 113) 7.

122 This Chapter later discusses the design and reliance of the medical reports and further shows how it feeds the mischaracterisation of the anti-sodomy laws during prosecution of cases.

123 Mubiana case (n 113) 8-9.

124 The *Mubiana* case (n 113) 12 (emphasis added).

125 The *Mubiana* case (n 113) 14.

126 See section 5.6 of this thesis below.

127 *Emmanuel Phiri v The People* (1982) ZR 77. *Christopher Nonde Lusinga v The People* (2010) SCJ/ 15/ 2011.

128 The *Mubiana* case (n 113) 28 (emphasis added).

> persons having sex. *Her statements are largely that she wanted to know if the duo were married since they were usually together*.

What transpired from the case is that the Court was persuaded that homosexual orientation was synonymous with acts of sodomy, but that under the law, corroborating evidence was required. Hence without saying it, the Court's decision acquiesced the perception that anti-sodomy laws criminalise homosexual identity, are exclusively meant for sexual and gender minorities, and that homosexuality means anal sex between men. This comes out clearly when in its concluding remarks the Court found it necessary to state:[129]

> The offence the accused persons are charged with is found in section 155 of the Penal Code […] This section is concerned with curbing any form of sex against the order of nature of performing intercourse. It is meant to encourage human beings to have sex through the legally recognised way, which is heterosexual. *Any intercourse per man's anus and penis may also be called sodomy or homosexuality which is illegal.*

Although the state did not appeal the decision, the *Mubiana* case exemplifies state sponsored homophobia in a heterosexual nation using the criminal justice system. First, the two accused men were reported shortly after the then Justice Minister called on the public to report 'homosexuals to the police'.[130] The call was made against the background that the Zambian government was concerned over the funding of sexual and gender minority human rights programs by foreign governments and international aid organisations.[131] In a typical heterosexual nationalist speech, the Minister stated:[132]

> As Zambians, we have declared that we are a Christian nation and there is no way we can allow this un-Zambian culture. I urge all Zambians to rise and denounce this vice and report all homosexuals to the Police. Why should someone or some institutions want to import this homosexuality and try to influence others to practice it? We can't allow it; I'm calling on all citizens to stand firm and reject it.

This statement which was widely broadcast was received with praise by the general public. Incidentally, it reveals all the themes that the public discourse above brought out: Religious and cultural nationalism, relativism, exceptionalism and the framing of international agencies as promoters of homosexuality. The police spokesperson echoed the call shortly after the speech and this saw the first rise of cases under the anti-sodomy laws.[133] The *Mubiana* case being the first and most publicised shortly after the speech did not yield the result desired by the state. As such the state reacted to the Court's decision when the then Minister of Home Affairs and later president, Edgar Lungu, retorted:

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129 The *Mubiana* case (n 113) 18 (emphasis added).

130 See n 10. Notably, around the same time, the then prime minister of Kenya made a similar call in that country asking the public and police to report and 'arrest gay'. see 'Arrest gays, Kenyan Prime Minister orders' Capital News 28 November 2010 http://www.capitalfm.co.ke/news/2010/11arrest-gays-pm-orders/ (accessed 21 September 2020). In many respects this represents the similar manifestation of heterosexual nationalism and politically influenced homophobia in Africa as similar situation have been recorded through the region.

131 'Kabimba urge Zambians to reject and denounce people and institutions championing homosexuality' Lusaka Times 22 April 2013. https://www.lusakatimes.com/2013/04/22/kabimba-urge-zambians-reject-and-denounce-people-and-institutions-championing-homosexuality/ (accessed 28 November 2022).

132 'Justice Minister wants no justice for Zambian gays' *Erasing 79 crimes* 22 April 2013. https://76crimes.com/2013/04/22/justice-minister-wants-no-justice-for-zambian-gays/ (accessed 21 September 2020).

133 See n 138.

'There will be no discussion on gay rights. That issue is foreign to this country and those championing it must go to hell.'[134] As already seen above, this is the same stance he took later in 2019 when he expelled the American Ambassador after he condemned Zambia's anti-sodomy laws.

In many respects, the *Mubiana* case fueled Zambia's heterosexual nationalism and the narrative that western governments were sponsoring 'homosexuality' in Zambia. This is because throughout the proceedings resident representatives of the European Union and the United States, attended court and made statements expressing concern over homophobia in Zambia.[135] This was taken to be an act of interference with Zambia's sovereignty and in particular the criminal justice system. With the state sponsoring homophobia and the public behind it, the trajectory in the prosecution of cases changed after the *Mubiana* case. More arrests were made but did not make the news.[136]

3.5.4. *Paul Kasonkomona v The People*

The case of *Paul Kasonkomona v The People*[137] highlights the state's use of the criminal justice system to suppress human rights activism for sexual and gender minorities through the anti-sodomy laws. Unlike the *Mubiana* case, the *Kasonkomona* case illustrates direct state interference. The background is telling of the situation of heterosexual nationalism in Zambia. After the visit of the Ban Ki Moon (discussed in Chapter 1) homophobic discourse increased in Zambia and any counter discourse or narrative was taken to be a promotion of homosexuality and therefore an offence contrary to the anti-sodomy laws. As was seen in Chapter 1, these events also coincided with the constitution making process where the evangelical churches were calling for the removal of the terms 'marginalised people' in the draft constitution.[138] In the midst of the debates, Paul Kasonkomona, a sexual and reproductive health rights activist, appeared on a live television programme aired by a private broadcaster in Zambia on the topic 'gay rights or human rights in the constitution making process'. During the programme Kasonkomona echoed the statement of the former UNSG and further called for the decriminalisation of anti-sodomy laws, stating that they have a negative impact on Zambia's response to the HIV pandemic and the rights of sexual and gender minorities. After the programme, he was immediately arrested by the police who were waiting for him outside the studio. Initially, he was charged under section 155 ('carnal knowledge against the order of nature') but it was soon realised that the charged would not stand and hence it was amended to 'soliciting in a public space for immoral purposes' under section 178 of the Penal Code, as read together with section 155 itself.[139] The rationale for the charge was that 'by asking for non-discrimination of sexual and gender minorities and calling for decriminalisation of the anti-sodomy laws, Kasonkomona was promoting homosexuality which is illegal and immoral in Zambia as a Christian nation'.[140]

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134 'Go to hell, Edgar Lungu tells gay rights activists in Zambia' *The Zambian Reporter* 5 February 2013 https://zambianreports.com/2013/05/21/ (accessed 13 August 2020).

135 See n 116.

136 The unreported cases came to my knowledge as volunteer lawyer on stand.

137 (2014) HPA/54.

138 Chapter 1 discusses these events in detail.

139 As above.

140 Zambia Police Indictment form of Paul Kasonkomona, 8 April 2013.

During trial, the state called six witnesses, among them the Reverend Leader of the Evangelical Churches Fellowship of Zambia (EFCZ), who was the main witness. He testified on the sinfulness and immorality of homosexuality as his testimony was meant to establish that the statement of the accused amounted to soliciting for immoral purposes.[141] This approach highlights the fact that the case was constructed in terms of religious and moral nationalism as justification for maintaining anti-sodomy laws in Zambia. However, the testimony was discredited on an evidential point of law because it turned out that the witness had not even watched or witnessed the programme himself. His testimony was in fact based on the 'collective view that he and his colleagues in the church leadership had, that Zambia being a Christian nation, the statement made by the accused amounted to a criminal offence which the state ought to prosecute'.[142] The testimony not only illustrates how the state (through agency of the police) understands the anti-sodomy provisions, but also how they are enforced in conjunction with other laws to unfairly prosecute sexual and gender minorities or activists. Notably, in its submissions the state made the following argument:[143]

> The respondent [the accused] was not merely discussing homosexuality but was actually advocating for the rights of people practicing homosexuality to be protected. It is illegal to practice homosexuality […] It is further submitted that in light of the provision under which the respondent was charged, it would be discerned that the test for the offence of soliciting for immoral purposes in relation to homosexuality is not actual harm but potential harm to public morality. Thus, any attempt to promote or to funding or in any way supporting homosexuality and related practices is an offence.

From the submission it is also clear that the prosecution's understanding of 'homosexuality as a practice' and not as a diverse form of human sexual orientation informed or rather misinformed its argument. As seen from the public discourse above, this understanding of homosexuality threads in many of the arguments in support of the anti-sodomy laws. Against this background it can be argued that in the context of sexuality, public discourses and narratives filter through legal arguments and court submissions.

The defense put up a strong argument, submitting that Kasonkomona not only had his freedom of expression guaranteed in the Constitution when he made the statement but also that calling for non-discrimination and decriminalisation did not amount to soliciting for immoral purposes. The Magistrate Court agreed with this submission by the defense and after protracted hearings Kasonkomona was acquitted. Unlike in the *Mubiana* case, the state was determined, under much pressure from evangelical churches and for reasons of political expedience (as discussed below), to show its strength against homosexuality. It therefore appealed the decision to the High Court, but the appeal was dismissed on all the grounds with the appeal Court judge stating that the 'prosecution had failed to meet the elements of soliciting and of immoral purposes.'[144]

The case draws attention to two important themes in Zambia; The use of the criminal justice system against sexual and gender minorities by the state for political expedience, And the potential

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141 *Kasonkomona* case (n 137) 13.
142 *Kasonkomona* case (n 137) 15.
143 States submissions in the *Paul Kasonkomona* case (2014) HPA/54.
144 *Kasonkomona* case (n 137) 12.

role of the judiciary to correct an otherwise mischaracterised law. The political motivation behind the case was expressly stated by then Vice President Guy Scot, who said at a press conference:[145]

> The problem with this guy going on television was that we had to do something because if we had done absolutely nothing, we would have got a bollocking from these evangelical churches.

The statement keenly brings out the extent to which religious/Christian nationalism influences political decisions of the executive with regard to sexual and gender minorities. While the executive arm can be stimulated by religious actors, the judiciary is less susceptible to such influence as seen from the decision of the Court. It is also for this reason that Chapter 5 argues that judicial decriminalisation is more promising than legislative decriminalisation in Zambia. The *Kasonkomona* and the *Mubiana* cases thus highlight that, while public discourse and the state through its institution may mischaracterise and misapply the anti-sodomy laws, the courts are in some cases able to correctly interpret the provision. However, the contention of this thesis is that the mischaracterisation outside the courtroom and within the public domain most significantly impacts on rights of sexual and gender minorities. The next chapter shows that the micro impact of the mischaracterisation occurs outside the purview of the court process but within the criminal justice system.

3.5.5. *Hatch-Brill v The People*

Most of the prosecutions under the anti-sodomy laws are against cisgender gay men. While this represents a historical rationale (the targeting of the law against males as discussed in Chapter 2), the anti-sodomy laws are also used against, and negatively impact on gender minorities. This is partly because all sexual and gender minorities are understood to be 'homosexuals.' Due to their relative visibility gender minorities are more likely to be victimised within and outside the criminal justice system.[146] The case of *Hatch-Brill v The People*[147] demonstrates the mischaracterisation of anti-sodomy laws through prosecution of transpersons because of their gender expression. The facts are chilling. On the material night, Hatch, a transwoman, got into a cab going home from a night club. On the way home, the cab driver forced himself on her, overpowered her and raped her. He then drove her to the police where he reported that Hatch was a transwoman who he had sex with him in his house and claimed that 'he did not realise that he was having anal sex with a man'.[148] At the police station, Hatch was stripped naked and when it was found that her biological sex was 'male' she was arrested, charged and detained under the anti-sodomy laws. The basis of the charge was that as transwoman she must have been responsible for initiating the anal sex and that the taxi driver would not have reasonably initiated or solicited anal sex. Hatch's statement that she was raped was rejected and she was branded as a 'prostitute'. During trail she was not represented by a lawyer, a fact that partly led to her conviction and sentence to 15 years with hard labor in Zambia's most notorious maximum prison.

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145 'The trail of Paul Kasonkomona points to politically motivated arrest' Southern African Litigation Centre https://www.southernafricalitigationcentre.org/2013/10/18/trial-of-paul-kasonkomona-points-to-politically-motivated-arrest/ (accessed 6 July 2020).

146 Human Dignity Trust *Injustice Exposed: The criminalisation of transgender people and its impact* (2018) 7 https://www.humandignitytrust.org/wp-content/uploads/resources/Injustice-Exposed-the-criminsalisation-of-trans-people.pdf (accessed 17 August 2020).

147 (2017) CAZ/09/03/2016 (*Hatch-brill* case).

148 As above.

This case raises a number of issues with respect to the application of the anti-sodomy laws against gender minorities in particular. First, Hatch was arrested, prosecuted and convicted mainly because of her gender expression. She was a lone accused minority person in a pool of hetero-normative criminal justice officials who discounted her plea that she was raped but instead criminalised her because she dressed as a woman. In its decision the Court stated:[149]

> This is the evidence that I received. I now state my findings of fact. I find that the accused permitted a male person to have carnal knowledge of him [her]. I find that there was carnal knowledge. I find that it was against the order of nature […] the accused acted as a woman by dressing as one and went to some night club where an unsuspecting complainant picked him from there under a belief that he had picked up a lady when Infact not. The Court wishes to state that the accused dressed like a lady, he applied some make up, on his face and some lipstick on his lips. How he appeared on that particular night is shown in the photographic album marked *P 9* and that appearance in ladies' clothes is quite unusual for a man.

The case also demonstrates that sexual or gender minorities are less likely to be believed in the prosecution of sodomy cases. The Court chose to believe the testimony of a witness who had a personal interest to serve while disregarding the testimony of the accused on the basis of her gender expression. Discounting the testimony of the accused, the Court held:[150]

> [I] can see no motive for the prosecutrix in this case deliberately and dishonestly making a false allegation. In the instant case, events as they happened there can hardly be an argument that the accused is being falsely implicated […] the issue which is coming out of the accused's defense is that he did not permit PW1 to have carnal knowledge of him as he told the court PW1 forced himself on him seeing that he dressed like a woman. The Court finds no merits that PW1 forced himself on the accused.

Mainly, the case reveals that the anti-sodomy laws will always be disproportionality applied against sexual and gender minorities. Arguably, a level of fairness would have been achieved if both the accused and the complainant were charged since each of them had a different version of events of the material night. However, due to the mischaracterisation of anti-sodomy laws as laws against queer identity and expression, the gender identity and expression of the accused was the criminalising factor which led to the exclusive application of the law on her, thereby endorsing the view that it was the person and not the action that was target of the law. According to Woods, such instances speak to the need for a critical queer criminology.[151] He argues that the criminal justice system continues to possess heterosexist views and ignore the experiences of queer people and queerness as a form of sexual citizenship (especially in heterosexual nations) with laws that criminalise different aspects of queer life such as same sex marriage and consensual same sex between adults.[152] Lenin and Buist add that in the absence of a queer criminological perspective, the criminal justice system will continue to view sexual and gender minorities through the lens of deviance and criminality and thereby disregard any experiences as victims of crime as illustrated by the *Hatch-Brill* case.[153] Further, when court decisions are made without due regard to the experiences and the sexual citizenship rights of sexual and gender

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149 See n 148.
150 See n 148.
151 B Woods *Queer contestations and the future of critical "queer" criminology* (2013) 9.
152 As above.
153 Buist & Lenning *Queer Criminology* (2018) 3.

minorities, it reinforces homo-and-transphobia in the public domain. In turn this translates in their marginalisation and victimisation in different sectors of public life. For example, after the judgment in *Hatch-Brill*, the media bashed her with headlines like 'fake woman jailed by court'.[154]

3.5.5. *The People v Francis Mwale*

This represents a clear mischaracterisation and abuse of the anti-sodomy laws. The accused, Francis Mwale, was charged under the anti-sodomy laws based on perceived homosexual orientation. Francis, at the time aged 31 lived with a 55 year-old friend (a person with a disability) who was thought to be his partner. One evening the police invaded their home, arrested him and charged him on the basis that he was known to be gay. His perceived partner was not arrested due to his disability. According to the police docket the 'particulars of the offence are that the accused is suspected to practice homosexuality with a known person.'[155] During trial the state called four witnesses all of whom speculated on the sexuality of the accused. Primarily the testimonies were to the effect that the accused lived with a person who was disabled had divorced his wife because he was a homosexual and therefore, the accused himself was also a homosexual. One witness claimed that the accused had followed him to the bathroom at an open-space bar and tried to have sex with him. However, this testimony was later retracted as the witness said the police had promised to pay him if he made the statement, but they never did.[156]

The arresting officer testified as follows in Court:[157]

> The officer in charge came one day and instructed me to go and arrest the accused because he was a homosexual. He said that people had been talking in town. I was alone on at that time but in the evenings when some other officers came, we went in the night and picked up the accused. We didn't find him having sex, but we arrested him because he was a homosexual. I don't know if he is a homosexual, and I don't know him.

As with all cases, the accused was subjected to a mandatory anal examination and HIV test. The medical examination report characteristically stated that the findings were consistent with the allegation in that microscopic abrasions were found on the anal area of the accused. During cross examination the medical doctor who carried out the test testified as follows:[158]

> The test results show microscopic abrasions but yes these can be as a result of using the bathroom more than anything. I was told the accused is a homosexual. So, it is possible that the abrasions could have been caused by anal sex […] Yes, every human would be found with these microscopic abrasions because every human uses the toilet *but in the case of the accused he is HIV positive which make it likely that he is a homosexual.*

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154 'Fake woman convicted of sodomy' *Zambia Daily Mail* 31 October 2015 http://www.daily-mail.co.zm/fake-woman-convicted-sodomy/ (accessed 20 August 2020).

155 Police Docket no. Chs/18/2017.

156 This information was obtained when witness spoke off the record in Court after his testimony. He was prompted by the fact that he had not been paid and could not see an innocent person go to jail. The information was however, not corroborated and as such it was discounted.

157 Case Record of proceedings- The *Mwale* case.

158 Case Record of proceedings- The *Mwale* case (emphasis added).

The above shows that the whole case was constructed against the accused without any evidence and without any substantive legal foundation. None of the elements of the 'canal knowledge against the order of nature' were established. Further, the evidence was interpreted within the frame of the health demographics of sexual minorities. The medical doctor's conclusion that the accused was a gay person because he was HIV positive speaks to this point. And in this regard the HIV status was viewed in the context of 'deviant sexual behaviour' – anal sex – thereby telling of the continued existence of the negative labelling associated with homosexuality and HIV. As with the *Hatch-Brill* case, this case reveals that the labeling of sexual and gender minorities as sexual deviants informs the construction of cases, the interpretation of evidence, and the testimonies of witnesses.

As at 30 July 2022, a ruling by the Court as to whether the accused has case to answer was not yet issued. However, it can also be noted that the case file went missing and unfortunately the prosecuting officer also passed away. The accused was discharged and the case withdrawn, but not dismissed and the accused not acquitted, and as such he could be recalled any time when the case record is found.[159] This turn of events does not in any way take away the mischaracterisation and misapplication of anti-sodomy laws on real or perceived homosexual orientation.

3.5.6. Mischaracterised evidence: Corroboration and the use of medical examination reports in sodomy cases

This part discusses how the use of medical examination reports as corroborating evidence in sodomy cases, highlights the mischaracterisation of anti-sodomy laws in the criminal justice system in Zambia. As a sexual offence, the commission of an act (*actus reus*) of 'carnal knowledge against the order of nature', requires proof by way of corroboration. In this regard the burden of proof lies with the prosecution to establish beyond reasonable doubt, through the testimony of an independent person, that penetration occurred and that it was the accused person who committed the act.[160] Reiterating this principle the Supreme Court in *Davis Chiyengwa Mangoma v The People* stressed:[161]

> In a sexual offence there must be corroboration of both the commission of the offence and the identity of the offender in order to eliminate the dangers of false complaint and false implication. Failure by the Court to warn itself is a misdirection.

As seen from the above statement, the requirement for corroboration in sexual offences is meant to eliminate the dangers of false identity and false inferences.[162] For this reason, this evidential requirement is also referred to as the *cautionary rule* in that Judges or Magistrates must warn themselves of the dangers of convicting an accused person for a sexual offence without corroboration.[163] According to Morris, the cautionary rule and the requirement for corroboration is 'a

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159 A discharge is where an accused person has charges against them withdrawn due to some technical aspects of the case such as the file going missing of witnesses not being found. Although discharges are not common, they are not an acquittal which is where after the course of trial the court finds the accused not guilty and sets them free.

160 *Davies Chiyengwa Mangoma v The People* (2015) SCA/217/2015.

161 As above.

162 See also *Daka v The People* (2014) SCZ/333/2013.

163 The rule was discussed in detail in *Katebe v The People* (1975) ZR 13. For a critical and comparative discussion of the cautionary rule in Africa see A Armstrong 'Evidence in rape cases in four Southern African Countries' (1989) 33 (2) *Journal of Africa Law* 172-184.

relic dating back to the Lord Chief Mathew Hale and was required in all illicit sexual conduct cases such as incest, pimping, oral copulation, sodomy, defilement and rape'.[164]

Corroboration itself is generally understood to mean independent evidence that proves the commission of the offence and the identity of the people that committed it. In *Nsofu v The People*, the Supreme Court defined corroboration as

> [i]ndependent evidence which tends to confirm that the witness is telling the truth when he or she says that the offence was committed and that it was the accused who committed it. It is the evidence of the witness of which a conviction is based; the corroborative evidence serves to satisfy the court that it is safe to rely on that evidence. [165]

In the more recent decision of *Christopher Nonde Lushinga v The People* the Supreme Court said:[166]

> There is no magical meaning in the word "corroboration". It simply means evidence which confirms the commission of the offence, and the identity of the perpetrator of that offence. Put differently, corroboration means supporting or confirming evidence.

The various definitions of corroboration do not limit it to eyewitness testimony, although traditionally courts in Zambia have only given weight to eyewitness testimonies for purposes of the cautionary rule.[167] Consequently the rule has been controversial especially for offences like rape and defilement, because it is highly unlikely that a corroborating eyewitness will be present during the commission of the offence, and further that it is based on an outdated rationality that stereotypes women and girls as liars whose testimonies have to be scrutinised.[168] In some jurisdictions the rule has been abolished in light of the development of liberal feminist legal theories that criticised it as being inclined to protect male perpetrators and failing to do justice for female victims.[169] Arabian has called the continued existence of the rule a 'lingering insult to women'.[170] In Zambia the rule has been maintained. However, to address the concerns of feminist legal scholarship and activists the scope of collaborative evidence has been widened. As such medical examination reports that show that some form of penetration occurred are taken to be sufficient collaborative evidence.[171]

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164 A Morris 'Empirical, historical and legal case against the cautionary instruction: A call for legislation reform' (1988) 1 *Duke Law Journal* 154.

165 (1973) ZR 287 SC.

166 SCZ /15/ 2011. See also L Tibatemwa *Criminal law Uganda; Sexual assaults and offences against morality* (2005) 11. See also Andrews & Hirst *Criminal evidence* (1987) 194.

167 *Phiri v The People* (1982) ZR 77.

168 A Armstrong (n 16). See also *S v D* (1988) 2 SACR 543 (A) where it was held that the application of the cautionary rule amounts to inherent discrimination on the grounds of gender in breach of article 5 of the Convention on the Elimination of all Form of Discrimination Against Women (CEDAW). Other criminal law scholars have counter argued that the rule exists with sufficient safeguard in the sense that it is only in circumstances where a trial Court finds the woman or child had a motive to lie that the rule is applied. In *S v Mupfundza* (1982) 1 ZLR 271 the Court took this approach when it convicted the accused for rape without corroboration.

169 For instance, the rule was abolished in Namibia following decisions in *S v D* 192 (SA) 0513 (Nm) and *S v K* 4BCLR 405 (NmS) where the Namibian Supreme Court said that the rule had outlived its usefulness. In South Africa, see *S v Jackson* (1998) 1 SACR 470 (SCA) where the Court said that 'the cautionary rule exists on irrational and outdated perception'.

170 A Abrabian 'The cautionary instruction in sex cases: A lingering insult' (1980) 10 *Southwestern University Law Review* 585.

171 *Phiri v The People* (1982) ZR 77.

While the use of medical examination reports protects accused persons from false implications and help ensure that victims of rape and defilement receive justice, it has inverse and negative implications for accused persons in sodomy cases. This is because the medical reports are taken as corroboration of 'homosexuality', for instance as seen in the *Hatch-Brill* and *Mubiana* cases. As stated above, homosexuality is incorrectly and narrowly understood to be a *sexual practice* in Zambia. As such when persons are arrested based on their perceived or actual homosexual orientation, they are subjected to mandatory anal examinations, conducted by a medical officer to establish the occurrence of penetration. This procedure is taken to be part of the investigation process and therefore refusal is seen as an obstruction of justice which attracts further charges. In *Kalebu Banda v The People* the Supreme Court somewhat indorsed this trajectory when it held: [172]

> In a sexual offences failure to obtain medical evidence when there was a duty to do so means that the court proceeds as if the doctor had testified that he had examined the victim and found no evidence of intercourse.

This holding has thus created a situation where the police ensure that anal examinations are done on accused persons in sodomy cases to secure conviction. Notwithstanding the 'need' for corroborative medical evidence as stated in the *Kalebu* case, conducting mandatory medical examination on an accused person is highly prejudicial and unconstitutional in that it strips the accused person of the right to presumption of innocence, the right to dignity, bodily autonomy and arguably amounts to torture, cruel and degrading treatment in light of its forced nature.[173] Borrowing from Arabian, the application of the cautionary rule in this manner can be described as an 'infraction and lingering insult [on the rights] of sexual and gender minorities'.[174]

The police report form on which the medical officer states their finding limits them to merely indicate 'Yes' or 'No' against the words 'examination is consistent with the allegation for which the accused is charged'. The test itself is done using a microscope camera, among other procedures, and only states if any microscopic or visible abrasions have been found on the anal area of any of the accused persons. Thus, even if the abrasions are invisible, the results are always positive with regard to microscopic abrasions and therefore what is recorded on the form is 'Yes', meaning the 'examination is consistent with the allegation for which the accused is charged'. This is problematic because microscopic abrasions are almost always present on every human being as a result of using the bathroom.[175] However, due to the narrow understanding of homosexuality as anal intercourse and the mischaracterised nature of anti-sodomy laws, the medical examination report is taken to be corroborative evidence that sodomy occurred. In the context of queer criminology this highlights the mischaracterisation of anti-sodomy laws which wrongly profiles all sexual and gender minorities as sexual offenders with the examinations being a pre-trial confirmation of the offence.

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172 (1977) ZR 169 (SC).

173 For a full discussion of the indignity of forced anal examinations of sexual and gender minorities see Human Rights Watch *Dignity debased: Forced anal examinations in homosexuality prosecutions* (2016) https://www.refworld.org/pdfid/5784e2dd4.pdf (accessed 18 July 2019).

174 Abrabian (n 170) 585.

175 See n 149.

The criminal profiling and labeling of sexual and gender minorities as sexual deviants does not stop at mandatory anal examinations to satisfy the cautionary rule of evidence; it goes further to conducting mandatory HIV tests. The tests are done based on the rationale that as sexual deviants, sexual and gender minorities are likely to recklessly contract HIV and other sexually transmitted infections (STIs) and then recklessly infect their heterosexual victims. In all the cases discussed above, HIV tests were conducted on the accused persons without their consent. Justified within the public health response to ensure that the victim was not infected and if so, to provide the necessary treatment, the mandatory HIV tests, like the anal examinations, are done without due regard to the rights of sexual and gender minorities. Further, it is ignored that the victim themselves can be tested within the framework of the national voluntary counselling, testing and treatment policy, if the need is seen, without necessarily having to conduct a mandatory test on the accused. It is accepted that sexual and gender minorities are framed as 'key populations' in the public health response to HIV and while this frame seeks to ensure universal health coverage by bringing them from the margins to the center of health care, the frame has been used negatively in the criminal justice system; First it is taken as an aggravating factor for sentencing in the event the HIV test is positive and second it perpetuates intersectional stigma and discrimination reminiscent of the 1980s labeling of HIV as the 'gay bug'.

The reliance of medical examination reports as corroboration was challenged as unconstitutional and inadmissible in the *Hatch-Brill* case.[176] Although in that case, as seen above, penetration did occur, the examination report was challenged on the basis of the mandatory nature of the medical procedure done on the accused coupled with the forced HIV test. During trial the accused stated that she was forced to undergo the anal examination and that she was deceived to do the HIV test on the promise that she was going to be put on medication when in actual fact it was all meant to obtain evidence.[177] In his decision the magistrate admitted the medical report as corroborative evidence because it established penetration stating:[178]

> His [the accused] third contention is he was forced to undergo medical examination by PW5 [the medical doctor] who received the report accompanied by an affidavit sworn by PW6 [the police arresting officer] for the accused to be examined […] the court finds no basis on which it can entertain the accused was deceived, misled or convinced into undergoing the medical examination. The reason is that the medical report clearly shows that he [the accused] showed tenderness to medical examination.

In written submissions filed in the Court of Appeal, the appellants argued as follows:[179]

> [t]he trial Court was able to appreciate that the Appellant claimed he was forced to undergo medical examination. That an anal examination and blood test was done without his consent. The Trial Court receiving evidence of an unrepresented accused and hearing what sounded like an objection to the whole process of an invasive and intrusive examination ought to have paid due attention and discard the medical reports. The medical report in question was also constituent of a mandatory HIV test. We invite the court to take judicial notice that HIV should always be voluntary and should be accompanied by counselling which did not take place in this case. Any HIV examination done without the consent of

176 See n 138.
177 The *Hatch-Brill* case (2015) record of proceedings in the Subordinate Court 19-21.
178 See n 138.
179 Appellant heads of arguments CAZ/09/03/ 1 June 2017.

> the person tested cannot be used in court as evidence for the very reason that it violates a persons' rights. As this argument merely supports our ground that the medical test cannot be used because it was born from unconstitutional conduct.

In support of their arguments the appellants cited different court decisions from across jurisdictions on the illegality of forced medical examinations on accused persons. However, the Court dismissed the appellants' arguments, reiterating that the cautionary rule was so established that the medical examination report could not be challenged because it was found that the accused had permitted penetration of him. As such, the reliance of the medical examination reports continues to reinforce and complement the mischaracterisation of anti-sodomy laws in Zambia.

3.6. Conclusion

This chapter has shown that, with reference to the elements of the offence, anti-sodomy laws do not require that the accused person's sexual orientation or gender identity be established. While the association of the anti-sodomy laws in Zambia with sexual and gender minorities is a product of British colonialism, this form of continued use can be attributed to deliberate heterosexual nationalism as coloniality.[180] This Chapter has also shown that the state, through its actions and omissions, has played a major role in shaping public opinion in the application of the anti-sodomy laws in the criminal justice system.

It is clear from the public discourse and the cases cited that the mischaracterisation and exclusive application of anti-sodomy laws against sexual and gender minorities in Zambia is contrary to the principle of legality in two ways. First, mischaracterisation of anti-sodomy laws is an afront to the principle of legality as an abstract or philosophical principle that guides the interpretation and application of criminal law. Second, it is an afront to the principle of legality as a constitutional principle within the rule of law as contained in article 18 of the Constitution cite above. In this regard, it can be argued that the existential character of anti-sodomy laws is unconstitutional within the local context and a breach of Zambia's international human rights obligations within the regional and global context. As a follow up to this argument Chapter 4 and 5 discuss this point further when examining Zambia's human rights obligations with respect to sexual and gender minorities and exploring decriminalisation as a possible solution to mitigate the negative impact of the mischaracterisation of anti-sodomy laws in Zambia.

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[180] See discussion on heterosexual nationalism and coloniality in Chapter 1.

Chapter 4: Protection of the rights of sexual and gender minorities: Zambia's domestic and international obligations, and the impact of anti-sodomy laws on the rights of sexual and gender minorities

4.1. Introduction

Building on the findings discussed in Chapter 3, this Chapter discusses the impact of the mischaracterisation of anti-sodomy laws on the rights of sexual and gender minorities in Zambia. The Chapter has two parts. The first part discusses Zambia's domestic and international human rights obligations with respect to sexual and gender minorities. Regarding the domestic obligations, this Chapter argues that despite the pervasive nature of heterosexual nationalism in Zambia, the provisions of the Constitution can be read in a progressive and inclusive manner to the effect that they offer protection for sexual and gender minorities as citizens. In this regard, the principles of citizenship, human dignity, social justice, equality and non-discrimination – all contained in the Zambian Constitution – are used to make a case for the domestic protection of sexual and gender minorities. At the international level I use the existing jurisprudence of the African human rights and the UN treaty systems to discuss Zambia's obligations with respect to sexual and gender minorities.

Having discussed Zambia's obligation regarding the rights of sexual and gender minorities, the second part of the Chapter highlights the impact of the mischaracterisation of anti-sodomy laws on sexual and gender minorities. Citing specific examples and documented lived experiences of sexual and gender minorities in Zambia, this Chapter demonstrates how the violation of their rights, resulting from the mischaracterisation of the anti-sodomy laws, is a breach of the country's domestic and international human rights obligations. This part of the Chapter shows that most of the violations occurs outside the criminal justice system and are occasioned by both state and non-state actors.

The Chapter answers research question 3, which asks, 'what is the impact of the mischaracterisation of anti-sodomy laws on the rights of sexual and gender minorities in Zambia?'. As earlier seen, the actual mischaracterisation of anti-sodomy laws is discussed in Chapter 3. Further, Chapter 4 sets the background for Chapter 5, the last substantive chapter, which makes an argument in favour of decriminalisation of the anti-sodomy laws in Zambia.

4.2. Domestic obligations: Protection of the rights of sexual and gender minorities under domestic law in Zambia

4.2.1. The Constitution

4.2.1.1. The spectrum of rights and fundamental principles defining Zambia's domestic obligations

At the domestic level, Zambia's human rights obligations are enshrined in the Constitution and supplemented by ordinary legislation (Acts of Parliament). Zambia first enacted its Constitution at

independence in 1964. Thereafter, the Constitution has undergone a series of amendments. These are in 1973, which saw the birth of the one-party state; in 1991, which re-introduced multiparty politics; in 1996, which was aimed at strengthening the democratic institutions; and the most recent, in 2016, which saw an overhaul of the Constitution and the beginning of a new constitutional life for the country.[1] Despite these amendments, the Bill of Rights, containing only civil and political rights, has remained substantively the same from the 1964 independence Constitution, with the only amendment being in 1973, which only introduced more derogations with the introduction of the one-party state.[2] In the 1991 constitutional amendment a provision was introduced which has a nearly made it impossible to amend the Bill of Rights as it requires that not less that 50 percent of all persons above the age of 18 in Zambia should vote in favour of the amendments to the Bill of Rights in a national referendum.[3] In 2016 a referendum was attempted to amend the Bill of Rights by the removal of some claw back clauses on civil and political rights and further to include economic, social and cultural rights.[4] However, the referendum failed as the threshold set in the Constitution in terms of article 79 could not be met.[5] As such, and as has been the case with most post-independence Constitutions in Commonwealth Africa, the current Bill of Rights in Zambia contains only civil and political rights while economic, social and cultural rights were included as 'Directive Principles of State Policy' up until 2016 when they were removed.[6]

The Bill of Rights, which contains the scope of the rights recognised and guaranteed in Zambia, is Part 3 of the Constitution. It is titled 'Protection of fundamental rights and freedoms of the individual.' The spectrum of rights guaranteed is shown in the Table below:

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1 For the full deliberation of the Zambia independence Bill and the discussion over the preferred constitutional order for Zambia see Hansard of the UK Parliament on the independence of Zambia https://api.parliament.uk/historic-hansard/commons/1964/jul/07/zambia-independence-bill (accessed 28 November 2022). And for a detailed account of the history and evolution of the Zambian Constitution see A Chanda *Constitutional law in Zambia: Cases and materials* (2011) 11-21, and M Mbao 'The politics of constitution-making in Zambia: Where does power lie?' In C Fombad & C Murray (eds) *Fostering constitutionalism in Africa* (2010) 87.

2 Chanda (n 1) 10-11.The 1973 constitutional amendment did not introduce or remove any substantive, rather it introduced more derogations into the Bill of Rights.

3 Article 79(3), Constitution of Zambia.

4 The 2016 referendum was held alongside the presidential elections. However, the threshold of at least 50 % of eligible votes translating to 3,764,0460 of the population at the time, could not be met as only 44.4% (3,345,471) turned out. See details of the 2016 referendum see https://www.eisa.org/wep/zam2016referendum.htm (accessed 15 September 2020). For details of the referendum question see https://www.elections.org.zm/2016/07/10/2016-refrendum/ (accessed 30 November 2022).

5 At the time of the referendum the total number of eligible voters (person above the age of 18 years) was 7,528,091 which meant a minimum of 3, 764, 046 of the eligible voters should have voted 'yes' for the referendum to succeed. However, 3, 345,471 cast their votes in the referendum with only 1,853,559 voting 'yes' which was far below the threshold. See https://www.eisa.org/wep/zam2016referendum.htm. (Accessed 30 November 2022). See also 'Lessons from the failed referendum' Zambia Daily Mail, 26 August 2016 http://www.daily-mail.co.zm/lessons-from-the-failed-referendum/ (accessed 30 November 2022).

6 The Directive principles of state policy were removed in 2016 because it was hoped that economic social and cultural rights would be included in the 2016 referendum but as already noted, the referendum failed to meet the constitutional threshold. For a detailed discussion on the value of directive principles of state policy in African constitutions see B A Gebeye 'The potential role of directive principles of state policies for transformative constitutionalism in Africa' (2017) 1 *African Journal of Comparative Law* 1.

List of rights in the Zambian Bill of Rights

Rights and freedoms	Article in the Constitution
Equity and non-discrimination	11
Right to life	12
Protection of right to liberty	13
Protection from slavery	14 (1)
Protection from servitude	14(1)
Protection from force labour	14(2)
Protection from torture and inhuman and degrading treatment	15
Protection from deprivation of property	16(1)
Right to privacy	17(1)
Protection of law including right to a fair trial	18(1)
Freedom of conscience	19
Freedom of expression	20
Freedom of assembly	21(1)
Freedom of association	21(1)
Freedom of movement	22(1)
Non-discrimination	23
Protection of young persons from exploitation	24

As can be seen, the scope of rights protected is limited to civil and political rights and further as states by the African Commission on Human and Peoples' Rights (African Commission) in *Legal Resources Foundation v Zambia*, the rights guaranteed in the Zambian Constitution are diluted by claw back clauses.[7] Some rights have a wider scope of protection than others. For example, article 14 provides that no person shall be held in slavery or servitude and article 15 provides that no one shall be subjected

[7] In *Legal Resources Foundation v Zambia* ACHPR/Com/211/98/ 2001, the African Commission found that the claw back clauses in the Constitution were not justifiable and in breach of the Charter and other international human rights instruments that Zambia has ratified. The African Commission, therefore, requested the Zambia to amend the Bill of Rights in the Constitution to bring it in line with the Charter. An amendment was attempted in the 2016 referendum but as stated earlier, the constitutional threshold was not met and as such the referendum failed. The Bill of rights therefore remains the same as at independence in 1964. See n 5.

to torture, or inhuman, degrading or other like treatment. These provisions are stated in language that allows no derogation. On the other hand, the right to protection from deprivation of property under article 16(1) contains no less than 26 permitted limitations. Other rights that have wide derogation clauses include freedom of conscience, freedom of expression, equal protection before the law, freedom of assembly, movement and freedom from discrimination. As such, for its claw back clauses, the Bill of Rights in Zambia has been criticised as maintaining a colonial legacy of ineffective protection and suffering from the limitations common in an oppressive regime.[8] International human rights treaty bodies, and most recently the Universal Periodic Review mechanism, have recommended that Zambia brings its Bill of Rights in line with its international human rights obligations.[9] Hansungule states that even though there is a case to be made with regards to the fact that the Bill of Rights already contains minimal provisions of international law, the point still remains that some of the provisions of the Bill of Right do not give the same protection as international law.[10]

Notwithstanding the apparent weaknesses of the Bill of Rights in the Zambian Constitution and the need for its alignment with international human rights law, this Chapter argues that the constitutional principles of citizenship, equality and non-discrimination, human dignity and social justice can be interpreted and read progressively in a manner that affords protection and inclusion of sexual and gender minorities.

4.2.1.2. Citizenship

Citizenship is a foundational aspect for the enjoyment of human rights in so far as the primary responsibility and obligations of the state are concerned. This is not to suggest that non-citizens in a particular state cannot enjoy the constitutionally guaranteed rights of that state.[11] The Constitution in Zambia does not necessarily state that non-citizens are not entitled to the rights in the Bill or Rights. However, a discussion on whether non-citizens in general and particularly in Zambia, can enjoy constitutionally guaranteed rights in the same way as citizens is not within the scope of this study.

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[8] Chanda (n 1) 11.

[9] Zambia has been reviewed four times. At the time of this thesis, the Report of the fourth Review was yet to be considered by the UNGA. The third review was in 2017 and its final outcome report was adopted at 37th Session of the Human Rights Council in 2018. Zambia received 203 recommendation and supported 183. Among the recommendations of Zambia's review were that the government takes steps to amend it Bill of Rights and in particular to align its equality and non-discrimination clause with international standard. The report also particularly requested Zambia to ensure protection of sexual and gender minorities, persons with albinism, persons with disabilities and people living with HIV. However, Zambia partly supported this recommendation as it rejected the protection of the rights of sexual and gender minorities as part of its constitutional development. For details of Zambia review see https://www.ohchr.org/en/hrbodies/upr/pages/zmindex.aspx and https://lib.ohchr.org/HRBodies/UPR/Documents/Session28/ZM/ZambiaHCLetter.pdf (accessed 12 March 2021).

[10] M Hansungule 'Domestication of international human rights law in Zambia' in M Killander (ed) *International law and domestic human rights in Africa* (2010) 72.

[11] The UN Declaration on the human rights of individuals who are not citizens in the country the *live* in (1985) sets out the rights of non-citizens in states. The declaration comes from the need to protect non-citizens in the countries they live in. This Human Rights Committee General Comment 15 (1986) and most recently the OHCHR 'The rights of non-citizens' (2006) further elaborate the rights the nature of the rights of non-citizens in a country. See https://www.ohchr.org/documents/publications/noncitizensen.pdf (accessed 13 March 2022). See also D Cole 'Are foreign nationals entitled to the same constitutional rights as citizens' (2003) 25 *Thomas Jefferson Law Review* 367. Under the African human rights system, instruments such as the African Charter on Human and Peoples' Rights, the OAU Refugee Convention and the AU Convention for the Protection and Assistance of Internally Displaced Person as well as some decisions of the African Commission also elaborate the rights of non-citizens in the countries they live.

Here, I only wish to make the point that the concept of citizenship can be used to interpret the Bill of Rights widely to include sexual and gender minorities as a protected category of citizen or persons in Zambia.

Conceptually, citizenship is a contested subject and theories around it continue to develop even if traditional notions of citizenship remain steadfast. Richardson observes that recent theorisations of citizenship have broadened the concept beyond formal identity or membership to a nation state and the traditional rights based approach associated with the identity/membership, to include considerations of belonging and practices which have led to conceptions like cultural, ecological, consumer and digital citizenships.[12] While these new conceptions undoubtedly have a role to play in modernising constitutional interpretations of citizens' rights and obligations, this thesis is inclined, for purposes of this Chapter, towards the traditional and earlier conceptualizations of general or common citizenship. This thesis contends that, in many respects, citizenship presupposes the existence of a state and thus defines the relationship between an individual and the state, with the state being the locus of individual and collective human rights.

Writing from this traditional conception of citizenship, Marshall states that citizenship, in general, relates to the rights and duties of an individual within a nation state.[13] Particularly, he defines the nature of citizenship in terms of three sets of rights: civil or legal rights, political rights and social rights.[14] Civil or legal are rights institutionalised through the law and include provisions of constitutional bills of rights such as the right to life, freedom of expression and equality before the law;[15] Political rights are institutionalised through parliamentary political systems and councils of local governments and these create a platform for participation in the life of that society either through voting or standing for political office;[16] And social rights include economic claims on the state, the rights to a certain standard of living and rights institutionalised in the welfare state, for example unemployment benefits, provision of health care and education.[17] While Marshall did not say so himself, he conceptualised what most theorists refer to as 'common citizenship' – the basic form of citizenship.[18] Belly defines common citizenship as a condition of civic equality which secures the equal enjoyment of individual and collective rights from the state, and also involves common duties to sustain the enjoyment of those rights.[19] Common citizenship, therefore, entails that individuals are entitled to all the rights and freedoms guaranteed in a constitution regardless of any distinction with other citizens.[20] In essence common citizenship is the basic form of human identity in a nation state and as such the enjoyment of rights under common citizenship are constitutionally protected through equality and non-discrimination clauses. Mbaku agrees that common citizenship is the basis for individual protection of human rights by the state and that it translates to the protection of other forms

12 D Richardson *Sexuality and citizenship* (2018) 18.
13 T H Marshal *Class, citizenship and social development* (1950) 18-26.
14 As above.
15 Marshal (n 13) 18.
16 Marshal (n 13) 20.
17 Marshal (n 13) 20-21.
18 Richardson (n 12) 19.
19 R Belly *Citizenship: A very short story* (2008) 9.
20 As above.

of citizenship, diversity and differences for both majority and minority groups of citizens.[21] Importantly, citizenship does not involve losing one's individual or minority group identity. On the contrary, such minority identities highlight the need for the state to create an enabling legal, social and political environment for those identities to thrive as the diversities that make up a rich society.

In Zambia, the general entitlements of citizenship are spelt out in article 42 of the Constitution as follows:

> A citizen is entitled to-
> *(a)* the rights, privileges and benefits of citizenship as provided in this Constitution or as prescribed; and
> *(b)* a document of identification issued by the State to citizens.

Drawing from the above discussion, article 42 can be said to protect common citizenship and thus it is indiscriminate. Sexual and gender minorities in Zambia are therefore included under article 42 as common citizens which entails that they are entitled to all the rights set out and guaranteed in the Constitution. In this light, inspite of the label of deviance and the rhetoric of heterosexual nationalism, sexual and gender minorities retain their common citizenship and are therefore entitled to the same rights, privileges and benefits guaranteed in the Bill of rights and other provisions of the law in Zambia in much the same way as heterosexual citizens. Taking Mbuka's argument that common citizenship translates to the protection of other forms of citizenship and diversities, it can also be argued that sexual and gender minorities are entitled to claims of their sexual and other forms of citizenship, just as much as heterosexual persons are entitled to claims of sexual, religious and political citizenship. This can be justified on the basis that sexual and gender minorities cannot fully realise their common citizenship when their sexual citizenship is denied.

In view of the above, article 18 on equality and non-discrimination, can be read together with article 42 as providing broad and inclusive protection of all forms of citizenship including the sexual citizenship of sexual and gender minorities. Therefore, even if sexual orientation and gender identity are not specifically stated as prohibited grounds of discrimination in the Constitution, sexual and gender minorities are still a protected category of citizens. To stretch the point further, the fact that sexual and gender minorities are expected to fulfill their common citizenship obligations such as paying tax and municipal levies on equal basis as heterosexual citizens, entails that they have an equal claim on the benefits that come with fulfilling that duty.[22] Like Mbaku, Ammaturo argues that common citizenship is the primary basis for the rights and duties of citizenship, such that other forms of citizenship like sexual, religious or political citizenship, are subordinated and cannot be the basis on which rights are denied or duties exempted.[23] As such, the provisions on equality, non-discrimination and equal recognition before the law should be at play when recognising sexual and gender minorities as common, political and sexual citizens in Zambia. This argument is developed further when

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21 J M Mbaku 'Constitutions and citizenship: Lessons for African countries' (2017) 17(1*) International and Comparative Law Review* 20-31.

22 F R Ammaturo *European sexual citizenship: Human rights, bodies and identities* (2018) 36.

23 As above.

discussing the use of other constitutional principles as a tool for the protection of sexual and gender minorities in Zambia later in this Chapter.

4.2.1.3. Equality and non-discrimination

Article 11, which is the opening article of the Bill of Rights, guarantees equality and non-discrimination in the following terms:

> **Protection of fundamental rights and freedoms of the individual**
>
> 11. It is recognised and declared that every person in Zambia has been and shall continue to be entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed, sex or marital status, but subject to the limitations contained in this part.

The underlying term is 'every person in Zambia' which, this thesis contends, entails that even with the limited defined prohibited grounds of discrimination, the sexual orientation or gender identity of a person, at least in theory, does not exclude them from 'every person' protected under the Constitution. In other words, it retains them in the category of common citizens who as 'persons' are entitled to enjoy their rights as guaranteed. Article 11 can be read together with articles 23 and 266 of the Constitution. Article 23 states:

> (2) No person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.
>
> (3) In this Article "discriminatory" means affording different treatment to different persons attributable, wholly or mainly to their respective descriptions by race, tribe, sex, place of origin, marital status, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

Article 266 also defines discrimination, but a bit more broadly, as follows:[24]

> [D]iscrimination means directly or indirectly treating a person differently on the basis of that person's birth, race, sex, origin, colour, age, disability, religion, conscience, belief, culture, language, tribe, pregnancy, health, or marital, ethnic, social or economic status.

Article 266 was added in the 2016 amendment to the Constitution under the definition section. It does not replace the definition in article 23 which is in the Bill of Rights, enacted in 1963, rather the two are to be read together. This thesis contends therefore, that the combined meaning and effect of article 42

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[24] The 2016 amendment added disability as a prohibited ground of discrimination. This shows that the expansive nature of the non-discrimination clause and more importantly that the listed grounds were meant for emphasis, based on the time the constitution was drafted, rather than being a closed list. In *Muyanda v Attorney General* (2016) CC/0006 the Constitutional Court states that there is contradiction between the discrimination clauses in article 11 and 266. However, article 266 has not been amended and the provisions remains. It can be argued to that two provisions can be read together to give a broader discrimination definition and not against each other.

on citizenship and articles 11, 23 and 266 on non-discrimination, is that no category of citizens was meant to be excluded from the enjoyment of their rights on the basis of who they are or how they identify themselves as individuals. As stated above, this means that sexual and gender minorities are a protected category of citizens, at least in theory, as the Constitution stands. As such, the state has the obligation to ensure the enjoyment of the scope of rights without discrimination. At a practical level this also means ensuring that laws and policies are not discriminatory in themselves or in their effect to any extent that may cause the violation of the constitutionally guaranteed rights. In this regard article 22 stresses that 'no law shall make any provision that is discriminatory either of itself or in its effect'.

Like freedom from torture and servitude, article 22 has no derogations or claw back clauses. The implications of article 22 is therefore that the anti-sodomy and other laws, which in their application or in their inherent nature led to discrimination, violate the Constitution. This brings the anti-sodomy laws within the brackets of article 1(1) of the Constitution which proclaims the Constitution as 'the supreme law of the Republic of Zambia and any other written law, customary law or customary practice that is inconsistent with its provisions is void to the extent of the inconsistency'.[25] Further article 1(2) states that 'an act or omission that contravenes the Constitution is illegal'. These provisions read together mean that acts of discrimination towards sexual and gender minorities arising from the mischaracterisation of anti-sodomy laws are illegal and the laws themselves unconstitutional.

Apart from being substantive constitutional rights, equality and non-discrimination are also pronounced as national values and principles in terms of article 8 which provides:[26]

> **8.** The national values and principles are—
>
> *(a)*……
> *(b)* …….
> *(c)* democracy and constitutionalism;
>
> *(d)* human dignity, equity, social justice, *equality and non- discrimination*;[27]

Article 9 gives life to these values and principles by stating:

> **9.** (1) The national values and principles shall apply to the —
>
> *(a)* interpretation of this Constitution;
> *(b)* enactment and interpretation of the law; and
> *(c)* development and implementation of State policy.

In this light article 9(1)(a) creates an obligation on the state, its organs and all institutions bound by the Constitution – as provided in article 1(2), discussed above – to interpret the provisions of the

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25 Article 1(1), Constitution of Zambia.

26 Article 8 was introduced in the 2016 amendment to ensure that there is a normative basis for the interpretation of the constitution and other laws by the judiciary, and other state organs, enactment of laws by parliament, enforce by the executive, development and implementation of policies. See *The Report of the Technical Committee on the drafting of the constitution,* 2019.

27 Articles 8 and 9 were added in the 2016 amendment to the Constitution. (emphasis added).

constitution in manner that ensures equality and non-discrimination of all citizens.[28] Principally this means that no provisions in the Constitution should be read or applied in a manner that discriminates, marginalises or in any way takes the enjoyment of constitutional rights and privileges from sexual and gender minorities in Zambia. Arguably, through this provision the Constitution indirectly creates the right to equality before the law and the obligation for equal treatment before the law— which are strengly not expressly stated in the Bill of Rights.

Article 9(b) which mandates the state to enact and interpret all other laws in the context of the equality and non-discrimination of citizens has important implications on the anti-sodomy laws. It entails that the anti-sodomy laws should be interpreted and enforced in a manner that does not contradict the principle of equality and non-discrimination. However, bearing in mind the inherent discriminatory nature of the anti-sodomy laws and most importantly the discrimination and violation of rights occasioned from their application –due to their mischaracterisation – the very existence of anti-sodomy stands is in sharp contradiction to articles 8 and 9 of the Constitution. This is more so when articles 8 and 9 are read together with artilce 22 which, as already stated, provides that 'no law shall make any provision that is discriminatory either of itself or in its effect'.

As will be seen later in this Chapter, the marginalisation and discrimination of sexual and gender minorities occur at the level of policy formulation and implementation. In fact, it is commonplace that sexual and gender minorities in most, if not all heterosexual nations, are ignored and marginalised at the policy level. However, this *de facto*-marginalisation and discrimination is unconstitutional because article 8, read with 9(c), creates an obligation on the state to ensure equality and non-discrimination in the development and implementation of national policy. To this end, the Constitution can be said to not only create the obligation to 'respect' and 'protect' the rights of sexual and gender minorities under the equality and non-discrimination clauses, but also the duty to 'fulfil' through the 'development and implementation of policy'.[29] Policy implementation, require resource mobilisation and distribution. In this context what article 9(c) entails, is a system of distributive and social justice that is not heteronormative in its application.

To conclude this point, this thesis argues that equality and non-discrimination as substantive rights and as national values and principles, give life to the minority rights thesis, obliging the state to ensure the enjoyment of the rights of minority citizens – in this case sexual and gender minorities – in the face of majority politics and norms in a democratic society. A leaf can be taken from *Kachasu v Attorney General,* where the Zambian Supreme Court held that the rights and practices of the majority, to sing the national anthem before public processions, do not take away the rights of the minority not to sing or salute the national flag.[30] This point can be further argued in the context of article 8(c), of the constitution states that democracy is a national principle. As minority rights are essential to democracy, article 8 (c) it can be taken that in principle the rights of minorities, including sexual and

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[28] Article 1(3) bind all persons, state and non-state organs to the constitution and subordinates them to it authority and contents.

[29] The 7th National Development Plan (NDP) 2018-21 which Zambia is implementing at the time of this thesis recites the National values and principles as the basis on which it was developed. While it reiterates the principle of equality and non-discrimination for different marginal and vulnerable groups it does not include sexual and gender minorities as beneficiaries of government policy or national resources.

[30] (1967) ZR 145.

gender minorities are constitutionally guaranteed, require equal protection and recognition. In essence democracy as a majority system is not meant to be disempowering of minorities and the enjoyment rights guaranteed in a constitution is not the preserve of majority rights whichever way they are fashioned.[31]

4.2.1.4. Human dignity

The right to equality and non-discrimination are complimented by the constitutional value and principle of human dignity provided under article 8(d). With the making of the UDHR human dignity became an important basis for the respect and protection of human rights under international law. However, at domestic level the inclusion of human dignity in national constitutions came after the Vienna Declaration in 1993 where the 170 state delegates who convened decided that 'inherent human dignity was central to national respect, protection and development of human rights.'[32] In this regard the second paragraph of the preamble of the Vienna Declaration reads:[33]

> All human rights derive from the dignity and worth inherent in the human person and that the human person is the central subject of human rights and fundamental freedoms, and consequently should be the principal beneficiary and should participate actively in the realization of these rights and freedoms.

Although human dignity is not defined in the Constitution, it is stated as a categorical imperative in the Kantian sense, and as such this thesis contends that its meaning is fairly unambiguous.[34] Lorraine states that 'according to a basic intuitive understanding, human dignity constitutes an expression of the respect and value to be attributed to each human being on the account of his or her humanity'.[35] Similarly, Reaume describes human dignity as the intrinsic and indelible worth of every human being that is not contingent on anything other than being human.[36] This is similar to the religious conception of dignity which generally holds that human beings are created in the image of God and therefore have equal sacred lives.[37] Much of this conceptualisation of human dignity is associated with the work of Immanuel Kant, whose formulation of dignity as 'a moral aspiration that man should be treated as an end in himself' provided the basis for the constitutional protection of human rights.[38] According to

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31 K Appiagyei-Atua 'Minority rights, democracy and development: The African experience'(2012) 12 *African Human Rights Law Journal* 83.

32 See https://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx (accessed 1 October 2020).

33 A C Steinman 'The core meaning of human dignity' (2016) *Potchefstroom Electronic Law Journal* 14 http://www.saflii.org/za/journals/PER/2016/23.html (accessed 25 September 2020).

34 For a detailed discussion of Kant's moral theory and perspective on human dignity see of human dignity see I Kant *The foundations of the metaphysics of moral* (1785), translated and edited in English by M J Gregor (1991).

35 E Lorraine 'Human dignity as a rights-protecting principle' (2004) 17 *National Journal of Constitutional Law* 325.

36 D G Reaume 'Discrimination and dignity' (2003) 63 *Los Angeles Law Review* 53.

37 C McCrudden 'Human dignity and the judicial interpretation of human rights' (2008) 19(4) *European Journal of Human Rights* 658. McCrudden traces the history of the use of *human dignity* from religious usage to the dark ages, the middle ages, the enlightenment and finally the morden usage. He concludes that the most influential conceptions of dignity came from mono-theological conceptions and the works of Immanuel Kant adding that 'Kant is the best source for the morden understanding of human dignity and its constitutional value.'

38 Immanuel Kant (1724–1804) argued that the supreme principle of morality is a standard of rationality that he dubbed the "Categorical Imperative" (CI). Kant characterized the CI as an objective, rationally necessary and unconditional principle that we must always follow despite any natural desires or inclinations we may have to the contrary. All specific moral requirements, according to Kant, are justified by this principle, which means that all immoral actions are irrational

Kant, 'broadly speaking and at the very minimum, human dignity encompasses the inalienable, inherent and intrinsic worth and value of each human being'.[39] Taking the Katian approach, the Canadian Supreme Court, in a famous decision that has been cited in numerous jurisdictions, boldly defined human dignity as follows:[40]

> Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences.

In this regard my reflection on the subject is that human dignity entails the common tangible and intangible essence of being human, the equal worth and value which is the essence of all persons and the individual and collective duty to respect the individual essence irrespective of other variables including the persons sexual orientation and gender identity. To borrow the words of Weisstub 'albeit ambiguous, dignity is signaling a term that goes to the heart of what constitutes the quality of humanness'.[41] On this reflection, this Chapter argues that the concept of human dignity is strongly connected to the constitutional principles of common citizenship, equality and non-discrimination discussed above. Corroborating this point, Jerry writes:[42]

> The concept of human dignity as a determinative tool identifies subjects of human rights. The criterion justifying the bestowment of rights is the quality of being human. There is a connection between equal citizenship and human dignity. This connection is crucial because it underlines that human beings should be respected as equal human beings irrespective of their sexual orientation. This means that it is their humanity that demands for them to be treated like other human beings.

The concept of human dignity is however, not without its contestations. Carozza says that the difficulties experienced in defining the term have raised concerns regarding the degree of judicial discretion proper in the application of human dignity, as well as the extent of the ideological manipulation which the concept could be subjected to.[43] As such Gearty has described human dignity as 'a loose cannon, open to abuse and misinterpretation.'[44] In similar light Karen Lee writes that because of its elusive nature and lack of a concrete meaning and consistent way of being defined, judges are dangerously left to introduce their own personal moral standards and competing claims of rights

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because they violate the CI. See Kant's moral philosophy https://plato.stanford.edu/entries/kant-moral/ (accessed 1 October 2020).

39 Kant (n 38) viii.

40 *Law v Canada (Minister of employment and immigration)* (1999) 170 DLR (4) 1.

41 D N Weisstub 'Honor, dignity and the framing of multiculturalist values' in Kretzmer & Klein (eds) *The concept of human dignity in human rights discourse* (2002) 263.

42 Wekesa S M 'Decriminalisation of homosexuality in Kenya: The prospects and challenges' in S Namwase and A Jjuuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* (2017) 93, quoting A Jerry 'Dignity, legal pluralism and same sex-marriage' (2010) 75 *Brooklyn Law Review* 794.

43 P G Carozza 'Human dignity in constitutional adjudication' in T Ginsburg & R Dixon (eds) *Comparative constitutional law* (2011) 459.

44 C Gearty *Principles of human rights adjudication* 85.

each of which has a plausible case for human dignity violation.[45] Arthur Schopenhauer particularly condemned Kant's view saying:

> [t]his expression "Human Dignity," once it was uttered by Kant, became the shibbo-leth of all perplexed and empty-headed moralists. For behind that imposing formula they concealed their lack, not to say, of a real ethical basis, but of any basis at all which was possessed of an intelligible meaning; supposing cleverly enough that their readers would be so pleased to see themselves invested with such a "dignity" that they would be quite satisfied.[46]

Other notable philosophers like Karl Marx and Friedrich Nietzsche also condemned any conception of human dignity due to its religious inclination.[47] Marx claimed that it was a refuge from history in morality, and Nietzsche said that 'there is no inherent human dignity as a person's worth is determined by his skill and contribution to society'.[48] Marx however, agreed that individuals had rights and therefore preferred to deal with concepts such as social justice rather than human dignity.[49]

Despite the above contestations and seeming lack of consensus on the theoretical foundations of human dignity, some scholars have agreed on what can be termed as its basic elements which can be used in the adjudication of the constitutional rights of individuals and groups.[50] In my view, Andrew Clapham breaks down these elements more clearly as follows:[51]

> Concern for human dignity has at least four aspects: (1) the prohibition of all types of inhuman treatment, humiliation, or degradation by one person over another; (2) the assurance of the possibility for individual choice and the conditions for 'each individual's self-fulfilment', autonomy, or self-realization; (3) the recognition that the protection of group identity and culture may be essential for the protection of personal dignity; (4) the creation of the necessary conditions for each individual to have their essential needs satisfied.

McCrudden refers to these elements as 'family resemblances' and constitutive of the 'minimum core' of human dignity.[52] Beyleveld and Brownswood have observed that these basic elements (minimum core) of human dignity are the concept's main theoretical basis is linked to Kant's moral and legal theories, 'which provide a legal framework to constitute human dignity as a *priori* constitutional value and as the basis for human rights.'[53] Stain agrees and adds that in constitutional adjudication of human rights, the elements of human dignity overlap and can be conflated by Courts.[54] Daly goes further to explain:[55]

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45 M Y Karen Lee 'Universal human dignity: Some reflections in Asia' (2008) 1 *Asian Journal of Comparative Law* 3.

46 A. Schopenhauer *The basis of morality* (2015) cited by McCrudden (n 24) 661.

47 McCrudden (n 37) 665-665.

48 McCrudden (n 37) 665.

49 As above.

50 For a full discussion of how different scholars have expressed these elements see Steinman (n 20).

51 A Chapham *Human rights obligations of non-state actors* (2006) 545-546.

52 McCrudden (n 37) 681.

53 D Beyleveld & R Brownswood *Human dignity in bioethics and biolaw* (2001) 53.

54 Steinman (n 33) 14.

55 E Daly *Dignity rights: Courts, constitutions and the worth of the human person* (2013) 6.

> [a]s a constitutional value, human dignity is the value of a person within the society. As such, it is a value that depends on context and is subject to change in a changing world. Democratic-liberal-modern societies for the most part have a common approach to the constitutional value of human dignity. That value is anchored, explicitly or implicitly, in the constitution itself and serves as the basis for all the constitutional rights recognized therein, playing an important interpretive role in fixing the scope of the various rights. Within that framework of interpretation, the interpretive value functions as a regulative, organizational, and integrative principle for the constitutional text. It can be of use, for example, in interpreting the right to equality. Similarly, the constitutional value of human dignity has a role in interpretive balancing (in situations where constitutional rights conflict) and in constitutional balancing (in situations where a law limits the realization of a constitutional right).

In Zambia, the provision on human dignity as a national value and principle on which the Constitution and other laws are to be interpreted and enforced was only introduced in January 2016 when the Constitution was amendment. While, as Daly observes, it takes time for a new constitutional court system to develop its own jurisprudence, there has been growing jurisprudence interpretating different constitutional clauses.[56] However, the Constitutional Court has not dealt with the aspect of human dignity specifically or general the question of discrimination based on sexual orientation or gender identity in Zambia. Nonetheless, lessons can be learnt from other jurisdictions that have in their constitutions, similar provisions on human dignity. Even though the concept of human dignity is contested by some, there seems to be a shared commonality in the courts of different jurisdictions, regarding the universal elements of human dignity. Kenya and South Africa offer good examples. It is worth noting that during the process that led to the 2016 amendment to the Constitution, the Technical Committee on the Constitution in Zambia consulted various constitution making processes among them the Kenyan and South African processes. As such the Committee borrowed not only the substantive clauses of these constitutions, but also the reasoning behind them.[57] Therefore, it is not a worthless exercise to understand how these jurisdictions interpret the concept in question.

Just as the Zambian Constitution, article 10 of the Constitution of Kenya includes human dignity as one of the national values and principles to be applied in the interpretation of the constitution, law and policy. In Kenya the concept of human dignity has been used together with equality and non-discrimination as a basis for the protection of human rights including for sexual and gender minorities. For example, in *Republic v Kenya National Examination Council and Attorney General ex-parte Audrey Mbugu,* the High Court of Kenya held that human dignity was the corner stone for the enjoyment of other rights in the constitution and on that basis made a landmark decision for gender minorities.[58] In that case Audrey Mbugua Ithibu a trans-woman, was awarded a Certificate of Secondary Education in 2001. Upon obtaining the award, she went through hormonal treatment. In 2010, she requested the Kenya National Examinations Council to change the name on the certificate from her former name *Andrew* to *Audrey* and to remove the male designation reflected on the certificate. The Council refused to to act on the changes she requested, citing its inability to

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[56] As above. For a list of cases decided by the Constitutional Court see https://judiciaryzambia.com/category/resources/decisions/constitutional-court-decisions/ (accessed 14 November 2023).

[57] Report of the Technical Committee on the constitution in Zambia (2015).

[58] (2013) eKLR/147.

authenticate awards by allowing former candidates to change their records, as well as its limited financial resources to implement a policy of name change on certificates.

In a significant ruling for the transgender community in Kenya, the High Court issued an order of mandamus compelling the Kenya National Examination Council to change her name and remove the existing gender mark. The Court reasoned that the governing law of the Council did not expressly prohibit name change on issued certificates, nor did it require gender to appear on awards. Referencing articles 10 and 28 of the Kenyan Constitution on human dignity, the Court said:[59]

> [her] unique situation ought to be put into consideration when addressing [her] application […] in article 10 of our constitution, human dignity is one of the national values and principles of governance which must be applied in interpreting the constitution; enacting law or interpreting any law; or making or implementing public policy decisions. Human dignity is that intangible element that makes a human being complete. It goes to the heart of human identity. Every human has a value. Human dignity can be violated through humiliation, degradation or dehumanisation. Each individual has inherent dignity which our Constitution protects. Human dignity is the cornerstone of the other human rights enshrined in the Constitution […] we make the orders of mandamus as these are orders that will make the applicant feel complete as a human being.

In essence, the Court took the approach that the identity of a person –how a person sees themselves, defines themselves and feel about who they are— is an essential part of being human and therefore as aspect of human dignity. Arguably, if the Court took a different approach, it would have *dehumanised* the applicant and that would have been a violation of her dignity. The positive implications of not only the actual decision but also the reasoning of the Court in this case is far reaching. The Court took a similar approach in the case of *Eric Gitari v Non-governmental Coordinating Board* when it held that an interpretation of the equality and non-discrimination clause of the Kenyan Constitution which excludes sexual and gender minorities is in conflict with the values of the human dignity and inclusiveness.[60] Drawing inspiration from the *Mbugua* case, the provision on human dignity in article 9 of the Zambia Constitution, which is on all fours with article 10 of the Kenyan Constitution, can be used to respect, protect and even fulfil the rights of sexual and gender minorities.

Even though South Africa has specific constitutional protection of sexual and gender minorities, unlike Zambia and Kenya, lessons case still be drawn from their jurisprudence on human dignity. Section 1 of the Constitution declares that 'South Africa is a sovereign democratic republic founded human dignity' among other values. Section 10 specifically recognises that 'everyone has inherent dignity and the right to have that dignity respected and protected'. Like the Zambian and Kenyan Constitutions, section 39 includes human dignity among the values for interpreting the Bill of Rights. In essence, there exists a common or perhaps even a shared need to conduct constitutional and statutory interpretation through the lens of human dignity among other values. In this sense human dignity is the paint that gives color to constitutional provisions and those of statute. Commenting on

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59 As above.

60 (2015) Petition no. 440/ KHC.

the interpretive value of human dignity the Constitutional Court of South Africa in *Dawood v Minister of Home Affairs* pointed out:[61]

> Human dignity informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis.

The Court continued by stating:

> [D]ignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected. In many cases, however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced.[62]

As in Kenya, human dignity has been used to ensure inclusion and protection of sexual and gender minorities in South Africa. Thus, in *National Coalition for Gay and Lesbian Equality v Minister of Justice and Others* the Constitutional Court denounced anti-sodomy laws expressing that they were an infringement of human dignity:[63]

> There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity and a breach of section 10 of the Constitution. The harm caused by the provision can, and often does, affect his ability to achieve self-identification and self-fulfilment. The harm also radiates out into society generally and gives rise to a wide variety of other discriminations, which collectively unfairly prevent a fair distribution of social goods and services and the award of social opportunities

This decision expresses the core elements of human dignity discussed above, which signifies the fact that human dignity is applicable in all areas of life and that sexual and gender minorities require respect and protection. In *Government of the Republic of South Africa v Grootboom* the Court took the important step of discussing the concept of human dignity from an abstract principle to a tangible state duty by amplifying that its constitutional protection which places obligations on the state to ensure a minimum standard of living through the fulfilment of economic and social rights such as housing, water and food.[64] Writing extra judicially, former President of the Constitutional Court reiterated that 'rooted in the respect for human dignity is the provision of social services and human needs, as there can be no human dignity in a life without access to housing, health care, food or water'.[65] This shows the practical significance of the concept of human dignity. It places the state in a position that requires

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61 (2000) 3 SA 936 (CC) para 147.

62 As above.

63 (2000) 2 SA (CC) 1. See also *Minister of Home Affairs v Fourie* (2006) 1 SA 524 (CC) 50, *Mohammed v President of South Africa* (2001) 3 SA 893 (CC) 55 and *Hoffman v South African Airways* (2001) 1 SA 1 (CC) 43.

64 (2001) 1 SA 46 (66).

65 A Chasklason 'Dignity as a constitutional value: A South African perspective' (2011) 26 *American University International Law Review* 1392.

the actualisation of dignified minimum standard of living of all citizens regardless of sexual orientation, gender identity or any of the prohibited grounds of discrimination.

The above discussion illustrates Daly's conclusion that, while there is no single understanding of human dignity in all circumstances, the cases reveal that courts interpreting the concept of dignity and applying it to concrete factual situations have developed a sense of the word that is coherent and substantive, and not merely product of each judges idiosyncratic moral standard.[66] Thus, taking Kenya and South Africa –having the same constitutional clause on human dignity as Zambia— as learning points, it is clear that the Zambian provision can be interpreted to respect and protect the rights of sexual and gender minorities. My contention is therefore that sexual orientation and gender identity are an essential part of every person's dignity, thus making it an obligation of state for its constitutional respect and protection in the manner discussed above. As a constitutional value and principle, human dignity is a 'categorical imperative' that cannot be limited or in any way treated with the relativism and exceptionalism that governmentalities like heterosexual nationalism seek to do. It is clear that by adding human dignity as a value for constitutional interpretation, the drafters of the constitutions of South Africa, Kenya and Zambia itself, took the Kantian approach that 'human dignity shall be inviolable and, to respect and protect it shall be the duty of all state authority'.[67] Even non-state actors in heterosexual nations have the 'duty' to respect the human dignity of every person in all its various forms.

4.2.1.5. Social justice

Heterosexual nationalism and the consequent mischaracterisation of the anti-sodomy laws in Zambia has consistently caused marginalisation and social injustice to sexual and gender minorities. From a purely legal and positivist point of view, it is not until the 2016 amendment to the constitution that social justice was included as a national value and principle that should be used in the interpretation of the Constitution, statutes and national policies. To this end, this thesis argues that, like equality, non-discrimination, citizenship and human dignity discussed above, social justice creates a domestic obligation on the state to ensure that sexual and gender minorities are not systematically excluded or marginalised in the distribution of national wealth or the provision of social services.[68]

Social justice, like human dignity, has been defined differently by different scholars and activists at different times to achieve different thematic ends.[69] According to Clark although the earliest conceptual use of social justice can be traced to the Theology of Augustine of Hippo (St Augustin)[70]

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66 Daly (n 55) 6. To highlight the point further, in *Minister of Home Affairs v Watchenuka* (2004) 4 SA 326 the Constitutional Court pronounced the multi-national nature of human dignity saying that '[h]uman dignity has no nationality. It is inherent in all people, citizens and non-citizens alike- simply because they are human.

67 Beyleveld & Brownswood (n 53) 11 and Kant (n 38).

68 Article 8, Constitution of Zambia. The term marginalisation is deliberately because in the context of social justice, it is the manifestation face of heterosexual nationalism.

69 The social justice movement differs in times thematic approach or issues of advocacy from women's rights, education, food, poverty alleviation, social security, racial equality and many more. Each agenda has a way of defining social justice to meet the needs and ends of that specific again. For this thesis, it is the core meaning and basic standard that can be applied to all groups focused on.

70 Augustine of Hippo, later known as St. Augustine was (354 – 430 AD) was a theologian, philosopher and Catholic Bishop in Roman North Africa.

the term gained prominent and practical usage in the late 18th century.[71] St Augustine's work on social justice was based on his view about slavery, positing that no group in any given society should be marginalised or suffer at the hands of another group, as all human beings were created in the image of God to enjoy the earth freely.[72] His philosophy which advocates for the just distribution of the earth's resources as gifts from God remains central to the christian teaching on social justice. According to him 'social justice is the norm for evaluating the success of any state.'[73] St Augustine's work remains among the most influential in the theological teachings on distributive and social justice.[74] Augustin influenced later church philosophers/theologians like St. Thomas Aquinas who conceptualised social as justice distributive justice positing that it entails the proportional distribution of the common good.[75] Agreeing with Augustine, Aquinas said 'not to do justice is sin and thus an unjust law should not be obeyed'.[76]

After the separation of church and state the social teaching or theology of the church evolved, and emphasized on the role of the state to ensure 'God's children, as citizens on earth should be provided with their physical, social and economic needs'.[77] Although the church and christianity in general had its own inconsistencies in the sense that some of its teaching led to the marginalisation of some classes of citizens such as sexual and gender minorities, its central message on social justice can be used to interpret article 8 of the Zambian Constitution and thereby challenge religious heterosexual nationalism and the anti-sodomy laws. As seen in Chapter 3, heterosexual nationalism breeds hate, and the application of anti-sodomy laws results in marginalisation and unfair human suffering of sexual and gender minorities. However, Christianity which Zambia seeks to uphold, has as its central message; love (for God and for one another), compassion and justice. Expressing this message in the context of social justice the Society of Jesus (Jesuits) write:[78]

> What, then, are we doing—identifying or confusing love with justice, for did we not previously note that the Ten Commandments prohibit injustice? No, this is no confusion of distinct virtues. Justice is still justice, and love is love. But the union of man with his neighbour which is love's fruit enables man to love his neighbour as himself and thereby to shade things in favour of his neighbour, to recognize what is really due to this neighbour. Paul and Augustine are not then saying that love is justice but that love is the fulfilment of justice. It is once again a case of Christian realism […] There can indeed be established a State which seeks a temporal peace, but this State will not survive unless justice prevails. And where there is no love for neighbour, justice cannot prevail, and no State can long endure.

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71 M T Clark 'Augustine on justice' in T Delgado (ed) *Augustine and social justice* (2016) 15. See also P Krause 'Augustine on love, justice and pluralism in human nature'(2015) https://voegelinview.com/augustine-on-love-justice-and-pluralism-in-human-nature/ (accessed 6 October 2020).

72 As above.

73 As above.

74 As above.

75 L Capeheart & D Milovanovi *Social justice: Theories, issues and movements* (2007) 14.

76 Krause (n 72) 15.

77 As above.

78 Clark (n 72) 8.

Summing up their position with reference to social justice, the Jesuits state that for those who profess christianity, states and individuals should recognise social justice is a work of love reflected in the respect for an individual's rights and the justice distribution of resources by the state to all citizens.[79]

In light of the above, if the constitutional principle of social justice is interpreted in the context of Christian theology, then it can be argued that heterosexual nationalism and the anti-sodomy laws are unconstitutional (bearing in mind the hate, marginalisation and suffering they breed). From this perspective ensuring that sexual and gender minorities have justice is a domestic state obligation, for as St Augustine himself said, 'rights are not a matter of charity as justice comes before charity'.[80] In this sense, social justice is indeed the norm for evaluating the success of the state.

The modern conceptualisation of social justice, emerged as a result of the inequalities of the industrial revolution. One of the main theorists in this regard was Karl Marx, who wrote that social injustice and inequalities were a product of capitalism.[81] Marx viewed social justice as a means of the equitable distribution of the economic wealth of the state. Marx argued that the exploited majority – the working class— would only achieve social justice through revolution, whereby they take over the means of production and progressively create a classless and equitable society.[82] In such an equitable society, social justice means 'from each according to ability and to each according to need'.[83]

Queer theorists have adapted and applied the Marxist conception of social justice advocating for a *queer revolution*.[84] Conrad argues that in a heteronormative capitalist society the struggle for equality would yield no positive results and hence advocates for a more 'radical move to inclusion beyond equality, and to participation beyond inclusion'.[85] In similar light Evangelista likened the class struggle to 'the quest for queer inclusion and participation claiming that the intersectionality of social class, poverty and minority sexual or gender identity inevitably linked the two struggles in modern times'.[86] Contesting the view that Marxist or socialist views of social justice ignore the struggle of sexual and gender minorities, Wolf responds:[87]

> Contrary to the dominant myth of socialism prevalent in the academy, Marxists do not reduce the oppression of sexual [and gender] minorities -or anyone else- to the issue of class. Rather, Marxists locate the source of racial, gender, sexual, and all other oppressions within the framework of capitalist

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79 Clark (n 72) 9.

80 See n 74.

81 K Marx & F Engels *The communist manifesto* (1848) 18. See also K Marx *Capital* (1867) 18.

82 Marx & Engels (n 81) 18, 52. Marx and Engels famously wrote that 'The communist disdain to conceal their views and aims. They openly declare that their ends can be attained by the forcible overthrow of all existing social conditions. let the ruling classes tremble at a communist revolution. The proletarians have northing g to lose but their chains. They have a world to win.

83 K Marx *Critique of the Gotha programme* (1891) 11. The phrase was used much earlier, but Marx is the one who popularized it. Its first use is contested by socialist theory writers. However, it suffices that it is based on the socialist idea of social justice.

84 R Conrad *Against equality: Queer revolution not mere inclusion* (2014) 4-7.

85 As above.

86 J A Evangelista 'On queer and capital: Borrowing key Marxist concepts to enrich queer theorising' (2013) 61 (2) *Philippine Sociological Review* 349.

87 S Wolf *Sexuality and socialism: History, politics, and theory of the LGBT Liberation* (2006) 75. Wolf, details how Marxists and Socialists have been involved in the liberation of sexual and gender minorities and other oppressed groups throughout history.

> class relations. As the earlier discussion of the nuclear family showed, women's oppression derives from the structure of the family, in which the reproduction and maintenance (childcare, housework, cooking etc) of the current and future generations of workers are foisted upon individual families rather than being the responsibility of society. Capitalism depends on the privatized reproduction to raise the next generation of workers at little expense to itself. Likewise, the oppression of LGBT people stems from the implicit challenge that sexual and gender minorities pose to the nuclear family and its gender norms.

Wolf, drawing from the writings of Lenin, argues the socialist quest for social justice as a struggle of the working class (the exploited) is not complete without the liberation of the sexual and gender minorities and other minority groups (the oppressed).[88] She voices that

> [f]ar from subordinating the issue of fighting homophobia and transphobia to the class struggle, Marxists cannot conceive of liberation of the exploited without the liberation of the oppressed. As any cursory look at the modern working class will show, class unity is inconceivable so long as the divisions are allowed to fester among working-class people who are themselves black, transgender, [homosexual], immigrant and members of other oppressed groups […] It is for this reason that the socialist have been found in the forefront of the struggles for sexual liberation from the nineteenth century to the present day. For Marxism, if it is about anything at all, is about the oppressed and the exploited taking control of society and running it in their interests. To argue, as do some academics, anarchists, and others that those who are sexually oppressed are theoretically and organisationally left outside of the socialists' vision for a new and [socially just] society is a serious charge. The facts, however, tell a different story.[89]

Adding to this voice this thesis contends that heterosexual nationalism is representative of an exploitative social, economic and political system with anti-sodomy laws as its weapons of oppression, suppression and marginalisation. A queer revolution in my view, would thus entail contextual and strategic use of the constitutional principle and value of social justice as both sword and shield to achieve equality, equality, inclusion and participation for sexual and gender minorities in Zambia. In this vein, decriminalisation is, as argued in Chapter 5, the first step in the 'revolution'.

Perhaps the most influential theory of social justice in relatively modern times came from John Rawls. In *A theory of justice,* Rawls regards of justice simply as 'fairness'.[90] Justice as fairness is based on his ideal that society must be organised in a way which allows everyone to obtain a fair share of wealth, position, education, social esteem and other benefits, regardless of their initial position or status in society.[91] Within his theory, Rawls postulates a 'difference principle' which basically holds that inequalities are justified only to the extent that they are advantageous to the vulnerable and marginalised groups. In a way, it can be said that Rawls was advocating for *equal* and *equitable* citizenship and the respect for individual and collective human dignity. I say so because Rawls was

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88 As above. Lenin wrote that 'working-class consciousness cannot be genuine political consciousness unless the workers are trained to respond to *all* cases of tyranny, oppression, violence, and abuse, no matter what class is affected […] The socialist ideal should not be the trade union secretary, but the tribune of the people, who is able to react to every manifestation of the tyranny and oppression, no matter where it appears, no matter what stratum or class of the people it affects.'

89 Wolf (n 87) 76-77.

90 J Rawls *A theory of justice* (1974) 4.

91 As above.

writing within the context of, and in response to a market/ capitalist economy which he argues is designed to produce unequal citizenship through unfair distribution of wealth and opportunities.[92] 'Let to its own devices, the market would continue to produce unfair social outcomes and thereby create vulnerable classes of citizens'.[93]

In *Free market fairness*, American political philosopher Tomasi agreed with Rawls's views on justice in general and social justice in particular stating that Rawls's principle of difference was based on the right assumption about society and the economy, that it should be organised in a way that is advantageous to every citizen. Otherwise, it would be unfair.[94] Writing as a liberal democrat Tomasi points out that[95]

> social outcome, and even the shape of distributions over a society as a whole, might properly be described as just or unjust. Justice requires that we consider the actual availability of goods and opportunities to citizens. Social justice requires more than formal equality of opportunity. It requires that people have access to the goods they need to make their freedom valuable. [s]ocial or distributive justice is a natural development from the idea of respecting citizens as free and equal [persons].[96]

In similar light Rhonheimer, elaborating on both Rawls's and Tomasi's conception of a just economic order in society and distribution of wealth, writes:[97]

> An economic order that, as such and on principle, undermines the position of the most disadvantaged, creating wealth and inequality at the expense of the least advantaged and generally of those who are less well off, would not meet the distributional adequacy condition and therefore would be 'unfair' and 'unjust'.

In a way, Rawls's view on social justice fits the Marxist conception in the sense that it advocates for a social and economic order that produces the fair distribution of advantages and disadvantages for everyone. In this light, heterosexual nationalism can be said to be a social order that is socially unjust in that it produces disadvantages for a specific group of citizens. Heterosexual nationalism is thus 'unfair' in the sense of Rawls's conception, as it does not allow sexual and gender minorities 'to obtain a fair share of wealth, positions, education, social esteem and other benefits due to their sexual orientation and gender identity'.[98] It cannot be imagined that Rawls and those that agreed with him where theorising a limited application of social justice after going at length to say that their conceptions were meant to benefit *everyone* especially the marginalised in society. It is also my view that any general theory of justice is adaptable as the ends of one quest for justice, should surely speak to another in the bigger picture.

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92 As above.
93 As above.
94 J Tomasi *Free market fairness* (2012) 126.
95 Tomasi (n 94) 35.
96 Tomasi (n 94) 35.
97 M Rhonheimer 'The true meaning of social justice: A catholic view of the Hayek (academic paper)' (2016) 35 (1) *Economic Affairs* 35.
98 See n 88.

Some theorists have criticised any conceptualisation of social justice claiming that it is simply intellectual laziness and wishful thinking. For instance, Novak argues that social justice has never been really defined and has no objective standard for existence:[99]

> [W]hole books and treatises have been written about social justice without ever defining it. It is allowed to float in the air as if everyone will recognize an instance of it when it appears. This vagueness seems indispensable. The minute one begins to define social justice, one runs into embarrassing intellectual difficulties. It becomes, most often, a term of art whose operational meaning is, "We need a law against that." In other words, it becomes an instrument of ideological intimidation, for the purpose of gaining the power of legal coercion.

Novak's major criticism of social justice is its Christian foundation (for instance the writings of St Augustin and St Thomas Aquinas discussed above) and how subsequent theorists and activists have used it. He especially disagrees with the catholic conception discussed above but does acknowledge that the church philosophers made the major contributions to the term.[100] He somewhat mocks that 'there is even a whole band of catholic thinkers calling themselves "social justice" Catholics but like everybody else, from the political, legal or social science discourse, they don't give a definition'.[101] He ends by arguing that it is used in legal text because 'it's warm and attractive that politicians don't want to be seen to be against it'.[102] He also criticised the Marxist conception of social justice calling it the 'dream of a socialists'.[103]

Novak was influenced by Friedrich Hayek. Hayek, who is perhaps the most famous critic of social justice, argued that the whole notion of social justice is meaningless, self-contradicting and simply ideological.[104] His basic contention is that, within the context of a spontaneous market economy, the concept of social justice is meaningless and illusory because no person or agency intentionally and deliberately determines the particular economic results for people.[105] In essence Hayek was critical of the socialist/Marxist conception of social justice and in that vein said that 'the only function that the notion of social justice serves is to blame other people, often "the system" or those who are supposed, mythically to control it'.[106] Hayek also added a semantic argument to his criticism. He traces the use of the word 'social' and found that 'originally social had a clear meaning (analogous to formations like 'nation', 'tribe' or 'organisational'), namely that of pertaining to, or

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99 M Novak *Defining social justice* (2000) 11-12. https://www.firstthings.com/article/2000/12/defining-social-justice (accessed 6 October 2020). Ironically Novak later we on to come up with a view 'social justice as it should be' by way of critiquing other views for their 'luck of purity'. In essence it can be argued that he fail in the very trap that he set by his criticism of the existence of social justice. While he claims that his view of social justice is pure of all the common uses, he forgets that 'his view' becomes one of the many and most importantly, his criticism does not amount to a theory of social justice in itself. See also M Novak & P Adams *Social justice isn't what you think it is* (2015) 17.

100 Novak (n 99) 16-18.

101 As above.

102 As above.

103 As above.

104 F Hayek *Law, legislation and liberty: A new statement of the liberal principles of justice and political economy* (2013) 224.

105 Hayek (n 104) 228. See also E Feser *The Cambridge companion on Hayek: Collected essays* (2003) for further discussions of Hayek on justice.

106 Hayek (n 104) 226.

clear characteristic of the structure and operations of society'.[107] According to him, in such a sense justice is already a social phenomenon and therefore the addition of the word social serves only to add confusion and makes it capable of meaning anything that its advocates want it to mean.[108] After receiving his Nobel Peace Prize, he famously wrote:[109]

> What I hope to have made clear is that the phrase 'social justice' is not, as most people probably feel, an innocent expression of good will towards the less fortunate, but that it has become a dishonest insinuation that one ought to agree to a demand of some special interest which can give no real reason for it. If political discussion is to become honest it is necessary that people should recognize that the term is intellectually disreputable, the mark of demagogy or cheap journalism which responsible thinkers ought to be ashamed to use because, once its vacuity is recognized, its use is dishonest. I have come to feel strongly that the greatest service I can still render to my fellow men would be that I could make the speakers and writers among them thoroughly ashamed ever again to employ the term 'social justice'.

While the critics of social justice have a point to make – especially in the absence judicial definition or elaboration – the inclusion of social justice as a constitutional value and principle means that it has important uses in the quest for a just society, especially in the face of heterosexual nationalism. In this regard, I agree with Miller who indicates that he does

> not share the skepticism about social justice. I think that a clear meaning can be given to the idea, and I do not think that the pursuit of social justice is politically misguided. On the other hand, it would be wrong to disregard or downplay the fact that people disagree about it […] and see how far differing views about what justice requires can be reconciled by showing that they stem from shared beliefs at a deeper level.[110]

In accepting that there are conceptual differences in the definition and understanding of social justice and the validity of some of the contestations regarding its nature and even existence, this thesis adopts the approach of A J Van Der Walt who states when it comes to social justice there is no single theoretical approach accepted by all and therefore that

> the best approach was not to develop a single, coherent and all-encompassing grand theory but rather to uncover the strengths and the weaknesses of several theoretical approaches for different contexts and circumstances. In short, the article concluded that the promotion and protection of social and economic justice need to be approached from different theoretical perspectives when considering different practical circumstances, contexts and dilemmas. [111]

In essence, from both a practical and theocratical point of view, the different perspectives of social justice can all be applied positively with regard to the rights of sexual and gender minorities as a marginalised group in Zambia. To take the point further it can be added that, if the different theocratical paradigms may not be found to be persuasive in the interpretation of the meaning of social justice in

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107 Hayek (n 105) 228.
108 Hayek (n 105) 236.
109 Hayek (n 105) 258
110 D Miller *Principles of social justice* (1999).
111 A J Van Der Walt (ed) *Theories of social and economic justice* (2005) 2.

the Constitution, recourse to the United Nations General Assembly's (UNGA) position is authoritative. Recognising the conceptual difficulties of social justice, while realising its importance and practical value, the United Nations policy brief on social justice states that social justice as term has evolved and intertwines with human rights such that the global effort to achieve the sustainable development goals represents an effort to achieve social justice.[112]

It further states as follows:[113]

> While many schools of thought attempt to define social justice, there is no consensus on a single, all-encompassing definition. For the purposes of this policy brief, social justice is defined as a normative concept centered on the principles of fairness, equality, equity, rights and participation. It builds on the two key principles identified by John Rawls as fundamental to any discussion of justice: equal basic rights and equality of opportunity that must be of the greatest benefit to the least advantaged in society.

It is therefore safe to say that social justice is an alive concept, that while eluding a standing definition, it invites the same feelings, passion and motivation in its believers. Therefore, its inclusion in the Constitution cannot be discounted on the basis of the lack of academic consensus. It may well mean different battle fronts for different vulnerable groups. This is because different marginalised groups have different lived experiences of suffering and thus different areas of focus although in theoretical terms all these struggles can be brought under the general umbrellas of equality, equity, participation, inclusion and recognition. This thesis's contention is that in Zambia, the aggregation of the theories or approaches to social justice and taking the UN approach as well, simply entails that social justice – as a compulsory constitutional value and principle on which national policy should be formulated and implemented – requires the recognition, inclusion and participation of sexual and gender minorities in all speres of the national life. Defined and understood in the context of equity, equal citizenship and human dignity, social justice would mean breaking the legal and policy barriers that prevent sexual and gender minorities enjoying the full spectrum of rights guaranteed domestically and under international law. In this regard, decriminalisation becomes an act of social justice as is discussed in the Chapter 5. Put in a different way, social justice means ensuring that sexual and gender minorities, as with the rest of the citizens, have to climb the human development index without the state living it to individual upward mobility based on economic status and the market economy.

4.2.2. Constitutional contestation of heterosexual nationalism and the anti-sodomy laws

Proponents of heterosexual nationalism argue that the provisions on citizenship, equality and non-discrimination, human dignity and social justice discussed above do not apply to sexual and gender minorities. As seen in the previous chapter, sexual orientation and gender identity, as prohibited grounds of discrimination, caused of much the controversy from the FIFA saga and the incident of the visit of Ban Ki Moon.[114] As such, proponents of heterosexual nationalism argue that even though the

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112 United Nation *Social justice and participation policy brief* (2013) https://www.unescwa.org/sites/www.unescwa.org/files/publications/files/social-justice-participation-policy-brief-english.pdf (accessed on 8 October 2020). See also Social justice in an open world: Role of the United Nations (2006) https://www.un.org/esa/socdev/IFSD/index.html (accessed 8 October 2020).

113 As above.

114 Chapter 3 discusses this aspect in detail.

Bill of Rights was drafted at a time when sexual diversity was not such a controversy and therefore left out under article 23, article 266 which was drafted after the above events would confirm that Zambia expressly rejected the inclusion of sexual orientation and gender identity as a prohibited grounds of discrimination with the argument going as far as saying that the word 'vulnerable' and 'marginalised' groups were removed from the draft constitution precisely to ensure that sexual and gender minorities do not have a basis to use them.[115] These arguments, all grounded in religious, cultural and moral heterosexual nationalism, do not have any actual legal basis as they cannot override the constitutional principles and values discussed above. A leaf can be taken from *Sara Longwe v Intercontinental Hotel,*[116] a case in which arguments based on religious, cultural and moral nationalism were discredited by the High Court on the basis of constitutional protection from discrimination in the Zambian Bill of Rights. In that case, the petitioner was a woman who walked into a hotel alone. However, because of the rule that 'a woman cannot walk into a hotel unaccompanied by a man' the petitioner was asked to leave the hotel premises.[117] She therefore, challenged the constitutionality of the 'unaccompanied women' rule in the hotel industry claiming that it was discriminatory and in breach of 11 and 23 of the Bill of Rights.[118] The respondents argued that it was against Zambian culture for a woman to be within hotel premises drinking alone and, further, that the rule was meant to preserve Zambian morality as without it, 'female prostitutes' would frequent hotels.[119] It was therefore, basically argued that the rule was important to preserve Zambia's culture, morality and Christian values as a sovereign state with its own normative and legal position on the status of women. The Supreme Court rejected the respondent's arguments, stating that the rule was discriminatory against women and therefore unconstitutional.[120] International law played a critical role in the interpretation of articles 11 and 23, and ultimately its decision. On its own volition the Court referred to the African Charter on Human and Peoples' Rights and the Convention of the Elimination of all forms of Discrimination Against Women (CEDAW), stating that Zambia's ratification of these treaties meant the states willingness to be bound by the provisions of the treaty and as such the courts duty to refer to them in the adjudication of cases.[121] Reference to international law in terms of human rights treaties is discussed in more detail in the next section.

From the *Longwe* case, it can be argued that religious, cultural and moral heterosexual nationalism cannot be sufficient ground to undermine the constitutionally guaranteed rights of sexual and gender minorities who have a valid claim to rights as citizens. Malila point out that while Zambian society still embraces internalised value systems based on their traditions and culture, many of these conflict with the provisions of the Zambian Bill of Rights and a plethora of international human rights law, and as such cannot be used in the adjudication of cases to undermine the rights of citizens.[122] It can further be argued that it was not the intention of the drafters of the Bill of Rights as agents of the people in a democratic society to exclude any category of citizens despite that category not being named as a prohibited ground of discrimination. The High Court discussed this point in *Edith Nawakwi v The*

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115 Chapter 1 discusses this aspect in more detail.
116 (1992) HP/765.
117 S Longwe 'Legal action to stop hotels discriminating against women in Zambia'(2019) *Feminist Africa* 83.
118 As above.
119 As above.
120 As above.
121 *Longwe* case, para 16.
122 M Malila 'Righting the wrongs: Justice Clever Musumali's legacy of judicial activism' (2020) *AfricaLii* 11.

Attorney General where a woman was required to seek permission of the father of her child in order to endorse the child's name in her passport.[123] She argued that the practice and requirement was discriminatory on the basis of sex, even though article 25 of the Constitution which related to the issue did not include sex as a prohibited ground of discrimination. In that regard the Court held:[124]

> Article 25 Clause 3 defines the expression 'discriminatory' as used in that Article. That definition does not include 'sex' or 'gender'. Be that as it may it is my very considered view that the intentions of the framers of this Constitution when they passed the Bill of Rights (PART III) of the Constitution could never have meant to discriminate between males and females in the way the Passport Office and its sister Department have been doing. I have no doubt in my mind therefore that if these practices were to have been brought up to the attention of those people who were passing this Constitution into law they would have not sanctioned them. I am not sanctioning them either.

The *Nawakwi* case illustrates the fact that it is not in the spirit of the constitution to exclude any category of citizens from enjoying the rights contained in the bill of rights. In essence the High Court in that case viewed the Constitution of Zambia as a living document, which is the antithesis of the 'letter of the law' theorists who foreclose any wide interpretation of constitutions.[125] In this light, this thesis argues that it is only through focusing on the spirit of the Constitution and interpreting it as a living document that its purpose can be actualised. Viewing it from the strict *dead letter of the law*, would be giving power to so few and thus take away power from 'we the people' who 'enact and give to ourselves this Constitution'.[126] It must be remembered that those who favor the strict letter interpretation of constitutions and of bills of rights historically belong to despotic regimes that wanted to retain power and limit the rights of their citizens through listed rights with so many claw back clauses. A good example are the independence constitutions, inherited from colonial administrations by most African states. These constitutions concentrated power in the executive and limited citizens' rights through narrow bills of rights and required a strict letter interpretation from courts.[127] Still haunted by the legacy of these constitutions, coupled with colonial overtones, It can be argued that one way, if not the only way that African states like Zambia can come out of this legacy, is to view constitutions as living documents, whose spirit is derived from the wishes of the people in a democratic and open society. Most importantly, for the rights of sexual and gender minorities, the 'spiritual' approach to constitutional interpretation bridges the gap between human rights law and human rights –whose difference was discussed earlier. Commenting on the American constitution Hard shares this point when he states that

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[123] (1991) HP/1724.

[124] As above.

[125] For a full discussion of the debate on these two approaches of constitution interpretation see M Mbao 'The vicissitudes of constitutional interpretation in Zambia' (2021) 1 *Turf Law Journal* 47 and B Murrill *Modes of constitutional interpretation* (2018) 5-22.

[126] The preamble of the Constitution of Zambia as with most, if not all constitutions, start with this famous and very important phrase which distinguishes the constitution from all other laws and national documents. In this regard, the contents of the constitution can only be interpreted and actualized in their right sense by looking at them form the context of the needs, wants, aspirations and rights of the people, without going so far as creating a tyranny of the majority.

[127] H Kwasi-Prempeh 'Africa's "constitutionalism revival": False start or new dawn' in E N Sahle (ed) *Democracy, constitutionalism and politics in Africa* (2017) 17.

> Among such views [looking at the spirit of the constitutions] was the doctrine of the rights of the individual-rights derived not, as in official English thought, from the Magna Charta or from any other charters wrung from kings, but on the contrary, from the natural law of a divinely created Universe.[128]

Notably the provisions of the Zambian Constitution speak to the spirit of its framing as pronounced in the *Nawakwi* case*,* that no citizen or category of citizens – which includes sexual and gender minorities– were meant to be left behind or set aside in the enjoyment of rights. Article 8 sets out the national values and principles as 'democracy, constitutionalism, human dignity, equality, social justice and non-discrimination'. As stated above, the national values and principles mandatory in the interpretation of the Constitution, the enactment and interpretation of law and the development of policy– which in essence entails reading the constitution within its 'spiritual context' to give life to its provisions rather than from its literal wording. Article 267 on the interpretation of the constitution compliments and consolidates this argument, providing as follows:

> 267. (1) This Constitution shall be interpreted in accordance
>
> with the Bill of Rights and in a manner that—
>
> *(a)* promotes its *purposes*, *values* and *principles*.[129]
>
> *(b)* permits the development of the law; and
>
> *(c)* contributes to good governance.

In light of the above provisions, it can be argued that the Constitution should be interpreted as a living document whose spirit is the guiding point and not the literal wording of its contents. As such, read as a whole, with all the above provisions taken into account, the Constitution and the Bill of Rights provides protection for sexual and gender minorities, with the obligation on the state to take measures to protect them from discrimination and any form of human rights violations. From this premise this thesis contends that specific provisions of the Constitution actually contest heterosexual nationalism in its general nature and its specific constituent manifestations of cultural, moral and religious nationalism. This point is discussed this below.

From the general point, the supremacy of the Constitution subordinates and subjects every domestic law, policy, custom, identity and form of consciousness to its provisions in a binding and unexceptional way. In this regard article 1 states as follows:

> This Constitution is the supreme law of the Republic of Zambia and any other written law, customary law and customary practice that is inconsistent with its provisions is void to the extent of the inconsistency.
>
> *(2)* An act or omission that contravenes this Constitution is illegal.
>
> *(3)* This Constitution shall bind all persons in Zambia, State organs and State institutions.

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128 W Hard 'The spirit of the constitution' (1936) 185 *The Annals of American Political and Social Science* 11.

129 (emphasis added).

> *(4)* The validity or legality of this Constitution is not subject to challenge by or before a State organ or other forum.

Consequently, heterosexual nationalism whether as a national policy, identity, sex consciousness, value system and as a governmentality, is subject and subordinate to the Constitution and as such cannot be the basis on which the rights guaranteed in the Bill of Rights are denied to sexual and gender minorities. Thus, the human rights exceptionalism and relativism against sexual and gender minorities that arises from heterosexual nationalism, as seen in Chapter 1 and 3, is unconstitutional.

Further, what heterosexual nationalism does –coupled with the mischaracterisation and the consequent misapplication of anti-sodomy laws— is that it marginalises, discriminates as well as dehumanises sexual and gender minorities. This takes away their common as well sexual citizenship and violates the scope of rights protected in the Bill of Rights. Effectively, this sharply contradicts the spirit of article 22 which states that no law shall make any provision that is discriminatory either of itself or in its effect. Article 1 and more specifically articles 1(3) and 22 entail that the state has the obligation to respect, protect and fulfil the rights of all citizens in a manner that all forms of governmentality should pass the constitutionality test.

4.3. Zambia's international human rights obligations towards sexual and gender minorities

4.3.1. Application of international law in Zambia

The previous section discussed Zambia's domestic obligations with respect to the rights of sexual and gender minorities. As seen from the discussion, the domestic obligations are based on specific constitutional provisions, values and principles. These constitutional values and principles are not, however, unique to Zambia and to a large extent, it can be argued that they are an expression of customary international law.[130] As such, the application of international principles related to these values would only complement and strengthen domestic obligations pronounced in the Constitution, while at the same time enhancing the use of international human rights law in nation states like Zambia. This part, therefore, discusses Zambia's international obligations with respect to sexual and gender minorities. As stated at the beginning of this Chapter, the main reason for discussing Zambia's domestic and international human rights obligations is to show that heterosexual nationalism and the mischaracterisation of anti-sodomy laws impacts negatively on Zambia's obligations by violating the rights of sexual and gender minorities in the country. As a starting point to the discussion, it is important to consider the application of international law in Zambia. It is important because heterosexual nationalism as a form of governmentality, and the discourse it inspires as seen in Chapter 3, contests the application of international human rights law in Zambia on the basis of a narrow conceptualisation of state sovereignty. In this context international human rights law is often invoked as a tool for 'promoting homosexuality' and as compromising Zambia's status as a Christian nation.[131]

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130 F Viljoen *International human rights law in Africa* (2007) 518. Viljoen acknowledges that 'norms of customary international human law are by and large contained in the constitutions of African states.'

131 See Chapter 1 and 3 for details of this discussion.

Application of international law can be direct or indirect. Direct application can mean international law applied in contentious cases, to resolve a dispute, as the basis of a remedy – where a violation is found, and the treaty provision is directly applied.[132] In this part application of international means indirect application, through the judgments of courts – where they find violations of national law but use or refer to international law to guide and inspire particular interpretations of national law, as seen from the cases discussed below.

Zambia is traditionally a dualist state, hence ratified international human rights treaties have to be domesticated before they can form part of the national law and be implemented.[133] However, as discussed below, this does *not* strictly mean that international law cannot be applied *at all* in Zambia until it is domesticated. In fact, 'this rigid distinction [between dualism and monism] does not play itself out in practice'.[134] Presently, Zambia has not domesticated any treaty to which it is a state party , although by way of reception (transformation), it has enacted some provisions of the Convention on the Rights of Persons with Disabilities (CRPD) and the Convention of the Rights of the Child (CRC).[135] On this basis, positive dualism would argue that international law does not apply in Zambia. Article 7 of the Constitution defines the laws of Zambia and specifically excludes international law. It states:

> The Laws of Zambia consist of-
>
> *(a)* The Constitution;
> *(b)* Laws enacted by Parliament;
> *(c)* Statutory Instruments;
> *(d)* Zambian customary law which are consistent with this Constitution; and
> *(e)* The laws and statute which apply or extend to Zambia, as prescribed.

International law is not even included in the national values and principles in article 8 of the Constitution. However, article 267 does state:

> This constitution shall be interpreted in accordance with the Bill of Right and in a manner that-
> *(a)* promotes its purpose, values and principles;
> *(b)* permits the development of law;
> *(c)* contributes to good governance;

From the provision it can be argued that international law can be used in the interpretation of the Constitution and other laws. First, bearing in mind the limited domestic decisions and jurisprudence in human rights law in Zambia, it can be argued that using developed principles of international human rights law in the interpretation of the Zambian Constitution is 'permitting the development of law' as envisaged by article 267(b). As Zambia does not exist in isolation, it is only by taking into account the international approach to the development of law that good governance can be promoted and enhanced

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132 For a full discussion see J Crawford *Brownlie's principles of international law* (2018) 667-691.

133 For a full discussion of dualism and monism in international law see M Killander & H Adjolohoun 'International law and domestic litigation in Africa: An introduction' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 16-18.

134 Viljoen (n 130) 518.

135 See *Zambia combined first, second, third, fourth, fifth, sixth and seventh periodic report under the African Charter on Human and Peoples' Rights, 2005-2019 and initial report under the Protocol on the Rights of Women* (2023) 3-5.

as required under article 267(c). It is also hard to imagine that the people of Zambia, as agents of enactment of their Constitution, want to be left behind nor be isolated in the use of international norms and principles of human rights law.[136] To this end, it can also be argued that it is and was never the purpose of the Constitution to be a static document solely interpreted and applied based on local imaginations and narrowed down to nationalism in spite of or in isolation from developing global trends. Such an approach would be spelling the death of constitutionalism and human rights law development in Zambia or indeed any nation that adopts it.

The national values and principles which have already been discussed above are, in many respects, also norms of customary international human rights law. As such, interpretating the Constitution and the Bill of Rights using the normative content of these norms as developed by treaty bodies and other human rights mechanisms, would only enrich the domestic protection of human rights in Zambia. In any event, Zambia, being a Common Law jurisdiction, customary international law is 'part' of domestic law under the principle of 'direct incorporation.'[137] Under this principle, norms of customary international law such as equality, non-discrimination and human dignity form an automatic *source of law* for the common law.[138] Crawford clarifies that, in essence, it is not the treaty, but rather the long standing norms created from the treaty that becomes an automatic source of law in common law counties.[139] Thus, deeply entrenched human rights norms such as equality and non-discrimination, dating back to their inclusion in the UDHR, are part of the sources of law in Zambia.[140] As such, when interpreting constitutional clauses that mirror these principles, it is within the law for the courts to use the international jurisprudence related to the clause. As with the first example, this approach of complementing the domestic provisions with related international norms ensures the development of law as required by article 267(c) of the Constitution.

The application of international law has arisen in the Zambian Courts on several occasions. In many instances, as in most dualist states, the courts have taken a progressive approach to the application of international law.[141] For instance, in the *Sara Longwe* case, cited above, the Court expressed the principle that despite being a dualist state, the fact that Zambia as a state, ratified a specific treaty, was an expression of its willingness to be bound by the treaty in the following terms:[142]

> Before I end, I have to say something about the effect of International Treaties and Conventions which the Republic of Zambia enters into and ratifies. The African Charter on Human and Peoples' Rights and the Convention on the Elimination of All Forms of Discrimination Against Women are two such examples. It is my considered view that ratification of such documents by a nation State without reservations is a clear testimony of the willingness by that State to be bound by the provisions of such a document. Since there is that willingness, if an issue comes before this court which would not be

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136 Article 1 of the constitution states that all law making power resides and is derived from the people. The provision mirrors the preamble declaring that 'we the people enact and give to ourselves this constitution'.

137 Crawford (n 132) 294.

138 Crawford (n 132) 299.

139 As above.

140 The UDHR is considered to have attained the status if customary international law. For a full discussion on the status of the UDHR as forming part of customary international law, see B Simma & P Alston *The sources of human rights law: custom jus cogens and general principles* (1992) 82.

141 Killander (n 133) 4, 12-13.

142 *Longwe* case para 19.

> covered by local legislation but would be covered by such international document, I would take judicial notice of the Treaty or Convention in my resolution of the dispute.

Notably, the Court distinguished international treaties ratified by states and soft law:[143]

> As for documents such as the Bangalore Principles, I am of the view that they do not enjoy the same status as the Treaties and Conventions. This is because it is my very considered view that in the separation of powers principle, I do not think that a meeting of jurists in an international forum can make resolutions which are binding on their respective States, in law. I am of the strong view that such powers are entrusted in the executive wing of the State. So whilst it is not wrong to take note of such resolutions I think it is a misdirection in law to treat them as standing at par with Treaties and Conventions entered into and ratified by the executive wing.

The Court took a similar approach in *Sata v Post News Paper and Another*, in which it mentioned the value of international human rights law in domestic litigation, as follows:[144]

> I make reference to the international instruments because I am aware of a growing movement towards acceptance of the domestic application of international human rights norms not only to assist to resolve any doubtful issues in the interpretation of domestic law in domestic litigation but also because the opinions of other senior courts in the various jurisdictions dealing with a similar problem tend to have a persuasive value.

Although article 267 was only enacted in 2016, courts, guided by the reasoning in the cases cited above, have also recognised that Zambia does not exist in isolation and, therefore, that international law is important for the development of domestic law. Thus, in *Kingaipe and Another v Attorney General* the Court noted:[145]

> This Court is at large to consider and take into account provisions of international instruments and decided cases in other courts. Zambian courts are not operating in isolation and any decision made by other courts on any aspect of the law is worth considering.

Although accepting this approach, the courts have at times taken a somewhat cautious stance of reiterating that Zambia remains a dualist state. Hence in *Roy Clark v Attorney General*, while applying international human rights law, the Court added:[146]

> We agree that in applying and construing our statutes we can take into consideration international instruments to which Zambia is a signatory. However, these international instruments are only of persuasive value unless they are domesticated in our laws.

In conclusion, while Zambia is a dualist state, international law is still applicable bearing in mind the provisions of article 267 discussed above and the cases cited. Admittedly, there is yet to be a case on the application of international law after the introduction of the national values and principles, as well

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143 As above.
144 (1995) ZM/ HC 1.
145 (2009) HL/ 86.
146 (2008) ZR 1/ 38.

as article 267 in the 2016 constitutional amendment. However, it cannot be imagined that the courts would make such a sharp departure from their decisions especially that the common law system is heavily reliant on the doctrine of precedent and *stare decisis*. It is therefore safe to proceed on the basis that Zambia's international human rights obligations have at the very least an applicable meaning at home which can be used for constitutional transformative purposes to better the lives of sexual and gender minorities. As Viljoen points out, the ratification of international human rights treaties is significant only if their provisions have an impact at the national level.[147] Apart from using international law in the domestic courts, as seen above, international law and, in particular human rights law, can be used where local remedies fail or are not available through mechanisms like the African Commission, the African Court, the Human Rights Committee, and other judicial and quasi-judicial organs. For political, more than legal reasons, these mechanisms have relative effective ability although a full discussion of the nature and extent of that effectiveness is not with the scope of this study.[148]

4.3.2. Obligations under the African human rights system

4.3.2.1. The African Charter on Human and Peoples' Rights

At the regional level, Zambia is a member state of the African Union (AU) and a state party to the African Charter on Human and Peoples' Rights (African Charter) as well as other AU treaties. The African Charter is the principal human rights instrument for the protection and promotion of human rights in Africa. Other instruments include the Protocol to the Charter on the Rights of Women in Africa (the Maputo Protocol), the African Charter on the Rights and Welfare of the Child and the Protocol on the Rights of Persons with Disabilities in Africa.[149]

The African Charter was adopted by the Organization of African Unity (OAU), now the AU, in Nairobi, Kenya, on 27 June 1981 and entered into force on 21 October 1986.[150] Zambia became a state party to the African Charter on 10 January 1984. The African Charter has 26 substantive provisions which create obligations for African states to respect, protect and fulfil human rights. Specifically, article 1 places the obligation to *recognize* the rights, duties and freedoms enshrined in the Charter and undertake to adopt legislative or other measures to give effect to them. The duty to adopt legislative measures can be interpreted broadly to not only mean enacting legislation that give effect to the rights in the Charter but also to initiate a process that repeals legislation or portions of

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147 Viljoen (130) 517.

148 For an analysis of the effectiveness and extent of the implementation of decisions of international judicial bodies see http://www.bristol.ac.uk/law/research/centres/hric/projects/implementation-of-human-rights-standards-project/ (accessed 1 April 2021). With specific reference to Africa see R Murray & D Long *The implementation of findings of the African Commission on Human and Peoples' Rights* (2015).

149 The full least of treaties that the AU has adopted can be found on https://au.int/treaties (accessed on 31 March 2021). The different AU treaties can be interpreted as providing protection of the rights of sexual and gender minorities in Africa and creating obligations on AU member states in that regard. This, however, entails an inclusive interpretation approach which harmonises the provisions of the Charter as the principal instrument, with the provisions of other treaties. However, that is not the aim of this study nor is that within its scope. It is sufficient to show that the African Charter offers protection for sexual and gender minorities in Africa and creates obligations on states in that regard.

150 For a discussion of the political and drafting history of the Charter see R Murray *Human rights in Africa: From the OAU to the African* Union (2004) 1-49, R Murray *The African Commission on Human and Peoples' Rights and International* law (2000) 9-27 and Viljoen (130) 151-212.

legislation that violate the rights in the Charter, as well as enhance redundant provisions to bring them in line with the Charter. In the same light the obligation to take other measures can be interpreted to included measures to repeal legislation that is inconsistent with the Charter. As discussed in the next chapter, decriminalisation of anti-sodomy laws is an obligation that Zambia and other state parties to the Charter have bearing in mind the violations that occur against sexual and gender minorities because of their existence.

Like all human rights treaties, the African Charter does not explicitly state that sexual orientation and gender identity are prohibited grounds of discrimination. Murray and Viljoen point out that this omission reflects the social-cultural context of the late 1970s when the Charter was drafted having been inspired by earlier treaties which themselves did not include sexual orientation and gender identity.[151] However, as with other treaties, the African Charter can be read in an inclusive manner to offer protection for sexual and gender minorities and thereby creating the attendant obligations on states as envisioned under article 1.[152] Article 2 of the African Charter, which lists the prohibited grounds of discrimination as race, ethnicity, colour, sex or any other status, provides room for this wide, inclusive and progressive interpretation.[153] The reference to 'sex' can be interpreted to include sexual orientation and gender identity. Murray and Viljoen explain that the Charter predates the use of the terms 'sexual orientation' and 'gender identity' and as such their emergence as aspects of sexuality would justify their inclusion within the term 'sex'.[154] Similarly, the term 'other status' is both normatively and semantically an open ended and expansive concept such that it includes sexual orientation and gender identity 'because exclusion from the ambit of article 2 has the far reaching effect of foreclosing reliance on all Charter rights', while the consequence of an inclusive, expansive and purposive interpretation of article 2 is that sexual and gender minorities in Africa will fall within the protective scope of the whole African Charter.[155] Below, five interrelated reasons are advanced for this inclusive, expansive and purposive interpretation of article 2.[156]

The first reason is purely 'positive' and semantic. The language of the African Charter is drafted in an open ended and inclusive manner. Article 2 states that 'every individual […]' which signifies that no one was meant to be left behind in the enjoyment of the rights in the African Charter. It goes further to use the phrase 'such as' when exemplifying the prohibited grounds of discrimination. In this regard it can be argued that when stating 'such as […]' the African Charter makes it clear that

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151 R Murray & F Viljoen 'Towards non-discrimination on the basis of sexual orientation: The normative basis and procedural possibilities before the African Commission on Human and Peoples' Rights and the African Union' (2007) 29 *Human Rights Quarterly* 89.

152 F Viljoen 'Sexual orientation as a challenge to the harmonized interpretation of international human rights law' in Buckley, Donald & Leach (eds) *Towards convergence in international human rights law: Approaches of regional and international systems* (2016) 168.

153 Murray & Viljoen (n 151) 89.

154 Murray & Viljoen (n 151) 89.

155 Murray & Viljoen (n 151) 91, 92.

156 The approach is inclusive in the sense that it includes sexual orientation and gender identity as a prohibited ground of discrimination, expensive in the sense that, through being inclusive it expands the prohibited grounds of discrimination and purposive in the sense that it is deliberate and targeted in its approach so that it can address present day as well as historical challenges. I will simply refer to the approach as 'inclusive'.

the list of prohibited grounds of discrimination in article 2 is not exhaustive but rather that they were other unlisted grounds.[157] Murray and Viljoen agree that

> [t]his language suggests that the drafters foresaw, and that the African Charter allows for, an expansion of the specific grounds, thus accepting the principle that the exact content of the Charter will not be frozen in time. Arguably there is no limit to the growth that could be allowed.[158]

Notwithstanding the contestation of heterosexual nationalism in Africa generally, this thesis contends contend that the language admits the reading of sexual orientation and gender identity within the terms 'sex' and 'other status.' Notably, the rule of practice among other treaty bodies is to expand the language of their respective treaties so as to expand the scope of their application and thereby ensure wider and more effective protection of human rights.[159] It is also worth noting that linguists interested in the language of human rights treaties agree that the language of human rights treaties is written in an expansive manner such that it can be used for law reform to reach the ever extending boundaries of human right.[160]

Second, the African Commission has in the past read into the Charter other grounds of non-discrimination that are not explicitly listed in article 2. For instance, in *Purohit and Moore v The Gambia* the African Commission declared 'disability' as a prohibited ground of discrimination even though it was not expressly stated in the Charter.[161] The AU has since adopted the Protocol to the Charter on the Rights of Persons with Disabilities.[162] The Protocol is testimony to the fact that the listed grounds of non-discrimination in the African Charter is not exhaustive and that the Charter is a living document which should be read in an ever progressive and inclusive manner to 'leave no one behind.'[163] Taking such an inclusive approach, the African Commission in the celebrated *Endorois* case[164] recognised 'indigenous peoples' as a protected group under the African Charter even though the concept is not provided.[165] In that case the African Commission noted that 'the terms indigenous is not intended to create a special class of citizens, but rather to address historical and present-day injustices and inequalities'.[166] Most significantly with respect to sexual orientation and perhaps even gender identity, the African Commission in *Zimbabwe Human Rights NGO Forum v Zimbabwe,* although in *obiter*, expressed that article 2 of the African Charter affords 'equal treatment for individuals irrespective of […] sexual orientation'.[167] In essence it can be said that the African

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157 Murray & Viljoen (n 151) 91.

158 As above.

159 The human rights committee in cases like *Toonen v Australia* (1994) Com488/1992/CCPR/C/50/D, the Inter-American in cases like *Karen Atala and Daughters v Chile* (2008) IACHR/Comp/Doc/22/1, and the European Court of human rights in cases like *Salgueiro da Silva Motua v Portugal* (2010) ECHR/Comp/ a/ 548.

160 For a detailed discussion of this aspect see D S Law 'The global language of human rights: A computational linguistic analysis' (2017) *Washington University Legal Studies Paper Series* 1-35.

161 241/01. The Protocol on the Rights of persons with disabilities has since come into force.

162 The https://au.int/sites/default/files/treaties/36440-treaty-protocol_to_the_achpr_on_the_rights_of_persons_with_disabilities_in_africa_e.pdf (accessed 16 April 2021).

163 In *Social and Economic Rights Action Centre v Nigeria* (2002) ACHPR/Comp/155/ 96, the Commission held that the right to food and shelter was implied in the Charter.

164 *Centre for Minority* Rights *Development* (*Kenya*) *and Minority Rights Group v Kenya* (2003) Comp/203

165 *Endorois* case, para 149.

166 *Endorois* case, para 149.

167 (2006) AHRLR 128 (ACHPR 2006).

Commission has on other occasions taken the African Charter as a living instrument and interpreted it within the context of its spirit and purpose rather than narrowing it to the black letter of it body.[168] In this light it can be concluded that the omission of a specific minority group in the African Charter does not entail that the group is denied recognition and protection under the African Charter.[169] Taking this inclusive and expansive manner of interpreting the African Charter as a trend, it can be said that the African Commission has progressively given indication that sexual orientation and gender identity is a prohibited ground of discrimination through the adoption of Resolution 275. The significance of Resolution 275 is discussed separately. Here, it suffices to state that its adoption is indicative of the fact that the African Commission is not closed eyed to the rights of sexual and gender in so far as protection under the Charter is concerned.

Third, the African Commission and indeed the Court are mandated, under article 60 of the African Charter, to 'draw inspiration from international law on human and peoples' rights" such as the UDHR, the ICCPR and the ICESCR. Article 60 is couched in mandatory language, thereby making it a duty of the African Commission and the Court to use the jurisprudence developed by the treaty bodies which monitor these instruments. This is closely related to the earlier point that the drafting of the Charter was highly inspired by the contents of the UN treaties and the Inter-American instruments.[170] As such in the *Endorois* case the African Commission acknowledged that 'it is enjoined under the Charter to be inspired by international law in determining rights under the Charter', and as such in defining Indigenous peoples' and finding that such peoples' had protection under the African Charter, the African Commission used the jurisprudence of the UN Working Group on Indigenous Populations.[171] This argument is strengthened by contrasting articles 60 and 61, which leave no room for the African Commission to act otherwise, while article 61 says 'the African Commission shall take into consideration, as subsidiary measures to determine the principle of law […]' which leaves room for the Commission to decide otherwise upon such consideration. In essence this thesis argues that article 60 requires the African Commission to use international law a source, while article 61 requires the Commission to simply think about other laws before making its decision but not necessarily follow them if they don't see it fit to do so. Given that the international human rights law jurisprudence from the UN system, the European system and the Inter-American system all interpreted sexual orientation and gender identity as a prohibited ground of discrimination in their respective treaties, it can be argued that the African Commission is compelled to do the same under its interpretive mandate.[172]

The fourth reason is perhaps more philosophical, but nevertheless a cardinal one bearing in mind the narratives on sexual diversity in Africa, especially as they filter into individual member states of the AU. One of the fundamentals of the Charter is that, in agreeing to its substantive provisions, the

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168 See also *Amnesty International v Zambia* (1999) ACHPR/Comp/212/98, *Free Legal Assistance Group and Others v Zaire* (1995) ACHPR/Comp/25/89/100.

169 Murray & Viljoen (n 151) 91.

170 Murray & Viljoen (n 151) 91.

171 The African Commission has often recognised this interpretive mandate. For instance, in the *Endorois* case the Commission stated it was enjoined to under the Charter to be inspired by international law in determining the rights under the Charter, and as such in defining indigenous peoples and finding that such Peoples had protection under the African Charter, the Commission used the jurisprudence of the UN working group on indigenous populations. See para 152, *Endorois* case.

172 A Rudman 'The protection against discrimination on the basis of sexual orientation under the African human rights system' (2015) 15 *African Human Rights Law Journa*l 16.

member states of the AU were taking 'into consideration the virtues of their historical tradition and values of the African civilization'[173] and further that these virtues of the historical tradition and values of African civilization should 'inspire and characterize their reflection on the concept of human and peoples' rights'.[174] With respect to sexuality and gender, Chapter 2 discussed that the virtues and values of traditional African societies were tolerance, inclusion and acceptance of sexual and gender minorities. The body of literature on this subject is significant and authoritative.[175] Any narrative to the contrary really represents one of the 'lies we have been told' about African sexuality.[176] In a nutshell, the virtues and values of traditional African societies inspires an interpretation of the Charter that includes sexual orientation and gender identity as a prohibited ground of discrimination.

The last reason relates to the gravity of the discrimination and other human rights violations on sexual and gender minorities in Africa. It is not contested that sexual and gender minorities in Africa suffer some of the worst human rights violations and are among the most marginalised in policy formulation and implementation.[177] Given that article 2 prohibits the most serious forms of discrimination and given the gravity of human rights violations against sexual and gender minorities in Africa, it follows that sexual orientation and gender identity falls within the scope of discrimination the Charter seeks to prevent. Thus 'other status' is the open ended and inclusive language that the Charter can be said to have to ensure protection of individuals and peoples' not explicitly covered in article 2, in this case sexual and gender minorities.

Based on the above it can be said that the Charter provides protection for sexual and gender minorities in Zambia in two ways. First, it can be used at domestic level to complement and strengthen the constitutional provisions on equality, non-discrimination and all the other principles earlier discussed, with the view of establishing that at constitutional level, sexual orientation and gender identity is a prohibited ground of discrimination. To this end, arguments regarding the constitutionality of the anti-sodomy laws can be made considering Zambia's international obligations as set out in the Charter. As seen above, Zambian Courts have on many occasions used international law in decisions. In this regard the case of *Amnesty International v Zambia* is instructive, wherein the African Commission said:

> Article 2 of the Charter reads: "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 and social origin, fortune, birth or other status"[…] This Article imposes an obligation on the Zambian Government to secure the rights protected in the African Charter to *all* persons within their jurisdiction.[178]

The import of the above arguments is that sexual and gender minorities are entitled to enjoy the rights enshrined in the Charter, and domestically the state has the obligation to ensure their enjoyment through the synergized interpretation of the Constitution and the Charter.

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173 See para 5 of the Preamble of the African Charter.
174 As Above
175 See Chapter 2 of this thesis.
176 See T Msibi 'Lies we have been told: On (Homo) sexuality in Africa' (2015) 58 *Africa Today* 56.
177 For see IGLA reports https://ilga.org/state-sponsored-homophobia-report (accessed 30 April 2020)
178 *Amnesty international v Zambia* (n 154) para 42,4. (emphasis added).

Second, if local remedies fail, the African Commission remains an open forum to escalate the argument, this time primarily using the provisions of the Charter in an inclusive manner as argued above. However, this is in no way an invitation or suggestion that the timing is ripe for such an action to be taken to the African Commission or the Court. As Jjuuko advises, an incremental approach is most appropriate given the political, social, and legal challenges that still exist regarding sexual diversity in Africa.[179]

Viljoen points out that provisions of the Charter that provide room for protection of the rights of sexual and gender minorities include article 3 on equal protection of every individual before the law, article 4 and 5 on the right to life, integrity of the person and prohibiting torture and other cruel, inhuman, and degrading treatment.[180] These and other provisions in the Charter have of course to be read with article 2 of the Charter.

4.3.2.2. The constituent obligations of Resolution 275 on Protection against Violence and Other Human Rights Violations against Persons on the Basis of Their Real or Imputed Sexual Orientation or Gender Identity

Resolution 275, which came after years of advocacy by civil society and human rights defenders in Africa, deserves special mention not only because it is the first formal resolution and expression of the African Commission regarding the protection of sexual and gender minorities in Africa, but also because it is an interpretive tool of the African human rights system with respect to states obligations towards sexual and gender minorities under the African Charter and its protocols.[181] As an interpretive document, Resolution 275 contains what this thesis terms as 'constituent obligations', which can be read into the Charter with respect to sexual and gender minorities in Africa and Zambia as a state party. Above, the Chapter argued for an expansive and inclusive interpretive approach to the Charter and, as promised, this part now highlights how Resolution 275 aids the expansive and inclusive interpretation using its constituent obligations discussed below.

Resolution 275 was the result of a carefully planned and implemented strategy by civil society within and outside Africa working together towards the promotion and protection of the rights of sexual and gender minorities on the continent. Nibogora documents that the first step was to decide whether to file a communication, push for a general comment or a resolution before the African Commission.[182] The civil society actors decided to push for a resolution because at the time the African Commission had not started the practice of making general comments before 2012 and a communication was an option that activists and scholars had consistently cautioned against given the uncertainty of the outcome and the risk of setting a negative precedent on sexual and gender minority

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179 A Jjuuko *Strategic litigation and the struggle for lesbian, gay, and bisexual equality in Africa* (2020) 13-36.

180 Viljoen (n 152) 168.

181 The Resolution was adopted by the African Commission in 2014 at its 55th session held in Luanda, Angola. For a full discussion on the advocacy leading up to Resolution 275 see B Nibogora 'Advancing the rights of sexual and gender minorities under the African Charter of Human and Peoples' Rights: The journey to Resolution 275' in Durajaye, Mirugi-Mukundi & Ngwena (eds) *Advancing sexual and reproductive health and rights in Africa* (2021) 172.

182 Nibogora (n 181) 176.

rights which would have been difficult to reverse.[183] The strategy also focused on violence because violence is unanimously rejected and would be the least controversial theme even in homophobic states. Further, acts of violence against sexual and gender minorities in Africa. With the strategy set, the action plan was to create visibility of sexual and gender minority in Africa through participation at the sessions of the African Commission. The civil society actors involved made statements, produced shadow reports and held side events between 2012 and 2014.[184] Solidarity was built around the need for a resolution and draft resolution was adopted at the NGO Forum in 2013.[185] The draft resolution was tabled before the African Commission and was adopted at its 55th session in Luanda, Angola.

The preamble of the Resolution deliberately makes reference to articles 2, 3, 4 and 5 of the Charter, thereby it is explicit that sexual orientation and gender identity are prohibited grounds of discrimination under the Charter, that sexual and gender minorities have equal protection and recognition before the law, and that they are entitled to respect of their life, dignity, integrity of the person as well as freedom from torture, cruel and other degrading treatments. In this respect it can be said that the Resolution reads sexual orientation and gender identity into these Charter provisions and thereby 'announces' the attendant obligations on states as found in the Charter. Read in the context of the preamble of Resolution 275, the Charter creates the general obligation on states – in line with article 1 – to recognize the rights, duties and freedoms enshrined in the Charter *with respect to sexual and gender minorities* and undertake to adopt legislative or other measures to give effect to them. It is hard to imagine that after the preamble and substantive contents of Resolution 275, the African Commission or indeed the African Court would denounce the applicability of articles 1, 2, 3, 4 and 5, specifically, and the whole Charter, generally, towards the protection of sexual and gender minorities.

Article 1 of the Charter can also be read in the context of the last paragraph of the Resolution. It 'strongly urges States to end all acts of violence and abuse, whether committed by State or non-state actors, including by enacting and effectively applying appropriate laws prohibiting and punishing all forms of violence including those targeting persons on the basis of their imputed or real sexual orientation or gender identities, ensuring proper investigation and diligent prosecution of perpetrators, and establishing judicial procedures responsive to the needs of victims'. The presence of anti-sodomy laws in African states makes difficult, if not impossible for states in Africa to end violence and even worse, makes states and non-state actors perceive acts of violence against sexual and gender minorities as a legitimate enforcement of the laws. In this light this Chapter argues that a specific constituent obligation of states under the Charter brought to light by Resolution 275 is to decriminalise their anti-sodomy laws and further to enact laws that will mitigate the impact of their 'former' existence as catalysts of violence.

Interrelated to the above constituent obligation is the obligation to adopt administrative measures and procedures that ensure effective investigations, court processes and safety of victims

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183 As above.

184 As above.

185 A report on violence against sexual and gender minorities in Africa produced by the different civil society actors and launched at the NGO Forum was crucial as it highlighted the magnitude of human rights violations based on sexual orientation and gender identity in Africa. The then Special rapporteur on the situation of human rights defenders in Africa was present at the NGO Forum and co launched the Report. Nibogora (n 181) 180.

through safe houses including rehabilitative measures of victims of corrective rape or other traumatising violence. There is therefore an aspect of resource planning through mobilisation and budget allocation.

Related to the constituent obligation to ensure effective administrative and procedural measures are taken is the promotional obligation of the rights of sexual and gender minorities. The promotional obligation takes two forms. One is the general human rights duty of states to promote the rights in the Charter and the other the specific promotional duty which takes the form of training administrative, judicial, law enforcement and other relevant officers in the rights of sexual and gender minorities. The specific duty to ensure that public officers are trained ensures the actualisation of the resolution and requires the mainstreaming of sexual and gender minority rights in the general human rights discourse and systems of the state. An example is to include a resocialisation training in the police curriculum so that police officers are not only aware of the rights of sexual and gender minorities but also that they have a change in attitude towards them. This is applicable to all specific promotional trainings that the state conducts.

The general duty and constituent obligation to promote the rights of sexual and gender minorities through creating public awareness is consistent with article 25 of the Charter which requires state parties to 'promote and ensure through teaching, education and publication, the respect of rights and freedoms in the Charter'. In essence, resolution 275 cannot be actualised if the public are not sensitised on the rights of sexual and gender minorities as victims of violence. The public awareness should also include informing the public on the new criminal and other laws that the state is enacting towards better actualisation of Resolution 275.

Another important constituent obligation that Resolution 275 brings out is with respect to the role of civil society and human rights defenders. The obligation to carry out promotional activities so that the public and public officials as well as private actors are sensitised requires the state to create an enabling environment for civil society to operate. Thus, where previously states where denying the registration of civil society organisations that work in the area of sexual orientation or gender identity, they now have the obligation to ensure their registration. In calling for states to ensure that human rights defenders and civil society work in an enabling environment, the resolution can be said to be evoking articles 10 and 11 of the Charter whose normative content include the right to registration and effective participation in the life of society as stated in the African Commission's guidelines on freedom of association and assembly.[186] The guidelines include sexual orientation and gender identity as a prohibited ground of discrimination in the enjoyment of freedom of association under article 10 and freedom of assembly under article 11 of the Charter.[187]

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[186] 'African Commission Guidelines on Freedom of Association and Assembly in Africa' (2016) para 81 https://www.achpr.org/public/Document/file/English/guidelines_on_freedom_of_association_and_assembly_in_africa_eng.pdf (accessed 28 May 2021). The guidelines were preceded by the Commission's 'Report of the Study Group on freedom of association and assembly in Africa' (2014) which observed that civil society and human rights defenders who work in the area of sexual orientation and gender identity were among the most affected in terms of violations of articles 10 and 11 of the Charter. See Preface, para 31 and 45. https://www.achpr.org/public/Document/file/English/report_of_the_study_group_on_freedom_of_association__assembly_in_africa.pdf (accessed 28 May 2021).

[187] As above.

Notably since Resolution 275, the African Commission has made several references to sexual orientation and gender identity in some interpretive instruments of the African Charter. For example, under Paragraph 3 of Resolution 376 on the situation of human rights defenders in Africa, the African Commission calls upon states to 'adopt specific legislative measures to recognise and protect human rights defenders [...] including those working on issues such as [...] sexual orientation and gender identity'.[188] Under paragraph 20 of General Comment 4 on the rights to redress for victims of torture and other cruel, inhuman or degrading treatment, the African Commission states that 'the general comment uses a non-exhaustive list of grounds of discrimination. These include [...] sexual orientation, gender identity [...]'.[189] When read together with the Charter and Resolution 275, it is apparent that the African Commission accepts and recognises sexual orientation and gender identity as a prohibited ground of discrimination, thereby placing on states party to the African Charter and its protocols, the obligation to respect, protect and fulfill the rights of sexual and gender minorities.

4.3.3 Obligations under the United Nations treaty system

At global level, Zambia is member of the United Nations (UN) and a state party to most of the human rights treaties under the UN human rights system.[190] In this regard, Zambia is bound by not only by the jurisprudence of the treaty bodies of the UN human rights system but also the resolutions of the Human Rights Council.

While some contestations remain under the African human rights system with respect to sexual orientation and gender identity as subjects of protection in the African Charter and its different protocols, the UN system is express and unambiguous on the matter. As such one needs not labour to make the point that sexual orientation and gender identity are prohibited grounds of discrimination under the respective human rights treaties of the UN[191] and therefore, that under the relevant treaties, Zambia as a state party, has obligations to ensure equality and non-discrimination of sexual and gender minorities in the actualisation of the rights in those treaties. This clarity is found in the jurisprudence of the treaty monitoring bodies. For example, in the *Toonen* case,[192] the Human Right Committee (HRC) held that laws criminalising consensual same-sex conduct between adults violated the right to privacy under article 17(1) and to protection from discrimination on the basis of 'sex' under article 2(1) and 26 of the ICCPR.[193] In so deciding, the HRC stated that the only effective remedy with respect to the violation caused by anti-sodomy was – in that case the laws of Tasmania— was to repeal them. In essence, through the *Toonen* case, the HRC created the jurisprudence that the reference to 'sex'

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188 Resolution 376 on the situation of human rights defenders in Africa, ACHPR/Res.376 (LX) 2017, https://www.achpr.org/sessions/resolutions?id=419 (accessed 30 November 2022).

189 General Comment number 4: The right to redress for victims of torture and other cruel, inhuman or degrading treatment https://www.achpr.org/public/Document/file/English/achpr_general_comment_no._4_english.pdf (accessed 30 November 2022).

190 Apart from ratifying the major human rights and pollical instruments of the UN Zambia has also accepted the individual complaints procedures under the ICCPR, the CAT and the ICPPED. For detailed information of Zambia's state of ratification see https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=194&Lang=EN (accessed 21 May 2021).

191 K O'Halloran *Sexual orientation, gender identity and international human rights law: A common law perspective* (2020) 51.

192 (1994) Com 488/1992/CCPR/C/50/D, para 1.

193 *Toonen* case, para 10.

under articles 2(1) and 26 of the ICCPR includes 'sexual orientation'.[194] Equally important, and relevant in the contestation of heterosexual nationalism in countries like Zambia, was the holding by the HRC that 'moral issues are not exclusively a matter of domestic concern, as this would open the door to withdrawing to the Committees scrutiny by a potentially large number of states'.[195] Since the *Toonen* case, the HRC has developed its jurisprudence in various cases, all of which affirm the position that states have an obligation to respect and protect the rights of sexual and gender minorities under the ICCPR.[196] The concluding observations of the HRC have reiterated the jurisprudence from its decisions. Thus, during Zambia's review in 2007, the HRC noted with concern that the Penal Code criminalises same sex sexual activities between consenting adults in breach of articles 17 and 26 of the ICCPR.[197] Artilce 17 is on the right to privacy and protection from unlawful interference or attacks which were elaborated on in the Toonen case and article 14 is on equal protection before the law. In essence it can be argued that under the ICCPR, Zambia is under an obligation to decriminalise consensual same-sex sexual conduct between adults through the repeal of its anti-sodomy laws.

The Committee on Economic Social and Cultural Rights (CESCR) in its various General Comments and Concluding Observations, has also clearly stated that the reference to 'sex' and 'other status' in article 2(2) of the ICESCR includes sexual orientation and gender identity thereby imposing on states the obligation to ensure equality and non-discrimination of sexual and gender minorities in the actualisation of the rights in the ICESCR.[198] For instance, General Comment 20 'on the non-discrimination under the ICESCR' emphasizes that states should ensure that a person's sexual orientation or gender identity 'should not be a barrier to realising the rights in the Covenant' as 'they are prohibited grounds of discrimination under the covenant'.[199] In General Comment 14, the ICESCR reiterates that states should ensure that marginalised groups such as sexual and gender minorities are given priority in the provision of health care and in fulfilling the underlaying determinants of health such as access to food, housing, employment, safe water, access to information and education.[200]

The treaty bodies of thematic treaties such as the Committee on the Rights of the Child, the Committee against Torture and the Committee on the Elimination of All Form of Discrimination against Women, of which Zambia is a state party to the treaties under which the Committees have been set up to monitor, have also pronounced themselves on the fact that sexual orientation and gender identity are prohibited grounds of discrimination within the context of the respective specialised

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194 *Toonen* case, para 8.7.

195 Para 8.6.

196 *Joslin v New Zealand*, Communication No. 902/1999, U.N. Doc. A/57/40 at 214 (2002); *Young v Australia*, Communication No. 941/2000, UN Doc CCPR/C/78/D/941/2000 (2003) 5 IHRR 747, IHRL 1921, UNHRC (2003); and *X v Colombia*, Communication No. 1361/2005, U.N. Doc. A/62/40.

197 https://www2.ohchr.org/english/bodies/hrc/docs/AdvanceDocs/CCPR.C.ZMB.CO.3.CRP.1.pdf (accessed 9 May 2023).

198 See CESCR General comment no. 20, 2009, para 32.

199 As above.

200 CESCR General Comment on the right to the highest attainable standard of health, 2000, para 11, 18 & 19. The CESCR took a similar view in General Comment no. 15, 2002 on the right to water, General Comment No. 18, 200. on the right to work,

treaties.[201] For instance, General Comment 15 of the CRC specifically states that children should be protected from discrimination and abuse on the basis of their sexual orientation and gender identity.[202]

The UN Charter-based system also provides value in interpretation of Zambia's obligations with respect to sexual and gender minorities. At this level Zambia has expressed its heterosexual nationalism by voting against resolutions and rejecting recommendations to do with the protection of sexual and gender minorities.[203] As a member of the Human Rights Council between 2008 and 2011, Zambia abstained from voting on Resolution 17/19, which was the first Human Rights Council resolution on sexual orientation and gender identity.[204] Under the UPRM Zambia is obliged to provide information on how it has ensured the protection of the rights of sexual and gender minorities. As at 30 July 2022, Zambia's latest review was in 2018. Among the recommendations was that 'Zambia should fully implement the principle of equality and non-discrimination particularly in relation to persons with HIV, persons with albinism and LGBTI persons'.[205] Zambia did not support this recommendation with respect to 'LGBTI persons'.[206] This contestation has to an extent manifested at domestic level, as programmatically, Zambia has not mainstreamed sexual orientation and gender indemnity in its interpretation of Sustainable Development Goals (SDG's) apart from the aspects on health. In seeking to achieve universal health coverage, the National health policy has included sexual and gender minorities as key population in the national response to HIV.[207]

As with the African Charter, Zambia has not domesticated any of the UN human rights treaties, with the exception of the CRPD, as well as some parts of CEDAW and the CRC.[208] However, as earlier observed, the Constitution of Zambia contains some of the universal aspects of international human rights law. And this is where the value of the UN treaty and to a certain extent the Charter system lies. In seeking the protection of sexual and gender minorities at the domestic level, the constitutional provisions on equality, non-discrimination, citizenship, human dignity, social justice, rights against torture and the Bill of Rights, in general, the jurisprudence of the treaties bodies can be used to enrich and supplement the interpretation of the provisions. This is more so bearing in mind that these constitutional principles mirror customary international law from the UDHR and the developed jurisprudence of treaty monitoring bodies.[209] Again, as with the African Charter, the second value of the UN system is that it provides an avenue for sexual and gender minorities and all citizens generally to seek redress for human rights violations subject to the satisfaction of the procedural requirements, such as exhaustion of local remedies. Thus, for instance, sexual and gender minorities can seek redress

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201 O'Halloran (n 191) 53.

202 CESCR General Comment 15, 2013 on the right to health of children para 8.

203 UNGA, Human Rights Council Resolution No. A/HRC/RES/17/19 adopted at the 17th Session of the Human rights council 24 states in favour, 19 against and 3 abstaining.

204 As above.

205 The Universal Periodic Review engagement to place during the 28th session of the Universal Periodic Review (UPR) Working Group in November 2017 and the final report of Zambia's review was adopted at the 37th session of the Human Rights Council in 2018. See https://www.ohchr.org/_layouts/15/WopiFrame.aspx?sourcedoc=/Documents/Issues/SDGS/2020VNRCountries/ZAMBIA.pdf&action=default&DefaultItemOpen=1 (accessed 21 May 2021).

206 As above.

207 'National HIV/AIDS strategic framework (NASF) 2017-2022' (2016) 11.

208 See n 135.

209 Viljoen (n 130) 518.

to HRC for non-registration of their organisations, once domestic remedies have been exhausted, or seek the redress through the independent expert on sexual orientation and gender identity.[210]

4.4. The impact of anti-sodomy laws on the rights of sexual and gender minorities in Zambia

4.4.1. Magnitude and micro impact of the mischaracterisation of anti-sodomy laws on the rights of sexual and gender minorities

The combined impact or effects of the mischaracterisation and the misapplication of anti-sodomy laws is a devastating promotion of discrimination, stigma and other forms of human rights violations against sexual minorities.[211] From the previous chapters, it is not surprising that this impact has political and social approval.[212] This, in itself, highlights the magnitude of the problem. This thesis takes the view that an examination of the actual micro impact of anti-sodomy laws on the rights of sexual and gender minorities is important to answer part of the questions in the research. As shown below, the impact manifests itself in different but interrelated ways, and affects a range of human rights of sexual and gender minorities. Using data from different reports on lived experiences of sexual and gender minorities in Zambia, this part highlights the impact of the mischaracterisation of anti-sodomy laws on the rights of sexual and gender minorities in Zambia.

4.4.2. Violence against sexual minorities

As deviance theory states, most societies see violence against 'sexual deviants' as justifiable.[213] In the case of sexual and gender minorities, anti-sodomy laws are seen as a license to carry out violent homophobic attacks on them. A TBZ report states that physical and mental violence is carried out against sexual and gender minorities by the police and general public in the name of enforcing the anti-sodomy laws of Zambia.[214] According to that report some trans men indicated that they were raped by police as a form of punishment and 'correction'.[215] Sexual violence as a form of correction is reported as an occurrence in the life time of most sexual and gender minorities in Zambia.[216] For example, one qualitative study on violence and well-being of sexual and gender minorities reports as follows:[217]

> When disaggregated by sexual orientation and gender identity, we found that 43% of lesbian women had experienced sexual violence in their lifetime (15% in the past year). Of all participants who identified as gay men, one in three (30%) had experienced sexual violence in their lifetime, and 13% in the previous year. Of all bisexual participants, one in three (38%) had experienced sexual violence in their lifetime, and one in four (26%) in the past year. Notably, bisexual women experienced much higher

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210 For the full mandate of the independent expert see Human Rights Council Resolution 32/2 of 2016 and 41/18 of 2019 at https://www.ohchr.org/EN/Issues/SexualOrientationGender/Pages/Index.aspx (accessed 20 May 2021).

211 For a global perspective see Report of the United Nations High Commissioner for Human Rights 'Discrimination and violence against individuals based on their sexual orientation and gender identity' (2015) UNHCHR A/HR/29/23.

212 D Ottosson *State sponsored homophobia* (2008) 2-3.

213 R Rich *The Sociology of criminal law: Evaluation of the deviance of the Anglo-American society* (1979) 7.

214 Transbantu Association of Zambia (TBZ) *Findings of Human Rights Violations Report 2013-2015* (2016) 15.

215 As above.

216 A Muller & K Daskilewicz 'Are we doing alright: Realities of violence, mental health and access to healthcare related to sexual orientation and gender identity and expression in Zambia' (2019) 39.

217 As above.

> levels of sexual violence than bisexual men: over half (57%) in their lifetime (compared to 19% of bisexual men); and more than one in three (35%) in the past year (compared to 16% of bisexual men). Participants with non-normative sexual orientations had experienced levels of sexual violence similar to lesbian women.

The above data means that sexual and gender minorities experience more violence compared to the general heterosexual population. The latest Zambia Demographic Health Survey (which is conducted every 10 years in Zambia)[218] found that 17 per cent of women had experienced sexual violence in their life time which according to Muller entails that lesbian women experience 2,5 times more sexual violence; transgender women almost 3 times more sexual violence, and bisexual women experience more than 3 times more sexual violence in their lifetime.[219] Other forms of violence are equally prevalent. The Panos institute of Southern Africa records that physical violence against sexual and gender minorities in Zambia is often unreported and seen as legitimate, with any contestation against it labelled as a challenge to the law and the constitutional declaration of Zambia as a Christian nation.[220] Another study by USAID, FHI-360 and NAC found that 'the criminalisation of consensual same-sex relations has created an impression that physical violence against sexual and gender minorities is legal'.[221] The study, which was conducted through focused group discussions, records accounts of violence and ill treatment of sexual and gender minorities from four Zambian Provinces, namely, Lusaka, Copperbelt Province, Central Province and North West Province. The accounts are similar and point to the criminal justice system, mainly the police as perpetrators of violence.[222] One account is of a young gay man in Solwezi district of the Northwest Province who was tied to a table and beaten for three days at a police station.[223]

Such treatment of sexual and gender minorities amounts to torture, cruel and degrading treatment which is prohibited by the Constitution and international human rights law. All three reports cited above also bring out the point that sexual and gender minorities fear taking action against the police and other perpetrators of violence against them, in court or other oversight institutions such as the Police Complaints Commission (PCC) because that would lead to further, and even worse victimisation. This is so because if they did report, they will have to 'out' themselves and this will turn the table against them. The knowledge by police and the public in general that sexual and gender minorities have nowhere to lodge complaints perpetrates violence, extortion and discrimination against them.[224] A compounding factor is that sexual and gender minorities in Zambia are generally economically disempowered and as such they do not have access to legal services that can effectively and confidentially represent them.

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218 Due to the Covid-19 outbreak the 2020 Demographic health survey was not conducted and as such the current official data remains the 2014 results.

219 Muller & Daskilewicz (n 216) 40-41. The data in Zambia is consistent with data from other African countries in that sexual and gender minorities experience more violence than the general heterosexual population.

220 Panos Institute *Towards non-discrimination on the basis of sexual orientation and gender identity in Zambia* (2013) 10.

221 USAID & FHi-360 'Understanding the legal barriers to HIV/AIDS services by key populations in Zambia: findings from expert panels in Zambia' (2018) 5-8.

222 As above.

223 As above.

224 R Thoreson 'Blackmail and extortion of LGBTI People in Sub-Saharan Africa' in S Cook and R Thoreson (eds) *Nowhere to turn: Blackmail extortion of LGBTI people in sub-Saharan Africa* (2007) 4.

Overall, while the incidents of violence are not reported or seen as newsworthy, the data confirms that the Zambian incidents of violence against sexual and gender minorities is high. Compared to other countries, the data suggests the following:[225]

> The levels of physical violence among sexual and gender minority people in our Zambian study are not only higher than the levels of violence among the general Zambian population, they are also higher than the levels of violence among sexual and gender minority populations elsewhere in the world.

In light of this impact, it can be argued that anti-sodomy laws represent a constructive delegation of state power of enforcing the law to citizens who have the zeal to inflict violence and homophobic attacks against minorities in the name of that law.[226]

4.4.3. Marginalisation in health services provision

The mischaracterisation of anti-sodomy provisions as laws that criminalise homosexual orientation have a particular negative impact on the right to health of sexual and gender minorities in Zambia. This is because the law acts as a barrier to accessing health services, facilities and utilities.[227] One way in which anti-sodomy laws causes this impact is that it affects the health seeking behaviour of sexual and gender minorities in that they fear seeking services as that may result in arrest.[228] For example, both the Panos and the USAID & FHi-360 report that sexual and gender minority participants do not generally seek health care services for fear of arrest.[229] This form of self-regulation and internalised stigma is where governmentality and labelling theory meets (as discussed in Chapter 1) as sexual and gender minorities internalise the criminal label and thus regulate themselves as if they are actually criminals at the expense of their own rights.

Apart from self-regulation, the problem of access to health care is compounded by the negative attitude of health care workers towards sexual and gender minorities. Some health care workers have reported sexual and gender minorities to the police while they were receiving treatment.[230] In one instance a medical officer who was treating a gay man called the hospital management 'to come and look at how a gay person with anal warts looks like' and later had him arrested without providing actual treatment.[231] He was only released after the police extorted money from him. Further most of the recorded lived experiences are that once they inform health care workers of their sexual orientation or gender identity, the health care workers refuse to provide services to them citing either their religious beliefs or that they 'do not want to be arrested for treating homosexuals'.[232] The belief that providing health services to sexual and gender minorities is a crime was a key finding in the FHi-360 study as

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225 Muller & Daskilewicz (n 216) 40-41.

226 For instance, no arrests or calls for arrests are made for persons who have committed offences against sexual minorities. Statements fuel homophobia are never condemned by the government but instead such statements are welcome. This is a manifestation of heterosexual nationalism.

227 USAID & FHi-360 (n 2211) 10.

228 L Mundia *et al* 'exclusion of sexual minorities in health care education in Zambia' (2019) 15 *European Scientific Journal* 25.

229 USAID & FHi-360 (n 221) 18, TBZ (n 204) 24 and Panos (n 210) 9.

230 USAID & FHi-360 (n 221) 18.

231 As above.

232 Muller & Daskilewicz (n 216) 41.

well as the Panos study earlier cited. As already stated, this belief is compounded by the already existing negative social perception and homophobic labelling of sexual and gender minorities. As argued in Chapter 3, regarding the media, the lack of knowledge on sexual diversity and the heterosexual socialisation of professionals affect their ability to provide indiscriminate quality services. To that effect, sexual and gender minorities are particularly vulnerable to physical and mental ill health.[233]

A serious example of this impact is that sexual and gender minorities are susceptible to HIV and yet are left behind in the main line HIV/AIDS response.[234] Like most countries, Zambia has a high incidence of HIV among sexual minorities in particular.[235] One reason for this is that lubricants and other utilities that can be used to mitigate the risk of HIV infection cannot be imported legally into Zambia, and alternative means of lubrication have proven to be ineffective.[236] Another reason is that sexual and gender minorities lack access to anti-retroviral treatment (ART) due to fear of seeking health services from both private and public hospitals.[237] Most times health care providers have reported sexual minorities to the police stating that seeking HIV related services indicates sodomy.[238] Thus HIV infection rate among sexual and gender minorities continues to be high and equally affects to heterosexuals due to bisexual intercourse.[239] Bisexual intercourse is, according to the Panos report, one of the main drivers for HIV infection in Zambia:[240]

> Sexual minorities live in fear of being stigmatised, blackmailed, attacked, raped or killed by their workmates, family members, neighbours and other members of the community. This harsh treatment pushes the sexual minority populations to the margins of society where they live double lives so as not to be identified as such. They find themselves in heterosexual relationships as a cover up while they are also in sexual relationships with people of the same sex. This tends to put them, and their partners at a higher risk of contracting HIV while increasing the risk of blackmail and stigma if found out.

In light of the above, the national HIV response strategy has not been effective. For this reason, the UN (through the UNAIDS and the UNDP) has termed sexual and gender minorities and other minorities as a 'key population' and has called upon member states to include them in their national

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233 TBZ (n 214) 21.

234 'National HIV/AIDS strategic framework (NASF) 2017-2022' (2016) 11. The NASF is the first official government document to recognise sexual minorities. It recognises them as key populations and acknowledges that sexual minorities are key to the National HIV response.

235 As above.

236 National Scientific research Centre & Panos Institute Southern Africa 'Combating HIV among men having sex with men in Zambia' (2016) 22. The report was based on a study that was carried out over a period of 2 years and is the most comprehensive study on HIV and sexual minorities in Zambia. It was conducted under the mandate of the National HIV/AIDS Council of Zambia and the Ministry of Health. It helped to give an empirical basis for the inclusion of sexual minorities in the National response against HIV through the NASF.

237 USAID & FHi-360 (n 221) 10.

238 Trans Bantu Association of Zambia (n 214) 19 and USAID & FHi-360 (n 201) 10.

239 The study was conducted against a sample of 332 sexual minority persons. Out of that sample 54.2% identified themselves as bisexual, 43.3% as homosexual (52% gay men and 48% lesbian women) and 2.4% transgender. Some sexual minority persons are not bisexual but are forced by circumstances to engage in both homosexual and heterosexual sex conduct as a way of fitting in society. Others go to the extent of being married and having families. These statistics are very difficult to verify because most sexual minorities live underground in Zambia and so it is difficult to have accurate demographics of the sexual minority population.

240 As above.

HIV response strategies.[241] The term 'key population' is used to indicate the fact that these minorities are key to successful attainment of Sustainable Development Goal number 3.2, which aims to eradicate HIV, tuberculosis, malaria and other ignored tropical diseases by 2030.[242] The SDG's or Agenda 2030 come with the pledge that UN member States will 'leave no one behind' and therefore prioritise the poorest and most marginalised populations.[243]

Keeping to this commitment, Zambia through the National Aids Council (NAC) launched and is now implementing the National HIV Strategic Framework (NASF) which includes sexual and gender minorities as a key population.[244] Among the strategies was the opening of a special and confidential clinic for sexual minorities. However, within months of operating the media got hold of the existence of the clinic and made a series of negative reports about it.[245] Days after the report, police invaded the premises of the clinic and it was closed down.[246] This has impacted on the ability of NAC to effectively implement the NASF with regard to sexual and gender minorities as they cannot be included in the main line health care system.

What is worth noting is that in Zambia, like in most states in Africa, the policy and programmatic inclusion of sexual and gender minorities in the health system has been catalysed by HIV. While this is a positive in the sense that it has made sexual minorities and other key populations visible, it is still problematic in that it does not end or address the root problem of the stigma and discrimination generally and in the health system, in particular, as sexual and gender minorities cannot access health services that are not HIV related. Addressing this point, the UNDP report on men who have sex with men in Zambia states:[247]

> Because the HIV epidemic has raised the visibility of "key populations," more attention has been paid to health than any other issues for sexual and gender minorities. Despite this, gay and bisexual men, other men who have sex with men and transgender women continue to receive disproportionately little HIV investment, policy attention, dedicated staffing and focused programming. Beyond HIV, the inattention to sexual and gender minorities and issues is even more striking.

4.4.4. Impact on mental and psychological well being

Plodder and Pierre state that in countries with anti-sodomy laws the constant fear of arrest, discrimination and violent attacks is the main cause of mental illness for most sexual and gender minorities, to the point that they may attempted suicide.[248] This is corroborated by the situation of mental illness among sexual and gender minorities in Zambia. The levels of depression, anxiety, stress and suicidality is high.[249] With respect to suicidality, Muller and Daskilewicz report as follows:[250]

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241 See https://www.unaids.org/en/topic/key-populations (accessed 1 December 2022).
242 See https://sdgs.un.org/goals (accessed 14 June 2022).
243 As above.
244 NASF (n 207) 11-12.
245 See http://www.daily-mail.co.zm/clandestine-homosexuality-meetings-worrying/ (accessed 14 June 2022).
246 As above.
247 UNDP *Zambia legal environment assessment for TB, HIV, sexual and reproductive health rights* (2018) 41
248 Plodder & Pierre 'Mental health of sexual minorities' (2015) 27 *International Review of Psychiatry* 367.
249 Muller & Daskilewicz (n 216) 49-56.
250 As above.

> Sexual and gender minority participants in our study showed much higher levels of thinking about and attempting suicide. The level of suicide attempts among the sexual and gender minority Zambians in our sample was more than 15 times that of suicide attempts among Zambians living with TB or HIV (52% in our overall sample versus 3% among Zambians living with HIV or TB). More sexual and gender minority people in our sample had thought about suicide in the past year alone than Zambians living with HIV at any point in their life (23% in our sample in the past year versus 9% of women with HIV/ 5% of men with HIV at any point in their life).

According to TBZ, gender minorities are particularly vulnerable to depression, anxiety and stress.[251] Although not officially recorded, suicide has occurred predominantly among adolescent gender minorities.[252] Muller and Daskilewicz report that 3 in 5 transgender women are medically classified as depressed, while 2 in 5 transgender men are classified as depressed.[253]

The coping mechanisms for mental stress, anxiety, suicidality and experiences of violence are usually alcohol and drug abuse.[254] The levels of alcohol and drug abuse are thus higher among sexual and gender minorities than the general population in Zambia.[255] Psychosocial support services are not available for sexual and gender minorities in main line public health system in Zambia, while private services are prohibitively expensive.[256] In essence, while enjoyment of the right to health and its underlying determinants as contained in General Comment 14 is a challenge for all Zambians, the challenge is significantly worse for sexual and gender minorities.

4.4.5. Non-registration and deregistration of sexual and gender minority right organisations

Another impact of anti-sodomy laws is that organisations seeking to promote the rights of sexual and gender minorities, or to provide any form of services to them are denied registration. As discussed in Chapter 3, registration has been rejected on the basis that homosexuality is 'illegal in Zambia' and that 'Zambia being a Christian nation cannot allow organizations that promote evil to operate'.[257] In this regard, sexual and gender minorities and their allies in Zambia are unable to enjoy their constitutionally guaranteed freedom of association and assembly. Due to the negative backlash that has been experienced in the past when attempts to register were made as was the case with LEGATRA, discussed in Chapter 3, sexual and gender minorities have opted not to challenge the unconstitutionality of the refusal to register their organisations. As discussed in more detail in Chapter 5, the refusal to register sexual and gender minority organisations has weakened the movement in

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251 TBZ (n 214) 21.
252 As above.
253 Muller & Daskilewicz (n 216) 77 and TBZ (194) 23.
254 As above.
255 Muller & Daskilewicz (n 216) 59.
256 TBZ (214) 23
257 A total of 5 organisations that work with sexual minorities have attempted to register as civil society organisations, but these applications have been turned down. Recently in 2016 TBZ had its offices raided by police who claimed to be looking for information about reported sodomy following 'a tip from members of the public.'

Zambia and therefore affecting the ability to effectively engage in lawfare against heterosexual nationalism and the anti-sodomy laws.[258]

4.4.6. Marginalisation in the financial sector

In August 2018, one of the leading private commercial banks closed the accounts of organisations that received funding for sexual and gender minority rights programmes. The reasons cited was that the bank is a law-abiding corporate citizen and holding such accounts posed a 'reputational risk to the bank and that it was therefore in the best business interest of the bank to close the accounts'. [259] This worsened the already weak position of the sexual and gender minority rights movement in Zambia. One of the strategies used to mitigate the closure of bank accounts was to use ally organisations to hold funds.

4.4.7. Economic disempowerment

Sexual and gender minorities are more economically disempowered than the average population in Zambia.[260] Muller and Daskilewicz capture the situation as follows:[261]

> Many participants were in financially precarious situations: almost half did not have a paid job (49%). By comparison, the unemployment rate in the Zambian general population, according to the World Bank, was 8% in 2017[5]. One in four participants (23%) held informal jobs, without contracts. More than half of participants (55%) said they did not have enough money to cover their basic needs.

According to participants in the Panos study, 'most persons who are known or perceived to be homosexuals in Zambia have been dismissed from employment'.[262] The lack of employment opportunities, is compounded by little or no education due to real and feared discrimination and victimisation. The 'Open Doors' report indicates that due to the economic disempowered position that sexual and most gender minorities find themselves in Zambia, most have resorted to commercial sex.[263] Corroborating this point, Muller and Daskilewicz state that gender minorities in Zambia are more likely to engage in commercial sex work due to systemic, institutional and interpersonal discrimination that limits their access to education and work opportunities.[264] The engagement in sexual work aggravates the exposure and vulnerability to HIV discussed above.

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258 Chapter 5 also discusses strategies that the sexual and gender minority rights movement in Zambia can use to be effectively engage in lawfare in the face of denial to register.

259 Letter from private Bank to TBZ and Friends of Rainka (a public health civil society organisation that promotes the rights of sexual minorities) dated August 2018.

260 Panos (220) 10.

261 Muller & Daskilewicz (n 216) 32.

262 As above.

263 USAID & FHi-360 (n 221) 8, 18. Part of the reason is that sexual minorities have no other means of survival and as a result they tend to engage in sex work. According to the reports, there are different classes of sexual and gender minorities. The middle and upper class who are working and the low class who have no means. Most upper-class minorities tend to get married in order to fit in society and end up seeking the services of sexual minorities' commercial sex workers as this has less chances of them being outed than in having relationships.

264 Muller & Daskilewicz (n 216 41.

4.5. Conclusion

This Chapter highlighted the fundamental contradiction of heterosexual nationalism and the retention of anti-sodomy laws in Zambia as stated in Chapter 1. On the one hand, Zambia's Constitution and the country's international human rights obligations guarantee the rights of sexual and gender minorities. On the other hand, Zambia retains anti-sodomy laws which impact negatively on their rights as citizens. The violations occasioned by the mischaracterisation of anti-sodomy laws are seen as legitimate by state and non-state actors and therefore go unaddressed. However, based on the constitutional principles discussed in this Chapter and the expansive interpretation of international human rights treaties that country has ratified, this thesis contends that anti-sodomy laws are unconstitutional and breach Zambia's international human rights obligations. It may be argued that heterosexual nationalism and the anti-sodomy laws express popular morality, which is fundamental to democracy. However, as stated in Chapter 1, democracy is not a tyranny of the majority, and the rights of minority groups require recognition and protection. As such, constitutional morality and the minority rights thesis have to prevail with respect to sexual and gender minorities. As discussed in the next chapter, diversity and inclusivity are elements of constitutional morality. This entails that anti-sodomy laws have no place on Zambia's statute books and should be repealed to foster inclusivity and mitigate the impact of heterosexual nationalism and the mischaracterisation of anti-sodomy laws. The next Chapter discusses decriminalisation as a factor that can most effectively mitigate the impact of heterosexual nationalism and the mischaracterisation of anti-sodomy laws in Zambia.

Chapter 5: Decriminalisation of the anti-sodomy laws in Zambia: Lessons from abroad, prospects and challenges at home

5.1. Introduction

The adverse impact of the mischaracterisation of anti-sodomy laws on sexual and gender minorities is discussed in Chapter 4. It affects all the rights set in the constitution and in international human rights treaties to which Zambia is a state party. In this light, this Chapter answers research question 4, which asks whether decriminalisation of anti-sodomy laws can mitigate the 'impact'[1] of their mischaracterisation in Zambia. To answer the question, the Chapter proceeds as set out below.

First, it discusses how decriminalisation happened in the United Kingdom (UK), India, South Africa and, most recently, in Botswana. It further considers whether decriminalisation has had a positive impact on the lives of sexual and gender minorities in the four selected countries. As discussed in Chapter 1, the four countries were selected because they each had similar anti-sodomy laws to those currently existing in Zambia. Botswana and South Africa are selected, in particular, due to their geopolitical proximity to Zambia, and the similarity in cultural and social environment, apart from the likeness in legal traditions in respect to criminal law. As such, the lived experiences of sexual and gender minorities in Zambia are, at least to a certain extent, similar to those in Botswana and South Africa. India shares a near identical legal tradition with Zambia, as at independence, the Zambian Constitution, received from the British Colonial government, was modelled on the Constitution of India. While the selected countries are culturally diverse, they are similar in terms of legal and political heritage due to colonialism. In this regard, the uniformity of factors that led to decriminalisation – and most importantly, the fact that decriminalisation mitigated the impact of their respective anti-sodomy laws – provides potential lessons for Zambia.

Second, drawing from the lessons learnt from the selected countries, the Chapter discusses whether decriminalisation is possible in Zambia and, if so, how that could be achieved. In this regard, this Chapter discusses the challenges posed by heterosexual nationalism for decriminalisation and thereafter explore possible routes towards decriminalisation that can be taken in Zambia.

Decriminalisation broadly refers to changing the law to the effect that certain actions or omissions which were classified as criminal offences are no longer recognised as crimes. Thus decriminalisation of anti-sodomy laws means that consensual same-sex sexual conduct is no longer a criminal conduct. Decriminalisation can take two routes, judicial or legislative. This Chapter defines judicial decriminalisation as the judicial declaration of anti-sodomy laws as illegal and unconstitutional. Judicial decriminalisation may be followed by the legislative act of repealing the laws (legislative decriminalisation). While it often takes time for the legislature to repeal a law following a judicial declaration, this thesis contends that the judicial declaration itself still amounts to decriminalisation of the acts in question awaiting the legislative repeal. Legislative decriminalisation

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1 As discussed in Chapter 4.

means the direct repeal of anti-sodomy laws by the legislature on its own motion or following a judicial declaration. While direct legislative decriminalisation is most desirable, in that instantly removes the law in question from the statute books, judicial decriminalisation is just as valuable in the sense that, in some contexts, as this Chapter shows, it is the most feasible. Both legislative and judicial decriminalisation are a starting point in 'queering criminal law' towards the protection and recognition of the sexual citizenship of sexual and gender minorities. In a criminalised environment, sexual and gender minorities are labelled as sexual deviants and treated as criminals, which strips away their citizenship. Consequently, as Murray and Viljoen cautioned, sexual and gender minorities are compelled to hide their sexuality, which as discussed in this Chapter dispositions them to mobilise as a group towards decriminalisation.[2] On the other hand, decriminalisation generally acknowledges the diversity of sexuality and in effect the sexual citizenship of sexual and gender minorities. From a criminological perspective, decriminalisation is the first big step towards queering criminology and criminal law in the sense that it takes sexual and gender minorities from the label of criminal sexual deviants in society, to victims of biased criminal justice systems, with laws based on subjective popular morality. In this light, decriminalisation is a manifestation of the minority rights thesis brings to life the global agenda to 'leave no one behind'.[3]

The chapter argues that judicial decriminalisation, through strategic litigation is more feasible in Zambia. Strategic litigation has no standard definition. *The handbook of legal professionals and activists* defines it as 'the litigation of a public interest case that will have a broad impact on society beyond the specific interest of the parties involved'.[4] Picking from different views and based on the authors experience, this thesis defines strategic litigation as the culture of starting and litigating cases in court with the view of achieving societal change in a specific area of need – in this context, decriminalising anti-sodomy laws.

5.2. The impact of decriminalisation in selected countries: Drawing lessons for Zambia

5.2.1. Decriminalisation in Britain: the triumph of *legal positivism*

5.2.1.1. Process of decriminalisation

The Zambian constitutional, legal and even policy tradition is modelled after that of the UK and in particular England and Wales.[5] With a similar form of historical governmentality, the UK teaches lessons for decriminalisation that may challenge the current rhetoric of heterosexual nationalism in Zambia.

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[2] Murray & Viljoen 'Towards a non-discrimination on the basis of sexual orientation: The normative basis and procedural possibilities before the African Commission on Human and Peoples' Rights and the African Union' (2007) 29 *Human Rights Quarterly* 29.

[3] See the joint statement of the ACHRs, the IACHR, the CoE and the OHCHR against homophobia and criminalisation https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23092&LangID=E (accessed 3 March 2022).

[4] *The handbook of legal professional* (2001).

[5] Within the UK (formerly called the United Kingdom of Great Britain and Northern Ireland), England and Wales (Part of Britain) generally follow the same patterns whereas Scotland (also part of Britain) generally exercises independent decision making. Northern Ireland (part of the UK but not part of Britain) is fairly more independent in its legal, political and economic systems. This notwithstanding, the anti-sodomy laws applied in the whole UK through the Offences against the Persons Act.

Until 1967, only three years after Zambia became independent, sodomy remained a criminal offence across the UK under the Offences Against the Person Act.[6] Before 1967 sexual and gender minorities in the UK, mainly in England and Wales, suffered stigma and discrimination, especially after the Second World War, much like in heterosexual nations like Zambia.[7] Higgins describes this post-war period as the 'era of heterosexual dictatorship' in the UK and explains that England and Wales alone had over 1,069 men in prison for sodomy with the mean age of 37 years.[8] Dryden explains that in the post-war era, more than any other time in history, sexual and gender minorities in the UK suffered arbitrary arrests, denial of employment, health services and had a lower standard of living.[9] Responding to the widespread and documented discriminatory impact of the anti-sodomy laws and particularly after several arrests and convictions of prominent UK government officials and public figures in the early 1950s, the UK government, in 1954, commissioned the Departmental Committee on Homosexual Offences and Prostitution, commonly known as the Wolfenden Committee, to make recommendations on whether homosexual acts and prostitution should be decriminalised named .[10] Another reason that led to the commissioning of this Committee was growing scientific evidence that homosexuality was not a medical or mental disorder.[11] The importance of this factor is that it challenged the prevailing theories that homosexuality was a choice, which led to forced medical treatment of many sexual and gender minorities.[12] However, the de-classification of homosexuality as a medical and mental disorder took decades.[13] Notably, the choice theory and the medicalisation, or medical model of homosexuality and trans-identity that prevailed in the UK until the 1960's, still prevails in heterosexual nations like Zambia.

The Wolfenden Committee concluded its work, submitted, and published its report in 1957. Central to the Report's findings was that the state should focus on protecting citizens rather than policing their private lives and conduct.[14] Regarding homosexuality, the Committee concluded that it was not a medical or mental disorder and as such recommended that consensual same-sex sexual conduct between adults be decriminalised in the UK.[15] In this regard, the Committee stated that

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6 The Act is discussed in detail in Chapter 2.

7 P Higgins *Heterosexual dictatorship: Male homosexuality in post war Britain* (1996) 56.

8 Higgins (n 7) 55-56.

9 S Dryden 'A short history of LGBT rights in the UK' (2018) *British Library Articles* 6, https://www.bl.uk/lgbtq-histories/articles/a-short-history-of-lgbt-rights-in-the-uk# (accessed 6 June 2021).

10 Dryden (n 9) 6.

11 As above.

12 The negative impact of the medicalisation of sexual orientation and gender identity was brought to light after the conviction of Alan Turing who was forced to undergo chemical castration to 'treat' his homosexuality. See A Turin 'Letter of note: Yours in distress, Alan' (1954) Further by that time several scientific works were publication that 'concluded' that homosexuality and trans identity were not a choice. For instance, in *Self: A study in endocrinology* (1949) Michael Dillon a war time hero, and first transgender person to under phalloplasty surgery wherein she insisted that her gender identity was not a choice and up with the famous phrase 'Where the mind cannot be made to fit the body, the body should be made to fit the mind, approximately at any rate to the mind'.

13 De-classification of homosexuality as a mental and medical disorder did not occur until 1973. The USA was first and then the UK followed suit and thereafter the World Health Organisation in 1992.

14 'Wolfenden Report, 1954' (2020) *British Library* https://www.bl.uk/collection-items/Wolfenden-report-conclusion (accessed 21 August 2021).

15 As above.

> [i]t is not, in our view, the function of the law to intervene in the private lives of citizens or to seek to enforce any particular pattern of behaviour, further than is necessary to carry out the purposes we have outlined. Homosexual behaviour between consenting adults in private should no longer be a criminal offence, by stating the argument, which we believe to be decisive, namely, the importance which society and the law ought to give to individual freedom of choice and action in matters of private morality. Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief, and crude terms, not the law's business. [16]

The Wolfenden Report also observed that 'there was no evidence that 'buggery' laws had any deterrent effect after centuries of existence'.[17] Without using the words, the report in essence acknowledged the sexual citizenship of sexual and gender minorities and in that context defined the limits of criminal law. Written before the adoption of the ICCPR, ICESCR and other UN treaties, the Wolfenden Report contains some of the normative position statements later made by UN treaty bodies on sexual and gender minority rights.

Ironically, the report was published eight years before independence in Zambia and most other colonies in Africa, but this wave of law reform towards decriminalisation in the UK was never channelled to any of the African colonies. Instead, the anti-sodomy laws were kept and enforced as if there was no movement towards their repeal in the UK.

At first the UK government rejected the recommendations in the Report, with leading English jurists such as Lord Delvin insisting that the government should not decriminalise sodomy as law should regulate morality even for acts conducted in private.[18] Senior government officials such as the Home Secretary stated that they were disappointed with the Report as they excepted the Committee to suggest more ways of regulating homosexuality and sexual citizenship in general instead of the recommending for the repeal anti-sodomy laws.[19] This highlights the fact that while there were concerns about the impact of anti-sodomy laws on sexual and gender minorities, the levels of tolerance for sexual diversity were not yet at a level that decriminalisation would occur as a matter of course after the report. When the report was first debated in Parliament in December 1957, the majority of members of Parliament voted against the recommendations.[20] The public debate about the recommendations of the report continued for 10 years, until decriminalisation finally became the legal position through the passing of the Sexual Offences Act,1967.[21] The Sexual Offences Act, 1967 reclassified consensual same-sex sexual conduct between males above 21 and females above 16 as non-criminal acts.[22]

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16 *Wolfenden Report* (1957) 62. In taking this position the committee reiterated the statement of the earlier Streets Offences Committee of 1952 which famously took a Positivist position and stated that "It is not the duty of the law to concern itself with immorality as such […] it should confine itself to those activities which offend against public order and decency or expose the ordinary citizen to what is offensive or injurious."

17 *Wolfenden Report* (n 15) 23-24.

18 See https://www.bl.uk/collection-items/wolfenden-report-conclusion (accessed 3 December 2022).

19 C J Summers 'The Wolfenden Report' (2015) The *LGBT Encyclopaedia* 2.

20 As above.

21 For the full debate in Parliament see https://api.parliament.uk/historic-hansard/commons/1966/feb/11/sexual-offences-bill#column_872 (accessed 11 May 2022).

22 As above.

The Sexual Offences Act, 1967 was initially applicable only in England and Wales. However, Scotland followed suit in 1980 by decriminalising its anti-sodomy laws through the Criminal Justice (Scotland) Act, 1980 which decriminalised same-sex sexual conduct between adults from 21 years .[23] Decriminalisation in Northern Ireland occurred in 1982 through the repeal of the Criminal Law Amendment Act, 1885 after the decision in *Dudgeon v UK*.[24] In the *Dudgeon* case the European Court of Human Rights held that the crime of 'gross indecency' (under section 11 of the Criminal Law Amendment Act, 1885), violated the right to privacy as protected by article 8 of the European Convention on Human Rights.[25] The *Dudgeon* case was and remains particularly significant because it was the first successful case regarding the decriminalisation of anti-sodomy laws decided by the European Court of Human Rights. Following the *Dudgeon* case, the Council of Europe Committee of Minsters applied the decision by requiring member states to decriminalise consensual same sex-sexual conduct between adults.[26] The impact of the Dudgeon case extended beyond Northern Ireland. Writing on the impact of decisions of the European Court of Human Rights decisions on LGBT rights in Europe, Helfer and Voeten states that the *Dudgeon* case and other decisions of the Court increased the 'likelihood to adopts pro-LGBT reforms, especially in countries with the lowest public tolerance levels for LGBT persons'.[27]

Several players contributed to decriminalisation in the UK after the Wolfenden Report was published. Prominent among these were the Church of England, [28] the British Medical Association and the sexual and gender minority rights civil society movement.[29] These players applied pressure on the UK government to decriminalise consensual same-sex sexual conduct between adults citing the Wolfenden Report's recommendations as progressive. The British Medical Association, for instance, played an important role by supporting the declassification of homosexuality as a mental and medical condition.[30] This contribution was particularly important because some psychiatrists in their individual capacity condemned the Report for refusing to classify homosexuality as a medical and mental condition.[31] Thus the voice of the British Medical Association gave credibility to the Report and was

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23 As above.

24 *Dudgeon v UK* (1981) ECtHR. The complainant, Jeff Dudgeon filed a complaint before the European Court of Human Rights stating that section 11 of the Criminal Law Amendment Act which criminalised same-sex sexual acts between males violated his rights to privacy. The agreed and held that the section 11 violated the European Convention on Human Rights and further stated that individual states should set their own age of consent with respect to same-sex sexual acts.

25 As above.

26 'Resolution on equal rights for homosexual and lesbians in the European Community' 4 February 1994. For full discussion of the Dudgeon decision and how it impacted sexual and gender minority rights in Europe see M McLoughlin 'Crystal or glass?: A review of the Dudgeon v United Kingdom' (1996) *Murdoch University Journal of Law* 8.

27 L Helfer & E Voeten 'International courts as agents of legal change? Evidence from LGBT rights in Europe' (2014) 68 *International Organisation* 77.

28 For a full discussion of the role of the church of England and other religious institution in decriminalisation in the UK see M Grimley 'Law, morality and secularisation: The church of England and the Wolfenden Report, 1954 – 1967' (2009) 60 *The Journal of Ecclesiastical History* 728 and L M Ramsay 'The Church of England, homosexual law reform and the shaping of the permissive society, 1957-1979' (2018) 57 *Journal of British Studies* 108.

29 For a full discussion of the role of the sexual and gender minority rights movement in decriminalisation in the UK see M Waites 'United Kingdom: confronting criminal histories and theorising decriminalisation as citizenship and governmentality' in Lennox & Waites (eds) *Human rights, sexual orientation and gender identity in the Commonwealth: Struggles for decriminalisation and change* (2012) 145-182.

30 Summers (n 19) 2.

31 As above.

therefore not only persuasive during the 10 yearlong debates but also crucial in 1967 when Parliament voted to repeal the anti-sodomy laws.[32]

Commenting on the role of the Church of England, Grimley states that the Church helped to shift the religious narrative on homosexuality and the anti-sodomy laws from intolerance to tolerance and acceptance of sexual and gender minorities, thereby 'influencing public opinion and a significant number of politicians and parliamentarians in the reform debates'.[33] In seeking to inform and influence public debate following the Wolfenden Report, the Moral Welfare Council of the Church of England conducted edification programmes between 1957 and 1965 to unify the people on the need for the UK government to decriminalise sodomy.[34] Ramsay notes that 'a close reading of the parliamentary debates shows that supporters of decriminalisation frequently referred to the views of the Church of England' thereby giving moral and religious credibility to their arguments.[35] Thus the role of the Church of England was vital because since the Wolfenden Report in 1957, the House of Commons was opposed to its proposed reform until 1966 while the executive maintained a policy of neutrality until 1967.[36] In particular, the Church of England, through its episcopal representatives in the House of Lords (the spiritual Lords), led by the Archbishop of Canterbury, supported and voted in favour of the Bill to decriminalise consensual same-sex sexual conduct between adults in 1966 and 'encouraged its clergy to be one with the "Church policy"'.[37] The crucial role of the Church of England to decriminalise can be juxtaposed to the role the churches play in Zambia to maintain religious heterosexual nationalism and retain anti-sodomy laws. In both cases, legislative action or omission is partly influenced by religious leaders. Arguably, the role of the church, as played in the UK, cannot be mirrored in Zambia and this leaves civil society as the likely actor towards decriminalisation in Zambia. The role of civil society in decriminalisation and the lessons to be drawn for Zambia is thus discussed in more detail when looking at India, South Africa and Botswana.

5.2.1.2. Impact of decriminalisation

Decriminalisation led to two main changes in the UK. First, it opened the space for the sexual and gender minority rights movement to effectively advocate for legal and policy reforms towards the improvement of the living standards for sexual and gender minorities in the UK.[38] In this regard, the sexual and gender minority rights movement became the formal voice for sexual and gender minorities

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32 C Water 'The Homosexual as a social being in Britain: 1945-1968' (2012) 3 *Journal of British Studies* 685.

33 Grimley (n 28) 728-730.

34 K Childs *Anglicans and sexuality: a way forward* (2016) 26.

35 Ramsay (n 28) 113.

36 During the Sexual Offences Bill, at the time a private members Bill sponsored by Lord Arran to decriminalise in line with the Wolfenden Recommendations was voted against several times in the House of Commons. It was only securing the support of the Church of England that the voting pattern began to change and eventually passed into law as the Sexual Offenses Act 1967.

37 Despite the united voice given in the House of Lords, Ramsay (n 18) 111, notes that the 'actions of the spiritual Lords concealed considerable disagreement and unease surrounding the issue within the church', such that some Bishops offered excuses for nonattendance during the debate and others outrightly speaking against the reforms. It was, however, important for the church to give a narrative of unity on the issue and as such, much of the disagreements were never exposed to the public.

38 M Waites 'United Kingdom: confronting criminal histories and theorising decriminalisation as citizenship and governmentality' in Lennox and Waite *Human rights, sexual orientation and gender identity in the Commonwealth* (2013)159.

in the UK, and for the first time, they had a formal relationship with the government towards a common agenda for equality and non-discrimination.[39] Second, and perhaps most significantly, decriminalisation led to a series of legislative and policy reforms that improved the legal status and lived experiences of sexual and gender minorities as discussed below.[40]

Anticipating decriminalisation and noting that much of the debate was centred on sexual minorities with little on gender minorities, the Beaumont Society was established in 1966 with the aim to provide information to the general public, the medical and legal profession on gender minorities.[41] The Beaumont Society also aimed to increase and improve research regarding gender identity in the UK.

Decriminalisation also gave visibility to sexual and gender minorities in the UK in public spaces without the fear of arrest. In 1972, for instance, the first 'gay Pride March' was allowed to take place in the UK after years of resistance before decriminalisation.[42] The Pride March was organised by the UK Gay Liberation Front (GLF). The GLF was founded in 1970 on the inspiration of the Stonewall riots, which took place in New York, in 1969.[43] The GLF provided leadership for the first battle for sexual and gender minority equality in the UK through its Manifesto. Published in 1971, it encouraged its members to 'come out', be visible and fight social change.[44] Due to differences in strategic approaches among its leadership, the GLF was disbanded in 1973, and some of its former members formed the Campaign for Homosexual Equality (CHE).[45] The CHE consolidated the efforts of GLF and led the fight for law and policy reform in the UK.[46] It also opened the way for other sexual and gender minority rights organisations to be established around the UK. Among those established in that period was SAPPHO, which was set up to 'educate society about the facts of lesbianism, support lesbians and women's rights.[47] It created and participated in debates about lesbian rights and with the emergency of feminist theory, it helped mainstream the rights and plight of lesbians in the sexual equality discourse.[48] Another publication based CSO was the 'Gay News Newspaper' which was a fortnightly publication aimed at highlighting incidents of discrimination against sexual and gender minorities as well as advocating for social and political change in the UK.[49]

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39 As above.

40 Summers (n 19) 3.

41 See https://www.beaumontsociety.org.uk (accessed 28 January 2022). The Beaumont Society is now the UKs biggest organisation on gender minorities welfare and rights.

42 The Pride March was organised by the UK Gay liberation Front (GLF). The GLF was founded in 1970 on the inspiration of stonewall riots in New York, in 1969. The GLF led the first battle for sexual and gender minority equality in the UK and when it was disbanded in 1973 the Campaign for Homosexual Equality (CHE) was founded, and it led the fight law and policy reform in Britain. It also opened up the way for the other Civil Society Organisations to be founded in the UK.

43 E Armstrong & M Crage 'Movements and memory: The making of the Stonewall myth' (2006) 71 *American sociological review* 724-751.

44 'A timeline of LGBTQ communities in the UK' (2021) https://www.bl.uk/LGBTQ-histories/lgbtq-timeline#Section-28-of-the-Local-Government-Act (accessed 6 June 2021).

45 As above.

46 S Dryden 'Arena three: Britain's first lesbian magazine' (2017) *British Library: LGBTQ histories* https://www.bl.uk/lgbtq-histories/articles/arena-three-britains-first-lesbian-magazine (accessed 2 September 2021).

47 As above.

48 As above.

49 In 1979 the Gay newspaper published a homoerotic poem about a Jesus titled 'The love that dare not speak its name'. The publication was received with controversy and attracted a court action for blasphemy by Mary White house, a

The year 1977 saw the first gay and lesbian trade union congress in which the right to work for sexual and gender minorities was highlighted, and this started the discourse on equality in the world of work.[50] The work of the congress progressively led to the adoption of the Employment Equality (Religion or Belief) Regulations.[51] The establishment of sexual and gender minority rights organisations in the UK continued with the founding of others, such as 'OutRage!',[52] and Human Dignity Trust,[53] which continues to challenge the criminalisation of same-sex sexual relations around the World.

Despite this progress, the Thatcher years came with inertia and attempts to push back the progress.[54] For example, in 1988, section 28 of the Local Government Act, was amended to 'ban all local authorities from 'promoting homosexuality' or 'pretended family relationships'' and further it barred local authorities from funding any educational or welfare projects that were perceived to promote sexual or gender minority rights.[55]

Following the Thatcher years, the movement towards more law reform which was built after decriminalisation continued. In 1994, the age of consent for same-sex sexual conduct was reduced from 21 to 18.[56] The initial proposal was to make the age of consent 16 in line with the age of consent for heterosexual acts.[57] However, the change signifies a positive development in law reform following decriminalisation. In 2001, the age of consent was eventually reduced to 16.[58] The following year, 2002, the Adoption of Children Act, was amended to allow sexual and gender minorities to adopt a child in the UK.[59] The infamous section 28 of the Local Government Act introduced during the Thatcher years was also repealed in 2003.[60] According to Glennon,[61] one of the most sought after legal

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religious association, founder of the Nationwide Festival of Light, and the National Viewers and Listeners Association. The Newspaper lost the case but most significantly the legal costs of the case were covered by the Gay community in from across the UK called the Gay news fighting fund. The case is significant not because of it cause of action but because, through the establishment of the fund to help keep the Gay newspaper afloat, it signified a shift in the attitude of sexual minorities in the UK following decriminalisation. See n 12.

50 For a discussion of the role of trade unions in the for sexual and gender minority rights movement see 'Hidden from history: How trade unions championed LGBT+ equality' *Trade Union Congress Media* 12 Media 2018 https://www.tuc.org.uk/blogs/hidden-history-how-trade-unions-championed-lgbt-equality (accessed 3 September 2021).

51 As above.

52 OutRage! was formed in response to several murders of gay men in London and the Increase in targeted policing against gay people. It was disbanded in 2011 after years of successful lobbying and activism.

53 See https://www.humandignitytrust.org (accessed 28 January 2022).

54 See D Janes ''One of us': The queer afterlife of Margaret Thatcher as a gay icon' (2018) 8 *International Journal of Media and Cultural Politics* 211 and https://www.independent.co.uk/news/uk/politics/section-28-explained-lgbt-education-schools-homosexuality-gay-queer-margaret-thatcher-a8366741.html (accessed 31 January 2022).

55 As above.

56 For a full discussion of the history, debates and law reform on the age of consent in the UK see M Waites *The age of consent: Young people, sexuality and citizenship* (2014) 60 - 235.

57 As above.

58 As above.

59 See https://hansard.parliament.uk/lords/2002-10-16/debates/653afbb8-64aa-4b0b-814a-4448924b574a/AdoptionAndChildrenBill (accessed 1 January 2022).

60 The provision was first repealed in Ireland in 2000. The Bill for its repeal in England and Wales failed at that stage. See N Watts 'David Cameron apologises to gays people for section' The Guardian, July 2009, https://www.theguardian.com/politics/2009/jul/02/david-cameron-gay-pride-apology (accessed 7 June, 2021).

61 L Glennon 'Strategizing for the future through the Civil Partnership Act' (2006) 33 *Journal of Law and Society* 244.

reform by the UK equal marriage campaigners happened in 2005, with the passing of the Civil Partnerships Act of the same year, which gave same-sex couples the same rights and responsibilities as married couples in the UK.[62] The Act came after years of the campaign throughout the UK under what was called the Equal Love movement which began in 2010.[63] Another significant reform born out of decriminalisation was the passing of the Gender Recognition Act, which gave full legal recognition to gender minorities.[64] The Act allows gender minorities to obtain birth certificates and other identity documents based on their gender identity.[65] Other legislative reforms include the Human Fertilisation and Embryology Act, 2008, and the Equality Act, 2010. In 2014, the Marriage (Same-Sex Couples) Act came into effect and allowed same-sex couples to legally marry.[66]

Policy towards sexual and gender minorities also changed gradually after decriminalisation. For instance, in 2001, the UK government lifted the ban for sexual and gender minorities to save in the UK armed forms.[67] In a symbolic restatement of history, the 'Policing and Crime Act' was passed in 2017, which pardoned all historic convictions against gay men. The Act became known as the 'Alan Turning Law'.[68] The Church of England also adopted a non-discrimination policy with openly gay and lesbian clergy being ordained and allowed to serve in the Church.[69]

In a criminalised environment the above reforms would not have been possible. It is, therefore, safe to say that decriminalisation was the gateway to major positive changes in the UK. The political context behind these changes is worth noting. They happened under the Labour government at a time when most of its voting constituent and the general public attitude was liberal and supported law reform in favour of sexual and gender minorities. According to the British Social Attitudes Survey, the public attitude towards sexual and gender minorities and issues such as same-sex marriage, gender transition surgery and recognition changed since 1967, becoming more and more tolerant and were most liberal during the debates of the Marriage (Same-sex couples) Act.[70] Thus, in line with these changes in public attitudes, and fearing that the growing popularity of the Liberal Democrats would capture the liberal

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62 Section 1 of the Civil Partnership Act, see https://www.legislation.gov.uk/ukpga/2004/33 (accessed 27 January 2022).

63 The Equal marriage campaign was started by the equality network to secure same sex marriage and mixed sex civil partnerships in the UK. Different sexual and gender minority rights organisations were part of the campaign focusing on different aspects. The campaign received opposition from conservative christian groups in the UK such as the campaign for Christian marriages.

64 See https://publications.parliament.uk/pa/cm5802/cmselect/cmwomeq/977/report.html (accessed 1 January 2022).

65 Section 10 of the Gender Recognition Act.

66 See https://www.legislation.gov.uk/ukpga/2013/30/contents/enacted (accessed 7 June 2012).

67 For a full discussion see C Paige 'Mental health and well-being of LGBT + veterans dismissed from the British Armed Forces before January 2000' (2021) 7 *Journal of Military, Veteran and Family Health* 122-126.

68 In 2017 the UK government passed the Policing and Crime Act also informally called the Alan Turin law, which pardoned men cautioned or convicted under the historical anti-sodomy laws. See A Reevel 'Pardon for gay men convicted under the abolished laws' *BBC News* 25 August 2020 https://www.bbc.com/news/uk-scotland-50002745 (accessed 3 September 2021).

69 Brattain & McKinnon 'Homosexuality and the construction of Anglican Orthodoxy: The symbolic politics of the Anglican communion.' (2011) 72 (3) *The Sociology of Religion* 351-373.

70 For a full details of the survey see https://www.bsa.natcen.ac.uk/latest-report/british-social-attitudes-30/personal-relationships/homosexuality.aspx (accessed 27 January 2022).

vote, the Labour Party, in the late 2000's, made 'liberal reforms, including sexual and gender minority rights reforms' as part of party policy.[71]

The legislative and policy reforms, and the growth of the sexual and gender minority rights civil society movement, has resulted in an improved standard of living and wellbeing over time, with relatively less stigma, discrimination, and marginalisation. In essence, decriminalisation was and is not an end in itself, but rather is a stepping stone towards great protection and promotion of the rights of sexual and gender minorities as seen in the series of changes that took place in the UK. Notably, in the UK, the drivers of change were the government itself through legislative action, the sexual and gender minority rights movement through effective activism and the support of the Church of England. The role and impact of the European Convention on Human Rights and the decisions of the European Court cannot be ignored in terms of how they influenced the national decision making.[72] Cases such as *Dudgeon* and *Norris v Ireland,* as well as several pronouncements of the Court, adds to the progressive environment not only in the UK but in Europe generally.[73] In this regard, Helfer and Voeten refer to the European Court of Human Rights as the agent of change in sexual and gender minority rights and public policy in Europe.[74]

5.2.2. Decriminalisation in India: the triumph of constitutional morality

5.2.2.1. Process of decriminalisation

The Indian Penal Code, along with the anti-sodomy provisions, was enacted in 1860 having been drafted by the Indian Law Commission under the leadership of Lord Macaulay.[75] The anti-sodomy laws of India were contained in Chapter XVI, section 377 of the Penal Code, which criminalised 'carnal intercourse against the order of nature with a man, woman or animal'.[76] The penalty for the offence was imprisonment for life, or with imprisonment of either description for a term which may extend to ten years.[77] As in Zambia, the anti-sodomy laws in India were characterised as laws against human sexual orientation rather than the actual sexual acts defined in the provision. Gupta notes that section 377 applied to heterosexual and homosexual persons, but 'there has been a tendency in the Indian courts to create an association between the sexual acts and certain kinds of persons, who are more likely to commit the act, thereby giving a character and face to sodomy in the form of homosexuals – a distinction not reflected in the law'.[78] Misra corroborates this view by stating that the

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71 Watts (n 56) 11.

72 For a detailed discussion of the role of the European Court and the European human rights system in the promotion and protection of sexual and gender minority rights see P Johnson *Homosexuality and the European Court of Human Rights* (2012).

73 S Dalvi 'Homosexuality and the European Court of Human Rights: Recent Judgements against the United Kingdom and their impact on other signatories to the European Convention on human rights' (2018) 15 *University of Florida Journal of Law and Public Policy* 468.

74 L Helfer & E Voeten 'International Courts as agents of legal change: Evidence from the LGBT rights in the Europe' (2013) 68 *International Organisation* 77.

75 For a detailed discussion of the history of the anti-sodomy laws in India see G Misra 'Decriminalising homosexuality in India' (2018) 17 (34) *Reproductive Health Matters Journal* 21-25.

76 The provision was similar to the provision in Zambia, but the difference lay in the source of the Penal Codes that came to Southern African as discussed in Chapter 2.

77 The repealed section 377 of the Indian Penal Code.

78 A Gupta 'Section 377 and the dignity of Indian homosexuals' (2006) 41 *Economic and Political Weekly* 4815.

anti-sodomy laws, while neutral in their drafted language, facilitated widespread institutionally tolerated discrimination and victimisation targeted at sexual and gender minorities.[79] Sexual and gender minorities in India, therefore, suffered arbitrary arrests, prosecutions and unfair convictions solely based on their orientation rather than evidence that they committed sodomy as defined under section 377.[80] Blackmail and extortion, as is presently experienced in Zambia, was one of the most devastating impacts of the anti-sodomy laws in India.[81] In this light, India has much to offer in terms of legal traditions which have been decriminalised, from which lessons can be drawn for Zambia. This is complemented by the fact that the two countries had (and to a certain extent still have) similar constitutions, with the Zambian Constitution having been modelled on the Lancaster House Constitution, at least at independence, in 1964.[82] Thus, the innovative and activist form of constitutional interpretation by the Indian High Courts is valuable for constructing constitutional arguments towards decriminalisation in Zambia. As discussed below, the concept of constitutional morality, the basis on which the Indian High Court and subsequently the Supreme Court struck down section 377, was grounded on inclusive, innovative and progressive interpretation of the Indian Bill of the Rights (Part III of the Indian Constitution) which guarantees, among others, the rights to equality, non-discrimination, life, dignity, citizenship and personal liberty. Substantively and semantically, the Indian Bill of Rights is similar to that of Zambia thereby making it easier to borrow the constitutional reasoning of the Indian High Court and Supreme Court.

With a conservative and highly religious society, before decriminalisation, India was one of the most homophobic countries in the world.[83] Arbitrary arrests, blackmail, extortion, social exclusion, stigma and discrimination occurred against sexual and gender minorities because of the mischaracterisation of the anti-sodomy laws.[84] The general impact of the anti-sodomy laws in India was aptly put by the Supreme Court in *Navtej Singh Johar & Others v Union of India* (the *Navtej* case).[85] The Court acknowledged that section 377 had the effect of relegating sexual and gender minorities to the margins of criminality and took away citizenship. It acknowledged that

> [g]ays, lesbians, bisexuals and transgender have been relegated to the anguish of closeted identities. Sexual orientation has become a target for exploitation, if not blackmail, in a networked and digital age. The impact of Section 377 has travelled far beyond the punishment of an offence. It has been destructive of an identity which is crucial to a dignified existence.[86]

The Court went on to say that

> [a]part from the visible social manifestations of Section 377, the retention of the provision perpetuates a certain culture…the existence of the provision nonetheless facilitates it by perpetuating homophobic

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79 Misra (n 75) 21.
80 As above.
81 As above.
82 For instance, the Bill of Rights and the directive principles of state policy, Parts III and IV respectively in both constitutions were identical and principally remain the same.
83 See https://www.aljazeera.com/features/2021/6/21/i-have-sacrificed-a-lot-growing-up-lgbtq-in-india (accessed 23 October 2021).
84 Misra (n 75) 21-22.
85 (2018) Writ Petition (Criminal) No. 76/2016.
86 The *Navtej* case, para 6.

> attitudes and making it almost impossible for victims of abuse to access justice. Thus, the social effects of such a provision, even when it is enforced with zeal, is to sanction verbal harassment, familial fear, restricted access to public spaces and the lack of safe spaces.[87]

As in most countries, if not all heterosexual nations, anti-sodomy laws in India had a profound impact on the fight against HIV in the country.[88] Chatterjee comments that anti-sodomy laws increased the social stigma against sexual and gender minorities and 'backed up by the threat of ten years imprisonment the laws helped drive the pandemic underground and heighten the risk of transmission, as sexual and gender minorities did not present themselves for testing, prevention services and treatment, lest they be found out'.[89]

Several events that adversely impacted on their rights, led the sexual and gender minority rights movement in India to mobilise and petition against the constitutionality of the anti-sodomy laws.[90] Standing out was the arbitrary arrests of male sexual minorities in cities, like Lucknow,[91] the entrapment of gender minorities in public restrooms, the high HIV infection rates among sexual and gender minorities, and the backlash after the release of a movie whose central concerned the lives of two Hindi lesbians.[92] Sheikh comments that the protests against the movie led to counter protests from the sexual and gender minority movement thereby causing a public debate on sexuality, discrimination and the overall treatment of minorities in India.[93] The first attempt to decriminalise was made in 1994 when ABVA, a Delhi based HIV/AIDS sexual minority rights organisation, petitioned for the repeal of section 377 on the grounds that it violated the constitutional right privacy.[94] The enthusiasm at the start of the case gradually turned into frustration as for unexplained reasons the case simply stayed filed and was never heard until 2001. Misra notes that as a non-funded organisation run entirely by unpaid volunteers, ABVA did not have a full-time lawyer to keep track of the case, such that when it finally came up for hearing, ABVA did not appear and the case was dismissed without their knowledge.[95] The failure of the *ABVA* case highlights the need for an effective impact litigation strategy and the mobilisation of resources before mounting a decriminalisation campaign.[96] As seen later, the same lesson is learnt from the first attempt at decriminalisation in Botswana. For heterosexual

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87 *The Navtej* case, para 51.

88 In the *Naz* case SC, the court acknowledged that the anti-sodomy 'laws seriously disadvantage and prejudice sexual and gender minorities when it comes to access to health-care facilities. LGBT persons, and specifically MSM, and transgender persons are at high risk of contracting HIV as they lack safe spaces to engage in safe sex practices. They are inhibited from seeking medical help for testing, treatment and supportive care on account of the threat of being 'exposed' and the resultant prosecution.'

89 P Chatterjee 'AIDS in India: Police powers and public health' (2006) *The Lancet* 805-806 https://www.thelancet.com/journals/lancet/article/PIIS0140673606683190/fulltext (accessed on 26 October 2021). See also India: HIV and AIDS-related discrimination, stigmatization and denial (2001) https://data.unaids.org/publications/irc-pub02/jc587-india_en.pdf (accessed 26 October 2021).

90 See https://cis-india.org/internet-governance/front-page/privacy-sexual-minorities (accessed 25 October 2021).

91 Lucknow was seen as a city with the most male sexual minorities and as such attracted regular random police raids in areas such as parks where it was rumoured that gay men frequented. Most sexual and gender minority rights organisations also operated from Lucknow where they distributed HIV prevention materials including condoms to male sexual minorities in the city. See Chatterjee (n 88) 17 and Misra (n 75) 22-23.

92 D Sheikh 'The road to decriminalisation in India: Litigating India's anti-sodomy laws' (2014) 16 *Yale Human Rights and Development Law Journal* 108.

93 As above.

94 Misra (n 75) 22-23. As the case did not proceed to trial and thus unreported, it was not given a citable case number.

95 As above.

96 K Van der Pas 'Conceptualising strategic litigation' (2021) *Oñate Socio-legal Series* 14-15.

nations like Zambia, a blind-sighted campaign that does not draw lessons from other countries would be fatal. In India, despite this failure, the case brought some degree of unintended but fortunate attention to the plight of sexual and gender minorities from which future activism was built.[97]

Noting the lessons from the failure in the *ABVA* case and after much activism and lobbying by the sexual and gender minority rights movement in India, decriminalisation finally occurred following the decision of the High Court[98] and confirmed by the Supreme Court in the *Navtej* case, which was an appeal petition challenging the constitutionality of Section 377 of the Penal Code.[99] The petitioners particularly argued that section 377 infringed the right to equality before the law under article 14, the right to non-discrimination under article 15, the right to freedom of speech, expression, association and assembly under article 19, and the right to protection of life and personal liberty under article 21.[100] When the matter first came up for hearing in the Indian High Court, it was dismissed on a procedural technicality that the NAZ Foundation, as petitioners, lacked the requisite locus standi to file the case since it was not a human person and that there was no individual before the High Court who stood charged under Section 377 in the case.[101] Handing down its decision, the High Court held that 'in this petition, there is no cause of action as no prosecution is pending against the petitioner […] an academic challenge to the constitutionality of a legislative provision cannot be entertained.'[102] Misra and Sheikh both argue that this was a crucial moment in the decriminalisation process because it was at this point that the different sexual and gender minority rights organisations in India collaborated with the NAZ Foundation to create a compiling and consented case for decriminalisation.[103] The petitioners appealed to the Supreme Court with a renewed strategy and evidence of lived experiences from sexual and gender minorities around the country, although at that stage the new evidence could not be used, but could be mentioned to strengthen the argument for the case to be determined on the merits back in the High Court.[104]

The Supreme Court overturned the High Court's decision and ordered the High Court to hear the case on its merits. At the second High Court hearing, the NAZ Foundation strengthened its arguments by providing testimonies of lived experiences of the impact of the anti-sodomy laws from individuals brought by the collaborating sexual and gender minority rights organisations.[105] The NAZ Foundation also heavily relied on the Wolfenden Report and on international human rights law jurisprudence to make their overall argument on constitutional morality, against public morality, and the need to strike done section 377.[106] In what became one of its landmark decisions, the Indian High Court held that the term 'sex' under article 15 of the Indian Constitution included sexual orientation and, therefore, found that section 377 of the Penal Code was unconstitutional as it violated the rights to equality, non-discrimination, dignity, privacy and the right to life guaranteed in the constitution

97 Sheikh (n 92) 108.
98 (2009) 160/277 DHC.
99 The *Navtej* case, para 6, 51 & 52.
100 *The India Case Digest* (2018) 4.
101 As above.
102 As above.
103 Misra (n 75) 18, Sheikh (n 92) 112.
104 Sheikh (n 92) 117.
105 Misra (n 75) 23.
106 For the arguments in the Supreme Court see http://www.voicesagainst377.org/court-transcript/ (accessed 19 October 2021).

under articles 14, 15 and 21, respectively.[107] In making its decision, the High Court grounded itself in the concept of 'constitutional morality'[108] expressed during Constituent Assembly Debates of the Indian Constitution,[109] and in so doing, partly relied on the principle of 'strict scrutiny' and 'compelling state interest' laid down by the US Supreme Court in *Lawrence v Taxes*.[110] In this regard, the High Court concluded that

> [t]he enforcement of public morality does not amount to compelling state interest to justify the invasion of the privacy of adult homosexuals engaged in consensual sex in private without intending to cause harm to each other or to others […] if there is any type of morality that can pass the test of compelling state interest, it must be constitutional morality and not public morality. Constitutional morality is based on constitutional values, while public morality is based on shifting and [subjective] notions of right and wrong.[111]

The appeal against the High Court's decision nonetheless had an impact up until it was upheld by the Supreme Court in 2018.[112] The Supreme Court hearing was protracted due to procedural applications which led to other fresh petitions, and in the end, these were joined and heard as one under the original Naz appeal.[113] The *Navtej* case made three key significant contributions to India's jurisprudence. First, it included sexual orientation and gender identity as prohibited grounds of discrimination under the Constitution. When arriving at this decision, the Court considered the amicus briefs filed by the medical profession, thus declaring as a legal position, the following scientific point:

> Sexual orientation is an innate attribute of one's identity, and cannot be altered […] Sexual orientation is not a matter of choice. It manifests in early adolescence. Homosexuality is a natural variant of human sexuality.[114]

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107 The *Navtej* case, para 51-76

108 According to L Vashit 'Re-thinking criminalisable in India: Constitutional morality as a restraint to criminalisation' (2013) 55(1) *Journal of the Indian Law Institute* 73-93 In India the concept of constitutional morality was first introduced by B R Ambedkar, an Indian jurist, during the constitutional debate. He argues that in essence 'constitutional morality refers to the respect, reverence and internalisation of the form and spirit of the constitution.

109 Vashit (n 108) 79. While in the constitutional debates, constitutional morality as elaborated by B R Ambedkar was more about the internalisation of constitutional values and inculcating a culture of the obedience, the High Court's innovative activism transformed the meaning as well as the potential its expression by making it more about application of constitutional values and the spirit of the constitution.

110 (2003) US 539 para 558. The principle of strict scrutiny was developed by the US Supreme Court to determine the constitutionality of certain laws. In its application the courts strictly look at the purpose of the law and particularly whether its exits to further a 'compelling state interest'. In *Taxes v Lawrence* the US Supreme Court strictly scrutinised the anti-sodomy laws of taxes and had to determine whether, despite their discriminatory nature, the state had a compelling interest or reasons to prevent through criminal law, consensual same-sex sexual conduct between adults. The Court found that the US government had no compelling interest to regulate the sexual conduct of consenting adults in private whatever their sexual orientation. The principle of strict scrutiny and compelling state interest as applied by the US Supreme Court is similar to the reasoning of the Wolfenden Committee that the state has no business regulating the sexual conduct of consenting adults in private- hence sodomy falling outside the realm of criminal law.

111 (2009) 160/277 DHC para 79.

112 For a full appraisal of the High Court decision see Vashit (n 107) 73.

113 *India case digest* (2018) 3-4.

114 *The Navtej* case, para 13.1.

Thus, taking sexual orientation as a natural variant of human sexuality, the Court read 'sex' in article 15 to included sexual orientation and gender identity, saying:[115]

> Sex as it occurs in Article 15, is not merely restricted to the biological attributes of an individual, but also includes their sexual identity and character […] The LGBT community is a sexual minority that has suffered from unjustified and unwarranted hostile discrimination and is equally entitled to the protections afforded by Article 15.[116]

Second, it found anti-sodomy laws in their character and application discriminatory against sexual and gender minorities and, therefore, declared them unconstitutional. Handing down the decision, the Supreme Court stated:

> Section 377 IPC, so far as it penalizes any consensual sexual activity between two adults, be it homosexuals (man and a man), heterosexuals (man and a woman) and lesbians (woman and a woman), cannot be regarded as constitutional […] it is declared that, insofar as Section 377 criminalises consensual sexual acts of adults (i.e. persons above the age of 18 years who are competent to consent) in private, it is violative of Articles 14, 15, 19, and 21 of the Constitution. The provisions of Section 377 will continue to govern non-consensual sexual acts against adults, all acts of carnal intercourse against minors, and acts of bestiality.[117]

In striking down section 377, the Court deliberated on who the section applied to and thus while Court acknowledge that its language suggested application to both heterosexual and homosexual persons, the Court recognised that it 'penalizes some forms of sexual expression among heterosexuals while necessarily criminalizing every form of sexual expression and intimacy between homosexuals'.[118] In this regard, section 377 was declared inherently discriminatory against sexual and gender minorities and unconstitutional.

Third, the Court introduced and highlighted the practical significance of sexual citizenship by spelling out the impact of anti-sodomy laws on the rights of sexual and gender minorities in India. For example, the Court found that section 377 violated the right to health by

> [c]riminalising 'carnal intercourse against the order of nature and enforcing it against sexual and gender minorities as a deviant class of citizens, Section 377 compels LGBT persons to lead closeted lives. As a consequence, LGBT persons are seriously disadvantaged and prejudiced when it comes to access healthcare facilities. This results in serious health issues, including depression and suicidal tendencies amongst members of this community. Citizens of a democracy cannot be compelled to have their lives pushed into obscurity by oppressive colonial legislation.[119]

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115 The Court made reference its earlier decision (where it referred the case back to the High) in which it acknowledged that sex under article 15 embraced sexual orientation and gender identity.

116 *The Navtej* case, para 15-16.

117 The *Navtej* case, para 21,252-253.

118 The *Navtej* case, para 28-31.

119 The *Navtej* case, para 32.

The Supreme Court took the route of the High Court by building on the principle of constitutional molarity against popular morality and placing reliance on the Wolfenden Committee's findings and recommendations. In this regard, the Court stated:

> [I]t is expected from the courts as the final arbiter of the Constitution to uphold the cherished principles of the Constitution and not to be remotely guided by majoritarian view or popular perception. The Court has to be guided by the conception of constitutional morality and not by societal morality […]. In the garb of social morality, the members of the LGBT community must not be outlawed or given a step-motherly treatment of malefactor by society. If this happens or if such a treatment to the LGBT community is allowed to persist, then the constitutional courts, which are under the obligation to protect the fundamental rights, would be failing in the discharge of their duty.[120]

The Supreme Court further evoked the directive principles of state policy, thereby reaffirming the constitutional aspiration of creating a society with social justice and equitable distribution.[121] In this regard, the anti-sodomy laws, based on their disproportionate impact on the rights of sexual and gender minorities in health, education, employment and all areas of social life were deemed 'against the aspiration for social justice and equitable distribution'.[122] Vashit agrees that by evoking the directive principles of state policy, 'constitutional morality revived the lost cause of re-distribution and re-fashioned neo-liberal policy decisions (including the policy of criminalisation) according to the redistributive and egalitarian spirit of the [Indian] Constitution'.[123]

The Court also draws inspiration from developments in other domestic jurisdictions, such as Trinidad and Tobago, Fiji, South Africa, Canada, Hong Kong, United States, Fiji, Ecuador and Nepal.[124] The trend of judicial decriminalisation is a factor that perhaps more than others make courts feel that they are 'not alone' and can thus make progressive decisions despite potential backlash. This level of confidence is also fed by using international human rights law jurisprudence as elaborated by the Human Rights Committee, the European Court of Human Rights, and soft law, such as the Yogyakarta Principles, which the Indian Supreme Court referred to. Using international human rights law in cases like the *Navtej* has the impact of showing how important human rights treaties are and the binding nature of states' obligations elaborated in them.

5.2.2.2. Impact of decriminalisation

Considering that decriminalisation only occurred in 2018 – and the strong cultural and religious resistance for law reform in that direction in India – its full impact is yet to be experienced by sexual and gender minorities in the country. However, as an end in itself, decriminalisation brought an end to an era where sexual and gender minorities lived in fear of arbitrary arrests, harassment and labelled as criminals by the justice system.[125] As discussed above, the jurisprudence and correlative legal reforms introduced by the Court are perhaps the most important impact in the sense that everything that came and yet to come rests on them. The decision to decriminalise came with its backlash as religious and

120 The *Navtej* case, para 119-122.
121 The *Navtej* case, para 133.
122 The *Navtej* case, para 44,52,53, 237.
123 Vashit (n 107) 80.
124 The *Navtej* case, para 40, 41, 91, 111, 115, 118, 195.
125 Gupta (n 78) 4816.

political leaders attacked the Courts and individual judges.[126] They called on defiance against the decision such that tolerance towards sexual and gender minorities was branded as a rebellion against religion and culture, reinforcing the pre-existing stigma and discrimination.[127] In spite of the backlash and widespread criticism of the Court, decriminalisation through the *Navtej* case led to a series of other important legal and policy reforms in India. Among the first and stand out cases that resulted from decriminalisation is *Shrinivas Ramchandra Siras v The Aligarh Muslim University* (AMU) *& Others,* where Dr Siras, a faculty member of AMU, was filmed having consensual sex with another adult in the privacy of his house.[128] The filming was done by two intruders and following the circulation of the video, Dr Siras was dismissed by AMU for immoral sex.[129] Dr Siras challenged the dismissal as unconstitutional and discriminatory on the basis of sexual orientation relying on the *Navtej* case. Sheikh notes that the dismissal was met with nationwide outrage from the sexual and gender minority rights movement because of the depiction of consensual same-sex sexual conduct between adults as immoral even after the *Navtej* case.[130] The *Siras* case thus acted as a test case on the impact and relevance of the *Navtej* case. The High Court held that the dismissal was unlawful and discriminatory based on sexual orientation and ordered the AMU to reinstate Dr Siras.[131]

After the decision, the two intruders who took the video were arrested and prosecuted. However, despite the decision, Dr Siras was ridiculed by AMU which expressed its disregard through an official statement to the effect that while they respected the Court's decision and the right to privacy of faculty members, 'the members were expected to live up to the valued cultural ethos and great moral credentials that AMU has been nurturing since its inception.'[132] A week after the Court's vindication, Dr Siras was found dead in his house, with the cause of death recorded as suicide.[133] Sipati argues that the *Siras* case shows the limitation of decriminalisation, on the one hand, and its positive impact on the other.[134] Apart from the positive impact on workplace that decriminalisation had through the *Siras* case, media narratives on sexual and gender minority rights began to shift as seen in the following excerpt from an article on the *Siras* case:

> [n]onetheless, it is inconceivable to imagine the court's verdict and police action taking place in a context in which gay sex was illegal. In the pre-Naz Foundation era, *Siras* would have been the criminal, the other wrongs mere sideshows. The current official narrative of a victimised Siras, a callous administration and criminal housebreakers owes much to the Court's view that Siras' sexual choice was legitimate […] It is too early to tell whether the sea has parted and that homosexuals can live with dignity in India. Progressive court pronouncements and their official enforcement usually have a time lag between them. Siras was an unwitting symbol; he is now part of a nationwide movement to realise Naz Foundation's dream. Shortly before he died, Siras told a reporter from this newspaper that 'I want to work for the gay community.' Despite his tragic end, Shrinivas Ramchandra Siras' work continues.[135]

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126 Chatterjee (n 89) 817.
127 As above.
128 (2010) HC 17549.
129 As above.
130 Sheikh (n 91) 188.
131 The *Siras* case, para 64.
132 V Sitapati 'The spectre of Naz' *The Indian Express*, 2 April 2010. https://indianexpress.com/article/opinion/columns/the-spectre-of-naz/ (accessed on 2 November 2021).
133 See https://cis-india.org/internet-governance/front-page/privacy-sexual-minorities (accessed 2 November 2021).
134 Sitapati (n 132) 3.
135 As above.

The *Siras* case and the death of Dr Siras, while tragic, brought to light the rights of sexual and gender minorities and highlighted the *Navtej* case in a manner that roused empathetic attention from the Indian public.[136] The fact that the *Siras* case happened before the Supreme Court passed its decision in the *Navtej* case makes it even more significant as it motivated other cases to be filed with the newfound faith in the courts. Thus, in *The National Legal Services Authority v Union of India* (*NLSA* case), the petitioners sought for the recognition and protection of gender minorities as it was felt that the *Navtej* Case focused more on sexual minority rights.[137] Taking a leaf from the *Navtej* case, the Supreme Court famously held that articles 15 and 16 of the Constitution which prohibited discrimination based on 'sex' included 'gender identity' within the concept of 'sex'.[138] Drawing inspiration from the Yogyakarta Principles, the Court stated that gender identity is an integral part of human personality and one of the most basic aspects of self-determination, dignity and freedom. The right to choose one's gender identity is integral to the right to lead a life with dignity and, therefore, fell within the scope of the right to life.[139] The Court went on to state that 'gender minorities are recognised as a "third gender" and that their rights are safeguarded under articles 14 (equality before law), 15 (prohibition of discrimination), 16 (equality of opportunity), 19(1) (a) (freedom of expression) and 21 (rights to life and personal liberty) of the Constitution.'[140] The *NLSA* case was one of the first cases to specifically focus on the rights of gender minorities and thus has its own significance apart from being a product of decriminalisation. Together with the *Navtej* case, it strengthened the sexual and gender minority rights movement in India.

Unlike in the UK, decriminalisation in India and the subsequent progressive court decisions have not yet translated into legislative and policy changes. This can be attributed to the fact that judicial decriminalisation is not backed by political leaders. In societies with strongly rooted religious and cultural nationalism, political leaders are unlikely to support decriminalisation in any way, as that possess a risk to their reputation and political survival, especially in run ups to elections. In a heterosexual nation like Zambia, politicians may have views about the need to decriminalise, but due to the political reputational risk associated with voicing anything towards the advancement of sexual and gender minority rights, such views cannot be expressed. It is no wonder that there is a difference in the nature of the impact that decriminalisation had in India and the UK. Notwithstanding, decriminalisation recorded significant positive change in the lives of sexual and gender minorities. A 2017 survey on the 'Impact of decriminalisation in India' concluded that the courts' striking down of the anti-sodomy laws

> […] has positively impacted the LGBT community and has improved the quality of life of sexual minorities. However, greater efforts must be made, and strategies must be formulated in order to truly integrate the LGBT community into Indian society, eliminate stigma and discrimination, and award them the same opportunities as those available to other citizens.[141]

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136 As above.
137 (2014) SC/1863.
138 As above.
139 The *NLSA* case para 17.
140 The *NLSA* case para 21.
141 D Jian 'Impact of the decriminalisation of homosexuality in Dehli: An empirical study' (2017) *Arkansas Journal of Social Change and Public Service* 1-14.

The survey had four main findings in terms of the impact of decriminalisation. First, decriminalisation led to increased self-acceptance and confidence by sexual and gender minorities.[142] This conclusion was arrived at based on the fact that the sample of sexual and gender minorities who participated said that, after the decision of the Supreme Court, they felt an improved sense of self-awareness, self-acceptance, self-confidence, and emotional security which translated to general good mental health.[143] Before decriminalisation, the mental health of sexual and gender minorities was generally poor and as a result, the rate of suicide was relatedly high.[144] Suicide rates were particularly high among working class sexual minority women.[145] In essence, decriminalisation led to the improved mental and social wellbeing of sexual and gender minorities in India. This impact is significant considering one of the most dangerous but less discussed effects of the mischaracterisation of anti-sodomy laws (as discussed in Chapter 4) is mental ill-health. As Goodman points out, anti-sodomy laws do not serve the ultimate purpose of forcing individuals to conform to heterosexual norms of sexuality, but they ultimately impact on the self-esteem, self-worth and personal identities of sexual and gender minorities.[146]

Second, the survey found that following decriminalisation, there was greater societal acceptance of sexual and gender minorities in India.[147] This in turn led to less discrimination and better treatment of sexual and gender minorities. However, the survey report acknowledges that 'while there is a marked difference in social perception and awareness of the rights of sexual and gender minorities after the decriminalisation, total societal acceptance will be a gradual process'.[148] This is evident from the lesson learnt from decriminalisation in the UK. Even after decades of decriminalisation, sexual and gender minorities did not enjoy life with zero stigma or discrimination.

Third and related to societal acceptance is the fact that after decriminalisation, sexual and gender minorities had a relatively improved relationship with the police, less police harassment, and fewer arrests.[149] The majority of participants recorded to have less fear when dealing with the police based on a sense of protection from the law after decriminalisation.[150] It was, however, acknowledged that the change in police attitude was not as widespread and training needed to be done to help change the attitude of the police.[151] This speaks to the fact that decriminalisation should be followed up with resocialisation training of police and other public officials including the public in general.

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142 Jian (n 141) 3.
143 As above.
144 Shadow Report of the National Alliance of Women in India to the Committees on the Convention of the Elimination of all forms of Discrimination Against Women (2006) http://www.iwraw-ap.org/resources/pdf/india%20Shadow%20reports.pdf (accessed 2 November 2021).
145 As above.
146 G Goodman 'Beyond the enforcement principle: Sodomy laws, social norms and social panoptic' (2001) 89 (3) *California Law Review* 19.
147 Jian (n 141) 6-7.
148 Jian (n 141) 7.
149 Jian (n 141) 6.
150 As above. He records one participant as stating 'There is a difference. There is a lot of change. Now we feel brave and can speak up for our rights even against the police. We are not scared of the like before'.
151 Jian (n 141) 8.

Last, the survey recorded that there was minimal, but nonetheless improved family acceptance.[152] Part of the reason for minimal family acceptance is the fear of rejection because some sexual minorities entered into heterosexual marriages and as such, it became difficult to come out even after discrimination. The survey paints the following picture: [153]

> It is clear that one of the major reasons for non-acceptance by families is the fear of social alienation. Many families fear that they may lose respect in society and face ridicule if their children are open about their sexuality. Hence, they either force them into heterosexual marriages or disown them, leaving them with little or nothing. This often leaves LGBT individuals little choice but to hide their sexuality and lead a dual life. One respondent, who was disowned by his family when they found out about his sexual orientation, was very distressed about being thrown out of his house without even getting his rightful share in the family property. He suddenly found himself not only abandoned by his family, but also without any money or assets, and very little means to support himself.

Decriminalisation also led to increased access to health care in that the decriminalised legal environment gave a sense of personal security, which in turn increased the health seeking behaviour of sexual and gender minorities in India.[154] Sheikh notes that decriminalisation drove HIV from the underground to the protected public space where prevention and treatment services could be accessed.[155]

While decriminalisation can help create an environment of legal security and personal wellbeing among sexual and gender minorities, deliberate efforts need to be made to restore family relationships. This requires efforts from both the state, sexual and gender minority rights organisations, and very importantly, from religious organisations. In fact, for family acceptance, the role of religious institutions such as churches, mosques, and temples is the most critical. However, the problem is that with judicial decriminalisation as happened in India, political will is comparably low, and in many cases, both political and religious leaders seek to preserve public relevance by condemning any acts of human rights development for sexual and gender minorities. As such, they are less inclined to play any positive role in family restoration. For instance, even after the Court's decision in the *Navtej* case, the Indian Parliament consistently rejected Bills for the legislative repeal of section 377.[156] In contrast, in the UK, the Church of England and the legislature, 'worked together to ensure that families were not broken because of sexual orientation and gender identity, and they proactively encouraged the government to adopt measures that would lead to family coercion'.[157]

The next section examines South Africa, where decriminalisation uniquely occurred as one of the products of a wider national struggle for democracy, with the strength of civil society, a willing judiciary and a less disinclined Parliament.

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152 Jian (n 141) 8-9.
153 Jian (n 141) 9.
154 Jian (n 141) 11
155 Sheikh (n 92) 108.
156 Sheikh (n 92) 122.
157 Grimley (n 284) 730.

5.2.3. Decriminalisation in South Africa: the triumph of the integrated struggle for freedom

5.2.3.1. Process of decriminalisation

South Africa is the first country in Africa to decriminalise it's consensual same-sex conduct , and the first in the world to have an equality clause in a national constitution that prohibits discrimination based on sexual orientation.[158] The journey towards decriminalisation in South Africa started with the post-apartheid interim Constitution of 1993, whose Bill of Rights contained an 'equality clause' prohibiting unfair discrimination on the basis of sexual orientation. The interim Constitution came into force in 1994, with the final one (Constitution of the Republic of South Africa, 1996) being adopted in 1996 and entering into force in 1997. Two important factors can be attributed to decriminalisation in South Africa: the strength and involvement of the sexual and gender minority rights movement, on the one hand, and the political will to decriminalise, on the other.

Before 1996, same-sex sexual conduct and relations were illegal in South Africa under the Immorality Act. The Immorality Act (also later referred to as the Sexual-Offences Act) was passed in 1927, prohibiting sexual relations between Europeans and those it classified as 'natives'.[159] The Act was amended several times between 1950 and 1988, intensifying restrictions and penalties for interracial intimacies and in 1968 it criminalised same-sex sexual conduct in private[160] 'between men' and the use of sex toys.[161] The focus was on men because, as in other countries, women's sexuality was seen as merely a site of reproduction and, therefore, the possibility and threat of lesbian sexual activity was not perceived, or at least, acknowledged.[162] According to Elder, the government at the time worried more about the different sizes, shapes and attributes of sex toys that could be used by lesbians than them engaging in actual sexual activity.[163] Even the attitude of courts revealed a reluctance to acknowledge the reality of female same-sex sexuality. For instance, in *S v Matsemela*, the Court doubted that same-sex conduct between females was a crime.[164]

Under Roman Dutch common law,[165] 'sex against the order of nature' was already an offence criminalising sexual conduct between men, sexual conduct between women, bestiality, masturbation

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158 Section 9, Constitution of the Republic of South Africa.

159 Race was classified through legislation like the Population Registration Act, 1950.

160 Same sex sexual conduct between men in public was an offence under the 1957 amendment of the Immorality Act, but this was seen as insufficient regulation the same-sex sexual act. As such, after the 'Forest Town raid' where 9 men were arrested for masquerading as women and engaging in sexual intercourse, the government introduced the 1968 amendment which criminalised same-sex sexual conduct between men in private, specifically criminalising two or more men at a party, engaging in activities which would arouse sexual desire. See D Pushparagavan 'The history of LGBT Legislation in South Africa' (2020) *South African History Online*, https://www.sahistory.org.za/article/history-lgbt-legislation (accessed 7 October 2021).

161 In 1957 the Act was renamed as the sexual offences Act with several amendments made.

162 G Elder 'The South Africa body politics: Space, race and heterosexual' in Nast & Pile (eds) *Places through the body* (1998) 153. Even the attitude of courts was reluctant.

163 As above.

164 (1988) 2 SA 254 (T) 258.

165 Roman Dutch common law is the uncodified law based on Roman law and applied in the Netherlands 18th Century and still applied to date in former colonies. It is scholarship and judge driven and has played a significant role in the South African legal system particularly in private law. Many aspects of South African private are still exclusively governed by principles of Roman Dutch law. For a discussion on the role and place of Roman Dutch law in South Africa see F du Toit 'Roman Dutch law in modern South African succession law' (2014) *Verdieping* 278 https://core.ac.uk/download/pdf/62635332.pdf (accessed 13 May 2023).

and heterosexual sodomy.[166] However, with the Immorality Act, the state made sodomy a statutory offence which meant wider powers to arrest and prosecute offenders.[167] Retief argues that there was a 'somewhat selective application of the law' as same sex relations between black male adults was generally overlooked under the apartheid regime.[168] However, as shown below, part of the chain of causation that led to decriminalisation in South Africa was the arrest for anti-apartheid activism, of black gay men like Simon Nkoli.

Although not as draconian as in other countries, the Immorality Act created an environment where sexual and gender minorities in South Africa were discriminated against, marginalised, repressed and generally had their rights violated.[169] As in most countries, part of the reason for the legal repression of sexual and gender minorities in South Africa was the mild religious nationalism of the National Party (NP, the then ruling party) which was strongly grounded in Calvinism as taught by the Dutch Reformed Church.[170] Costa-Santos writes that 'the emergence of a growing gay sub-culture in big South-African cities such as Johannesburg, associated with the increasing visibility of places frequented by homosexuals, blew the whistle and caught the attention of the National Party, which saw homosexuality as a threat to South African civilisation, and the reformed doctrine the party stood on'.[171] According to Costa-Santos, 'to make sure the country would not have the same destiny as Rome or Esparta, the falls of which were intimately associated with the dissemination of homosexuality in the eyes of the NP, in 1968, the party imposed a major repression on homosexuality by amending the Immorality Act 1957.'[172] In this regard, the South Africa apartheid government can be said to have held the same moral and religious nationalism of heterosexual nations like Zambia.[173] From this premise, decriminalisation in South Africa provides valuable lessons for Zambia.

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166 P De Vos 'On the legal construction of gay and lesbian identity and South Africa's transitional constitution' (1996) 12 *South Africa Journal on Human Rights* 274. The Roman Dutch common law offence of sodomy was similar to the English offence and based on the same Christian understanding that all non-heterosexual sexual conduct was 'against the order of nature' and should be punishable by law. The offence was defined in old cases like *R v Curtis* (1926) CPD 385, *R v Gough and Narroway* (1926) CPD 159, *R V K and F* (1932) EDL 71 (in obiter) and *S v V* (1967) 159.

167 Section 1 of the Act stated that the aim of the Act was to stamp out immorality and gave wide powers of arrest to the police for suspected immoral Acts.

168 G Retief 'Keeping Sodom out of the lagger: The policing of sexual minorities in South Africa' in Gevisser & Cameron (eds) *Defiant desire: Gay and lesbian lives in South Africa* (1994) 106-109.

169 A Carolina 'Apartheids Immorality Act and the fiction of heteronormative whiteness' (2017) *African Journal Online* 114, citing E Cameron 'Unapprehend felons: Gays and lesbians and the law in South Africa' in Gevisser & Cameron (eds) *Defiant desire: Gay and lesbian lives in South Africa* (1994) 89-98.

170 As above.

171 G da Costa Santos 'Decriminalising homosexuality in Africa: Lessons from South Africa' in C Lennox & M Waites (eds) *Human rights, sexual orientation and gender identity in the Commonwealth* (2015) 317.

172 As above.

173 For instance, in rationalising and arguing for the stricter anti-sodomy provisions in the Immorality Act, the Justice Minister, P C Pelser addressed the house of Assembly stating that:

> history has given us a clear warning and we should not allow ourselves to be deceived into thinking that we may casually dispose of this viper in our midst by regarding it as innocent fun. It is a proven fact that sooner or late homosexual instincts make their effects felt on a community if they are permitted to run riot [...] *Therefore we should be on the alert and do what there is to do lest we be saddled later with a problem which will be the utter ruin of our spiritual and moral fibre*. (emphasis added) See Retief (n 165) 56.

Further, Gevisser (n) notes that among the multiple sites of 'otherness' in apartheid South Africa were the black conspiracy, the communist conspiracy, and later the queer conspiracy which was constructed as a threat to the nation.

Decriminalisation is one of the products of the end of apartheid in South Africa. With increased pressure against the South African apartheid government, there came the growth of the liberation movements from which the sexual and gender minority rights movement gained momentum as they also translated their cause as part of the wider struggle against apartheid.[174] Civil society played a critical role towards not only decriminalisation, but also the formal recognition and equality of sexual and gender minorities during and after apartheid in South Africa. The Gay Association of South Africa (GASA) formed in 1982 was the first organisation to be formed but had no political objectives; rather, its aim was to provide its members with spaces for socialisation and support services.[175] GASA was criticised for its silence over the arrests of its black members, such as Simon Nkoli, for political activism against apartheid.[176] In 1988, Nkoli established the Gay and Lesbians of Witwatersrand (GLOW) as a non-racist, non-sexist and non-discrimination organisation committed to achieving democracy in South Africa where sexual and gender minorities would be free.[177] The intersection between race and the struggle against apartheid and against oppression based on sexual orientation was important not only to Nkoli but for many black sexual and gender minorities in South Africa. Thus, in setting up GLOW, Nkoli said:

> I'm fighting for the abolition of apartheid, and I fight for the right of freedom of sexual orientation. These are inextricably linked with each other. I cannot be free as black man if I am not free as a gay man. So when I fight for my freedom I must fight against both oppress.[178]

This intersection between race and sexual orientation would play a pivotal role in decriminalisation in South Africa. Other organisations that formed and strengthened during this period include the Organisation of Lesbian and Gay Activists (OLGA), the National Coalition for Gay and Lesbian Equality (NCGLE), and the Lesbian and Gays Against Oppression (LAGO).[179] Pettis writes that the period leading to the end of apartheid was defining for the sexual and gender minority rights movements in South Africa, as its activism moved away from the white-centeredness, a political stance of former activist groups, such as GASA and the Law Reform Movements, as new activists groups, like GLOW and OLGA, aligned themselves with anti-apartheid groups, such as the African National Congress (ANC) and the United Democratic Front (UDF).[180] Donham adds that 'GLOW had a major impact on black homosexual life since it provided advocacy and support for black LGBT people,

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174 H de Ru 'A historical perspective on the recognition of same-sex unions in South Africa' (2013) 19(2) *South African Law Journal* 222.

175 Santo (n 171) 318.

176 Santo (n 171) states that arrest of black members of GASA such as Simon Nkoli over their involvement in the anti-apartheid activism in 1986 exposed the internal contradictions in GASA, which he argues did not accept black members out of principle but rather to 'show the world' that as primarily a human rights group, it was non-racial. The arrest of Nkoli also highlighted contradictions within the ANC as most of its leaders did accept or tolerate homosexuality with some, like Ruth Mompati (ANC leader in the UK) coming out openly against it as an issue that would shift attention of the ANC to less important matters. The protests against the ANC, resulting from Mompatis statement, from many anti-apartheid and human rights groups in Europe, forced the ANC, through its director of information and later President of South Africa, Thabo Mbeki, to make a public commitment that 'the ANC would fight for gay and lesbian rights' as part of its agenda for liberation and democracy in South Africa.

177 De Ru (n 168) 227.

178 S de Wall & K Martin *Till the time of trail: Prison letters of Simon Nkoli* (2007) 3.

179 Pushparagavan (n 160) 9.

180 As above.

especially those in the townships.'[181] OLGA membership was mostly white, middle-class people who stringently opposed apartheid and allied itself with the ANC and the UDF.[182]

Although banned in South African at the time, the ANC – as part of its national and international political mobilisation strategy – could not be seen to be anti any group which was being oppressed in South Africa, and as such, after the arrest of gay black men, like Nkoli, the ANC leadership held meetings with both white and black sexual and gender minority rights activists within and outside South Africa.[183] Arguably, these early contacts were fundamental to bringing sexual and gender minority rights in the Bill of Rights after the end of apartheid. De Ru writes that by the time political parties began drafting the interim Constitution, the ANC had formally recognised sexual and gender minority rights as part of its agenda and agreed to include a prohibition of discrimination based on sexual orientation in the proposed Bill of Rights.[184] During the drafting of the 1996 Constitution, the sexual and gender minority rights movement organised themselves under the National Coalition for Gay and Lesbian Equality (NCGLE) and mounted a vigorous campaign to ensure that sexual orientation is kept as a prohibited ground of discrimination. De Ru submits that the inclusion of sexual orientation as a prohibited ground of discrimination in the final constitution can be attributed, to a great extent, to the vigorous campaign mounted by NCGLE.[185] The role black gay anti-apartheid activists also played a key role in ensuring that the discrimination clause is kept in the final Constitution. GLOW lead by Nkoli contextualised its struggle against discrimination based on sexual orientation within the struggles against apartheid which led the ANC to adopt the struggle as part of its own. As discussed in more detail in the section that follows, the ANC could not be seen to be anti any group that was fighting for its own liberation against repressive apartheid laws. The discrimination Constitution clause was therefore, kept in the final, and thus South Africa became the first country in the world to explicitly prohibit discrimination based on sexual orientation and, in that regard, sexual and *gender minorities*[186] were at the very least protected *de jure*. De Vos holds that the sexual and gender minority rights movement in South Africa was ultimately successful because its leaders were fortunate and wise enough to present their struggle as forming part of a broader struggle against oppression by the apartheid state.[187]

The jurisprudence that came from the judiciary gave life to the equality and other clauses in the Constitution. The legal issues that arose from the equality clause can be put in two broad categories. One was the prohibition of discrimination, primarily to ensure that sexual and gender minorities as individuals are protected from discrimination in their public and private lives, and the other was the

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181 See https://www.sahistory.org.za/article/history-lgbt-legislation (accessed 7 October 2021).

182 Pushparagavan (n 160).

183 Santo (168) 318.

184 De Ru (n 174) 228.

185 As above. See also Currier & Moreau 'Understanding same-sex marriage debates in Malawi and South Africa' in B Winter *et al* (eds) *Global perspectives on same-sex marriage: A neo-institutional approach* (2018) 93.

186 Although the terminology and focus was on sexual orientation, gender minorities were also by implication protected under the discrimination clause and the other clauses as well as the other clauses on equality before the law and human dignity.

187 P De Vos 'The inevitability of same-sex marriage in South Africa's post-apartheid state' (2007) 23 *South African Journal on Human Rights* 435.

recognition of same sex-relationships as legal unions with the same rights as heterosexual unions.[188] In essence, it was all about the recognition and protection of the sexual citizenship of sexual and gender minorities in South Africa. Decriminalisation was based on the first issue. In one of the first cases, *S v Kampher*, the first case to deal with decriminalisation of sodomy in South Africa, the Western Cape High Court held that the common law offence of sodomy violated the Constitution.[189] The case involved a gay man in the Western Cape who was convicted of sodomy and sentenced to 12 months' imprisonment. He appealed against the decision to the High Court on the grounds that the offence of sodomy violated the equality clause in sections 8(1) and 13 of the interim constitution which prohibited discrimination based on sexual orientation. The appeal was allowed by the High Court which stated that the offence of sodomy was a clear example of discriminatory laws against sexual minorities in South Africa.[190] However, the Court did not strike down the anti-sodomy laws. Decriminalisation happened three years later in *National Coalition for Gay and Lesbian Equality (NCGLE) v Minister of Justice* where the constitutionality of the common law and statutory offence of sodomy under section 20(A) of the Immorality Act was escalated to the Constitutional Court.[191] The Court made a landmark decision where it held that both the common law and statutory offence of sodomy was unconstitutional as it violated the rights to equality, dignity and privacy, and further, that the limitations on the rights were not justifiable under section 36 of the Constitution.[192] The Court began by analysing the characterisation and application of anti-sodomy laws in South Africa, which, from the following quote, is the same as in Zambia, currently:[193]

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

Putting the case in perspective, Sachs J stated that 'only in the most technical sense is this case about who may penetrate whom and where. At the practical and symbolic level, it is about the status, moral citizenship and sense of self-worth of a significant section of the community.'[194] The Court then went into detail highlighting the impact of anti-sodomy laws in South Africa citing the same situations that sexual and gender minorities face in Zambia, such as unfair arrests, discrimination from employment, education, health services, violation of human dignity, emotional abuse, and in some cases, physical violence.[195] The Court found the discrimination based on sexual orientation to be unacceptable under the Constitution of South Africa, especially in a democracy which set a new vision to build an inclusive

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188 U Jivan 'From individual protection to recognition of relationships: same sex couples and the South African experience of sexual orientation reform' (2007) 3 *Law, Democracy and Development Law Journal* 19.

189 (1997) 2 SACR 418 (C).

190 The *Kampher* case, para 10.

191 (1999) 1 SA 6 (CC).

192 The *NCGLE* case para 26,28,30, 32 and 37.

193 The *NCGLE* case para 19.

194 The *NCGLE* case para 107.

195 The *NCGLE* case para 107, 108,109 and 113.

society grounded on the respect of the rights of all citizens.[196] Addressing the unfair impact of anti-sodomy laws, Ackermann J emphasised that

> [i]t is the impact of the discrimination on the complainant or the members of the affected group that is the determining factor […]. The desire for equality is not a striving for the elimination of all differences but requires an understanding of 'the other' in society. Discriminatory prohibitions on sexual relations between men reinforce existing societal prejudices and increase the negative effects of such prejudices.[197]

Sachs J, in a concurring opinion, stated that equality should not be mistaken to mean uniformity, but rather that 'equality means concern and respect across difference'.[198] Commenting on the decision, Jivan states that the Constitutional Court 'reaffirmed its earlier equality jurisprudence which had [by then] embodied a rejection of the notion of "formal equality" in favour of a "substantive" understanding of equality.'[199] De Vos, referring to the Court's approach on substantive equality, states:[200]

> Substantive equality takes into account the structural inequalities in our society and endorses the view that the experience of subordination lies behind the vision of equality […] the right to equality is conceptualised as a right to be different from the stated or unstated norm without suffering adverse consequences because of such difference.

In making its decision, the Court also relied on international law pursuant to section 38 of the South African Constitution. As such, the Court referred to the international bill of rights, the European Convention of Human Rights, and the growing jurisprudence of the time regarding the decriminalisation of anti-sodomy laws.[201] Particularly following the reasoning of the European Court of Human Rights on the right to privacy in the *Dudgeon* case, the South African Constitutional Court stressed that the way in which people express their sexuality is at the core of their private lives, and if as adults, they consent in their expression of their sexual intimacy, without doing harm to one another, or actual harm to others, then any law that seeks to regulate their conduct is an invasion of their privacy.[202]

5.2.3.2. Impact of decriminalisation

Beyond decriminalisation, South Africa is the only country in Africa to legislate in favour of same-sex marriage through the Civil Union Act,[203] equal opportunities in employment for sexual and gender minorities through the Employment Equity Act,[204] alteration of the sex assigned at birth through the

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196 As above.
197 The *NCGLE* case para 19.
198 The *NCGLE* case para 132.
199 Jivan (n 188) 27.
200 P De Vos 'Same-sex sexual desire and the re-imagining of the South African family' (2004) 20 *South African Journal on Human Right* 184.
201 The *NCGLE* case para 39.
202 The *NCGLE* case para 32. See also Jivan (n 188) 28 for a detailed analysis of this aspect.
203 The Civil Union Act, No. 17, 2017.
204 Employment Equity Act, No. 55, 1998.

Alteration of Sex Description and Sex Status Act,[205] and the rights of same-sex couples to adopt a child/children under the Children's Act.[206] In this regard, decriminalisation had a positive sequential effect by creating an environment of legal, formal and substantive equality for sexual and gender minorities. Jivan notes:

> South Africa has been no different from most countries which go through a standard sequence of legislative steps recognising homosexuality. The first steps are taken within the criminal law: permitting homosexual acts between male adults and then removing age and other distinctions between same-sex and opposite-sex sexual activity. The next steps are taken by the civil law: prohibiting discrimination in employment, and in the provision of goods, housing and other services. The final steps are taken by family law, extending laws applicable to heterosexual couples to homosexual couples, recognising the parental relationship between homosexual parents and their own, or their partners' children, and finally providing for marriage rights.[207]

India and the UK also had the same sequence, starting with decriminalisation to recognition. The decided cases also show this sequence. For instance, after decriminalisation, several civil actions were filed challenging discriminatory laws and practices with respect to marriage recognition, equality employment and the right to adopt children. For example, *Langemaat v Minister of Safety and Security*, a case filed shortly after decriminalisation, was on employment discrimination and the recognition of same-sex partnerships in employment bases Insurance schemes.[208] In the case, a lesbian police captain sought to have her partner included on her medical aid scheme but was denied. The court found in her favour holding the scheme discriminatory based on sexual orientation and, therefore, unconstitutional. Accordingly, the Court ordered that the petitioner's partner be registered under the scheme stressing that

> [a] dependant is someone who relies upon another for maintenance. Taking into account the times and society in which we live, we cannot ignore the knowledge and experiences of many same-sex couples who have lived together for years. They must surely, in my opinion, owe a duty of support to each other […] the stability and permanence of their relationships is no different from that of married couples, both types of unions are deserving of respect and protection. It is time that the law began according protection to same-sex unions. The effect of the scheme's rules and regulations was to exclude many *de facto* dependants of members of the police force.[209]

The *Langement* case did more than recognise sexual and gender minorities as equal citizens, it also brought to life the equality clause in that employment based discrimination and in other social services would not be tolerated. Sequentially, the *Langement* case compares to the *Siras* case in India. As Sitapati said, such cases would not be possible in a criminalised environment.[210]

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205 Births and Death Registration Act: Alteration of forenames Act
206 Children's Act, No.38, 2005.
207 Jivan (n 188) 27.
208 (1998) 3 SA12 (T).
209 As above.
210 Sitapati (n 132) 3.

Building on the growing equality jurisprudence, in *Fourie v Minister of Home Affairs*, the Supreme Court of Appeal recognised same-sex unions as legal unions in South Africa.[211] As a result of the *Fourie* case, the Civil Union Act was enacted in 2006, a year after the decision. South Africa thus becomes the first country in Africa and the fifth in the world to legalise same-sex unions.[212] In *Ehler v Bohler-Uddeholm Africa*, the Supreme Court of Appeal specifically recognised gender identity as a prohibited ground of discrimination under the Constitution, and thus gender minorities are sexual as citizens whose right to employment is protected under the law.[213] In 2002, the Constitutional Court, in *Du Toit v Minister of Welfare and Population Development* held that same-sex couples could legally adopt children jointly, and that one partner could adopt the child of the other.[214] In that case, the petitioners challenged the constitutionality of the Child Care Act and the Guardianship Act which they argued discriminated against them based on sexual orientation and marital status.[215] The Court declared the challenged provisions of both Acts unconstitutional and the following year both the Child Care Act and the Guardianship Act were repealed and replaced by the Children's Act. The age of consent for consensual same-sex sexual conduct which stood at 19 years was reduced to 16 years in line with the age of consent for heterosexual sexual conduct in *Geldenhuys v National Director of Public Prosecutions.*[216] Because of the decriminalised environment and in spite of continued social and religious conservatism, sexual and gender minorities in South Africa, more than in any other country in Africa, can form civil unions, live together, express themselves, seek social services, enforce their employment rights, and continue to run effective civil society organisations that fight the residual negative social attitudes which existed before decriminalisation.[217] In essence, decriminalisation was a vital step towards the realisation of full citizenship for sexual and gender minorities in South Africa.

Pushparagavan, argues that despite the above legal reforms, homophobia and discrimination against sexual and gender minorities still persists in South Africa.[218] He states that sexual and gender minority employees still face homophobic treatment at work, trans-students are still harassed at school and cites ''curative or corrective' rape as one of the most disturbing statistics in the country.'[219] A 2016 survey Report on violence and hate crimes against sexual and gender minorities in South Africa recorded that 1 in 10 sexual minority women between the age of 16 to 24 experienced rape and other

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211 (2005) ZACC 19.

212 At the time the Netherlands (2000), Belgium (2003), Canada (2005) and Spain (2005) had legalised same-sex unions. The UK only legalised in 2013 while India and Botswana are yet to. However, going by the uniformity in the evolution of events and jurisprudential developments in countries that decriminalised, it is safe to say that the legalisation of same-sex unions in Botswana and India is a matter of time. For details of countries that legalised same-sex unions and a summary of the political discourse around the process see https://www.pewforum.org/fact-sheet/gay-marriage-around-the-world/ (accessed 6 February 2022).

213 (2010) ZALC 117.

214 (2002) ZACC 20.

215 As above.

216 (2008) ZACC 21.

217 Others cases included *Satchell v President of the Republic of South Africa* (2002) 6 SA 1 (CC) on equal treatment in employment, Farr v Mutual and Federation Insurance Company (2000) 3 SA 684C where it was held that two gay men living together in a domestic relationship constituted a family, *J v Director General , Department of Home Affairs* (2003) BCLR 463 (CC) where the it was held that a child born through artificial fertilisation to a lesbian couple was a legitimate child, and *Du Plessis v Road Accident Fund* (2003) BCLR 1220 (SCA) in which the supreme court held that a surviving partner of a sex-same relationship is entitled to the same benefits as a heterosexual surviving partner.

218 Pushparagavan (n 160).

219 As above.

forms of sexual violence.[220] Black sexual minority women living in the townships are especially vulnerable to rape.[221] Mkhize *et al* corroborates that even though all women in South Africa are vulnerable to gender based violence, 'black queer women are doubly vulnerable'.[222]

The incidences of corrective rape and other forms of homophobia show the continued negative public/ social perceptions against sexual and gender minorities in South Africa. Reedy also points out that the legislative and judicial changes created a gap between the law and the social attitudes of the majority of citizens who remain conservative on the subject.[223] Some religious and traditional groups still express homophobic views and still argue that 'homosexuality' is un-African and a sin.[224] According to a 2016 survey of social attitudes towards sexual and gender minorities conducted by The Other Foundation, 7 out of 10 (70 per cent) South Africans 'strongly feel that homosexual sex and breaking gender dressing norms are simply 'wrong' and 'disgusting'.[225] However, the same survey report shows positives in terms of respect for human rights, and that over time, South Africans have been gradually accepting and less homophobic.[226]

In terms of employment and business opportunities, sexual and gender minorities are still lagging. According to an analysis of the 2011 Census Report, unemployment rates for black, coloured, and white same-sex households were at 30.9 per cent, 16.7 per cent and 4.2 per cent respectively, compared to 26.4 per cent, 14.1 per cent and 3.8 per cent for heterosexual households.[227] A 2019 report on economic cost of sexual and gender minorities exclusion in South Africa corroborates the census statistics, concluding that the annual economic cost due to wage discrimination and underemployment related to sexual orientation and gender identity stood at approximately US$316.8 million.[228] The overall total cost of discrimination was approximated at US$3.5 billion.[229] These figures highlight the level of disadvantage that sexual and gender minorities face in South Africa despite the favourable legal environment and economic power of the country.

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220 OUT LGBT Well-being Hate crimes against lesbian, gay, bisexual and transgender (LGBT) people in South Africa (2016) 6,7,9,10 https://out.org.za/wp-content/uploads/2020/10/Hate-Crimes-Against-LGBT-People-in-South-Africa-21-November-2016-Web.pdf (accessed 16 October 2021).

221 L Middleton 'Corrective rape': fight a South Africa scourge' (2011) *Time* *http://content.time.com/time/world/article/0,8599,2057744,00.html* (accessed 15 October 2021). For a more comprehensive conceptual discussion on 'corrective rape' see Action Aid 'Corrective Rape' (2011) https://www.actionaid.org.uk/sites/default/files/doc_lib/correctiveraperep_final.pdf (accessed 15 October 2021).

222 N Mkhize *et al The Country we want to live in: Hate crimes and homophobia in the lives of black lesbians South Africans* (2010). See also 'We only write about them when they are dead: Hate killings of black lesbians in South Africa' *Mail & Guardian*, 1 July 2021 https://mg.co.za/news/2021-07-01-we-only-write-about-them-when-they-are-dead-hate-killings-of-black-lesbians-in-sa/ (accessed 9 October 2021).

223 V Reedy 'Decriminalisation of homosexuality in South Africa in post-apartheid South Africa: A brief case history review from sodomy to marriage' (2006) *Agenda: Empowering women for gender equity* 156.

224 As above.

225 The Other Foundation *Progress preludes: A survey of attitudes towards homosexuality and gender non-conformity in South Africa* (2016) 37 https://theotherfoundation.org/wp-content/uploads/2016/09/ProgPrudes_Report_d5.pdf (accessed 16 October 2021).

226 As above.

227 S N Nyeck & D Sherperd *The economic cost of stigma and discrimination in South Africa* (2019) https://williamsinstitute.law.ucla.edu/wp-content/uploads/Impact-LGBT-Discrimination-South-Africa-Dec-2019.pdf (accessed 16 October 2021).

228 As above.

229 As above.

Despite these gloomy figures and statistics, decriminalisation and the associated legal reforms have improved the lives and lived experiences of sexual and gender minorities in South Africa. The legal changes brought about through decriminalisation, discussed above, enabled sexual and gender minorities to marry, adopted children and enforce their rights to be treated equal as seen from the numerous cases in the Constitutional Court. Further studies show that social attitudes towards sexual and gender minorities have been gradually changing towards tolerance and acceptance. For instance, a study in 2010, 11 years after decriminalisation, showed that 83.6 per cent of South Africans from a random sample expressed disapproval and hostile attitudes towards sexual and gender minorities.[230] A similar survey, conducted by the Other Foundation, reported the number to have reduced with 72 per cent of South Africans expressing that same-sex sexual conduct is wrong, but with 51 per cent still expressing optimism believing that sexual and gender minorities are equal citizens whose rights should be protected.[231] The Report further found that between 2012 and 2015, there has been a tenfold increase in the number of South Africans who 'strongly agree' with same-sex marriages.[232] "During the same period, the number of people who 'strongly disagrees' with same sex marriage reduced by half."[233] Perhaps most significantly, a ratio of 2:1 of South Africans support maintaining the constitutional protection of discrimination of sexual and gender minorities.[234]

South Africa paints a very good picture of the impact of decriminalisation in that it shows that while challenges persist as already seen, the significant gains that the country has witnessed are due to decriminalisation which started with a constitutional protection. In this light, having an express constitutional provision or interpreting constitutional clauses on equality, non-discrimination, citizenship, social justice, and human dignity as discussed in Chapter 4 is the core foundation to a successful campaign for decriminalisation.

5.2.4. Decriminalisation in Botswana: the triumph of learnt lessons from abroad

Botswana is a classic case of a country whose civil society movement effectively used the lessons learnt from the three countries previously discussed to mount an effective plan that led to decriminalisation. With its proximity, similar social, political, and legal settings as Zambia, Botswana exemplifies a near perfect country from which lessons can be drawn for decriminalisation in Zambia. Like in Zambia and other countries, sexual and gender minorities in Botswana suffered stigma, discrimination and other abuses under the anti-sodomy laws. Olebile notes that incidences of human rights violations against sexual and gender minorities are rarely reported as they do not attract media attention.[235]

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230 T Smith *Cross-national difference in attitudes towards homosexuality* (2010) 10 https://williamsinstitute.law.ucla.edu (accessed 15 October 2021).

231 The Other Foundation (n 221) 3.

232 As above.

233 As above.

234 As above.

235 L C Olebile 'Status of LGBTI rights in Botswana and the implications of social change' in Namwase & Jjuuko *Protecting the human rights of sexual minorities in contemporary Africa* (2017) 198.

The road to decriminalisation in Botswana is one of the earliest in Africa, having started in 1995 with *Kanane v Attorney General*.[236] In that case, Utjiwa Kanane was charged for 'engaging in canal knowledge against the order of nature' under sections 164(a) and 167 of the Botswana Penal Code. During the criminal trial at the Magistrates Court, he challenged the constitutionality of the offence, and, as per procedure, the matter became a constitutional reference to the High Court for determination of the constitutionality of the charge and the substantive anti-sodomy provision.[237] The High Court decided that 'the state had the power to enact laws even if such laws override individual rights in order to defend public morality'.[238] The Court further stated that 'laws regulating morality were necessarily even among consenting adults in private, so as to maintain a healthy, stable and decent society.'[239] As such, the Court found that the anti-sodomy laws, as 'laws prohibiting homosexuality, are constitutional and necessary in Botswana's society'.[240]

On appeal, the Court of Appeal – the highest Court in Botswana – upheld the decision of the High Court finding the anti-sodomy laws constitutional, reiterating their necessity in Botswana's society.[241] The Court of Appeal, however, made several remarks which afterwards it referred to years later, as will be seen. The Court, though refusing to decriminalise the anti-sodomy laws, left the door open for decriminalisation in the future by stating the that

> the question, however, remains whether the time has arrived when society in Botswana requires that Botswana should follow those other countries where decriminalisation of homosexual practices has occurred. There are, of course, many countries who have not followed this approach. It is not necessary for this Court to express any opinion as to whether the social norms and values of the people of Botswana as to the question of homosexuality are conservative or liberal. The Court has no evidence of either. It, however, does have indications before it that the time has not yet arrived to decriminalise homosexual practices even between consenting adult males in private. Gay men and women do not represent a group or class which at this stage has been shown to require protection under the Constitution.[242]

In a way, the Court can be said to have framed the question of decriminalisation based on social change more than on the substantive unconstitutionality of the anti-sodomy provisions. Thus, according to the Court, 'the answer lay in part, in whether the circumstances in Botswana at the time demand[ed] the decriminalisation of homosexual practices.'[243] Arguably, having considered other jurisdictions, the Court of Appeal had a sense that, in the future, the question of decriminalisation in Botswana would come up again and be answered in the affirmative.

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236 (1995) 2 BLR 94 (CA).

237 Like in Zambia, criminal procedure in Botswana under order 10 permits a person charged with an offence to challenge the constitutionality of the offence, in which case the matter becomes a constitutional reference to the High Court.

238 The *Kanane* case (HC).

239 As above.

240 As above.

241 *Kanane v Attorney General* (2003) 2 BLR 64

242 The *Kanane* case (CA) per Tebbutt JP.

243 As above.

The decision in *Kanane* has been criticised from all corners, but in hindsight, it is clear why decriminalisation did not occur at that point. Several factors that aid judicial decriminalisation, discussed in more detail later, were not in place at the time of the *Kanane* case in Botswana. For example, judicial decriminalisation requires a strategic litigation plan that demands several steps to be taken before a case can be commenced in court. The *Kanane* case was a lone case started by an individual and thus unsupported by the necessary ground factors. It can, therefore, be compared to the *ABVA* case in India which also failed due to the lack of a pre-litigation preparation and resources. Like *Kanane,* the case was dismissed. Further, like in India, at the time of the *ABVA* case, the sexual and gender minority rights civil society movement in Botswana had not yet grown and developed to a level where the necessary pre-litigation activism could be done. During trial, the case was not argued within a strategic human rights frame, and it lacked the necessary evidence in the same way as the first *Navtej* case in India before it was referred back to the High Court. International human rights law was not effectively used and was notably not as developed compared to later years. These factors show the disastrous contributory effect of the lack of a litigation strategy. All these factors are discussed below in detail in respect of Zambia. The major point and lesson for Zambia is that strategic litigation fails, as in the case of India and Botswana, when there is no preparation. Jjuuko underscores this point in detail by examining several African countries.[244]

Following the *Kanane* case, several events worthy of note happened in Botswana which can be argued to have 'made the time right for decriminalisation'.[245] Taking a leaf from neighbouring South Africa, the sexual and gender minority rights movement grew strong, and became visible and was able to mount effective advocacy campaigns. Most prominent among them is the Lesbians, Gay and Bisexuals of Botswana (LEGABIBO). Due to the silence of the victimisation of sexual minorities in Botswana, LEGABIBO started to document them and voice them out.[246] It largely framed its human rights advocacy within the context of public health and the national response to HIV, which helped it to gain ground and credibility among other civil society organisations and public institutions, as well as political leaders.[247] As will be seen later, this greatly contributed to the decriminalisation strategy. In 2007 and 2012 respectively, LEGABIBO applied for formal registration as a civil society organisation but was rejected on both occasions. Similar rejections were made to sexual and gender minority civil society in Zambia with the Registrar of Societies strongly stating that 'homosexuality is immoral and a criminal offence in Zambia, and for that reason I cannot register an organisation that promotes it any more than I could a satanic organisation'.[248] Notably, the narrative that 'homosexuality

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244 A Jjuuko *Strategic litigation and the struggle for gay, lesbian and bisexual equality in Africa* (2020).

245 F Viljoen 'Botswana court ruling is a ray of hope for LGBT people across Africa' (2019) *The Conversation* https://theconversation.com/botswana-court-ruling-is-a-ray-of-hope-for-lgbt-people-across-africa-118713 (accessed 4 December 2021)

246 Olebile (n 231) 200.

247 Viljoen (n 245). Also See T Esterhuizen 'Decriminalisation of consensual same-sex sexual acts and the Botswana Constitution: Letsweletse Motshideimang v The Attorney General (LEGABIBO as amicus curiae)' (2019) 19 *African Human Rights Law Journal* 847-849.

248 Long (n 11) 69. Notably not long before the Registrar denied the registration of the Lesbian, Gay, Bisexual and Transgender Association (LEGATRA), the first sexual and gender minority organisation in Zambia, the Minister of home Affairs, under which the office of the registrar of societies falls, issued a statement that with Zambia being a christian nation and homosexuality being illegal in the country, any person who tried to register an organisation that promotes it would be arrested. See 'Zambia issues warning on gay associations' *The Herald*, Harare 5 September 1998. In contrast to Botswana, since then, no registration attempts have been by sexual and gender minority right organisation in Zambia.

is illegal and immoral' such that registering an organisation that promotes it would be a front to the moral values of the country is common.[249] Unlike in Zambia and other countries were organisations resigned themselves to operating clandestinely, in 2014, LEGABIBO petitioned the constitutionality of the decision of its denied registration in *Thuto Rammoge and 19 Others v The Attorney General* (*The LEGABIBO* case).[250] In what remains a landmark decision, the Court held that refusal to register LEGABIBO was a violation of freedom of association and, therefore, unconstitutional.[251] The Court, therefore, ordered that LEGABIBO be registered. It went further to state that activism and advocacy on sexual and gender minority rights, including lobbying to decriminalise anti-sodomy laws was lawful.[252]

The LEGABIBO decision was one step towards protection of sexual and gender minorities in Botswana. As if responding to the *Kanane* case regarding public perception and attitudes towards sexual and gender minorities, the Courts narrated:

> Rammoge *et al* were able to lead compelling evidence that attitudes in Botswana have, in the recent years, softened somewhat on the question of gay and lesbian rights. National policies on HIV/AIDS recognise gays and lesbians as a vulnerable group requiring special support, and organisations such as BONELA have been registered which openly campaign for the rights of LGBTI community. This Court, too, can take notice of far more open public debate on these issues in recent years. While strong views are still expressed by religious and other groups, some prominent politicians have begun to speak out in support of gay and lesbian rights. This was a subject which only a few years ago was a virtual taboo for public discussion, unless to condemn homosexuality outright.[253]

The Court also noted the shift in political attitudes, citing the following:

> Parliament itself has, by the Employment (Amendment) Act 10 of 2010, amended Section 23 (d) of the Employment Act (CAP 47:01) and forbid the termination of an employee's contract on the grounds of sexual orientation […] The Minister's answering affidavit, too, is free of any homophobic nuance, and refers only to enforcement of laws as he sees it. He encourages the respondents to have his decision tested in court if they disagree. Interims of timing, it maybe that general softening of attitude towards the LGBTI community has developed in the years that followed the adoption in 1997 of the National Vision 2016, and the widespread dissemination of the Vision document. One of the pillars of the Vision was that Botswana would be regarded as a "compassionate, just and caring nation."[254]

Two other cases that are worth noting: In *Tapela and Others v Attorney General*, the Court acknowledged same-sex sexual conduct in male prisons and reversed the government's refusal to distribute anti-retroviral treatment to foreign prisoners.[255] With respect to gender minorities, in *ND v*

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249 Site the Zambia issue.
250 (2016) CACGB 128-14.
251 The *LEGABIBO* case para 33.
252 The *LEGABIBO* case para 17.
253 The *LEGABIBO* case 511.
254 As above.
255 (2018) 2 BLR 118 (CA).

Attorney General, the Court overturned the decision of the Registrar of Births which denied a trans-woman to make changes on their national identity documents.[256]

Apart from these judicial changes, political and social attitudes evolved after the *Kanane* case. In 2013, Parliament passed the Employment Act (Amendment Act) which expressly included sexual orientation and gender identity as prohibited grounds of discrimination for employment in Botswana.[257] This development can also be attributed to collaborative civil society lobbying, particularly by the Botswana Network on Ethics Law and HIV/AIDS, Ditshwanelo Botswana Centre for Human Rights (DB-CHR), and LEGABIBO.[258] In this regard, the lobbying and activism itself formed a major part of incremental steps towards decriminalisation. Prominently during their tenure, former Presidents, Festus Mogae, his successors Ian Khama and current president Mokgweetsi Masisi have all publicly made statements in support of sexual and gender minorities.[259] In an act that gave confidence not only to the sexual and gender minority rights movement, but also served as a statement that homophobia would not be tolerated in Botswana, former president Ian Khama ordered the arrest and deportation of Steven Anderson back to the USA, in 2016, for preaching homophobic sermons in his church.[260] This act, too, helped fertilize the ground for decriminalisation in Botswana. Social attitudes towards sexual and gender minorities in Botswana also improved significantly over this period. An Afrobarometer survey shows that Botswana is among the most tolerant societies for sexual and gender minorities in Africa with tolerance levels of 43%.[261]

Decriminalisation was achieved in the case of *Letswelestse Mosthidiemang v Attorney General.*[262] In a unanimous decision, the High Court of Botswana held that the anti-sodomy laws violated the rights to privacy, liberty, non-discrimination and further that they served no public interest.[263] The decision was appealed against by the State in the Court of Appeal. After a year of waiting, the Court of Appeal delivered its judgment on 3 December 2021, upholding the High Court's decision.[264] It is evident from the decision that the above factors played an important role in the Courts decision to strike down the anti-sodomy laws. From the onset, as stated above, while the *Kanane* case did not decriminalise, it was the open door it left that the Court used as an entry point to decriminalise as seen from the following quote: [265]

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256 (2018) 2 BLR 233 (HC).

257 The Act particularly amended section 23 of the Employment Act of 2010 by introducing several prohibited grounds employment discrimination which included HIV status, sexual orientation and gender identity. See https://www.sundaystandard.info/new-employment-act-recognises-sexual-orientation/(accessed 28 December 2021).

258 See https://www.sundaystandard.info/new-employment-act-recognises-sexual-orientation/ (accessed 28 December 2021).

259 See https://www.un.org/africarenewal/web-features/good-leadership-about-people-–-festus-mogae, and https://www.mambaonline.com/2018/12/10/botswanas-new-president-acknowledges-lgbti-peoples-rights/

260 'Botswana to deport anti-gay pastor Steven Anderson' *BBC* 20 September 2016 https://www.bbc.com/news/world-africa-37418875 (accessed 29 December 2021).

261 See https://afrobarometer.org/site/ddefult/files/publicaations/dispatches/ab_r6-dispatchno74_tolerance_in_africa_eng1.pdf (accessed on 17 January 2022).

262 (2019) MAHGB-00591-16.

263 As above.

264 *Attorney General v Letswelestse Mosthidiemang* (2021) CACGB/157/19. (*Letswelestse* case CA.)

265 The *Letswelestse* case (CA), para 37,70.

> What is clear from the judgement in Kanane is that the Court was not closing the door to the possibility, sometime in the future, of the court finding in another case, in light of subsequent events or upon the presentation of convincing evidence, that it would then be proper and necessary to strike down the offending sections. A subsequent court, or this Court, would not be in those circumstances to be overruling Kanane. It would be endorsing the sentiments expressed therein, and taking the next logical step as decreed therein.

The Court went on to examine the changes (previously discussed) that had occurred in Botswana after the *Kanane* case and having considered them, it concluded:

> As has been demonstrated above, the evidence before the High Court in the present case was entirely different from that in Kanane Case (where there was little or no evidence at all), and the Kanane decision was specifically decided on the conditions as they pertained in 2003. In the present case not only was significant new evidence produced, but new legal issues which had not been dealt with fully or at all were raised. These related discriminatory effect, contrary to Section 15 (1) of the constitution, and also to breaches of fundamental rights conferred by Section 3, to liberty, dignity and privacy.[266]

In terms of lessons learnt for Zambia, the last part of the quote is very important. At the time of the *Kanane* case, the ground was not yet prepared as already said. However, after the *Kanane* case, the sexual and gender minority movement in Botswana 'prepared the ground by organizing, over an extended period, the integration of LGBT issues – such as risks and effects of HIV infection – into the general human rights concerns'.[267] In essence, a strong civil society movement was and is vital to decriminalisation. Furthermore, the framing of sexual and gender minority rights with broader human rights discourses helped not only the movement gain credibility, but also gave the substantive issues the attention needed. Viljoen notes that LEGABIBO, the most prominent LGBT organisation in Botswana, its foundation and growth, closely associated itself with two 'mainstream' human rights organisations, such as Ditshwanelo – Botswana Centre for Human Rights and Botswana Network on Ethics, Law and HIV/AIDS.[268] In the case, LEGABIBO was able to file an amicus brief which, as discussed later, were instrumental in the Courts decision. It was also through civil society activism that political and social attitudes changed in Botswana. Additionally, domestic constitutional and international human rights law jurisprudence had grown such that the court had a richer source of substantiative law material to rely on.

Taking into account the political and social changes, came what this thesis describes later as general and thematic judicial independence necessary for decriminalisation. In the main, Botswana learnt from other countries, like South Africa, that transformative jurisprudence has to be worked on, and that it takes several factors being in place before a successful strategic ligation case for decriminalisation can be filed. The next section discusses how these perspectives apply.

In decriminalising, the Court interpreted the Constitution as a living document and took into account jurisprudence from South Africa, the UK, the USA and the UN Human Rights Committee, and, in closing, declared the anti-sodomy law unconstitutional reiterating that

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266 The *Letswelestse* case CA, para 71 - 73.
267 Viljoen (n 245) 3.
268 Viljoen (n 245) 4.

> [t]here can be no discernible public interest purpose for the continued existence of Sections 164 (a) and 164 (c) of the Penal Code. In my judgment, they have been rendered unconstitutional by the march of time and the changes in circumstances. At present, they serve only to stigmatise gay men unnecessarily, which has a harmful effect on them, and as far as I am aware there has never been any prosecution of a women or even any though of doing so, for the offence of sodomy. Those sections have outlived their usefulness, and serve only to incentivise law enforcement agents and others to become key-hole peepers and intruders into the private space of citizens. That, in my view, is neither in the public interest, nor in the nature of Botswana.[269]

As at July 2022, decriminalisation had only been confirmed by the Court of Appeal less than a week earlier. As such, it is impossible to measure the full impact of the decision. However, bearing in mind the basis on which it was made, the social changes in Botswana and taking a leaf from lessons learnt in the UK, India and South Africa, it can be said with confidence that the decision will have as much positive impact in Botswana as there can be had. Expressing this optimism, LEGABIBO as amicus in the case leaders stated as follows:[270]

> It has taken a long time for our community to be where it is. This incredibly life changing decision, although it does not right all the wrongs done to individual members of the LGBT community, it is a step to restoring our dignity as human beings. The decision has several implications for the LGBT community. Not only does it provide legal affirmation and recognition of the rights of LGBT persons, but it also provides legal affirmation and recognition of the rights of LGBT person and also allows an important space for addressing public health issues more efficiently and effectively. We can finally start building a more tolerant society where LGBT persons are not inconstant fear of being arrested by archaic laws. *The work starts now*.

In the context of judicial decriminalisation, there are some commonalities among India, South Africa and Botswana. All countries have strong sexual and gender minority rights movements with a track record of effective activism before decriminalisation. Considering the strength and work of the sexual and gender minority rights movement in South Africa and Botswana, the two countries have among the highest tolerant populations to sexual and gender minorities in Africa. In all the countries, decriminalisation was mainly led by sexual and gender minority rights organisations, and all have relatively strong and independent judiciaries and consequently a culture of public interest litigation. In addition to this, all the countries have constitutional provisions that could be read in a progressive manner such that they could offer protection to sexual and gender minorities. The next section applies these lessons to the Zambia context.

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269 The *Letswelestse* case (CA) para 115.

270 Anna Mmolai, CEO of the Lesbian, Gays and Bisexuals of Botswana (LEGABIBO) after the delivery of the decision in the *Letswelestse* case. https://mg.co.za/article/2019-06-11-botswana-high-court-ruling-a-victory-for-countrys-queer-communities/ (accessed 8 July 2020) (emphasis added).

5.3. Prospects for decriminalisation: Is decriminalisation of the anti-sodomy laws possible in Zambia and would it mitigate the impact of these laws?

5.3.1. Background and context

The first part of this chapter discussed how decriminalisation of anti-sodomy laws was achieved, and how it significantly improved the lives of sexual and gender minorities in the selected countries. Primarily, two effects of decriminalisation emerged. As an end in itself, decriminalisation was a momentous legal milestone that changed the legal status of sexual and gender minorities by removing the label of criminality and thereby equalising them as sexual citizens deserving dignity and respect for their human rights. As a means to an end, decriminalisation was and remains the steppingstone to more legal and social reforms towards the respect, protection and fulfilment of the rights by sexual and gender minorities as sexual citizens. In essence, the experience of the countries discussed answers the question affirmatively, that decriminalisation mitigates the impact of anti-sodomy laws in the lives of sexual and gender minorities not only *de jure* but also *de facto.*

Trends emerging and insight gleaned from the experience in the countries, as discussed earlier, allow for the contention that decriminalisation of anti-sodomy laws is possible in Zambia, and that it would have the same two effects: As an end in itself, it would change the legal environment and status of sexual and gender minorities as sexual citizens in Zambia, even in the face of heterosexual nationalism. As a means to an end, it would be a springboard for progressive social and legal reforms, such as legalisation of identity change from the sex assigned at birth, same sex marriage, and the right of same-sex couples to adopt. Such 'futuristic' changes, as Sitapati notes, can only occur in a legal and social context where anti-sodomy laws no longer exist.[271] However, country contexts differ and as such some countries, including Zambia, would take long to decriminalise, and there after the consequent positive effects would, arguably, take longer. To put the country context in some form of frame, this part discusses the challenges and prospects for decriminalisation in Zambia, based on the factors that led to decriminalisation, as derived from the experience of the countries previously discussed.

5.3.2. Unfavourable opportunity structure: Heterosexual nationalism and anti-sodomy laws in Zambia

The starting point is to note that decriminalisation, and the factors that led to it, did not come about in an environment conducive for decriminalisation. In fact, in all the countries discussed, as in many others, decriminalisation occurred amid an unfavourable opportunity structure, which mirrors heterosexual nationalism in Zambia in varying extents. An opportunity structure refers to a social, political and legal context within which a social movement operates and thereby informing the strategies they employ to engage in activism.[272] Thus, an unfavourable opportunity structure, is in the context of this thesis, refers to the negative social (religious and cultural) and political sentiments

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271 Sitapati (n 132) 5.

272 E Allan *Out of the closets and into the court room: Legal opportunity structure and gay rights litigation* (2005) 6. See also 126. S Gloppen 'Conceptualising lawfare: A typology and theocratical framework' (2018) https://www.academia.edu/4131632/Climate_Change_Lawfare (accessed 18 May 2023).

against sexual and gender minorities combined the presence of anti-sodomy laws.[273] Heterosexual nationalism and the mischaracterisation of anti-sodomy laws thus represent the unfavourable opportunity structure for the sexual and gender minority rights movement in Zambia. Benford postulates that social movements only emerge and engage in rights based activism in the absence of a favourable opportunity structure.[274] Given that social movements such as sexual and gender minority rights movements have succeeded effecting social and legal reforms to different extents in some countries, heterosexual nationalism in Zambia and other African countries cannot be a reason for decriminalisation not to occur. In fact, the decriminalisation cases formerly discussed, all show that it was the unfavourable opportunity structure and the impact of anti-sodomy laws that actually necessitated and motivated the sexual and gender minority rights movement to mobilise towards decriminalisation.[275] Therefore, heterosexual nationalism, with a constitutionally-backed provision commanding adherence to Christian mores, while posing a challenge for decriminalisation in Zambia, also sets the scene where an innovative and courageous decriminalisation strategy can be mounted.

An important lesson from the countries discussed is the courage and resilience, in the decriminalisation process, of the actors, namely civil society, courts and reform committees, such as the Wolfenden Committee in the UK. Sexual and gender minority rights organisations, in particular, turned the negative lived experiences of sexual and gender minorities in their countries into a positive advocacy and litigation tool towards decriminalisation. For example, in the *Navtej* case, it was the many affidavits of lived experiences that enabled the court to draw a factual conclusion that popular morality as expressed through anti-sodomy laws violated the constitutional rights of sexual and gender minorities.[276] Similarly, in the *Letsweletse* case, the amicus brief of LEGABIBO containing reports of the impact of anti-sodomy laws on the lives of sexual and gender minorities generally, and in particular, as key populations in the fight against HIV helped to, inform part of the reasoning of the Court's decision as follows:[277]

> A number of studies and research papers, all authorised by the Botswana Government, confirmed the negative effect of the impugned criminal sections had on gay men in Botswana as an HIV/AIDS vulnerable group, and that they were often reluctant, owing to the stigma, and fear of prosecution, to come forward for testing and treatment, or as complainants when they suffered blackmail or assault owing to their orientation. This had an adverse effect on their mental well-being owing to the stress of constant fear of discovery or arrest if they engaged in what for them was normal sexual conduct as an expression of their love for their partners. This sometimes led to depression, suicidal behaviour, alcoholism, or substance abuse, and at a level far higher than that of heterosexuals.

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273 For an elaborate examination of *opportunity structure* in context of sexual and gender minority rights in Africa see S Gloppen, A Jjuuko, F Viljoen & A Msosa *LGBT* 'Introduction' in Jjuuko, Gloppen, Msosa & Viljoen *Lawfare in Africa: Legal strategies in contexts of LGBTIQ+ criminalisation and politicisation* (2022) 15-18

274 R Benford 'Master frame' in D Snow (ed) *The Wiley-Blackwell Encyclopaedia of social and political movement* (2017) 126.

275 For instance, in the *Letsweletse* case the Court said that as long as the anti-sodomy laws continued to exist of the statute books their negative impact generally and in the fight against HIV would also continue.

276 See http://www.voicesagainst377.org/court-transcript/ (accessed 19 October 2021).

277 The *Letsweletse* case para 16. LEGABIBO produced the Report A Muller & K Daskilewicz *Are we doing alright? The realities of violence, mental health, and access to healthcare related to sexual orientation and gender identity and expression in East and Southern Africa* (2019). The report is discussed in Chapter 4 on the impact of the mischaracterisation of the anti-sodomy laws in Zambia.

The approach taken by the sexual and gender minority rights organisations to use the hostile legal environment and the social impact of anti-sodomy laws gave courts the much needed human perspective which complemented their theoretical arguments.

Retired US Judge R Powell captures the above point well. Writing in the aftermath of his judicial career, Judge Powell, who, after having been on the fence throughout the proceedings, cast the deciding vote in *Bowers v Hardwick,*[278] stated that he believed he made a mistake. When he read the dissenting judgement, he in retrospect felt it made the better arguments as it humanised sexual orientation and gender identity by pointing out the social impact of the law on actual people.[279] In what is said to be one of the biggest 'what ifs' in the American sexual and gender minority rights movement, Judge Powell introspected that had he known that his legal clerk, Cabell Chinnis, was gay, he would have put a face to abstract arguments, and he would, therefore, have appreciated the social and legal challenges that sexual and gender minorities face in society, and maybe he would have decided differently.[280] At the risk of sounding less academic, the saying that 'there is a silver lining in every cloud' rings true on this point. The prospects for decriminalisation in Zambia exist alongside the use of the impact of heterosexual nationalism and the mischaracterisation of anti-sodomy laws which are discussed in detail in Chapters 3 and 4.

5.3.2. Strong civil society movements

The effective use of the negative impact of anti-sodomy laws on the lives of sexual and gender minorities in the decriminalisation cases earlier discussed co-relates to another factor that contributed to decriminalisation – one that is missing in Zambia: a strong and resilient civil society movement on sexual and gender minority rights. In all the countries discussed, it was sexual and gender minority rights organisations that raised funds, mobilised, filed the cases in court and provided amicus support. It almost goes without saying that activism and the change that results from it is not possible without a strong civil society movement.[281]

Decriminalisation through strategic litigation has been perhaps the most illustrative example of the potential impact of the sexual and gender minority rights movement. Roa and Klugman agree and accordingly define a strong civil society movement, in the context of strategic litigation and activism, as one with the capacity to frame social problems as human rights violations and strategically litigate on them.[282] Discussing the role of civil society in sexual and gender minority rights in Africa, Gore points out that despite socio-political resistance, some African civil society movements have been surprisingly strong and consequently recorded remarkable strides towards equality and non-discrimination in the last two decades.[283] India, South Africa and Botswana show that civil society

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278 (1986) 478/US/186.

279 L Greenhouse *The legacy of Lewis F Powell* (2002) 45.

280 As above.

281 Benford (n 274) 126.

282 M Roa & B Klugman 'Considering strategic litigation as an advocacy tool: a case study of defence of reproductive rights Colombia' 1 *Reproductive Health Matters* 32.

283 E Gore 'Queer Activism in Africa' (2019) *Oxford Research Encyclopaedia* 17. See also the other Foundation (n 143) 27.

activism, visibility and public communication strategies incrementally influence the narrative on the rights of sexual and gender minorities in a positive way. For instance, the combined efforts of civil society in South Africa show that, at country level, social attitudes can be changed from rejection to increased levels of recognition and acceptance of sexual and gender minorities.[284] At international level, the Centre for Human Rights at the University of Pretoria has far-reaching impact that trickles down domestically and is felt in communities. For example, the Centre hosts annually a short course on sexual minority rights in Africa which draws academics, civil society leaders and government officials with the aim of promoting sexual and gender minority rights on the continent.[285] The *LEGABIBO* case in Botswana exemplifies a movement that is strong and resilient domestically and taps into the regionally grounded organisations, such as the Centre for Human Rights at the University of Pretoria, hence its litigation success.[286]

In the context of sexual and gender minority rights, a strong civil society movement on sexual and gender minority rights is unfortunately not the reality for Zambia. In my view, several factors account for the weak local sexual and gender minority rights movement in Zambia.

First, Zambia is generally not seen and labelled as a homophobic country on the continent, and as such, adequate attention and support is not given to enhance the capacity of its sexual and gender minority rights organisations compared to those in countries that are labelled as homophobic. This is notwithstanding the fact that Zambia ranks among the 10 most homophobic countries in Africa with a tolerance rate of 7 per cent according to Afrobarometer.[287] Compared to South Africa, with 67 per cent and Botswana with 43 per cent, Zambia presents the picture of one of the worst countries for sexual and gender minorities despite the fact that it never makes the news for the homophobic occurrences.[288]

Second, as discussed in Chapters 3 and 4, the anti-sodomy laws are mischaracterised to mean that registration of sexual and gender minority rights organisations is illegal. Consequently, organisations have been denied registration and activists who have attempted to register organisations have been harassed and some arrested. Civil society organisations that have voiced strong support for sexual and gender minority rights in the country have either been threatened with closure, with some actually closed, as was the case for Afro-Net and the ZMIT as discussed in Chapter 3.[289]

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284 See the Other Foundation (n 221) 37

285 See https://www.chr.up.ac.za/courses-presented/sexual-minority-rights (accessed 5 December 2022) The Centre runs other activities such as conferences, litigation training and produces publications on sexual and gender minority rights in Africa as well as activism at the African Commission on Human and Peoples' Rights. See https://www.chr.up.ac.za/sogiesc-unit (accessed 5 December 2022).

286 For example, in the *Letsweletse* Case para 20 where court in accepting LEGABIBO's contributions said '[w]hile categorising the studies presented [by LEGABIBO] as self-serving and advocacy based, the Attorney General merely 'noted' these and /or stated that he "had knowledge of them". He baldly denied that the sections caused stigmatisation of gay men, or had the effect of discriminating against them, but offered no research, no studies, and no evidence from the Government to the opposite effect.

287 See n 243.

288 Gloppen, Jjuuko, Viljoen & Msosa (n 273) 11-12.

289 S Long *More than a name: State-sponsored homophobia and its consequences in Southern Africa* (2003) 46. This issue is is discussed in detail in Chapter 3.

Third, the unfavourable opportunity structure in Zambia has driven the local sexual and gender minority rights movement underground, forcing them to operate clandestinely but paying the hefty price of ineffectiveness.[290] The arrest of key popular activist, Paul Kasonkomona, during a live human rights television programme, discussed in Chapter 3, sent a shock wave to the movement thus deepening the underground hole and making themselves invisible as a strategy for personal safety.[291] The invisibility of the movement is evident from the *Hatch-Brill* case, which for the first time attempted to point out sexual and gender minority rights in Zambia.[292] All known local organisations shied away from any form of involvement or support in the case, which was in sharp contrast to the *Letsweletse* case in Botswana where LEGABIBO influenced the decision of the court through its amicus brief,[293] and others showing solidarity outside the Court premises carrying banners and placards while singing and dancing calling for decriminalisation.[294] While the invisibility and shying away of Zambian organisations indicate apparent weakness, it was perhaps a wise strategy under the circumstances, in the sense that a poor, unsustainable solidarity strategy would potentially do more harm than good. The backlash in the Zambian heterosexual nationalism context would outweigh the strength of the movement to forge resistance. In this light, when discussing strategic litigation, the Chapter argues that stark visibility without strength, resilience, capacity and a strategic vision could be retrogressive and counterproductive given the opportunity structure in a heterosexual nation like Zambia.[295]

The fear of arrests, harassment and the consequent invisibility of organisations relates to another factor – the critical financial condition in which local Zambian sexual and gender minority organisations are. Organisations are unable to respond to calls for funding because 'the government is waiting to see which money-hungry civil society organisations will get donor money and start championing gay rights in Zambia' as was put by former President, Edgar Lungu.[296] He was reacting to a call for grants put up by the European Union under its country-based support scheme for democracy and human rights which specifically included sexual and gender minority rights as a theme for support.[297] Van Klinken notes that the Zambian government's consistent reference to organisations 'falling for donor funding to support gay rights' and labelling them as agents of western neo-colonial imperialism has isolated and weekend the local sexual and gender minority rights movement in Zambia.[298] Chapter 4 discusses how local and international private commercial banks in Zambia closed the accounts of organisations perceived to support sexual and gender minority rights, citing reputational risk. The banks' fear to hold accounts for organisations perceived to 'champion gay rights' indicates the level of the Zambian government's repression and homophobic governmentality.

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290 The Other Foundation *Canneries in the coal mines: An analysis of spaces for LGBTI activism in Zambia* (2017) 17 https://theotherfoundation.org/canaries-in-the-coal-mines-zambia (accessed 14 November 2021).

291 As above.

292 The *Hatch-Brill* case is discussed in detail in Chapter 3.

293 See n 171.

294 See https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/SALC-Legabibo-Booklet-1.pdf (accessed 11 November 2021).

295 See section 5.3.4.

296 'Zambia's President say no to homosexuality' *Sky News*, 2 December 2019. See also https://www.youtube.com/watch?v=DyNQGrwt7Ig (accessed 16 December 2019).

297 As above.

298 A Van Klinken 'Christianity, human rights and LGBTI advocacy: The case of Detta Resources Foundation Zambia' in Van Klinken & Chitando (eds) *Public religion and the politics of homosexuality in Africa* (2016) 229.

Consequently, the financial condition of sexual and gender minority rights organisations has been impaired because the strict funding procedures and financial controls of donor agencies cannot allow an organisation without a bank account to receive funding.[299]

The compounded effect of heterosexual nationalism and the anti-sodomy laws has also crippled the operational reach of sexual and gender minority rights organisations in Zambia such that they are unable to reach a wide constituency, reaching only the urban population in Lusaka and the Copperbelt.[300] Addressing this dynamic in African sexual and gender minority rights organisations, Currier and Cruz observe that by lacking the capacity to reach rural populations, most African organisations consequently fail to develop 'local language' styles of addressing and identifying sexual and gender minorities thus limiting identities to western terminologies which adversely impacts on the depth and effectiveness of their of outreach.[301] This is the case for Zambia as the local sexual and gender minority rights movement has not done programming outside urban centres in Lusaka, Copperbelt and Livingstone.[302]

5.3.3. Culture of strategic litigation

Decriminalisation through strategic litigation stands out as a significant achievement of the global sexual and gender minority rights civil society movement.[303] In the countries discussed, civil society organisations, over time, built a culture of strategic litigation as part of their wider human rights, social justice and societal change agenda. These developments saw the forging of a culture of strategic litigation, as sexual and gender minority rights organisations such the NAZ Foundation in India, LEGABIBO in Botswana and NCGLE in South Africa, took their activism and quest for equality to the court room where they eventually succeeded in having anti-sodomy laws struck down.[304] Jjuuko notes that between '1997 and 2020, approximately 34 strategic litigation cases have been filed across Africa with varying results'.[305] He further notes the successes and defeats in different African countries, and regarding the success laments the lack of effective social change resulting from these efforts:[306]

> Surprisingly, however, all these court victories and legal changes have barely been able to transform into social change for LGB persons in the selected Common Law countries. They have

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299 The Other Foundation (283) 24.

300 According to an unpublished report by the Panos Institute of Southern Africa, after several rounds of training on sexual and gender minority rights, traditional and religious leaders in 5 rural districts mourned of the lack of civil society presence to address, educate and provide services regarding several sexual diversity. The training culminated into a human rights brief but due to the sensitive of the subject it was published as a general human rights engagement material for traditional leaders. See http://www.panos.org.zm/wp-content/uploads/2017/04/Panos-Human-Rights-English.pdf (14 November 2021).

301 Currier & Cruz 'Civil society and sexual struggles in Africa' in E Obadare (ed) *Handbook of civil society in Africa* (2014) 10.

302 See n 300.

303 Gloppen, Jjuuko, Viljoen & Msosa (n 273) 11-12.

304 For a more detailed discussion on strategic litigation in sexual and gender minority rights in Africa see A Jjuuko *Strategic litigation and the struggle for gay, lesbian and bisexual equality in Africa* (2020). While Jjuuko focuses on South Africa, Botswana, Kenya, Uganda and Nigeria his work offers an insight to the benefits, challenges and prospects for strategic litigation in Africa.

305 Jjuuko (n 244) 46.

306 Jjuuko (n 244) 2.

> neither been able to result in enduring legal protections for LGB people except to some extent in South Africa, and neither have they spurred broad acceptance by the state and the community.

True that legal victories have not fully translated into every day positive lived experiences for sexual and gender minorities, but the reality of decriminalisation and the consequent *de jure* protection is the steppingstone needed for positive *de facto* experiences. As observed by Sitapati, it is impossible to make any meaningful progress on sexual and gender minority rights and improved wellbeing in a criminalised environment.[307]

As a factor that led to decriminalisation in not only the countries discussed but others around the world, strategic litigation presents challenges for Zambia. To be successful, strategic litigation aimed at decriminalisation requires a strong sexual and gender minority rights movement, which in the words of Roa and Klugman means having the capacity to frame social problems as human rights violations and carrying out activism and strategically litigate on them.[308] Jjuuko details that an effective strategic litigation campaign starts with several years of activism where the stage is set for court.[309] The failure of the *ABVA* case in India and *Kanane* case in Botswana show how strategic litigation can be unsuccessful if a civil society moment does conduct ground work preparation before commencing a court action. The *Navtej, Letsweletse* and *NCGLE* cases show how ground preparation can lead to successful strategic litigation.

The weak position of the sexual and gender minority rights movement in Zambia teases the capacity to work through the incremental stages towards an effective strategic litigation campaign. An effective strategic litigation campaign starts with several years of activism where the stage is gradually set for court. Activism itself requires several approaches which includes first framing sexual and gender minority rights within a master frame which is discussed in discuss l below. Further, it requires administrative capability and, very importantly, collaboration with other organisations, such as medical and law societies to complement testimonies and legal arguments with amicus curiae briefs. As gleaned from the Indian experience, in countries with strong religious and cultural resistance, amicus briefs filed by professional bodies give credibility to cases and are therefore, vital in persuading courts.[310] What this entails is that the crucial starting point in strategic litigation aimed at decriminalisation in Zambia is deliberate capacity building, strengthening of the sexual and gender minority rights movement and forging close links with relevant professional bodies. As stated by Currier and Cruz, and reiterated by several others above, in the African and Zambian context, it is nearly impossible to score any meaningful success in sexual and gender minority rights without a strong civil society movement specifically working in the area.[311] In fact, in the context of heterosexual nationalism in Zambia, it can be argued that a weak sexual and gender minority rights movement, even if clear about its goals, but impaired in ability and capacity, can end up mounting campaigns and strategies whose backlash would do long-term harm and would become more difficult to repair, thus worsening the situation. The closure of ZMIT and Afro-net in Zambia, and the consequent

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307 Sitapati (n 132) 3.
308 Roa & Klugman (n 282) 32
309 Jjuuko (n 295) 2.
310 *India case digest* (2018) 3-4
311 Currier & Cruz (n 301) 11.

underground retreat of local sexual and gender minority rights organisations, as discussed in Chapter 3, saves as an example.

Apart from a strong sexual and gender minority rights movement, other factors that aid effective strategic litigation are an independent judiciary and an open legal system with unrestrictive legal procedures. Zambia has both factors at relatively healthy levels. Judicial independence is discussed separately below. The civil procedure in Zambia, like most Commonwealth countries, is wide such that strategic and other forms of public interest litigation are not restricted. The Zambian High Court Act, under Order 6, allows litigants to file cases regarding the rights contained in the Bill of Rights in the Zambia's Constitution.[312] While this procedure requires that one of the parties should be an affected natural person, it does not prevent civil society organisations from being a party to the case. Further, Order 13 of the Rules of the High Court allows organisations or individuals with interest or expertise in the subject matter of the litigation to join either as intervener or amicus curiae. The High Court route was the one taken in Botswana and India. Its upside is that if the case is unsuccessful at that level, the decision can be appealed against to the Court of Appeal and potentially all the way to the highest Court. This gives room to re-organise and strengthen legal arguments as the Indian organisation did in the *Navtej* case. On the downside, as seen in Botswana, the state can always appeal and, potentially, a favourable High Court decision may be overturned in the Supreme Court. However, as subjects of strategic litigation, such decisions form the basis of future advocacy.[313]

The introduction of the Constitutional Court, in 2016, made the legal environment in terms of procedure even more favourable. Under Order 3 of the Constitutional Court Rules, an individual or organisation has the right to file an action regarding the constitutionality of any law, policy or decision. It also allows for individuals or organisations to join cases as either amicus curiae or interveners. Apart from these civil rules of procedure, a person charged under the anti-sodomy laws or any criminal law offence has the right to apply for a constitutional reference to challenge the constitutionality of the law they are charged under. In such a case, the criminal proceedings are suspended until the constitutional reference to the High Court is resolved. The *Mulundika* case discussed in Chapter 4 exemplifies the effective use of this procedure. In Botswana, this was the procedure used in the *Kanane* case. The cases illustrate not only the procedure available, but also, importantly, it signals that an individual charged under the anti-sodomy laws can challenge without the involvement of civil society. However, such an individualistic and unilateral approach to decriminalisation is potentially dangerous as it does not come with the benefits of a planned approach preceded by years of activism, narrative setting, and overall ground preparation. As such, it can be counterproductive.

Zambia has a less active culture of strategic litigation compared to countries such as South Africa, Botswana and Zimbabwe. Unsurprisingly, the level of strategic litigation in a country correlates with the strength of its civil society and not with the level of its social and economic problems. However, while the strength of civil society in Zambia is not in a desirable condition, the introduction of the Constitutional Court in 2016 has seen a steady increase in constitutional matters being

312 High Court Act of Zambia, Chapter 27 of the laws of Zambia as read together with Statutory Instrument number 21 of 2020.

313 Kenya is an example where the High Court refused to decriminalise the anti-sodomy laws. Civil society there remains strong and is using the decision as part of its advocacy.

litigated.[314] This momentum potentially opens the door for novel and perhaps more controversial constitutional challenges. It also helps to awaken the public and hold the government accountable to its human rights obligations. Local sexual and gender minority rights organisations could in the future feed off the momentum and litigate cases aimed at law reform or other strategic reasons.

In the main, taking all these circumstances into account, strategic litigation as a factor that aids decriminalisation is procedurally possible and has healthy prospects. However, more preparatory groundwork has to be undertaken to lay the foundations of successful strategic litigation, such as strengthening the local civil society movement.

5.4.4. Effective use of constitutional and international law principles

From a substantive law point of view, one of the standout lessons from the jurisdictions discussed above is that decriminalisation occurred through innovative, expansive and inclusive interpretation of constitutional principles, and the use of international human rights law. As seen from the *Navtej* Case in India, the *NCGLE* Case in South Africa and the *Letsweletse* Case in Botswana courts effectively used the principles of equality, non-discrimination, human dignity, citizenship, and the right to privacy contained in the respective constitutions, and as elaborated by international human rights law, to declare the anti-sodomy laws unconstitutional and in violation of the rights of sexual and gender minorities. The jurisprudence of constitutional morality, substantive equality, and constitutional legality all grew out of the combined use of the international human rights law and local constitutional jurisprudence. The level of homophobia in the country did not make the different courts shy away from striking down the anti-sodomy laws despite the potential backlash.

Chapter 4 discusses how the constitutional values and principles of equality, non-discrimination, human dignity, citizenship and social justice as contained in the Constitution of Zambia can be used in an expansive and inclusive manner to challenge the constitutionality and legality of the anti-sodomy laws despite the reality of heterosexual nationalism. In this regard, the necessary substantive (constitutional and human rights law) foundation which exists in the countries that decriminalised also exists in Zambia. Further, Chapter 4 also demonstrates that courts in Zambia are increasingly using international human rights laws and principles to challenge exiting laws and policy.

5.4.5. Judicial independence

Strategic litigation and the effective use of constitutional principles and international human rights law are interdependent on judicial independence. Ultimately, it is courts that make the decision to decriminalise. Thus, it goes without saying that judicial independence, where judges retain an objective mind, unclouded by the religious, social, economic and political prejudices, such as heterosexual nationalism, is a fundamental element for transformative human rights jurisprudence. In the countries discussed, judicial independence comes out as a common factor, in that courts and, very importantly, individual judges kept an independent mind set, such that they did not shy away from declaring anti-

[314] See https://judiciaryzambia.com/category/resources/decisions/constitutional-court-decisions/ (accessed 8 January 2022).

sodomy laws as being unconstitutional and struck them down despite the social and political controversy and disapproval associated with their decisions. Wakesa notes that only an independent judiciary can decriminalise in a society that demands compulsory heterosexuality.[315] To pick one example, Patrick Heller has described the South African judiciary as 'highly autonomous' and argues that 'it has played a proactive role in supporting the constitution (in particular its social rights clauses).'[316] As seen in the cases, the judiciary in South Africa was and remains an appealing institutional focal point for sexual and gender minority rights activists. The same can be said for the UK, India and Botswana.

The question of judicial independence rises in almost every country. In Zambia, the louder voice is that the judiciary is an independent institution. For instance, in several of its public statements, the Law Association of Zambia has praised the judiciary for its independence and judges for their courage and diligence in the discharge of their duties.[317] A 2021 report, by the SADC Lawyers Association, on independence of the judiciary and judicial capture in the region, described the Zambian judiciary as among the most independent in the sub-regional, while highlighting the fact that there are areas of improvement.[318] It is tempting to stop here and endorse the independence of the Zambian judiciary based on the views of local and international bar associations. However, while this thesis does not contest these endorsements, it contends that in the context of decriminalisation, judicial independence must be put in perspective and defined accordingly. Ndulo states that

> Judicial independence is the vital mechanism that empowers judges to make decisions that may be unpopular but none the less correct. In so doing, the judiciary vindicates the principle that no person, or group, however powerful, is above the law. And it gives life to the promise that the rule of law safeguards the minority from the tyranny of the majority.[319]

Although Ndulo was writing generally on the subject, if this is true, then something more specific has to be said about the nature of judicial independence. In my view, judicial independence must be defined within a specific thematic context or frame, preceded by the satisfaction of the general normative standards and principles. Therefore, this thesis is proposing a two layered approach to endorsing a country's judiciary as independent. First, the satisfaction of general norms and standards on judicial independence (the general test), and second, satisfying the specific thematic standards (the specific and thematic test). It is important to do so because a judiciary can be independent in terms of the general test but still fail the specific or thematic test and thereby be incapable of doing justice in strategic litigation cases regarding a specific area of human rights. This is true of many judiciaries that meet all the general standards but fail to acknowledge sexual and gender minority rights as human rights because of popular morality considerations.

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315 S M Wakesa 'Decriminalisation of homosexuality in Kenya: The prospects and challenges' in Namwase & Jjuuko (eds) *Protecting the human rights of sexual minorities in Africa* (2017) 153.

316 P Heller 'Democracy deepening in India and South Africa' (2009) *Journal of Asia and African Studies* 123.

317 See https://www.laz.org.zm/about-laz/ (accessed 26 November 2021).

318 SADC-LA *Independence of the judiciary in eSwatini, Zimbabwe and Zambia* (2021) 39-71. https://www.derebus.org.za/wp-content/uploads/2021/06/SADC_LA_Judicial_Report_On_Eswatini_Zimbabwe_and_Zambia_2021.pdf (accessed 16 May 2021).

319 M Ndulo 'Judicial reform, constitutionalism and the rule of law in Zambia' (2012) 9, Paper presented at the Law Association of Zambia annual general meeting, 2012.

In terms of the general test, judicial independence is measured by many perimeters, but three documents standout as arguably the most important in the African/ Zambian context. These are the *ACHPR's Principle and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa,* [320] the *UN Basic Principles on the Independence of the Judiciary*,[321] and the *Bangalore Principles on Judicial Conduct.*[322] These documents emphasise the financial autonomy of the judiciary, appointment of judicial officers by an independent body, security of tenure of judicial officers, non-interference of the judiciary and judicial officers by external forces such as political or business leaders, and the embedment of these principles in the Constitution. Applied to Zambia, it can be argued that, at least on paper or rather than *de jure*, the Constitution meets the standards in the above documents. For example, article 119 vests judicial authority in the courts and mandates that it shall be exercised in accordance with the Constitution. Thus, the judiciary and judicial officers are subject only to the Constitution. The provision is strengthened by other articles. Article 122(1) reiterates that 'in the exercise of its authority, the judiciary shall be subject only to the Constitution and the law and not subject to the control or direction of any person or an authority.' Deepening judicial independence, article 122(2) provides that 'A person and a person holding public office shall not interfere with the performance of a judicial function by a judge or judicial officer.' Further, article 122(4) and (5) ensure administrative and financial independence of the judiciary, stating that 'in the execution of its administrative functions and the management of its financial affairs, it [the judiciary] shall not be subject to the control or direction of any person, body or authority.'

The appointment of the Chief Justice, the President of the Constitutional Court and all other judges and judicial officers, is layered by procedures to ensure autonomy. First, persons wishing to be appointed to specific judicial positions apply to the Judicial Service Commission which conducts a vetting process.[323] Only successful applicants are recommended to the President for appointment. The appointments only takes effect after ratification by the legislature, which also has its own independent mechanism to ratify, or refuse to ratify the appointments. In terms of tenure, judicial officers enjoy security of tenure under article 144, until retirement at the age of 70, but may elect to retire early with full benefits at the age of 65 or voluntary resignation at any age. Judicial officers may, however, be removed from office on grounds that they have a mental or physical disability that makes them incapable of performing judicial functions, incompetence, gross misconduct or bankruptcy.[324] The process of removal under these grounds is overseen by the Judicial Complaints Commission which has to be satisfied that, on the face of it, a case has been made for the removal of the judicial officer after which they recommend to the President for the suspension of the judicial officer.[325] Following

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320 See also the Resolution on the respect and strengthening of the independence of the judiciary https://www.achpr.org/sessions/resolutions?id=26 (accessed 27 November 2021).

321 See https://www.ohchr.org/en/professionalinterest/pages/independencejudiciary.aspx (accessed 29 November 2021)

322 See https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf (accessed 28 November 2021).

323 Pursuant to section 5 of the Service Commissions Act, the Judicial service Commission is composed of the chairperson appointed by the President, a judge appointed by the Chief Justice, the Attorney General, a magistrate appointed by the Chief Justice, a legal Practitioner appointed by the Law Association of Zambia, Deans of faculties of Law from Public Universities, an official from the Public Service appointed by the Public Service Commission and any other person appointed by the President.

324 Article 143 of the Constitution of Zambia, Act No. 2 of 2016.

325 Article 144(2) of the Constitution of Zambia, Act No. 2 of 2016. The Judicial Complaints Commission is composed of seven members appointed from different institutions.

suspension by the President, the Judicial Complaints Commission conducts a detailed trial after which they recommend the removal or reinstatement of the judicial officer.[326]

Overall, the constitutional and legal framework, as well as the experiential life of the judiciary in Zambia, favours the conclusion that it is independent in the context of the general test. Turning to the specific and thematic test, as already stated, the argument here is that satisfying the general test is not enough, as the judiciary and judicial officers should have the capacity to hear cases within a specific area without being influenced by external factors. For example, a court needs to be able to adjudicate cases on women's rights, rights of commercial sex workers and within the context of this thesis, the rights of sexual and gender minority rights. Since passing the general test is a pre-requisite of the specific or thematic test, this thesis contends that when dealing with specific areas of human rights, judicial independence should be defined within the context of that area. In my view, making transformative jurisprudence and doing transformative justice requires this approach.

In light of my argument and in the context of this thesis, defining judicial independence is defined as the institutional and human (individual judicial officers) capacity to adjudicate on sexual and gender minority rights cases without being influenced by heterosexual nationalism in Zambia. This is not to suggest that the judiciary or judges should be robots and turn a blind eye to social circumstances or factors. It is to underscore the fact that certain social circumstances and factors are irrelevant in the judicial making process. Accordingly, within the context of the definition, satisfying the specific and thematic test requires the judiciary and judicial officers to be able to see past popular morality and apply constitutional morality, decolonise and modernise as was seen earlier from Courts in India, South Africa and Botswana. Perhaps even more importantly, specific and thematic judicial independence indicates the ability of courts to make transformative jurisprudence and consequently achieve transformative justice despite the institutional and individual backlash they would face. Therefore, specific and thematic judicial independence is the vital ingredient for judicial activism. The many strong statements of individual judges in the decriminalisation cases of the countries discussed illustrate a degree of judicial activism. In this regard, specific and thematic judicial independence can be said to stand on general judicial independence in that unpopular decisions, such as decriminalisation, cannot/ should not result in the removal, suspension or any formal mistreatment of judicial officers.

To illustrate the point, comparison can be made between Botswana and Kenya. As commonwealth countries, the two countries have similar legal traditions and anti-sodomy laws. Strategic litigation on decriminalisation was on-going, at the same time, in the High Courts of both countries and judgements delivered nearly the same time, with one court finding the anti-sodomy laws unconstitutional and the other upholding them as constitutional. As Jjuuko notes:

> [t]wo countries with similar laws and legal systems, two courts at the same level, and two contrasting decisions within less than a month of each other […] This state of affairs highlights not only the

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326 Article 144(4) & (5) of the Constitution of Zambia, Act No. 2 of 2016.

> increased use of strategic litigation as an avenue for vindicating LGB rights in Common Law Africa, but also the continued controversy and divisions over this strategy.[327]

While the judiciaries of both countries can be said to have general judicial independence, the outcome of their civil society's strategic litigation was different, in my view, due to the different levels of specific and thematic judicial independence. Notably, political leaders in Botswana have been less aggressive on sexual and gender minority rights, while the President of Kenya has expressed strong homophobic views. This is not to suggest that Courts were influenced by political rhetoric, but admittedly, right or wrong, the political landscape with respect to sexual and gender minority rights plays a significant role in creating specific and thematic judicial independence.[328] In the 2021 decision, in Botswana, the Court referred to the fact that political and social attitudes towards sexual and gender minorities in Botswana had 'improved' since the Kanane Case, and as such, the Court could not allow the historic legal and social stigma of sexual and gender minorities, which society was clearly moving away from, to continue.[329] Moreover, a court's refusal to decriminalise does not necessarily mean that it lacks specific and thematic independence as several other factors can affect the outcome of a case.

Two lessons can be learnt from the discussed foregoing cases with respect to specific and thematic judicial independence. The first lesson is that it is built over time outside the court room. This underscores the point on ensuring that the ground is fertile through activism, narrative setting, proper documentation and all the background work is done before strategic litigation cases are filed. The second is that specific and thematic judicial independence can be brought out through skilful case presentation using legal arguments, international authorities and compelling evidence of human experiences with respect to the negative impact of the law. The two lessons complement each other and complement all the other factors that can lead to decriminalisation.

With the above stated, the question then is how a country which has not decriminalised determines the specific and thematic independence of its judiciary. The test is subjective and admittedly could have its flaws but arguably very helpful. The two lessons just discussed are helpful here. First, the sexual and gender minority rights movement must introspect and ask itself if it has done sufficient groundwork as a pre-condition to strategic litigation. If the answer is 'no' , then it is almost expected that the case presentation will be poor and consequently the court would not be provoked to put on their judicial activism hats and assert their specific and thematic independence on the matter. As earlier stated, due to the relative weakness of the sexual and gender minority rights movement in Zambia, this thesis argues that such background activism has not been done. Shying away from cases involving sexual and gender minority rights is yet another sign that this step has not been taken and that the ground is yet to be prepared.

Second, but perhaps less important, examining the decisions of courts in specific controversial cases could be helpful. In this sense, the question being asked is whether the court has made controversial decisions striking hegemonic laws or policies after much background civil society

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327 Jjuuko (245) 3.

328 For example, in the *Letsweletse* case case para 18, the court noted the current and former President's support of sexual and gender minorities, the passing of the Employment Act and the deportation of the homophobic paster discussed above.

329 The *Letsweletse* case para 59-73.

activism. Lessons from the women's rights movement, and the HIV and human rights movements suggest the answer here is in the affirmative as seen through the *Longwe* case (on women's rights), and the *Kingaipe* case (on the rights of PLHIV) already discussed. However, in light of the highly religious nature of heterosexual nationalism in Zambia, this Chapter argues further that looking at cases where religious values were challenged is valuable to the process. If courts have shown ability to decide against strong Christian values that undermine human rights, then they can potentially be independent in decriminalisation cases. A case worthy of note is *Kelvin Hang'andu v The Law Association of Zambia*.[330] There the Supreme Court decided that having Saturday as an official working day in Zambia was not a violation of the right to religion against Members of the Seventh-Day Adventist Church (SDA), who notably comprise a fairly large section of Zambia's Christian population. The case was brought by a member of the Law Association of Zambia (LAZ) who argued that by holding its AGM on Saturday, his religious rights as a member of the SDA was violated, *albeit* the government allowing Saturday as an official working day. Similarly, in *Monze Muyeka* v *Miniva Nakamba,* the High Court held the practice and belief of the Jehovah Witness Church to refuse blood transfusion of children in need of it as it was a violation of the child's right to life, and that in no way was lifesaving blood transfusion a violation of the religious rights of the parents.[331] Right or wrong, these decisions demonstrate the courts ability to make decisions against strong religious beliefs of very influential religious bodies in Zambia. While, in themselves they do not indicate specific and thematic judicial independence in the context of sexual and gender minority rights, they aid the argument that, given the necessary pre-litigation work done, the court would not blindly decide based on religious nationalism. In essence, the cases articulate that specific and thematic judicial independence as defined above is possible in Zambia.

To end this point on a more optimistic note, the constitutional mandate of the judiciary in Zambia gives judicial officers thematic and substantive independence required under strategic litigation. In this regard, article 118 provides:

> In exercising judicial authority, the courts shall be guided by the following principles:
>
> *(a)* justice shall be done to all, without discrimination;
>
> *(b)* justice shall not be delayed;
>
> *(c)* adequate compensation shall be awarded, where payable;
>
> *(d)* alternative forms of dispute resolution, including traditional dispute resolution mechanisms, shall be promoted, subject to clause (3);
>
> *(e)* justice shall be administered without undue regard to procedural technicalities; and
>
> *(f)* the values and principles of this Constitution shall be protected and promoted.

The provision offers protection for all litigants by creating an obligation for fairness. In essence, while several concerns can be raised, the judiciary appears to be an independent enough institution which, given all the background factors put in place, can fairly adjudicate and perhaps strike down the anti-

330 (2014) SCZ/36.
331 (2015) HP/0974.

sodomy laws. The Chapter later discusses why judicial decriminalisation would be more feasible in Zambia.

5.4.6. A human rights master frame: Mobilisation of sexual and gender minority rights within the broader human rights discourse

The label of sexual and gender minorities as sexual deviants lends the narrative that they are seeking rights which are outside the 'normal human rights' protection spectrum. As such, in countries that decriminalised, sexual and gender minority rights organisations first had to strategise by framing sexual and gender minority rights around the broader human rights frame. This strategy was effective in the litigation of cases and in activism generally. Benford and Snow posit that in order for any minority group to be successful in its struggle for recognition, emancipation and equality, its agenda must be argued from general and less controversial human rights discourses within the context of that society- a master frame.[332] The term 'master frame' was originally conceptualised in order to account for the empirical observation that 'cycles of protest' occasionally emerge in the absence of a favourable political and legal opportunity structure.[333] In this sense a master frame can be said to be a generally accepted space in an unfavourable legal and political opportunity structure. From this premise, a human rights master frame can thus be defined as broad thematic discourse that is publicly accepted and engaged, from which a specific human rights subject –such as sexual and gender minority rights– can be narrated and advocated.[334] In South Africa, for example, the most powerful master frame or master narrative available for sexual and gender minorities was the anti-apartheid struggle.[335] As earlier indicated, 'the sexual and gender minority rights movement in South Africa was ultimately successful because its leaders were fortunate and wise enough to present their struggle as forming part of a broader struggle against oppression by the apartheid state.'[336] Croucher agrees that in 'South Africa the LGBT movement was able to argue that their struggle fitted the master frame, namely the larger struggle for human rights and the emancipation of the oppressed'.[337] The movement took the same approach after apartheid by framing their activism within the broader human rights discourse, thereby achieving success in strategic litigation. Currier and Moreau write that in the post-apartheid era, organisations continued to capitalize on dominant discourses of human rights and democracy to persuade the court that denying same-sex couples access to marriage violated the Constitution.[338]

In India, Botswana and many others, the master narrative was the public health and HIV frame. The litigation strategy was to include the lived experiences of many gay men in the context of how the anti-sodomy laws prevented them from accessing health services in general and HIV health care services in particular. Viljoen notes that 'the prevalence of HIV and the effects of AIDS on African

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332 D Snow & R Benford 'Master frames and cycles of protest' in A Morris & C Muller (eds) *Frontiers and cycles of protest* (1992) 134.

333 R Benford 'Master frame' in D Snow (ed) *The Wiley-Blackwell Encyclopaedia of social and political* movement (2013) 126.

334 P De Vos 'On the legal construction of gay and lesbian identity and South Africa's transitional constitution' (1996) 12 *South Africa Journal on Human Rights* 274.

335 As above.

336 De Vos (195) 435.

337 S Croucher 'South Africa's democratisation and politics of gay liberation' (2002) 28(2) *Journal of South African Studies* 315.

338 Currier & Moreau (n 301) 95.

communities and the growing concern for vulnerability of men having sex with men allowed sexual orientation to be dealt with in the relatively more depoliticised setting of public health'.[339] In the *Letsweletse* case, the litigants used the HIV and public health frame by submitting research reports on the impact of anti-sodomy laws on sexual and gender minorities as key populations in Botswana.[340] In the UK, the master narrative was related to the role of law in society and specifically that public law has no place in the private non-harming lives of citizens. In all the cases, equality, non-discrimination, human dignity and social justice for sexual and gender minorities clothed the argument within the broader human rights frame.

Winter *et al* compared the success of different sexual and gender minority rights movements in different countries and concludes that in countries were progress has been made, 'sexual and gender minority rights organisations framed their activism within the broader human rights discourse and struggle'.[341] Thus framing sexual and gender minority rights in the strategically broader human rights discourse or master frame is crucial for decriminalisation and other social changes that potentially come with it. What the above says about Zambia, in the context of heterosexual nationalism is that, as a start, a non-controversial but broader enough human rights frame can be used to cycle on the road to decriminalisation. The word is used cycle to symbolise the consented effort that civil society has to make on a rough and hilly road of heterosexual nationalism and the mischaracterisation of anti-sodomy laws as is the case with actual roads in the rural parts of the country. Sexual and gender minority rights in Zambia suffer the 'rural like poverty' of civil society isolation, dependency on foreign donors and inability to raise their voice. Cycling to mainstream human rights, finding a home their and receiving recognition from others will, therefore, be a challenge.

In Zambia, as in most states, the master narrative or frame can be the public health frame within the context of the national response to HIV. As in Chapters 1 and 3, sexual and gender minorities in Zambia have only been talked about without backlash and politicisation as key populations. Obliged to implement the SDGs, government policy and programmes on health has to include key populations in its HIV response and the wider universal coverage agenda under vision 2030. Accordingly, as discussed in Chapter 3, the National HIV/AIDS Strategic Framework (NASF) includes sexual and gender minorities as key in the response to HIV and in maintaining a healthy general population.[342] It is for this reason that the Zambia National AIDS Council (ZNAC), a government institution under the oversight of Zambia's Ministry of Health, has been able to conduct training of journalists on the rights of sexual and gender minorities. However, NAC is a lone ranger as other government departments and almost all local civil society organisations do not take this approach. Further, the government can almost be accused of political gesturing and box ticking by adopting the key populations approach in the NASF. It has consistently not budgeted for any key population's health and human rights

339 F Viljoen *International human rights law in Africa* (2012) 260.
340 See n 238.
341 Winter *et al* 'introduction' in Winter *et al* (eds) *Global perspectives on same-sex marriage: A neo-institutional approach* (2018) 93.
342 The *NASF* (2017) 93.

programmes since the NASF was conceived in 2011 and adopted in 2017. All the programmatic support has come from external sources mainly UNDP and Fhi-360.[343]

The lax of government, notwithstanding, the HIV and public health framing of sexual and gender minority rights represents the best opportunity in Zambia. Incrementally, the discourse, programming and activism can have a more 'standalone' but never divorced voice from the public health and HIV master frame. One way that local sexual and gender minority rights organisations and its supporting partners can gain traction is by strategically using the NSAF/ RNASF. As government official policy, the RNASF recognises that

> HIV, however, continues to contribute the highest mortality rates, burdening households and straining national health systems. With this understanding, the Revised Zambia National AIDS Strategic Framework (RNASF) 2020-2023 exemplifies the government's efforts to deliver better health for all with focus on socially inclusive interventions to prevent and manage HIV and AIDS […] *It emphasises an equitable HIV response that ensures no one is left behind*. This is a priority for Zambia to achieve her goals. It targets *key and priority populations* while ensuring that all Zambians are reached and stigma and discrimination are reduced for improved health outcomes.[344]

While government budgeting arguably makes the above policy statement sound rhetorical and look like political gesturing, local sexual and gender minority rights organisations and their supporting partners can take advantage of this 'commitment' by creating thematic programmes and activities around it. Notably the RNSAF is conceived around SDG goal Number 3 to ensure universal health coverage. As such, 'to ensure that no one is left behind' programmes can be created around legal barriers to health for key/priority populations which will include the anti-sodomy laws, the sources of stigma and discrimination, and the different arms of heterosexual nationalism. Eventually, discourse can be developed around what law and policy reforms are required to achieve universal health coverage so that no one is left behind. Undoubtedly, the approach will take years beyond the life of the RNSAF which ends in 2023, but starting would build the momentum needed to feed on subsequent HIV policy documents and increase the level of activism with each policy towards 2030.

The different approaches that sexual and gender minority rights can take under the HIV and public health frame in Zambia are numerous and not within the scope of this thesis. The point here was underscored by the fact that, given the intensity of heterosexual nationalism in most countries, the journey to decriminalisation starts with framing sexual and gender minority rights within a broader human rights frame but specific to each country context. Roa and Klugman stress the importance of taking country contexts into account stating that there is no single formula for an adequate human rights framework as domestic systems and social situations differ.[345] In Zambia, based on vision 2030 and the RNSAF as the only government document 'recognising sexual and gender minorities' as priority population, the master frame is HIV and public health in respect of access to health for all. Considering the similar health demographics, policies and programmes between Botswana and

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343 This information was learnt through observation research based on my former position as local training consultant to NAC on its key populations programme.

344 *Revised National HIV and AIDS Strategic framework 2020-2023* (2020) xii (emphasis added).

345 Roa & Klugman (n 282) 32.

Zambia, all based on vision 2030, it is very likely that the public health and HIV response frame would work almost as effectively in Zambia.[346]

5.5. Prospects for decriminalisation in Zambia

5.1. First things first: Strengthening the local sexual and gender minority rights civil society movement

The challenging position in which the Zambian sexual and gender minority rights movement currently find itself makes the argument for decriminalisation, in the near future, harder to make. This is coupled with the fact that other institutions and organisations do not want to be associated with sexual and gender minority rights in Zambia due to 'reputational risk'.[347] However, this position does not mean that decriminalisation is impossible in Zambia. Several steps can be taken to strengthen the movement and enable them to mount effective activism. One way is through the assistance of international organisations and established local institutions like the ZNAC. Assistance in this regard comes in many forms and should include capacity building training in advocacy, organisational administration, human rights defending, strategic visibility and communication, as well as providing financial assistance. Further, programmatic collaboration, international and established local institutions can lift and incrementally boost the confidence and visibility of local sexual and gender minority rights organisations to a position relatively similar to those seen in other countries.

Several examples highlight the collaborative potential of local sexual and gender minority rights organisations. UNDP and the Canadian High Commission to Zambia conducted capacity building workshops for local civil society organisations on sexual and gender minority rights activism. A similar training of para-legal human rights defenders was conducted by the Southern Africa Litigation Centre (SALC).[348] The Panos Institute of Southern Africa and the German Aid Agency (GIZ) collaborated with local civil society and was able to conduct a baseline study on discrimination and stigma based on sexual orientation in Zambia and used those findings to train traditional and religious leaders in rural communities.[349] The trainings which were organised in three rounds yielded positive results on the third round with leaders exhibiting positive and tolerant attitudes towards sexual diversity and sexual and gender minority rights.[350] Under the public health and key populations frame, the NAC has been able to train journalists across the country on the rights of sexual and gender minorities, the impact of sexual morality laws criminalising sodomy and sex work, and on making the

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346 Using the HIV and public health frame also worked in Nigeria. According to Sogunro, queer activism grows in Nigeria by first focusing on the health effects of criminalisation rather than direct human rights contestations of anti-sodomy laws. He argues that this was useful both to ensure societal receptiveness and to provide access to government officials. See A Sogunro 'Against the ''order of nature'': Towards the growth of queer lawfare in Nigeria' in Gloppen, Jjuuko, Msosa & Viljoen (eds) *Queer lawfare in Africa: Legal strategies in contexts of LGBTIQ+ criminalisation and politicisation* (2022) 221.

347 Van Klinken & Chitando (n 298) 234.

348 See https://www.southernafricalitigationcentre.org/countries/zambia/page/12/ (accessed on 5 November 2021).

349 Panos Institute *Towards non-discrimination on the basis of sexual orientation and gender identity in Zambia* (2013) 10.

350 See http://www.panos.org.zm/wp-content/uploads/2017/04/Panos-Human-Rights-English.pdf (accessed 6 November 2021).

public health argument for decriminalisation.[351] In all these efforts, even though they remained largely invisible, local sexual and gender minority rights organisations have provided substantial assistance. Further, organisations like Transbantu Zambia have a relevant online presence and have been able to openly collaborate with UN Agencies, such as UNAIDS, in the context of ensuring no one is left behind towards universal health coverage agenda 2030, particularly SDG 3.[352] The Zambia Network of Religious Leaders Living with HIV (ZENERELA+), the only faith based organisation working with sexual and gender minorities in Zambia, has a programme called 'binaries and boxes' which it uses to engage journalists on sexual and gender minority rights using the HIV and key populations frame.[353] Although they seem insignificant, these examples highlight the fact that local sexual and gender minority rights organisations can be lifted from the underground, capacitated and strengthened through the assistance and collaboration with established international organisations.

International support has the potential for backlash in the sense that it can reinforce the narrative that sexual and gender minority rights are a western agenda. As earlier discussed, civil society organisations that received support were attacked as 'money hungry' organisations and were closed down. Long notes that 'the discourse on sexual minority rights in Zambia eventually, and perhaps most dangerously, becomes more about how and who funds civil society organisations that support homosexuality.'[354] Epprecht also cautions that international organisations and governments should take the African situation into account and develop a context based strategy when offering support to local organisations to avoid reinforcing the narrative that there is a western agenda of diluting African values by supporting homosexuality on the continent.[355] Despite the backlash that comes with international assistance and heeding this caution, this thesis argues that, given the weakness of local sexual and gender minority rights organisations, increased international assistance would enable them to mount a strong campaign or litigation strategy for decriminalisation in Zambia. Additionally, resistance can be built over time as seen from the women's and, to a certain extent, the children's rights movement in Zambia. Similar, although less aggressive, resistance was earlier faced when these two movements were developing in Zambia and throughout Africa. The dominant narrative was that women and children's rights were unAfrican and, therefore, organisations had unprecedented resistance from governments, religious and traditional leaders in much the same way as the sexual and gender minority rights movement .[356] Resistance manifested itself in national heteropatriarchal philosophies, such as humanism in Zambia, which dedicated a whole section on the role of women, and how they should behave in the Zambian society.[357] These prescriptions relegated women to the

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351 See NAC Report (n 24, in Chapter 3). Although the major issue that the report bring out is the limited knowledge that the Zambian media has on sexual and gender minority rights, the activity having taken place with the help sexual and gender minority organisations in the background helps make the point that these organisations have a life that can be energised live up to a standard seen in countries like India, South Africa and Botswana.

352 Transbantu has a visible online presence with resources published from its collaboration with international organisations https://mobile.twitter.com/transbantu, https://international.coc.nl/wp-content/uploads/2018/10/33-TBZ.pdf , https://www.cal.org.za/wp-content/uploads/2017/02/MAKING-ACCESS-REAL-ZAMBIA.pdf (accessed 6 November 2021).

353 The Other Foundation (283) 18.

354 S Long *More than a name: State-sponsored homophobia and its consequences in Southern Africa* (2003) 46.

355 M Epprecht *Sexuality and social justice in Africa: Rethinking homophobia and forging resistance* (2013) 12.

356 G Geisler 'Sisters under the skin: women and the women's league in Zambia' (1987) 25(1) *Journal of Morden African Studies* 44-48.

357 *Humanism in Zambia and a guide to its practice* (1975). The rules included how women should dress, the types of hair styles they are allowed and places they are not allowed to go to without a man.

private space (the 'kitchen') and led to hegemonic rules, for example, that women should be accompanied by a male partner in social places like hotels.[358] Mobilisation and resistance took time, but eventually, such hegemonic policies were challenged, as seen in the *Longwe* case,[359] discussed in Chapter 4. Mushota notes that the turn in the women's rights movement in Zambia came after the Beijing Conference which helped Zambian organisation's collaborate with international organisations and governments thereby gathering the capacity for effective local activism.[360] The narrative later changed from who fund women's rights organisations to the need to dismantle patriarchy and ensure women's equality.[361] As with sexual and gender minority rights today, the opposition to the women's rights movement is not unique to Zambia, and as with other countries, the women's rights movement soon 'overcame.'[362] In this light, I argue that the sexual and gender minority rights movement and their organisational mobilisation can evolve in a similar way, but this requires external support.

Another way that local sexual and gender minority rights organisations can strengthen is to strategise their registration approach by registering under general human rights names which do not suggest association with sexual diversity. On the registration forms, the activities can be listed in a broad and general manner which does not raise any suspicion or attract further scrutiny.[363] Common ways in which this has been done is to use sexual and reproductive health rights, HIV and equality linked names.[364] In this way, organisations will be registered, hold bank accounts and eventually grow. They will also be able to identify friendly organisations and forge strong alliances within the wider civil society human rights agenda. However, Currier and Cruz caution that while this approach is tactically effective in the African context, 'it has produced situations where activists endlessly defer initiating LGBT rights campaigns and activities'.[365] They state that 'some organisations took years to decide to open decriminalisation campaigns, and in the end, those plans died with the organizations.'[366]

Local organisations in Zambia, and perhaps most of Africa, have also limited their own capacity by restricting their human resource to sexual and gender minorities, thereby not benefiting from the knowledge and skills of allies. By allowing heterosexual allies to be part of their workforce and programming, organisations can overcome more barriers.[367] Although I disagree with several points raised by Awondo, he makes the important argument 'that sexual and gender minority civil

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358 L Mushota 'International law, women's rights and the Courts: A Zambian perspective' in Southern Africa Litigation Centre *Using law courts to protect vulnerable people: Perspectives from the judiciary and legal profession in Botswana, Malawi and Zambia* (2015) 104.

359 (1992) HP/765.

360 Mushota (n 358) 105.

361 As above.

362 Currier & Cruz (n 301) 4, discuss the opposition faced by the women's rights movement in Ghana lobbying for a law to criminalise marital rape. Legislature and other traditional organisations claimed that supporting women's rights organisations by enacting laws amounted to installing westerns values and would ultimately lead to the deterioration of Ghana's cultural values.

363 The registration forms in the Societies Act and the NGO Registration Act provide for activities of an organisation to be listed. Organisations need not state their activities in detail unless requested to do so by the Minister.

364 This has worked in countries Nigeria where the sexual and gender minority rights movement register organisations as sexual and reproductive health rights organisations. Therefore, queer activism in Nigeria has blossomed around the provision of social and health services to sexual and gender minorities. See A Sogunro 'Citizenship in the shadows: Insights on queer advocacy in Nigeria' (2018) 45 *College Literature* 632.

365 As above.

366 As above.

367 Currier & Cruz (n 301) 11.

society movements in Africa are more effective if they are inclusive as seen in the story of Alternatives-Cameroun'.[368]

In my view, the general weakness of sexual and gender minority rights organisations in Zambia reflects the *general weakness and relative weakness* of the civil society movement in the country.[369] For example, as at 30 July 2022, only one Zambian organisation, Legal Resources Foundation, had observer status at the African Commission , and yet that is one forum which can advance human rights development in the country.[370] Without observer status, organisations cannot raise pertinent human rights concerns at the African Commission or participate in the open session of the Commission's agenda on the general state of human rights in Africa. The NGO Forum is also an important networking and collaborative opportunity which Zambian civil society organizations cannot take part in.[371] In this regard, the level at which Zambian organisations provide checks on the implementation of the Charter is relatively weaker compared to one that has observer status. Most organizations carry out what can be termed as workshop or board room advocacy which rarely results in transformative action.

The last two decades have seen an unprecedented level of positive and resilient civil society activism in sexual and gender minority rights in Africa, but the future being dependent on the built momentum.[372] Zambia has not recorded similar progress in this front. If equality and non-discrimination based on sexual orientation and gender identity is a prospect to be effectively pursued and eventually attained, the local sexual and gender minority civil society movement must rise to the challenge and emulate organisations in countries close by, such as Botswana, South Africa, Zimbabwe, and Malawi.[373] The fact these countries have recorded different but better degrees of success than Zambia is also testimony that Zambian organisations can also rise to the occasion eventually.

5.5.2. Judicial decriminalisation: the route most likely to succeed in Zambia

Given the legal and political opportunity structure for sexual and gender minority rights lawfare in Zambia, this Chapter argues that judicial decriminalisation is the most likely route for success in Zambia. One of the trends that comes from countries that have decriminalised is that judicial decriminalisation is driven by the sexual and gender minority rights civil society and with little or no support from the political society. In fact, most political leaders gain political mileage from discrediting civil society groups and their strategic litigation efforts as agents of the Western governments sponsored to destroy African values.[374] However, legislative decriminalisation is driven by political leaders who are legislators in Parliament, alongside civil society activism. In both cases, religious leaders are usually unsupportive, with legislative decriminalisation having relatively more religious

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368 P Awondo 'The politicisation of sexuality and the rise of homosexual movements in post-colonial Cameroon' (125) 37 *Review of African Political Economy* 315-328.

369 Several factors not within the scope of the thesis can be attributed to the general weakness of civil society in Zambia.

370 For the criteria on how to obtain observer status with the African Commission see https://www.achpr.org/ngos (accessed 7 November 2021).

371 For details on the NGO forum and how to take part see https://www.acdhrs.org/ngo-forum/ (7 December 2022).

372 E Gore 'Queer activism in Africa' (2019) *Oxford Research Encyclopaedia* 110. See also The Other Foundation (n 284) 27.

373 As above.

374 Gloppen, Jjuuko, Viljoen & Msosa (n 273) 8-9.

support as seen in the UK. Either way, this trend exposes a challenge in Zambia where religious/ Christian nationalism is strong and has a constitutional backing of 'the republic being a Christian nation' and to be governed based on Christian mores, while upholding the rights of members in other religious groups. The declaration creates the unlikelihood that religious leaders would support either judicial or legislative decriminalisation. With the tendency of political leaders seeking validation and support through the religious constituency, it is unlikely that any (ruling or opposition) political party in Zambia would initiate, and later on, support a motion to amend the Penal Code through the removal of the anti-sodomy laws. Similarly, backbenchers and independent members are almost always aligned to the ruling party and as such would not risk making a motion to repeal anti-sodomy laws which would be dismissed by the majority of the house in any case. In this regard, this thesis agrees with Eborah who argues that in comparative terms, and in view of the dilemma that African parliamentarians face, judicial arms in Africa are better suited to decriminalise anti-sodomy laws and provide safeguards for sexual and gender minorities.[375] Since the return to multiparty politics in 1991, Zambia has seen three different political parties take office with eight different Presidents. Each of the three political parties and the presidents has categorically stated that they would never support repealing the anti-sodomy laws. In the most recent elections of 2021, which saw the United Party National Development (UPND) take over from the Patriot Front (PF), one of the very first issues the UPND was requested to address in Parliament was the rumour that they would 'legalise homosexuality by repealing the anti-sodomy laws'.[376] Given the level of politicisation of sexual and gender minority discourse in Zambia, it was not surprising that this was the first question that arose.[377] Of course the new UPND government gave a categorical 'no to gay rights in Zambia under the UPND government'.[378] The issue rose again in September 2021 when the newly elected President, Hakainde Hichilema, travelled to New York for the United Nations General Assembly (UNGA). The issue was that in seeking economic support through bilateral talks while at the UNGA, he promised western leaders to promote and legalise gay rights in Zambia in exchange for aid.[379] On his return, the President was compelled to address the nation on his real motive at the UNGA and confirm that it was not to promise equal rights to gay persons.[380] In his address, he confirmed: [381]

> I did not go to New York for that issue. I went to seek economic support from the IMF and other partners so that children can have an education in Zambia. My trip had nothing to do with homosexuality. My government will never support gay rights. I am a Christian and Zambia is a Christian nation, so there is no place for homosexuals or gay rights in Zambia.

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375 S T Eborah 'Africanising human rights in the 21st century: Gay rights, African values and the dilemma of African leadership' (2012) 1 *International Human Rights Law Review* 110.

376 'Homosexual not welcome in Zambia- HH confirms' *The Daily Nation*, 8 November 2021.

377 Notably one for the most damaging message was that UPND would support a Pride Celebration in 2022 circulated on Youtube. See https://www.youtube.com/watch?v=OdNJarmmBEo (accessed 18 November 2021).

378 See n 339

379 'The Zambian Constitution is clear on issues of gay and lesbian rights says President Hichilema' *The Lusaka Times* 30 September 2021 https://www.lusakatimes.com/2021/09/30/the-zambian-constitution-is-clear-on-issues-of-gay-and-lesbian-rights-president-hichilema/ (accessed 17 November 2021).

380 As above.

381 'Zambian leader denies gay rights talk during USA trip' The Business Economist 1 October 2021 https://clubofmozambique.com/news/zambia-leader-denies-gay-rights-talks-during-us-trip-202220/ (accessed 17 November 2021).

As seen in Chapters 1 and 3, these sentiments are no different from those made by previous Presidents. These 'official government' positions almost makes it clear that legislative decriminalisation is not an immediate or medium term prospect given the legal and opportunity structure in in Zambia. As such, judicial decriminalisation appears to be the most feasible considering the nature of heterosexual nationalism in Zambia. There are two factors for this contention, both related to the trends of judicial decriminalisation observed from the countries earlier discussed.

First, Zambian courts have shown sufficient potential to make progressive decisions based on international human rights law principles. In countries like India, South Africa, the United States, and Botswana, the courts were inspired by international human rights jurisprudence based on the principles of equality, non-discrimination, human dignity and social justice. In Zambia, decisions such as in the *Longwe* case, the *Mulundika* case, and the *Hang'andu* case discussed earlier demonstrate that courts are ready to use these principles of international human rights law to make its judgements. In the *Longwe* case the court used the provisions of CEDAW to declare a discriminatory policy against women unconstitutional. In the *Mulundika* case the court referred to the ICCPR to declare the provision of the Public Order Act which required a permit before holding a public assembly unconstitutional in a democracy and similarly in the *Hang'andu* case the court referred to the ICCPR to decide that freedom of conscience is not violated when public meetings are held on a working day.

Second, the decriminalisation cases demonstrate the need for institutional and individual independence of the judiciary such that they can strike down anti-sodomy laws despite the social backlash and religious controversy their decisions would cause. Such independence is essential for judicial decriminalisation of anti-sodomy laws in the face of religious and moral nationalism. The Zambian judiciary has demonstrated that it does not shy away from making decisions that would infuriate even the most popular and influential religious and social groups, if the earlier stated principles of human rights law are at stake. For example, in the *Hang'andu* case, the High Court decided that it was not a violation of religious rights of the members of the SDA Church to have Saturday as a working day. Thus, together with *Longwe*, *Mulundika* and other cases highlight a comfortable degree of institutional and individual independence that gives relative hope to an incremental approach towards judicial decriminalisation.

5.6. Conclusion

Ultimately, where decriminalisation has occurred, it mitigated the impact of anti-sodomy laws, and thus led to improved wellbeing of sexual and gender minorities as citizens. Throughout the world, as exemplified by the countries discussed, wherever decriminalisation has occurred, sexual and gender minorities have enjoyed better formal and substantive equality, wellbeing and experienced less discrimination and marginalisation. Social attitudes towards them have been less hostile compared to those countries where anti-sodomy laws still exist. Realistically, decriminalisation did not immediately end stigma and discrimination against sexual and gender minorities, but it laid a firm foundation to start the long-awaited journey towards the *je jure* and *de facto* recognition, protection and promotion of their rights. Hepple makes the important point that 'the battle for equality of sexual and gender

minorities will not stop at decriminalisation in Africa, though it is currently the most important and urgent one'.[382]

As a starting point, decriminalisation acknowledges the sexual citizenship of sexual and gender minorities and incrementally protects citizenship in different aspects of life. It queers the criminal justice system by making sexual and gender minorities victims rather than perpetrators of crime. Fundamentally, decriminalisation has three positive impacts. First, it moves the debates on sexuality away from public morality to constitutional morality. In this regard, the constitution as the supreme law, and the attendant principles and norms of constitutional morality, defines what actions should and should not be criminalised under substantive criminal law, as opposed to abstract and subjective views of public morality. Vishta argues that by invoking constitutional morality in conjunction with international human right norms in matters involving substantive constitutional law, courts developed a constitutional theory of criminalisation.[383] Courts, as did the Wolfenden Committee in the UK, thus delineated a criminal law free zone of social life thereby creating a 'right not to be criminalised'.[384] It is in this regard, by respecting the diversity of sexual expression among consenting adults, and making such expression a criminal law free zone, that decriminalisation acknowledges sexual citizenship. Second, decriminalisation redirected the discourse on harm, as the question gradually changed from whether 'homosexuality' harmed society and the ideals of family, religion and culture to how the provisions harm sexual and gender minorities. It is in this regard that decriminalisation can be said to queer the criminal law and thus develop a queer criminology. Third, decriminalisation brought to life the minority rights thesis by highlighting the rights of sexual and gender minorities as equal citizens and thus motiving the journey to the legal and social changes towards their wellbeing.

The lesson from the jurisdictions discussed highlights that both judicial and legislative decriminalisation are effective. In essence, decriminalisation is both a means to an end and an end in itself in terms of guaranteeing the respect and protection of the rights of sexual and gender minorities. As an end in itself, decriminalisation brings an end to a law whose application has adverse effects on the lives of sexual and gender minorities. Therefore, as an end in itself, decriminalisation does mitigate the impact of the mischaracterisation of the anti-sodomy laws, but rather an important start button to a process of legal and social change that significantly improves the lives of sexual and gender minorities over time. As a means to an end, decriminalisation is the start button to major legal and policy changes which incrementally make a huge difference in equalising sexual and gender minorities as sexual citizens among other forms of their citizenship.

From the lessons learnt in other jurisdictions discussed in this Chapter, it can be argued that decriminalisation would have the same positive effect in Zambia as in other countries, namely, that it can mitigate the impact of the mischaracterisation of anti-sodomy laws. In the long run, it can start the process of recognition, protection, and promotion of the rights of sexual and gender minorities in Zambia.

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382 J Hepple 'Will sexual minorities ever be equal? The repercussions of British colonial "sodomy laws" (2012) 8 *The Equal Rights Review* 50.

383 Vashit (n 107) 55.

384 As above.

Chapter 6: Conclusion and recommendations

6.1. Introduction: Summary and restatement of the problem

Constitutional bills of rights, complemented by the ratification of international human rights treaties are generally meant to strengthen the respect, protection and fulfillment of human rights for all citizens. While this is generally true for most aspects of citizenship, this study has found and shown that in Zambia, the Bill of Rights and the ratification of international human rights treaties has not strengthened the protection of sexual citizenship for sexual and gender minorities and their rights in the country.[1] While the Bill of Rights and the black letter provisions of international treaties do not include sexual orientation and gender identity as a prohibited grounds of discrimination, sexual and gender minorities are still legally covered under these law based on the principle of expansive interpretation.[2] However, due to the emotive nature of heterosexual nationalism and queer lawfare in Zambia, attempts by local and international actors to fit sexual and gender minority rights within the constitutional and international treaty provisions are often disregarded and discredited as affronts to Zambian culture, moral values and Christian mores.[3] In the discourse, foreign actors are branded as meddlers in Zambia's sovereignty seeking to impose their western values, while local actors are branded as proxies of the West.[4] As such, human rights exceptionalism with respect to sexual and gender minority rights is an 'official' state position in Zambia.

Seen through the lens of heterosexual nationalism, sexual and gender minorities in Zambia are labeled as sexual, social and religious deviants which lends itself to the label of criminality under anti-sodomy laws. This study has also demonstrated that the negative labeling of sexual and gender minorities as deviants, is mainly grounded in Christian heterosexual socialisation and sexual coloniality, which disregards sexual diversity and imposes heterosexuality as the only accepted form of sexual citizenship in Zambia. In this regard, to regulate sexual citizenship in a way that deters and punishes non-heteronormative citizenships and identities, Zambia retains anti-sodomy laws inherited from the British colonial government in 1937.[5] However, while in their elemental criminal nature the anti-sodomy laws prohibit 'canal knowledge against the order of nature' (essentially criminalising specific sexual conduct between consenting heterosexual and homosexual adults) they are

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1 Discussed in detail in Chapter 4.

2 Chapter 2 discusses this aspect in detail. More detailed discussion on expansive interpretation F Viljoen 'Sexual orientation as a challenge to the harmonized interpretation of international human rights law' in Buckley, Donald & Leach (eds) *Towards convergence in international human rights law: Approaches of regional and international systems* (2016) 168, and Murray & Viljoen 'Towards non-discrimination on the basis of sexual orientation: The normative basis and procedural possibilities before the African Commission on Human and Peoples' Rights (2007) 29 *Human Rights Quarterly* 86 for a further and deeper discussion on expansive interpretation.

3 Chapter 1 discusses the backlash received by former UNSG Ban Kin Moon and a former American ambassador to Zambia when they spoke in support of sexual gender minority rights in Zambia.

4 See L Banda 'Queer lawfare in response to heterosexual nationalism in Zambia' in S Gloppen, A Jjuuko, A Msosa & F Viljoen (eds) *Queer lawfare in Africa: Legal strategies in contexts of LGBTQ+ criminalisation and politicisation* (2022) 228.

5 The laws were amended in 2005 to increase the punishment for sodomy from fourteen years to a minimum of 25 years in prison and a maximum of life imprisonment. As discussed in Chapter 1 and 3, the cause of the amendment was moral panic due to perceived increases of child sexual offences leading Parliament to increase the punishment for all sexual offences to a '25 to life' threshold.

mischaracterised and enforced as laws against homosexual orientation and gender non-conforming identities even in the absence of the actual sexual conduct prohibited in the provisions. In sum anti-sodomy laws, despite their gender neutral language are singled out as anti-homosexuality laws such that a homosexual is perceived as synonymous to a sodomite and a sodomite synonymous to a homosexual. Thus, anti-sodomy laws therefore, exclusively and unfairly enforced against sexual and gender minorities as discussed in Chapter 3. The mischaracterisation and exclusive application of anti-sodomy laws on sexual and gender minorities in Zambia causes a chain of human rights violations against them. Due to the nature of heterosexual nationalism in Zambia and the label of deviance as well as the criminality placed on sexual and gender minorities, the human rights violations that result from the mischaracterisation of anti-sodomy laws are often viewed and justified as legitimate and, in some instances, seen as necessary. It is in this sense that this thesis contends that Zambia, for lack of a better term, 'practices' human rights exceptionalism with regard to sexual and gender minority rights by disregarding constitutional and international human rights law principles of equality, non-discrimination, and human dignity which protect the sexual citizenship of sexual and gender minorities through the expansive interpretation of the Country's Bill of rights and international treaties to which Zambia is a state party.[6] The minority rights thesis, in the context of sexual and gender minorities, is thus disregarded and consumed in the heterosexual nationalism arguments that homosexuality is un-African, un-Zambian; immoral; an attempt by western liberal democracies to impose their mores in Zambia; And most prominently that it is against the declaration of Zambia as a Christian nation.

6.2. Summary of research findings

Faced with the above problematic scenario, this study set out to examine the mischaracterisation of anti-sodomy laws in Zambia as a country that ascribes to heterosexual nationalism. Specifically, the study sought to answer four research questions set out in Chapter 1 as follows:

i. What was the original intention for the anti-sodomy provisions in Zambia?

ii. How are the anti-sodomy laws interpreted and enforced in Zambia?

iii. What is the impact of how anti-sodomy laws are interpreted and enforced on the human rights of sexual and gender minorities in Zambia?

iv. Would decriminalisation mitigate the impact of the mischaracterisation of anti-sodomy laws in Zambia, and if so, how?

Each chapter of the study was informed by one research question in the chronological order above. Several findings were made in the journey of this study some of which are not necessarily in response to the specific research questions, but which nonetheless inform and enrich the findings. The findings are summarised below.

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6 Discussed in detail in Chapter 3 and 4.

6.2.1. The original mischief to be prevented, and purpose of the anti-sodomy laws in Zambia

6.2.1.1. Sexual diversity has been part of pre-colonial African and Zambian societies.

In seeking to find the original mischief to be prevented by anti-sodomy laws, this study first explored whether pre-colonial African societies in the territory that is now Zambia had forms of sexual diversity which anti-sodomy laws were meant to regulate when introduced through colonialism. The study found that contrary to the narrative of cultural heterosexual nationalism that 'homosexuality' is unAfrican, unZambian and a western imposition, sexual diversity was part of the cultural makeup of pre-colonial African and Zambian societies.[7] For example, one of the early records of same-sex patterns was made by Turner, a British ethnographer who observed the Ndembu in northwest Zambia.[8] He described the existence of 'sexual dualism' as a practice where a person either plays dual gender or sex roles such as engaging in both homosexual and heterosexual intercourse.[9] Similar findings were made among the Tong by Colson as discussed in Chapter 2.[10]

The study further found that in pre-colonial African and Zambian societies, sexual and gender minorities were neither treated with homophobia or transphobia, nor were they outcasted as is the case in morden day Africa generally, and Zambia, in particular. Rather, they were tolerated, accepted, and lived peacefully in their communities, as the culture was inherently accommodating of sexual diversity. While these pre-colonial African and Zambian societies did not have the same traditions on sexual diversity, the common theme was the culture of tolerance and inclusion. Although heterosexual partnerships were preferred for purposes of having children as a source of labour and a symbol of social status, social mechanisms were in place which accommodated sexual and gender minorities.[11]

The culture of tolerance for sexual diversity was disrupted by colonialism and colonisation with the introduction of Christianity and the codification of English criminal law. Hence the label of deviance on sexual and gender minorities did not exist before colonisation. Logically related to this point, is the fact that African societies did not have the form of exclusionary heterosexual socialisation that developed in colonial and post-colonial times. With colonialism, African traditional laws and customs as well as norms of socialisation were replaced in Zambia with English laws and value systems. Christianity became the source of moral values, 'civilized' identity and social regulation. Traditional African values were subject to the English repugnancy test and deemed harmful if they failed the test. In this sense, the creation of the colonial state saw the beginning of citizenship in general and sexual citizenship in particular. Under citizenship, sexuality was regulated by heteronormative laws and mores that were foreign to African societies.

In essence sexual and gender minorities lived in and were part of Zambian communities before colonisation and the introduction of anti-sodomy laws. This fact contests the foundations of cultural

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7 Murray & Roscoe (eds) *Boy wives and female husbands: Studies in African homosexualities* (2001) 11.
8 V Tuner *The ritual process: structure and anti-structure* (1969) 75, 86, 90-93.
9 As above.
10 E Colson *Marriage and family among the plateau Tonga of Northern Rhodesia* (1958) 139-140.
11 M Epprecht *Heterosexual Africa? The history of an age of exploration the age of AIDS* (2008) 1-27.

Zambian heterosexual nationalism in two ways. First, it establishes that homosexuality is not unAfrican or unZambian. Second, it shows that sexual diversity is a universal human attribute and thus rules out the possibility of its exportation into Africa from the west and detracts from the conspiracy theory of a culturally-imposed foreign agenda. In fact, when foreign and local actors speak in support of sexual and gender minority rights, it is and should be taken as a decolonisation as well as decoloniality effort. In regard, this thesis argues in conclusion that, in the context of sexuality and culture nothing could be more unAfrican/unZambian as the homophobia, exclusion and discrimination faced by sexual and gender minorities today.

This finding is discussed more fully in Chapter 2.[12]

6.2.1.2. Anti-sodomy laws were not introduced in response to sexual diversity in pre-colonial Africa but consequent to the imposition and codification of British criminal law.

Exploring further the mischief and purpose of the anti-sodomy laws and having found that pre-colonial African and Zambian societies were sexually diverse, the thesis sought to find out whether anti-sodomy laws were introduced as response to the diversity or were motivated by other factors.

The study found that while pre-colonial African societies, such as those in the territory that is now Zambia, tolerated sexual diversity (and did not discriminate against sexual and gender minorities) nor labelled them as deviants, anti-sodomy laws were not introduced in response to the diversity and culture of tolerance. Anti-sodomy laws were an administrative and legal consequence of the codification and introduction of criminal codes in African and other British colonies. The codification and introduction of criminal codes in British colonial Africa, and consequently, Zambia, was part of the wider British colonial project.[13] The drafting of the codes and the decision making regarding both the process of codification and the contents of the criminal codes took place entirely at the level of the British colonial political and administrative apparatus. African local populations were excluded from providing any form of input and African traditional values and customs did not inform the debates regarding the contents of these criminal codes. The substantive provisions of the criminal codes such as the anti-sodomy provisions were not discussed in relation to African sexualities, nor were they debated in respect of other provisions. The criminal codes were simply 'copied and pasted' from the different drafts that went around the British colonial empire. Therefore, the far-reaching impact of the provisions were not contemplated by the colonial authorities. The governmental purpose for the codification of criminal law in Africa was purely legal convenience aligned with the political preference of the different administrative players, and was not designed to specifically regulate the relationship between law and the pre-colonial African societies, such Zambia, that they were meant to govern.

As discussed in Chapter 2, the draft that came to Zambia was based on the Queensland Code and it passed in the Northern Rhodesia Legislative Council in 1937, without debate or any form of

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12 See section 2.2 of Chapter 2.

13 See F D Lugard *The dual mandate in British tropical Africa* (1922) which explains the reasons for British colonialism in African territories.

localisation or consultation with the population. This happened because the colonial office in Britain instructed the African colonies in East and Southern Africa 'not to depart from the principles on which the code was based'.[14] The rationale was simply to extend the application of English law in the colonies under what Lugard termed the 'dual mandate' and not in any way a response to the need to regulate sexual diversity in Zambia and other colonies in response to existing local constructions of sexuality.[15]. While the African local population in Zambia was not consulted and the culture of sexual diversity not considered, the British colonial authorities also did not intend the law to be in response to any cultural practices. Rather, the belief was the criminal codes would have a civilising effect in Africa as part of the project of colonial governmentality.[16]

At independence, the liberation government simply adopted all the colonial laws including the criminal codes containing the anti-sodomy laws without any attempts to indigenise the law. Thus, while the liberation government somewhat managed to decolonise in terms of political self-determination, the adoption of and reliance on colonial laws in post-independent Africa was the beginning of African and Zambian coloniality. Liberation governments continued to govern using colonial laws and value systems such as Christianity which in turn maintained the colonial patterns of socialisation and legal interpretation. As such there continues to be a generational transfer of colonial governmentality which is manifested through heterosexual nationalism in Zambia.

This finding is elaborated upon in Chapter 2.

6.2.1.3. Anti-sodomy laws were first enacted to deter same-sex sexual conduct between men.

Further to question 1, the study traced the etiology of anti-sodomy laws with the view of finding their intention in their home of birth – England. The study found that anti-sodomy laws in Zambia can be traced back to the Old Testament Books of the Bible, through to the Justinian Code, the Buggery Act, the Offences against the Persons Act and later to the criminal codes in India, Queensland and subsequently the African colonies. In Zambia, the criminal code, containing the anti-sodomy laws, was introduced in the 1930's. Having explored the etiology of the anti-sodomy laws, this study found that the original intention and purpose of these laws was to deter and punish anal sex between persons but primarily targeted at men.[17] What started as a sin in the Bible became a criminal offence under the jurisdiction of the ecclesiastical courts in England. And because the 'sin' of Sodom was perceived to have been sodomy, committed by men in the City of Sodom, the ecclesiastical courts, which first had jurisdiction over the crime of sodomy applied it exclusively against men. However, as discussed in Chapter 2, the alternative explanation is that the sin of the men of Sodom was the lack of hospitality for visitors in the city.

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14 H F Morris & J S Read *Indirect rule and the search for justice: Essays in East African legal history* (1972) 23.

15 Lugard (n 13) 1-3.

16 As above.

17 M Michael 'The offence of sodomy: England's least lovely criminal law export?' in Lennox & Waites (eds) *Human rights, sexual orientation and gender identity in the commonwealth: From history and law to development activism and transnational dialogue* (2013) 61.

In England, the jurisdiction over sodomy offences moved to the state following the enactment of the Buggery Act in 1583 and subsequently the Offences Against the Persons Act in 1828. Thereafter, the offence was codified in criminal codes exported to British colonies through colonialism. Throughout this course, heterosexual sodomy was also an offence under the anti-sodomy laws.[18] The net result is that the original intention and purpose of anti-sodomy laws in Britain and as codified in the criminal codes exported to the African colonies like Zambia was to 'deter and punish anal sex between consenting adult persons and between a person and a beast'.[19] The conceptual basis of these laws was that non-reproductive sex was immoral. As discussed in Chapter 3 and explained in the summery finding below, the provision as contained in section 158 of Zambian Penal Code expressly states that the offence of 'canal knowledge against the order of nature' still applies to both heterosexual and homosexual adults. In essence the mischief to be prevented and purpose of anti-sodomy laws was to deter and punish specific sexual conduct and not the sexual orientation or gender identity of the persons.

6.2.2. The mischaracterisation of anti-sodomy laws as laws against homosexual orientation and identity.

Having found that anti-sodomy laws were originally meant to deter anal sexual intercourse between persons and apply to both heterosexual and homosexual adults (though primarily targeted at men) this study, under research question 2, the thesis examined how anti-sodomy laws are understood and applied in Zambia currently. The findings, mainly discussed in Chapter 3, are summarised below.

6.2.2.1. Sexual orientation and gender identity are not elemental ingredients of anti-sodomy laws in Zambia.

The study examined the elemental nature of anti-sodomy laws as provided in section 158 in the Zambian Criminal Code. The study found that sexual orientation and gender identity are not elemental characteristics or requirements of the anti-sodomy provisions in Zambia. Substantively and procedurally, sexual orientation and gender identity are not relevant to establish the *actus reus* and the *mens rea* of the offence. In essence, when two consenting adults are accused and are being prosecuted under the anti-sodomy laws, the prosecution does not need to establish their (homosexual or bisexual) sexual orientation or (transgender) gender identity to secure a conviction. In similar light, accused persons need not state their (heterosexual) sexual orientation or (cisgender) gender identity to secure an acquittal. In this regard, from a technical legal point of view, homosexuality as it is a natural form of human sexual orientation (and not a type of sexual conduct or practice) is not illegal in Zambia. Thus, the narrative that homosexuality is illegal reveals a lack of understanding of sexuality generally and more particularly the difference between sexual conduct and sexual orientation as well as gender identity. Homosexuality is incorrectly understood as same-sex sexual conduct and to the effect that sodomy is seen as synonymous to homosexuality and homosexuality synonymous to sodomy. However, anti-sodomy provisions are still a problem because not only are they mischaracterised as

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18 See also *Rex v Wisemen* (1716) KB 7740-775.

19 J E Halley 'Reasoning about sodomy: Act and identity in and after *Bowers v Hardwick'* (1993) 79 *Virginia Law Review* 1721.

laws against homosexual orientation with negative impact, they are also inherently discriminatory against sexual and gender minorities.

6.2.2.2. Anti-sodomy laws are mischaracterised as laws against non-heteronormative orientations and gender identities and are applied exclusively against sexual and gender minorities.

Contrary to the above finding that sexual orientation and gender identity – therefore homosexual orientation and identity – are not elemental ingredients of the anti-sodomy laws in Zambia, this study found that anti-sodomy laws are mischaracterised as laws against homosexual orientation and identity. As such – and as consistently stated in this thesis – these laws are applied exclusively against sexual and gender minorities in the absence of actual acts of sodomy prohibited in the Penal Code. As seen in Chapter 3, anti-sodomy laws are applied against sexual and gender minorities for their identity – for *being* homosexual, bisexual or gender non-conforming. The mischaracterisation of anti-sodomy laws as laws against homosexual orientation and the consequent exclusive application of the laws against sexual and gender minorities occurs both within and outside the criminal system (during investigation and in court) and is also manifested in decisions by state and non-state actors such as government officials, public and private media and religious institutions.

In examining the mischaracterisation of anti-sodomy laws in Zambia, this study also found that one of the underlying reasons for the mischaracterisation is the lack of adequate understanding and knowledge of sexual diversity in Zambia. Due to Christian heterosexual socialisation, homosexuality for example is not understood as a normal form of inherent human sexual orientation, but rather as a deviant and deliberate choice to engage in same-sex sexual conduct. Homosexuality is thus reduced and understood to mean anal sexual intercourse among men and the use of sex toys by women.[20] Further, all sexual and gender minorities are understood and classified as 'homosexuals'. As discussed in Chapter 3, this narrow and limited understanding of homosexuality is seen through the actions of police officers, politicians, religious leaders, media personnel and even medical professionals.

A related finding is the fact that heterosexual anal intercourse is not labelled as a deviant sexual conduct and, therefore, it is not given the criminal tag of 'sodomy'. In fact, heterosexual anal intercourse has been found to be prevalent in Zambia from the research referenced in Chapter 3.[21] On the other hand, homosexual anal intercourse is labeled as deviant sexual conduct and in turn is exclusively given the criminal tag of sodomy. The labeling of homosexual anal intercourse as a deviant sexual practice is highlighted in Woods's 'homosexual deviance theory', who in arguing for a queer criminology state that

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[20] See S Pierre 'Exploring discourses and actions of othering homosexual citizens by officers of the Zambia Police service in Lusaka, Zambia' unpublished master's dissertation, Van-Hall Larenstain University of Applied Science, 2013

[21] See Avert *HIV and AIDS in Zambia: Country Report* (2018) https://www.avert.org/professionals/hiv-around-world/sub-saharan-africa/zambia (accessed 4 September 2020). I O Morhason-Bello *et al* 'Reported oral and anal sex among adolescents and adults reporting heterosexual sex in sub-Saharan Africa: a systemic review' (2019) *Reproductive Health Journal 1* https://reproductive-health-journal.biomedcentral.com/track/pdf/10.1186/s12978-019-0722-9 (accessed 1 June 2020).

> [t]o this day, mainstream criminology continues to possess heterosexist views and ignore the experiences of queer people and queerness as a form of sexual citizenship especially in countries with laws that criminalise different aspects of queer life such as same sex marriage and consensual same sex between adults. Even in countries where queer people are legally recognised, they are still yet to attain social acceptance and full inclusion as they are viewed with a deviance lenses.[22]

In this light, consensual heterosexual sodomy is difficult if not impossible to investigate and prosecute. A consenting heterosexual adult couple will ordinarily not arouse any suspicion of sodomy and thus invite no criminal investigation into their private space and sexual conduct. On the other hand, a homosexual or perceived homosexual couple not only automatically arouses suspicions of sodomy but inevitably invites criminal investigation and prosecution. Consequently, despite their true elemental character and nature, existentially the anti-sodomy laws can almost only operate and be applied against sexual and gender minorities. And, only with some almost inevitable measure of intrusion into private domain. It is in this sense that anti-sodomy laws are inherently discriminatory in and of themselves as stated in Chapter 1.

The findings are discussed further in Chapter 3.

6.2.3. The impact of the mischaracterisation and misapplication of the anti-sodomy laws on the rights of sexual and gender minorities in Zambia.

Having found that the original intention of anti-sodomy laws was not to criminalise and punish homosexual orientation and having further found that anti-sodomy laws are mischaracterised and applied as laws against homosexual orientation, this study, under research question 3 examined the impact of the mischaracterisation on the rights of sexual and gender minorities. Chapter 4 discussed the finding of research question 3 and the summary findings in that regard are stated below.

6.2.3.1. The mischaracterisation and misapplication of anti-sodomy laws negatively impacts on the rights of sexual and gender minorities and violates Zambia's domestic and international human rights obligations.

In seeking to understand the impact of the mischaracterisation of anti-sodomy laws in Zambia, this study examined Zambia's domestic and international human rights obligation towards sexual and gender minorities. The study found that Zambia is a state party to the major international human rights instruments and has a constitution, which as a living document, can be read in an expansive, inclusive and innovative manner through the principles of equality, non-discrimination, human dignity, citizenship and social justice to respect and protect the rights of sexual and gender minorities. Read in this manner, and together with the supremacy clause of the constitution which renders other laws null and void if they are inconsistent with any part of the Constitution,[23] anti-sodomy laws have no place on the Zambian statute books as they conflict with the domestic obligations grounded in the principles pronounced by the Constitution. The expansive and inclusive interpretation of the constitution is complemented by the fact that Zambia is a state party to the major international human rights treaties

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22 B Woods 'Queer contestations and the future of critical "queer" criminology' (2013) 9.

23 Article 1 of the Constitution of Zambia, Act Number 2 of 2016.

whose treaty bodies have interpreted and embraced sexual orientation and gender identity as a prohibited ground of discrimination.

Despite these legal obligations, anti-sodomy laws continue to exist, and their mischaracterisation and application negatively impacts the rights of sexual and gender minorities protected under the constitution and international human rights law. As discussed in Chapter 4, anti-sodomy laws are in essence seen as a barrier to providing any services to sexual and gender minorities. Examples of the impact of the mischaracterisation on the rights of sexual and gender minorities can be seen from the refusal to register sexual and gender minority rights organisations, denial of health services, physical violence, extortion, arbitrary arrests, anal examinations without consent and frivolous prosecution. A telling example is when LEGTRA was denied registration because it was understood that registering a sexual and gender minority rights organisation was registering an organisation of criminals against Zambia's anti-sodomy laws. Similarly, when sexual and gender minorities seek health services, they are denied such service because it is perceived to be against anti-sodomy laws to provide them with medical treatment. The quality of life, lived experiences and the overall enjoyment of human rights of sexual and gender minorities as citizens, is far below that of other citizens.[24]

The findings are discussed in Chapter 4.

6.2.3.2. Human rights exceptionalism: Sexual and gender minorities are not seen as rights holders.

Further to the above finding, this study also found that the violations of the rights of sexual and gender minorities are seen as legitimate and therefore are not addressed as such. In other words, sexual and gender minorities are not seen as human rights holders by both state and non-state actors, but rather as sexual, religious and social deviants, and consequently as criminals.[25] Constitutional principles of equality, non-discrimination and human dignity complemented by Zambia's international human rights obligations found in human rights treaties are not taken to apply to sexual and gender minorities. As discussed in Chapter 1 and 4, Zambia practices human rights exceptionalism by rejecting the minority rights thesis with respect to sexual and gender minorities. Instances of the human rights exceptionalism and the rejection of the minority rights thesis can be seen from state actions and comments as discussed in Chapter 3.

Human rights exceptionalism and the view of sexual and gender minorities as non-human rights holders is grounded on the misunderstanding that sexual and gender minority rights are not human rights. The is evident from the comments of the political, religious and some civil society leaders as discussed in Chapter 3. One of the most telling facts on this point was the removal of the word 'vulnerable' and 'marginalised' from the draft constitution in the 2016 constitutional amendment to

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24 Muller & Daskilewicz 'Are we doing alright: Realities of violence, mental health and access to healthcare related to sexual orientation and gender identity and expression in Zambia' (2019) 23-41.

25 Banda (n 4) 231.

ensure that sexual and gender minorities do not take advantage of the terms to seek protection of their rights.[26]

6.2.4. Decriminalisation is the foremost way to mitigate the impact of heterosexual nationalism and the mischaracterisation and misapplication of anti-sodomy laws in Zambia.

Under question 4, the study considered what would mitigate the impact of the mischaracterisation and misapplication of the anti-sodomy laws discussed in question 4. The study found that with the nature of heterosexual nationalism in Zambia, decriminalisation is the only sustainable way to mitigate the impact of the mischaracterisation and misapplication of anti-sodomy laws in Zambia. The study further found that decriminalisation is a long process that can occur either through litigation or through direct parliamentary repeal of the anti-sodomy laws with the laws first being struck down by the courts.

6.2.4.1. Decriminalisation would mitigate the impact of the mischaracterisation and misapplication of the anti-sodomy laws.

In considering whether decriminalisation would mitigate the impact of the anti-sodomy laws in Zambia, the study first examined the impact that decriminalisation had in other countries. The countries examined where Britain, India, Botswana and South Africa. The study found that before decriminalisation, sexual and gender minorities suffered the same types of human rights violations as in other countries such as Zambia. However, after decriminalisation sexual and gender minorities incrementally enjoyed greater protection of their rights. While pockets of violations still occur, the study found that decriminalisation significantly improved wellbeing and integration of sexual and gender minorities in society. Based on the fact that the countries compared have similar social and legal contexts with Zambia, the study concluded that decriminalisation would have the same positive effect in Zambia.

6.2.4.2. The underlying determinants that can aid decriminalisation of the anti-sodomy laws need first to be put in place before decriminalisation can occur.

Having found that decriminalisation would have the positive effect of mitigating the impact of the mischaracterisation of anti-sodomy laws in Zambia, the study went further to consider what factors would lead to decriminalisation in selected countries namely United Kingdom, India, South Africa and Botswana. Drawing lessons from the selected jurisdictions the study found that decriminalisation occurred as a result of incremental gains with interdependent factors at play. The factors identified are, first, a strong sexual and gender minority rights movement. In the selected jurisdictions the sexual and gender minority rights movement feed from a strong human right's civil society movement.

Second, a culture of strategic litigation helps towards decriminalisation. The study found that the decriminalisation occurs through either direct parliamentary repeal of anti-sodomy laws as was the case in the UK following the Wolfenden Report or through a decisions of courts following reform

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[26] Banda (n 4) 229-230.

based strategic litigation. In this regard the study found that in hostile environments such as heterosexual nationalism like Zambia, the legislature is unlikely to directly repeal anti-sodomy laws on its own and as such the real hope for decriminalisation is through incremental strategic litigation as learnt from similarly hostile environments like India and Botswana. Judicial decriminalisation requires as independent judicial arm. In this regard as a third factor the study found that judicial independence is crucial to decriminalisation. In this regard this thesis posits that while functional judicial independence is important, judicial independence also means thematic or subject matter independence where courts can freely make 'unpopular' decisions without malice and without any form of external pressure. Hence to decriminalise, courts require thematic independence uninfluenced by heterosexual nationalism.

Four, the study found that decriminalisation occurred through the effective use of constitutional and international human rights law principles. Using constitutional and international human rights law principles effectively is linked to thematic independence as courts cannot interpret the provisions of these laws expansively if they are influenced by heterosexual nationalism as a frame of judicial decision making. Further, the study found that that in hostile environments centering the discourse of sexual and gender minorities around a broader and less controversial frame such as the public health and HIV frames is cardinal to making incremental games towards decriminalisation.

6.2.4.3. Prospect for decriminalisation in Zambia

The study finally examined prospects for decriminalisation in Zambia. It found that, similar to the selected jurisdictions where decriminalisation occurred, decriminalisation is possible in Zambia. However, the challenge in Zambia, is that the sexual and gender minority rights movement is not strong enough to mount an effective decriminalisation campaign. As discussed in Chapter 5, due to the hostile nature of heterosexual nationalism in Zambia, the sexual and gender minority rights movement has been driven underground and consequently it is unable to drive programs that can have an incremental effect towards decriminalisation. One of the lessons learnt from the selected jurisdictions is that decriminalisation is driven by a strong local sexual and gender minority rights movement. Support for international partners should be complimentary and not primary. Decriminalisation efforts driven by international organisations reinforce the narrative that sexual and gender minority rights are a foreign agenda. As such, if decriminalisation is to happen in Zambia, the local sexual and gender minority rights movement has to build its technical, financial and administrative capacity.

With respect to the route that decriminalisation can most probably occur, this study found that judicial decriminalisation through strategic litigation is the most promising. This is because the nature of heterosexual nationalism in Zambia entails that the legislature are unlikely to unilaterally move a motion to repeal the anti-sodomy laws. If anything, they are likely to reinforce anti-sodomy laws. Similarly, it is unlikely that lobbying and advocacy to the legislature would yield any positive results towards decriminalisation. Heterosexual nationalism in Zambia is one of the sources of political legitimacy and retention of political power. As such, it is not expected that political leaders would give up their power for a minority constituency that is seen as deviant by the larger population and discredited by the most power source of moral education in the Country- the church. Therefore, strategic litigation over a period of time through an incremental approach has the most promise. For

strategic litigation to occur, this study found that judicial independence is crucial. As earlier stated, the judiciary has to have general independence as a principle of democracy and second, the judiciary has to have thematic independence in the area of sexual and gender minority rights. This entails mounting a series of pre-litigation programs to help shift the narrative about sexual and gender minorities from deviance to victims. One way this can be done is to contextualise and advocate for sexual and gender minority rights within a broader and less politicised human rights master frame such as the public health and HIV master frame. The public health master frame, specifically under the fight against HIV were sexual and gender minorities are defined as priority populations has been successful in other jurisdiction such as Botswana as seen in Chapter 5. It is the only frame where sexual and gender minority rights in Zambia have been discussed without steering political and religious contestations.

6.3. Conclusion: Towards an African queer criminology

This thesis defined heterosexual nationalism as a form of coloniality and governmentality that rejects the diversity of sexual citizenship by using the principles of nationalism and state sovereignty to affirm a constructed heteronormative culture and identity which is protected by the retention of anti-sodomy laws. As seen throughout the study, heterosexual nationalism contests the recognition of sexual and gender minorities as a vulnerable class of citizens, but instead labels them as social deviants. The study noted that heterosexual nationalism and the retention of anti-sodomy laws also exemplify coloniality in the sense that they are continuing living legacies of colonialism and colonisation. Further, the study explained that heterosexual nationalism manifests in three forms, which are religious, cultural and moral heterosexual nationalism. These three forms of heterosexual nationalism are in essence the arguments used to retain, interpret and enforce anti-sodomy laws in Zambia.

While all three forms of heterosexual nationalism often manifest within the same narrative and at the same time, it is religious nationalism that dominates the discourse in Zambia.[27] Religious heterosexual nationalism is based on the declaration of Zambia as a Christian nation. The basis of religious based heterosexual nationalism is that same-sex sexual acts are a sin against God and therefore should be illegal. Proponents of this view complement it with the cultural and moral heterosexual nationalism rhetoric, generally arguing that homosexuality is unAfrica, unZambian and immoral, and therefore should be illegal.[28] However, all the forms of heterosexual nationalism and arguments to retain anti-sodomy laws are based on the misconception that non-heteronormative sexual orientations and gender identities are choices of individual; are deviant; are spiritual, mental and medical disorders; and, can be cured and deterred through the retention and enforcement anti-sodomy laws.

The mischaracterisation and exclusive application of anti-sodomy laws to sexual and gender minorities, are contrary to the principle of legality – the punishment of people for offences that are not defined in the law. This point relates to the need for the development of Queer criminology as argued by Woods in his homosexual deviancy theory.[29] Throughout the public discourse and in the

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27 Banda (n 4) 234.
28 As above.
29 B Woods *Queer contestations and the future of critical queer criminology* (2013) 14.

administration of criminal justice in Zambia, it is apparent as seen in this thesis that the lived experiences, voices and circumstances of sexual and gender minorities have been ignored. This exclusion has meant that sexual and gender minorities have only been seen through the lens of criminal and deviant identity to be corrected and punished through anti-sodomy laws. Woods observes:[30]

> To this day, mainstream criminology continues to possess heterosexist views and ignore the experiences of queer people and queerness as a form of sexual citizenship especially in countries with laws that criminalise different aspects of queer life such as same sex marriage and consensual same sex between adults. Even in countries where queer people are legally recognised, they are still yet to attain social acceptance and full inclusion as they are viewed with a deviance lens.

In agreeing with Woods, this thesis argues that creating and queering African criminology will have a transformative effective on the criminal justice system and incrementally move sexual and gender minorities from a label of deviance to that of vulnerability. To borrow from Lenin and Buist:[31]

> Queer criminology is more than simply adding sexuality or gender identity as a variable in research. […] It investigates, criticises and challenges heteronormative systems of oppression in the context of the criminal legal system. By failing to recognize sexuality and gender identity as integral to one's experiences in the same manner in which we recognize the significance of race or social class, we reinforce the stereotype that being Queer is a deviant act as opposed to an inherent part of one's self and something that has bearing on experiences and outcomes in the criminal legal system. There must be a conscious effort to remove the "sexuality or gender as deviant" stigma that criminologists have historically been a part of perpetuating.

Likewise, Ball points out:[32]

> Many of the tasks pursued by queer criminologists aim to respond to various inequalities experienced by LGBT people in the criminal justice system and seek to ensure LGBT people are recognized as citizens deserving the full protection of the law […] These disruptive approaches ask queer criminologists to move away from the more conventional political tasks (dominant within queer criminology), like expanding criminological representations of LGBT people (as victims, offenders, and criminal justice agents in this context), and evaluating and reforming criminal justice policies to achieve inclusion. Instead, these queer approaches encourage a disruptive queering of social institutions and norms in order to lead to more effective change in the gender binarized and heteronormative structures that produce and perpetuate many of the inequalities LGBT people experience (including in criminal justice).

In essence Bell argues that queer criminology goes further by shifting the focus of queer as deviants or victims of legal systems to discourses of inclusion that frame queer people as equal and normal sexual citizens. While this thesis does not claim that a queer criminological perspective is *the* solution for the mischaracterisation and misapplication of the anti-sodomy laws, based on the above, it is safe

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30 As above.

31 Buist & Lenning *Queer criminology* (2018) 3.

32 M Ball 'Unsettling queer criminology: Notes towards decolonisation' (2019) 27 (1) *Critical Criminology* 145.

to say that as a practice and as a form of activism, apart from being a theoretical perspective, it is evidently a good starting.

Through the lens of labeling theory, queer criminology and partly by way of discourse analysis what this thesis shows is that in Zambia, just as in other heterosexual nations in Africa, sexuality is not seen as diverse, but rather as singular (heterosexual). Sexual and gender minorities are not seen as *different*- in this sense as respectable sexual citizens but rather, they are generally seen as sexual deviants whose sexual citizenship is criminalised. The practical implications of the theocratical distinction are important to bear, as McLaughlin explains:[33]

> *Difference* in modern society is respected as a right: *deviance* is always liable to be penalized or regulated. Deviance is a culturally unacceptable level of difference which is subject to constant suspicion and surveillance from social control agencies. Difference is seen to contribute to the vitality and creativity of modern capitalist society, whereas deviance always holds a threat to the social fabric.

As already stated, when sexual and gender minorities are viewed through the deviance lens, the state will continue to seek their regulation and ignore their sexual citizenship. The continued existence of anti-sodomy laws and how they are applied, has negative impact on their rights as ordinary citizens.

What would African queer criminology be like? This remains an open question. However, what can be said for now is that African queer criminology would take as a starting point the fact that pre-colonial African societies were sexually diverse, and this diversity was not a source of exclusion or marginalisation. African pre-colonial societies had their own traditional criminal justice systems which were inclusive, and thus which same-sex sexual intimacies were not criminalised. In this sense, African traditional criminal law justice systems were already queered. Thus, it can be argued that African queer criminology is about looking back to traditional criminal law systems and reclaiming the culture of inclusion, tolerance and non-criminalisation of diverse identities and expressions of sexuality.

Sexual diversity did not end with colonialism or the introduction of anti-sodomy laws. African people continued to be sexually diverse even if anti-sodomy laws and Christian value systems labeled non-heterosexual orientations and identities as deviant. Anti-sodomy laws and Christian mores disrupted the culture of inclusion and tolerance in tradition African legal systems such that sexual and gender minorities became deviants. Consequently, queer people in Africa today, have a different lived experiences from those in pre-colonial African societies before the introduction of anti-sodomy laws. As such, an African queer criminology needs to take into account the lived experiences of African queer people today as a continuum of a community of people that has always been part of the African societal fabric. Of course, the experiences differ in certain respects, but the literature shows that there are more commonalities than differences. These experiences are important to inform the criminal justice system and law today, to inform research and to ground African theory. Currently the theories of deviance, labelling, including the perspective used in this thesis, are mainly based on European and American theories developed from the criminal realities of those countries' demographics. While the underlaying theoretical propositions still apply, subtle differences in terms of conditions, political

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33 E McLaughlin & J Muncie *The Sage Dictionary of criminology* (2001) 89 (author's emphasis).

realities, poverty, human rights actualisation and levels of democratic consolidation cannot be ignored as important factors to develop home grown theory.

African queer criminology would also be a reconstruction and rewriting of pre-colonial history of sexual diversity and tolerance towards sexual and gender minorities. In this regard, African queer criminology would be a both a decoloniality and decolonisation exercise. Building on the knowledge of pre-colonial constructions of sexuality and taking the rights-based approach to sexual diversity, African queer criminology should confront the criminal justice system and the law towards reform. Understandably this is easier said (written) than done, but if queer criminology is possible and taking root somewhere, surely the African experience has enough material to develop its own perspectives over time. At least the conversation can start now.

6.4. Recommendations: Towards decriminalisation of the anti-sodomy laws and recognition of sexual and gender minority rights

This study has that found the mischaracterisation and exclusive application of anti-sodomy laws on sexual and gender minorities in Zambia negatively impacts on their lives and rights. As such, as an overall prescription, this thesis recommends the decriminalisation of the anti-sodomy laws in Zambia. As discussed in Chapter 5, decriminalisation has both short and long term effects in so far as improving the wellbeing and enjoyment of human rights by sexual and gender minorities. However, as learnt in Chapter 5, decriminalisation occurs through incremental gains which are not easy to achieve. Several factors need to be in place, to not only to achieve decriminalisation but consequently to ensure that sexual and gender minorities are treated as equal sexual citizens. In this light the following sub-recommendations are made:

6.4.1. Short term strategies

To achieve decriminalisation the sexual and gender minority rights movement in Zambia needs to rise to a position of strength and start mounting an effective decriminalisation campaign. To do this the sexual and gender minority rights movement should slowly, steadily and strategically start building its technical, financial and administrative capacity. In building its capacity the sexual and gender minority rights movement should identify allies that can help in framing sexual and gender minority rights within the public health and HIV master frame in the context of Zambia's fight against HIV/AIDS. In this regard the sexual and gender minority rights movement can take advantage of programs run by the National HIV/AIDS Council, FHI-360, HIVOS and the PANOS Institute. These organisations run 'priority populations' inclusivity programmes under SDG 3.8 which aims to achieve universal health coverage through access to effective, safe, affordable and quality health care.[34] SDG 3 in general aims to ensure 'Good health and wellbeing and leaving no one behind' towards this goal.[35]

As part of its short strategy towards decriminalisation, the sexual and gender minority rights movements, through local and international support, should also conduct resocialisation trainings of

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34 See https://www.zambia.un.org/en/sdgs/3 (accessed 20 August 2022).

35 As above.

key professionals such as parliamentarians, religious leaders, law enforcement officers, health care providers and judicial officers. Advantage can be taken of organisations that offer such trainings like the Other Foundation and Human Dignity Trust. Further human rights training on sexual and gender minority rights should be conducted and encouraged. Popularising and encouraging different civil society leaders, government officials and religious leader to undertake the short course on sexual minority rights in Africa offered by the Centre for Human Rights, University of Pretoria is one small but effective and tangible way through which resocialisation training can be achieved.

6.4.2 Medium-to-long term strategies

Another crucial and perhaps long term goal towards resocialisation, to counter heterosexual socialisation, is to decolonise not only the primary education system, but also secondary and tertiary education.[36] Kelly defines education as constituent of five interrelated factors; A system (a school or university system), an institution (a secondary school or university), a certain activity (action exercised by on those being taught and those learning), content (a curriculum or syllabus) and a product (an graduate or educated person).[37] Education, primarily through content and social activity is the means through which we acquire knowledge about ourselves and world around us. Heterosexual socialisation is a continuing product of an education that is grounded on colonial systems, activity, content and intended products. Thus, to decolonise education, according to Simukungwe, means to 'identify how colonisation affected education in Zambia, challenging the colonial practices that are still present and working to unsettle/dismantle the structures, systems, contents and dynamics in the educational context'.[38] The decolonisation process in this context lends itself to decoloniality and hence mitigating, if not stopping certain forms of socialisation. As Ndlovu puts it, decolonising education means addressing the colonisation of the mind, of knowledge, of language and culture, and the effects of colonisation at both personal and collective level so as to stop normalising and universalising coloniality as a natural state of the world.[39]

As discussed in Chapter 1, heterosexual socialisation started with missionary Christian education and post-independence, the education system did not change much to the extent that it breed, and now feeds heterosexual nationalism and the mischaracterisation of anti-sodomy laws in Zambia. Hence, decolonising the education system in general as a matter of particular concern for this thesis would be a step towards resocialisation and incrementally, as a long-term goal, towards decriminalisation. Manthalu and Waghid point out that decolonisation of the education system and decoloniality for education acknowledges that patterns of exclusion, inequality and injustice are prevalent in manifest and subtle forms in African society due to coloniality in education, as graduates from universities, who later become decision makers, retain aspects of the mentality that colonial education systems had.[40] For instance, and as argued in Chapter 1, heterosexual nationalism is produced, and anti-sodomy laws maintained partly because decision makers learnt in schools and

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36 For a detailed discussion on the decolonisation of the education system see Manthalu & Waghid (eds) *Education for decoloniality and decolonisation in Africa* (2019).

37 M J Kelly *The origins of education in Zambia* (1999) 1.

38 M Simukungwe 'Universities as sites for advancing education for decolonisation' In C H Manthalu & Y Waghid (eds) *Education for decoloniality and decolonisation in Africa* (2019) 69.

39 S J Ndlovu-Gatsheni 'Why decoloniality in the 21st century' in E Pahad (ed) *The thinker* (2013) 11

40 C Ezeanya-Esiobu *Indigenous knowledge and education in Africa* (2019) 28-32.

universities, theories of deviance that include sexual and gender minorities as sexual/criminal deviants. These theories of deviance are reinforced by social and Christian mores of sex and sexuality. The pre-colonial structure of African societies, as discussed in Chapter 2, that would arguably contest these theories of deviance,[41] as seen from the nature of the discourse, treatment and decision making around sexual and gender minorities and the anti-sodomy laws in Chapter 3. Writing on decolonisation of the education system in general in Zambia Simukungwe confirms that 'in almost 54 years after juridical-political decolonisation, the Zambia education, [legal and] systems remain Eurocentric leaving out elements of our own world view at the time.[42] In this regard Pratt *et al* state that:

> [T]he aim colonising 'schooling' in Africa was to eradicate indigenous modes of education, to stop the transmission of indigenous cultures, language and knowledge from families and communities, thereby severing subsequent generations from their homes, traditions and cultural identities.[43]

In my view, if the education system was decolonised in the context of sexual and gender minorities, with elements of pre-colonial constructions of sexuality and diversity informing the understanding of African sexuality today, the discourse in Chapter 3 would be different or at the very least not as rejecting of sexual and gender minorities as equal sexual citizens.

Apart from decolonising the education system, this thesis recommends decolonising institutions of law such as the Zambia police service and the judiciary. The decolonisation of the judiciary is cardinal not only to achieve decriminalisation of anti-sodomy laws but in my view to achieve real democratic independence. As stated in Chapter 1, coloniality is a lasting capture of colonisation on our (Zambia) post-colonial institutions. As such overcoming coloniality through decoloniality and decolonisation is an act of authenticating Zambia's liberation and adding value to its present-day democracy. In this way the challenge of building thematic judicial independence which was discussed in Chapter 5 would be mitigated to a large extent, if not overcome. However, it must be noted that by decolonisation of the judiciary, the thesis does not propose doing away with all traditions of English common law but rather to realise that some aspects of those traditions are not in tandem with our history and cannot be the basis for our future. Further that, there are African and Zambian paradigms of logic, thinking, knowledge creation and law interpretation which are authentic to the lived experiences of citizens tied to the history of tolerance and forbearance.

Decolonisation of the judiciary in the context of anti-sodomy laws would mean the interpretation of the law based on the historical and pre-colonial contexts, current lived experiences, and realities, as well as recognition of universal human rights norms and standards. The consequent implementation of court decisions would be 'queered'. This would go alongside the decolonisation of the legal education system. The decolonisation of the Zambia Police Service, which in this regard means to create a system of policing, in so far as sexual and gender minorities are concerned, that recognises them as a vulnerable group whose vulnerability is disregarded based on the lost culture of tolerance and acceptance of sexual diversity discussed in chapter 2 – and not a class of criminals as

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41 As above.

42 Simukungwe (n 38) 71.

43 P Pratt, D Louie & J Ottmann 'Indigenous education and decolonisation' in L Jackson (ed) *Oxford research encyclopaedia of globalisation and education* (2016) 31.

discussed in Chapter 3. In essence decolonising the Zambia Police Service entails discarding some of the British colonial administration perspectives of crime and deviant criminal actions. In essence decolonising the police and the judiciary would be a step towards queer criminological perspective in Zambia and possibly Africa as discussed in the conclusion above.

One of the lamentations of this doctoral journey is the lack of Zambian scholarly and academic work or publications in the area of sexual and gender minorities. As can be noted, most of the scholarly articles on Zambia referenced in this thesis came from foreign academicians, such as Van Klinken, who are commended for contributing so much to this area from an academic point in Zambia. However, the lack of home-based scholars conducting research and publishing in the area of sexuality reinforces the narrative that scholars like Van Klinken and Siri Gloppen who have written on Zambia are part of their Western countries agenda to promote homosexuality in Zambia. While their work is commendable and does much good, in the long run it will be counterproductive if Zambian scholars do not add to their voice. As such, this thesis recommends and encourages Zambian researchers and scholars to publish work on sexuality, sexual diversity and human rights to counter the narratives of heterosexual nationalism. One way through which this can be done, as the author is also seeking to do presently, is through collaborative writing with those who have more expertise and have gained respect not only in this area but in the wider human rights space in Africa and across the world. It is admitted that the environment is hostile and one almost commits academic suicide by consistently publishing in this area, but if academia has to have meaning in society, and if academic freedom counts, then bolder steps have to be taken.

Apart from scholarly work, an important step towards decriminalisation will be the voices of public intellectuals who can contribute through opinion pieces, radio and television interviews and social media posts. Scholars like Kaaba and Sambo have provided an example when they made a commentary on the constitutional status of sexual minorities in Zambia.[44]

The incremental but almost ultimate step of strategic litigation can follow after a period of effective activism and academic contributions. As learnt from the selected jurisdictions and discussed in Chapter 5, strategic litigation fails when done on an unfertile ground. The steps described above and discussed in Chapter 5 are crucial to this recommendation of conducting strategic litigation towards decriminalisation of anti-sodomy laws in Zambia. In any case, strategic litigation requires willing litigants, knowledgeable lawyers, an active sexual and gender minority rights movement, an independent and tolerant judiciary and an overall safe environment – all of which Zambia does not have in the context of sexual and gender minority rights. The sexual and gender minority rights movement can start with cases on their registration, access to health services for example as a buildup to the more politically charged court action on decriminalisation. As such, strategic litigation towards decriminalisation should be the last step taken as a recommendation.

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[44] See O Kaaba & P Sambo 'The constitutional status of gay people in Zambia' (2022) *Makanday* https://www.makanday.com/posts/the-constitutional-status-of-gay-people-in-zambia (accessed 23 May 2023).

6.5. Further research

Several issues arose during this study which could not be dealt with in depth but which can be considered important under the recommendation above for other scholars to research and publish on. The following stand out as areas for further research.

This study noted that one of the reasons for the mischaracterisation of the anti-sodomy laws as laws against homosexual orientation is the lack of understanding of sexual diversity in Zambia. As such, an area that requires further study is how to create awareness of sexual diversity and sexual and gender minority rights in a hostile environment such as Zambia. Such a study would require an acute inter- or transdisciplinary lens. Pierre, whose masters dissertation highlights how police officers in Zambia lack knowledge and understanding of sexual diversity and the need for training in that regard, provides a base on which the recommended further research can be done.[45]

Related to the above, this study found that heterosexual nationalism is in part due to heterosexual socialisation. However, the study could not go deeply into how heterosexual socialisation can be prevented or mitigated. One recommendation of this thesis is the decolonisation of systems and institutions like the education system, the legal education system, the legal system in general, the police and the judiciary. However, it was not within the scope of this study to enquire into how decolonisation of these systems and institutions can be achieved in relation to sexual and gender minorities. The recommendation above would therefore benefit much from studies on how resocialisation can be achieved through decolonisation of the systems and institutions. Such studies would have to have a multi-disciplinary approach as they require, apart from law, an understanding and contribution from social science disciplines such as public administration, political science, sociology, social psychology, physiology and education. However, more focused and narrow studies from these disciplines can also be conducted to build knowledge towards the wider goal of decolonising these systems. Simukungwe raises the concern that 'despite the debate to decolonise the education system having taken a center stage in Africa, suggesting shifts in knowledge production in universities to be relevant, there seems to be a distinct silence, showing a lack of engagement of academics and intellectuals in Zambia over the decolonisation of education [and in particular legal education]'.[46] This work can be used as a used a building block towards further research on decolonisation and decoloniality in Zambia.[47]

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45 S Pierre 'Exploring discourses and actions of othering homosexual citizens by officers of the Zambia Police service in Lusaka, Zambia' unpublished master's dissertation, Van-Hall Larenstain University of Applied Science, 2013 31-33.

46 As above.

47 Other work that can contribute to further research include Kosciw, Joseph, Greytak & Diaz 'Who, what, and why: Demographic and ecological factors contributing to the hostile climate for lesbian, gay, bisexual and transgender youth' (2009) 38 *Journal of Youth and Adolescence* 976-988, M Glenton 'Heteronormative higher education: Challenging this status qou through LGBTIQ awareness raising' (2017) 31 *South African Journal of Higher Education* 112–126 and G Herek ''Beyond homophobia': A social psychological perspective on attitudes towards lesbians and gay men' (1984) *Journal of Homosexuality* 1–21.

Related to the above studies is the concern of how to queer the criminology in African and Zambia as the study country. As stated above there is need for queer criminological perspective in the criminal justice system. A study on how to queer the African/Zambian criminology perspective can also relate to decolonising the legal education system, the police and judiciary. As stated in Chapter 1 and the conclusion above, decolonisation as specifically discussed in this thesis and queer criminology have a common meeting point and the same destination. Sogunro provides some useful insights that can be used in this regard.[48]

Queer criminology is fairly new from an academic lens and literature or research is yet to be developed from an African perspective. As such and in related to the above point I recommend research towards African queer criminological perspectives. The social and political dynamics of Africa in general and Zambia as seen in this study speak to fact that some queer criminological perspectives discussed in western Europe and the United States of America may not have full application despite great adaption attempts. As stated in Chapter 2, pre-colonial African traditional legal systems did not frame sexual and gender minorities as deviants and hence did not criminalise same-sex conduct. As such African queer criminology should start by looking at sexual and gender minorities as sites of colonial power and counter anti-sodomy laws products of colonialism and coloniality. Bell[49] and Ngwena[50] provide useful foundational insights on this aspect.

This study also showed that the sexual and gender minority rights movement in Zambia is not strong and can in fact be described as weak. It recommended that for decriminalisation to occur, the movement has to be alive and active. While Chapter 5 discussed strategies towards strengthening the movement, each of the strategies discussed require further research. For example, it is important and thus recommended to conduct more in-depth research on how a human rights master frame can be used to advocate for sexual and gender minority rights. Carroll and Ranter, for examples, provide discusses how master frames have been used by social movements in network building towards social justice.[51] It will also be valuable for research to be conduct on what strategies can be more effective to use the proposed master frame of public health to promote the rights of sexual and gender minorities as key populations.

As stated above, decriminalisation requires an independent judiciary. As discussed in Chapter 5, this entails having both general and thematic independence. Much research has already been done on the general independence of the judiciary under the discourse of democratisation in Africa.[52]

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48 A Sogunro 'Adocacy, social control, and the criminalisation of same-sex relationships in: The evolution and enforcement of 'anti-gay' laws in Nigeria' unpublished LLD thesis, Centre for Human Rights, Faculty of Law, University of Pretoria, 2020. https://repository.up.ac.za/bitstream/handle/2263/78375/Sogunro_Advocacy_2020.pdf?sequence=1&isAllowed=y (accessed 28 May 2023).

49 M Bell 'Unsettling queer criminology: Notes towards decolonisation' (2019) 27 *Critical Criminology* 145-161.

50 C Ngwena *What is Africaness*? (2018) 270-275.

51 Carroll & Ranter 'Master framing and cross-movement networking in contemporary social movements' (1996) 37 *The Sociological Quarterly* 6-1-625.

52 For example see example D Mathokwani 'A critical evaluation of the sovereignty of the Zambian Judiciary' unpublished Phd thesis, Cavendish University, 2020, H Mkandawire 'Judicial independence and executive supremacy: A comparative study of Zambia, Ghana and Malawi' unpublished Phd thesis, Cavendish University, 2021 and SADC-LA *Independence of the judiciary in eSwatini, Zimbabwe and Zambia* (2021) 39-71. https://www.derebus.org.za/wp-

However, little if any research has been conducted on how to have thematic judicial independence in specific themes and none that I know of exists on how to attain thematic independence in the area of sexual and gender minority rights in democracies that practice heterosexual nationalism like Zambia. Such research would also be of great value. Malila, who is Chief Justice of Zambia has provided elements on which the recommended further research can be done in his reflections on judicial activism in Zambia.[53] He states that 'unless the reality of culture and its impact on human right to its fullest extent is internalised and admitted, neither the existence of a perfect Bill of Rights, nor a full corpus of international human rights law and standards will do much to stop the practice of contesting some human rights on the basis of tradition and culture'.[54] As such 'the country needs judges to take up the challenge and interpret both constitutional provisions and international conventions in a manner that shows sensitivity to the objectives of the norms contained in those documents'.[55]

In closing this thesis, hopefully forming part of the body of knowledge on sexual and gender minority rights, and adding voice to this area, argues – as others before it – for a human rights model of sexual and gender minority citizenship.[56] Sexual and gender minorities are human beings with rights, freedoms and with feelings like all other human citizens in all aspect of citizenship. As such the claim, quest and fight for equality and non-discrimination based on sexual orientation and gender identity is not an illegitimate human rights claim by a deviant class of citizens, but rather it is a valid legal claim based on the minority rights thesis of citizens whose sexual citizenship is as valid as that of heterosexual citizens.

content/uploads/2021/06/SADC_LA_Judicial_Report_On_Eswatini_Zimbabwe_and_Zambia_2021.pdf (accessed 16 May 2023).

53 M Malila 'Righting the wrongs: Justice Clever Musumali's legacy of judicial activism' (2020) *AfricaLii* 11.

54 As above.

55 As above.

56 See full range of Chapters in S Namwase and A Jjuuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* (2018) and in Gloppen, Jjuuko, Msosa & Viljoen (eds) *Queer lawfare in Africa: Legal strategies in contexts of LGBTQ+ criminalisation and politicisation* (2023).

Bibliography

Books and book chapters

Adepoju A 'Migration in Africa: An overview' in J Baker & T A Aina (eds) *The migration experience in* Africa (Gotab Press: Stockholm 1995)

Allan E *Out of the closets and into the court room: Legal opportunity structure and gay rights litigation* (Michigan University Press: Michigan 2005)

Ambani J O 'A triple heritage of sexuality? Regulation of sexual orientation in Africa in historical perspective' in S Namwase and A Jjuuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* (Pretoria University Law Press: Pretoria 2017)

Ammaturo F R *European sexual citizenship: Human rights, bodies and identities* (Palgrave McMillan: Gewerbestrasse 2018)

Amnesty International 'The alien legacy of the origins of sodomy laws in British colonialism' in Lennox C & Waites M (eds) *Human rights, sexual orientation and gender identity in the commonwealth: From history and law to development activism and transnational dialogue* (Human rights consortium: London 2013)

Amory D P 'Mashoga, Mabasha, And Magai: "Homosexuality" on the East African Coast' in S Murray and W Roscoe (eds) *Boy wives and female husbands: Studies in African Homosexualities* (2001 Palgrave: London 2001)

Ayittey G *Indigenous African institutions* (Transitional publishers: New York 1991)

Banda L 'Queer lawfare in response to heterosexual nationalism in Zambia' in S Gloppen, A Jjuuko, A Msosa & F Viljoen (eds) *Queer lawfare in Africa: Legal strategies in contexts of LGBTQ+ criminalisation and politicisation* (University of Pretoria Law Press: Pretoria 2022)

Belly R *Citizenship: A very short story* (Oxford University Press: New York 2008)

Bentham J *Introduction to the principles and morals of legislation* (Batoche Books: Ontario 2000)

Beyleveld D & Brownswood R *Human dignity in bioethics and biolaw* (Oxford University Press: London 2012)

Bryman A *Social research methods* (Oxford University Press: London 2012)

Buist D and Lenning E *Queer criminology* (Routledge: London 2016)

Burg B R *Boys at Sea: Sodomy, indecency and Courts martial in Nelsons Navy* (Palgrave MacMillan: London 2007)

Cameron E 'Unapprehend felons: Gays and lesbians and the law in South Africa' in M Gevisser & E Cameron *Defiant desire: Gay and lesbian lives in South Africa* (Ravan Press: Braamfontein 1994)

Carozza P G 'Human dignity in constitutional adjudication' in T Ginsburg & R Dixon (eds) *Comparative constitutional law* (Cheltenham Press: London 2011)

Capeheart L & Milovanovic D *Social justice: Theories, issues and movements* (Rutgers University Press: London 2007)

Chanda A *Constitutional law in Zambia: Cases and materials* (University of Zambia Press: Lusaka 2011)

Ciaralli A & Raddling M *The corpus juris civilis in the middle ages: Manuscripts and transmission from the sixth century to the juristic revival* (Brill Publishers: Leiden 2007)

Clapham A *Human rights obligations of non-state actors* (Oxford University Press: London 2006)

Clark M T 'Augustine of justice' in T Delgado *et al* (eds) *Augustine and social justice* (Lexington Books: Washington 2016)

Cohen S Folk *devils and moral panics* (Routledge: London 2002)

Colson E *Marriage and family among the plateau Tonga of Northern Rhodesia* (Manchester University Press: London 1958)

Colson E *The organisation of the Gwembe Tonga* (Berg Publications: London1995)

Currier A and Cruz J 'Civil society and sexual struggles in Africa' in E Obadare (ed) *Handbook of civil society in Africa* (Springer: New York 2014)

Currier A & Moreau A 'Understanding same-sex marriage debates in Malawi and South Africa' in B Winter *et al* (eds) *Global perspectives on same-sex marriage: A neo-institutional approach* (MacMillan-Palgrave: London 2018)

Darwin J *Britain and decolonisation: The retreat from empire in the post-war world* (Macmillan: London 1998)

Daly E *Dignity rights: Courts, constitutions and the worth of the human person* (University of Pennsylvania: Pennsylvania Press 2013)

Davidson M 'A 1958 visit to a Dakar brothel' in S Murray and W Roscoe (eds) *Boy wives and female husbands: Studies in African Homosexualities* (2001 Palgrave: London 2001)

Dean M *Governmentality: Power and rule in morden society* (SAGE Publications: London 2010)

Delvin P *The enforcement of morals* (Oxford University Press: London 1965)

Dias R *Jurisprudence* (Butterworths: London 2013)

Dillon-Malone C *Zambian, humanism, religion and social morality* (Getway Publishers: London1989)

Donnelly J *Universal human rights in theory and practice* (Cornell University Press: Newy York 2013)

Duff R A 'Responsibility, citizenship and criminal law' in S Green & R A Duff (eds) *Philosophical foundations of criminal law* (Routledge: London 2017)

Emilliana M *Social and cultural dynamics: Psychology and cultural development science* (Springer: London 2018)

Elder G 'The South Africa body politics: Space, race and heterosexual' in H Nast S Pile (eds) *Places through the body* (Routledge London: 1998)

Englund H (ed) *Christianity and public culture in Africa* (Cambridge University Press: Cambridge 2011)

England H (ed) *Christianity and public culture in Africa* (Cambridge University Press: Cambridge 2011)

Epprecht M *Hungochani: The history of a dissident sexuality in Southern Africa* (McGill University Press: Montreal 2006)

Epprecht M *Heterosexual Africa? The history of an age of exploration the age of AIDS* (Ohio University press: Ohio 2008)

Epprecht M *Sexuality and social justice in Africa: Rethinking homophobia and forging resistance* (Zed Books: London 2013)

Evans D *Sexual Citizenship: The material construction of sexualities* (Routledge: London 1993)

Ezeanya-Esiobu C *Indigenous knowledge and education in Africa* (Springer: Los Angeles 2019)

Falk K 'Homosexuality among the natives of southwest Africa' [translated by B Bradley & W Roscoe] in S Murray and W Roscoe (eds) *Boy wives and female husbands: Studies in African Homosexualities* (2001 Palgrave: London 2001)

Feser E *The Cambridge companion on Hayek: Collected essays* (Cambridge University Press: Cambridge 2003)

Finn J 'Codification of the criminal law: The Australasian parliamentary experience' in B Godfrey & G Dunstall (eds) *Crime and Empire 1840-1940: criminal justice in the local and global context* (Willan Publishing: Cullompton 2005)

Fynn E *Disabled Justice? Access to justice and the UN Convention on the Rights of Persons with Disabilities* (Routledge: London 2016)

Foucault M 'Governmentality' in C Gordon *et al* (eds) *The Foucault effect: Studies in governmentality* (University of Chicago Press: Chicago 1991)

Fuller L *The morality of the law* (Oxford University Press: London 1964)

Gearty C *Principles of human rights adjudication* (Oxford University Press: London 2004)

Gloppen S, Jjuuko A, Msosa A & Viljoen F (eds) 'Introduction' in S Gloppen, A Jjuuko, A Msosa & F Viljoen (eds) *Queer lawfare in Africa: Legal strategies in contexts of LGBTIQ+ criminalisation and politicisation* (Pretoria University Law Press: Pretoria 2022)

Gloppen S & Ranker L 'LGBT rights in Africa' in C Ashford & A Maine (eds) *Research handbook on sexuality, gender and the law* (Edvard Elgar Publishing: London 2021)

Goldin B and Gelfand M *African law and custom in Rhodesia* (Juta: Cape Town 1975)

Hatchard J 'Crime and punishment in Zambia' in M Ndulo (ed) *Law in Zambia* (East Africa Publishing House: Nairobi 1984)

Helmholz R H 'Judges and trials in the English ecclesiastical courts' in R H Helmholz Judicial tribunals in England and Europe between 1200-1700 (Cambridge University Press: Cambridge 2018)

Herring J *Criminal law text, cases and materials* (Oxford University Press: Oxford 2013)

Heyns C & Killander M (eds) *Compendium of key human rights documents of the African Union* (Pretoria University Law Press: Pretoria 2016)

Higgins P *Heterosexual dictatorship: Male homosexuality in post war Britain* (Fourth Estate Publishers: London 1996)

Germond E and De Gruchy (eds) *Aliens in the household of God: Homosexuality and the Christian faith* (New Africa Books: Cape Town 1997)

Gunda M R *The Bible and homosexuality in Zimbabwe: A socio-historical analysis of the politics, cultural, and Christian arguments in the homosexual public debate with special reference to the use of the bible* (University of Bamberg Press: Bamberg 2010)

Haberlandt M 'Occurrence of contrary sex among the negro population of Zanzibar' in S Murray and W Roscoe (eds) *Boy wives and female husbands: Studies in African homosexualities* (2001 Palgrave: London 2001)

Han E & J O'Mahoney *British colonialism and the criminalization of homosexuality: Queens, crime and empire* (Routledge: London 2018)

Hansungule M 'Domestication of international human rights law in Zambia' in M Killander (ed) *International law and domestic human rights in Africa* (Pretoria University Law Press: Pretoria 2010)

Hart HLE *Liberty and morality* (Oxford University Press: London 1963)

Hayek F *Law, legislation and liberty: A new statement of the liberal principles of justice and political economy* (Routledge Classics: London 2013)

Hekman G 'Sexual citizenship' in G Hekman (ed) *The LGBTI Encyclopedia* (Routledge: New York 2014

Hussein B *The miraculous wave of democratization in Africa in the 1990s* (Toronto University Press: Toronto 2020)

Hoad N *African intimacies: Race, homosexuality and globalization* (University of Minnesota Press: Minneapolis 2007)

Ikambana P *Mobutu's totalitarian political system: An Afrocentric analysis* (Routledge: New York 2007)

John J *Sociology* (Pearson publications: Toronto 2011)

Johnson P *Homosexuality and the European Court of Human Rights* (Routledge: New York 2014)

Jjuuko A *Strategic litigation and the struggle for lesbian, gay, and bisexual equality in Africa* (Daraja Press: Montreal 2020)

Jjuuko A 'The incremental approach: Uganda's struggle for the decriminalisation of homosexuality' in C Lennox and M Watts (eds) *Human rights, sexual orientation and gender identity in the Commonwealth: From history to developing activism and dialogues* (Human Rights Consortium: London 2013)

Kant I *The foundations of the metaphysics of moral* (1785), translated and edited in English by M J Gregor (Cambridge University Press: Cambridge 1991)

Kaunda K D *Zambia shall be free* (Heineman Educational Books: London 1963)

Kaunda K D *A Humanist in Africa* (Longman Publishers: London 1966)

Kaunda K D *Letter to my children* (Longman Publishers: London 1973)

Kennedy D *Decolonization: A very short story* (Oxford University Press: New York 2016).

Kendall K '"When a woman loves a woman" in Lesotho: Love, sex and the (Western) construction of homophobia' in S Murray and W Roscoe (eds) *Boy wives and female husbands: Studies in African homosexualities* (2001 Palgrave: London 2001)

Kelly M J *The origins and development of education in* Zambia (Image Press: Lusaka 1999)

Knutsson J *Labeling theory: A critical examination* (SRG Books: Amsterdam 1977)

Kohn M & McBride K *Political theories of decolonisation* (Oxford University Press: New York 2011)

Kwasi-Prempeh H 'Africa's "constitutionalism revival": False start or new dawn' in E N Sahle (ed) *Democracy, constitutionalism and politics in Africa* (Palgrave Macmillan: New York 2017)

Leila R *Sapphistries: A global history of love between women* (New York University Press: New York 2009)

Makower F *The constitutional history and the constitution of the church of England* (MacMillan and Co: New York1895)

Mandipa E 'The suppression of sexual minority Rights: A case study of Zimbabwe (2017) in A Jjuuko and S Nawase (eds) *Protecting the rights of sexual minorities in contemporary African* (Pretoria University Law Press: Pretoria 2017)

Martin K & de Waal S Till the time of trail: Prison letters of Simon Nkoli (Gala: Johannesburg 2007)

Marx K *Capital* (Penguin Classic Books: London 1867)

Marx K *Critique of the Gotha programme* (Dodo Press: London 1891)

Marx k & Engels F *The communist manifesto* (Penguin Classic Books: London 1848)

Marshal T H *Class, citizenship, and social development* (Chicago University Press: Chicago 1950)

Mass M (ed) *The Cambridge companion to the age of Justinian* (Cambridge University Press: Cambridge 2005)

Mbao M 'The politics of constitution-making in Zambia: Where does power lie?' in C Fombad & C Murray (eds) *Fostering Constitutionalism in Africa* (Pretoria University Law Press: Pretoria 2010)

Michael M 'The offence of sodomy: England's least lovely criminal law export?' in C Lennox & M Waites (eds) *Human rights, sexual orientation and gender identity in the commonwealth: From history and law to development activism and transnational dialogue* (Human Rights Consortium: London 2013)

Mill J S *On Liberty* (Batoche Books: London 1859)

Miller D *Principles of social justice* (Harvard University Press: Massachusetts 1999)

Mkhize N *et al The Country we want to live in: Hate crimes and homophobia in the lives of black lesbians South Africans* (HSRC Press: Cape Town 2010)

Morris H F & Read J S *Indirect rule and the search for justice: Essays in East African legal history* (Clarendon: London 1972)

Murray R *Human rights in Africa: From the OAU to the African Union* (Cambridge University Press: New York 2004)

Murray R *The African Commission on Human and Peoples Rights and International law* (Hart Publishing: Oxford 2000)

Murray R & Long D *The implementation of findings of the African Commission on Human and Peoples' Rights* (Oxford University Press: London 2015)

Murray S and Roscoe W (eds) *Boy wives and female Husbands: Studies in African homosexualities* (Palgrave: London 2001)

Murray S *Homosexuality traditional in Sub-Saharan Africa: An overview* (Palgrave: London 2012)

Mushota L 'International law, women's rights and the Courts: A Zambian perspective' in Southern Africa Litigation Centre *Using law courts to protect vulnerable people: Perspectives from the judiciary and legal profession in Botswana, Malawi and Zambia* (Herman: London 2015)

Mutua M 'Sexual Orientation and human rights: Putting homophobia on trial' in S Tamale (ed) *African Sexualities: A Reader* (Pambuzaka Press: Oxford 2011)

Mwanakatwe J M *End of Kaunda era* (Mission Press: Lusaka 1994)

Nadel S *The Nuba: An anthropological study of the hill tribes in Kordofan* (Oxford University Press: London 1947)

Ndjio B 'Sexuality and Nationalist Ideologies in Post-Colonial Cameroon*'* in S Wieringa and H Sivori (eds) *The Sexual History of the Global South: Sexual Politics in Africa, Asia, and Latin120–America*, (Zed Books: London 2013)

Ngwenya C *What is Africaness? contesting nativism in race, culture and sexualities* (Pretoria University Law Press: Pretoria 2018)

Nigam A *Decolonising theory* (Bloomsbury Publishing: New Delhi 2020)

Novak M & Adams P *Social justice isn't what you think it is* (Encounter Books: New York 2015)

O'Flaherty M 'The Yogyakarta Principles at Ten' in A Hellum (ed) *Human rights, Sexual Orientation and Gender Identity* (Routledge: London 2017)

O'Halloran K *Sexual orientation, gender identity and international human rights law: A common law perspective* (Routledge: London 2020)

Ottosson D *State sponsored homophobia* (ILGA: Geneva 2008)

Pakenham T *The scramble for Africa* (Brown Books: London 1995)

Plooy-Cilliers F and Davis C *Research matters* (Juta: Cape Town 2016)

Poewe K *Reflections of a woman anthropologist: No hiding place* (Academic Press: London 1982)

Pollock F and Maitland F W *The history of the law of England before the time of Edward* I (Cambridge University Press: London 1898)

Pratt Y, Louie D & Ottmann J 'Indigenous education and decolonisation' in L Jackson (ed) *Oxford research encyclopaedia of globalisation and education* (Oxford University Press: Oxford 2016)

Rawls J *A theory of justice* (Harvard University Press: Boston 1974)

Ranger T 'The invention of tradition in colonial Africa' in Hobsbawm E & Ranger T (eds) *The Invention of tradition* (Cambridge University Press: Cambridge 1983)

Retief G 'Keeping Sodom out of the lagger: The policing of sexual minorities in South Africa' in M Gevisser & E Cameron *Defiant desire: Gay and lesbian lives in South Africa* (Ravan Press: Braamfontein 1994)

Rich R *The Sociology of criminal law: Evaluation of the deviance of the Anglo-American society* (Butterworths: Toronto 1979)

Ruthermund D *The Routledge companion on decolonization* (Routledge: New York 2006)

Thoreson R 'Blackmail and extortion of LGBTI People in Sub-Saharan Africa' in S Cook and R Thoreson (eds) *Nowhere to turn: Blackmail extortion of LGBTI people in sub-Saharan Africa* (IGLHRC: Harare 2007)

Tomasi J *Free market fairness* (Princeton University Press: New Jersey 2012)

Tuner V *The ritual process: structure and anti-structure* (Cornell University Press: New York 1969)

Sagar J W *Notes on the history, religion and custom of the Nuba* (University of Khartoum Press: Khartoum 1922)

Santos C 'Decriminalisation of homosexuality in Africa: lessons from South Africa' in C Lennox & M Waites (eds) *Human rights, sexual orientation and gender identity in the commonwealth: From history and law to development activism and transnational dialogue* (Human Rights Consortium: London 2013)

Simukungwe M 'Universities as sites for advancing education for decolonisation: The case of Zambian Universities' in C H Manthalu & Y Waghid (eds) *Education for decoloniality and decolonisation in Africa* (Palgrave McMillan: Gewerbestrasse 2019)

Smith E W and Dale A M *The Illa speaking people of Northern Rhodesia* (Macmillan: London 1920)

Snow D & Benford R 'Master frames and cycles of protest' in A Morris & C Muller (eds) *Frontiers and cycles of protest* (Yale University Press: New Haven 1992)

Stein E 'Law, sexual orientation and gender' in J Coleman and S Shapiro (eds) *The Oxford handbook of Jurisprudence and Philosophy of Law* (Oxford University Press: London 2002)

Sogunro A 'Against the ''order of nature'': Towards the growth of queer lawfare in Nigeria' in S Gloppen, A Jjuuko, A Msosa & F Viljoen (eds) *Queer lawfare in Africa: Legal strategies in contexts of LGBTIQ+ criminalisation and politicisation* (University of Pretoria Law Press: Pretoria 2022)

UNAIDS Terminology Guidelines (2015)

Van Klinken A 'Sexual Citizenship in postcolonial Zambia: from Zambian humanism to christian nationalism' in B Bompani & C Valois (eds) *Christian citizens and the moral regeneration of African state* (Routledge: London 2017)

Van Klinken A 'Religion, sexualities and politics' in J Chammah *et al* (eds) *Competing for Caesar: Religion and politics in postcolonial Zambia* (Fortress Press: Minneapolis 2020)

Van Klinken A 'Christianity, human rights and LGBTI advocacy in Zambia: The Case of Dette Resources Foundation' in A Van Klinken & E Chitando (eds) *Public religion and politics of homosexuality in Africa* (Routledge: London 2016)

Van der Walt AJ (ed) *Theories of social and economic justice* (Sun Press: Stellenbosch 2005)

Viljoen F 'Sexual orientation as a challenge to the harmonized interpretation of international human rights law' in CM Buckley, A Donald & P Leach (eds) *Towards convergence in international human rights law: Approaches of regional and international systems* (Brill Nijhof: Leiden 2016)

Viljoen F International human rights law in Africa (Oxford University Press: Oxford 2012)

Waites M *The age of consent: Young people, sexuality and citizenship* (Palgrave Macmillan: New York. 2005)

Waites M 'United Kingdom: confronting criminal histories and theorising decriminalisation as citizenship and governmentality' in C Lennox & M Waites (eds) *Human rights, sexual orientation and gender identity in the commonwealth: From history and law to development activism and transnational dialogue* (Human rights consortium: London 2013)

Weaver H 'Indigenous struggles for justice: Restoring balance within the context of Anglo settler societies' in M Reisch (ed) *The Routledge international handbook of social justice* (Routledge: New York 2014)

Weisstub N 'Honor, Dignity and the Framing of Multiculturalist Values' in Kretzmer D and Klein E (eds) *The Concept of human dignity in human Rrights discourse* (Kluwer Law International: The Hague 2002)

Wekesa S 'Decriminalisation of homosexuality in Kenya: The prospects and challenges' in S Namwase and A Jjuuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* (Pretoria University Law Press: Pretoria 2017)

Weldesellasie K I 'The development of criminal law and criminal justice in Africa from pre-colonial rule to the present day' in C Jalloh & I Bantekas (eds) *The International Criminal Court and Africa* (Oxford University Press: Oxford 2017)

Williamson K & P Scifleet *Research methods* (Chandos Publicising: London 2018)

Wolf S *Sexuality and socialism: History, politics, and theory of the LGBT Liberation* (Haymarket Books: Chicago 2006)

Woodward W H *A short history of the expansion of the British Empire: 1500- 1902* (Cambridge University Press: London 1903) 306

Journal articles

Armstrong E A & Crage S M 'Movements and memory: The making of the Stonewall myth' (2006) *71 American Sociological Review* 724

Asal V, Sommer U & Harwood P 'Original sin: The cross-national study of the legality of homosexual acts' (2013) 46 (3) *Journal of Cooperative Political Studies* 320

Awondo P 'The politicisation of sexuality and the rise of homosexual movements in post-colonial Cameroon' 37 *Review of African Political Economy* 315

Ball M 'Queer criminology, critique and the art of "art of not being governed' (2014) 21 *Critical Criminology International Journal* 22

Bassham G 'Legislating Morality: Scoring the Hart-Devlin debate after fifty years' (2012) 25 *Ratio Juris* 117

Blanco R 'Problematising the ultimate other of modernity: the crystallisation of coloniality in international politics' (2019) 4 *Contexto Internacional* 601

Burchardt M 'Transparent sexualities: sexual upness, HIV discourses and the governmentality of sexuality in South Africa' (2013) *Culture, Health & Sexualities* 498

Carolina A 'Apartheids Immorality Act and the fiction of heteronormative whiteness' (2017) *African Journal Online* 114

Carnelley M 'Laws on adultery: Comparing the historical development of South African common law principles with those in English law' (2013) 19 *Fundamina* 185

Cole D 'Are foreign nationals entitled to the same constitutional rights as citizens' (2003) 25 *Thomas Jefferson law Review* 367

Cheyeka A 'Zambia, a "Christian nation" in the post Movement for Multiparty Democracy (MMD) Era, 2011-2016' (2016) 6 *International Journal of Humanities and Social Sciences* 167

Croucher S 'South Africa's democratisation and politics of gay liberation' (2002) 28(2) *Journal of South African Studies* 315

Crossman A 'A sociological understanding of moral panic' (2019) *The Thought* 1

Dalvi S 'Homosexuality and the European Court of Human Rights: Recent Judgements against the United Kingdom and their impact on other signatories to the European Convention on human rights' (2018) 15 *University of Florida Journal of Law and Public Policy* 468

De Ru H 'A historical perspective on the recognition of same-sex u ions in South Africa' (2013) 19 (2) *South African Law Journal* 222

De Vos P 'On the legal construction of gay and lesbian identity and South Africa's transitional constitution' (1996) 12 *South Africa Journal on Human Rights* 274

De Vos P 'The inevitability of same-sex marriage in South Africa's post-apartheid state' (2007) 23 *South African Journal on Human Rights* 435

Ebobrah S T 'Africanising human rights in the 21st century: Gay Rights, African legislator' (2012) 1 *International Human Rights Law Review* 112

Epprecht M '"Bisexuality" and the politics of normal African ethnography' (2006) 48 *Anthropologica* 187.

Epprecht M 'The "unsaying" of indigenous homosexuality in Zimbabwe: Mapping a blind spot in an Africa masculinity' (1998) 24 *Journal of Southern African Studies* 4

Essien V 'The northern Nigeria penal code: A reflection of diverse values in penal legislation' (1983) 5 *Journal of International and Comparative Law* 86

Esterhuizen T 'Decriminalisation of consensual same-sex sexual acts in the Botswana constitution: Motshidiemang v The Attorney General' (2019) 19 *African Human Rights Law Journal* 843

Evangelista JA 'On queer and capital: Borrowing key Marxist concepts to enrich queer theorising' (2013) 61 (2) *Philippine Sociological Review* 349.

Ewins L H 'The criminalisation of sexual orientation: why Uganda's Anti-Homosexuality Act threatens its trade benefits with the United States' (2011) 34 *The Boston College Law Review* 30

Farmer L 'Reconstructing the English Codification Debate: The Criminal Law Commissioners, 1833-45' (2000) 18 *Law and History Review* 397

Finerty CE 'Being gay in Kenya: The implications of Kenya's new Constitution for its Anti-Sodomy laws' (2012) 45 *Cornell International Law Journal* 431

Fombad C 'Constitutional reforms and constitutionalism in Africa: Reflection on some current challenges and future prospects' (2011) 59 *Buffalo Law Review* 1007

Gebeye A B 'The potential role of directive principles of state policies for transformative constitutionalism in Africa' (2017) 1 *African Journal of Comparative Law* 1.

Geisler G 'Sisters under the skin: women and the women's league in Zambia' (1987) 25(1) *Journal of Morden African Studies* 43

Goodman G 'Beyond the enforcement principle: Sodomy laws, social norms and social panoptic' (2001) 89 (3) *California Law Review* 19

Gittlemen R 'The African Charter on human and Peoples Rights: A legal analysis' (1982) 22(4) *Virginia Journal of International Law* 667

Greenberg D F & M H Bystryn 'Christian intolerance of homosexuality' (1982) 88 *American Journal of Sociology* 515

Grimley M 'Law, morality and secularisation: The church of England and the Wolfenden Report, 1954 – 1967' (2009) 60 *The Journal of Ecclesiastical History* 728

Grossman G 'Renewalist christianity and the political saliency of LGBTs: Theory and evidence from Sub-Saharan Africa' (2015) 77 (2) *Journal of Politics* 337

Gulzar S 'Who enters politics and why?' (2021) *The Political Science Annual Review* 255

Gupta A 'Section 377 and the dignity of Indian homosexuals' (2006) 41 (46) *Economic and Political Weekly* 4815

Hallpike C R 'The Konso of Ethiopia: A study of the values of a Cushitic people' (1972) 16(2) *African Studies Review* 150

Halley J E 'Reasoning about sodomy: Act and identity in and after Bowers v Hardwick' (1993) 79 *Virginia Law Review* 1721

Hard W 'The spirit of the constitution' (1936) 185 *The Annals of American Political and Social Science* 11

Harris A 'Discourses of desire as governmentality: Young women, sexuality and the significance of safe space' (2005) 15 *Feminism and Psychology* 39)

Heller P 'Democracy deepening in India and South Africa' (2009) *Journal of Asia and African Studies* 123.

Hepple J 'Will sexual minorities ever be equal? The repercussions of British colonial "sodomy laws" (2012) 50 *The Equal Rights Review* 850

Himonga C and Dialo F 'Decolonisation and the teaching of law in Africa with special reference to living customary law' (2017) *Potchefstroom Electronic Journal* 5.

Ireland P R 'A macro-level analysis of the scope, causes and consequences of homophobia in Africa (2013) 56(2) *African Studies Review* 47

Janes D ''One of us': The queer afterlife of Margaret Thatcher as a gay icon' (2018) 8 *International Journal of Media and Cultural Politics* 211

Jason P D 'The courts christian in medieval England' (2017) 4 *The Catholic Lawyer* 339

Jian D 'Impact of the decriminalisation of homosexuality in Dehli: An empirical study (2017) 13 *Arkansas Journal of Social change and Public Service* 1

Jivan U 'From individual protection to recognition of relationships: same sex couples and the South African experience of sexual orientation reform' (2007) 3 *Law, Democracy and Development Law Journal* 19

Johnson P 'Buggery and Parliament, 1533-2017' (2018) 38 *Parliamentary History* 325

R Joseph 'Democratization in Africa after 1989: Comparative and theoretical perspectives' (1997) 29 *Comparative Politics* 363

Kaunda C J 'From fools for Christ to fools for politicians: A critique of Zambian Pentecostal Theo-political imagination' (2017) *Mission Research* 13

Kumari K 'Heterosexual nationalism: Discourses on masculinity and femininity' (2018) 6(10) *International Journal of Social Science Studies* 34

Kuwali D 'Battle for sex? protecting sexual(ity) Rights in Africa' (2014) 36 *Human Rights Quarterly* 23

Law D S 'The global language of human rights: A computational linguistic analysis' (2017) *Washington University Legal Studies Paper Series* 1

Lee K M 'Universal human dignity: Some reflections in Asia' 1 (2008) *Asian Journal of Comparative Law* 3

Lewis H S 'Ethnographic studies' (1973) 16(2) *African Studies Review* 305

Leslie C R 'Creating criminals: The injuries inflicted by "unenforced" sodomy laws' (2000) *35 Harvard Civil Rights-Civil Liberties Law Review* 111

Lucie C 'Advancement of human rights standards for LGBT people through the perspective of international human right' (2012) 16 *Journal of Comparative Research in Anthropology and Sociology* 190

Mbao M 'The vicissitudes of constitutional interpretation in Zambia' (2021) 1 *Turf Law Journal* 47

Macleod C & Durrheim K 'Foucauldian feminism: the implications of governmentality' (2002) 32 *Journal for the Theory of Social Behaviour* 41

Maldonado-Torres N 'On the coloniality of being' (2007) 21 *Cultural Studies* 240

Maguire S 'The human rights of sexual minorities in Africa' (2004) 34(1) *California Western International* 1

Mbaku J M 'Constitutions and citizenship: Lessons for African countries' (2017) 17(1*) International and Comparative Law Review* 11

McCrudden C 'Human dignity and the judicial interpretation of human rights' (2008) 19(4) *European Journal of Human Rights* 658

McNamarah C T 'Silent, spoken, written and enforced; The role of law in the construction of pot-colonial queerphobic states in Africa' (2018) 22 *Cornell International Law Journal* 496

Milnsbridge J 'Self-interest in political life' (1990)18 *Political Theory* 132

Msidi T 'Lies we have been told: On (homo) sexuality in Africa' (2015) 58 *Africa Today* 56

Mwansa A 'Law, religion and human rights in Zambia: The past, the present and the practice (2008) 8 *African Human Rights Law Journal* 554

Mokotso R 'Decoloniality of school governance in Lesotho: A religio-historical approach' (2022) *Pharo Journal of Theology* 103

Morris H F 'A history of the adoption of codes of criminal law and procedure in colonial Africa 1876-1935' (1974) 18 (1) *Journal of African Law* 6

Mundia L *et al* 'Exclusion of sexual minorities in sexual health education in Zambia' (2019) 15 (8) *European Scientific Journal* 25

Murray R & Viljoen F 'Towards non-discrimination on the basis of sexual orientation: The normative basis and procedural possibilities before the African Commission on Human and Peoples' Rights (2007) 29 *Human Rights Quarterly* 86

Ndulo M 'African Customary law, Customs and Women's rights' (2011) 18 *Indiana Journal of Global Legal Studies* 87

O'Regan R 'Sir Samuel Griffith's Code Criminal Code' (1991) 7 *Australian Bar Review* 141

Paige C 'Mental health and well-being of LGBT + veterans dismissed from the British Armed Forces before January 2000' (2021) 7 *Journal of Military, Veteran and Family Health* 122

Pushparagavan D 'The history of LGBT Legislation in South Africa' (2020) *South African History Online* 1.

Plodder M & Pierre P 'Mental health of sexual minorities' (2015) 27 *International Review of Psychiatry* 367

Phiri I 'President Fredrick Chiluba of Zambia: The Christian nation and democracy' (2003) 33(4) *Journal of Religion in Africa* 401

Rao R 'Re-membering Mwanga: Same sex intimacy, memory and belonging in postcolonial Uganda' (2015) 9 (1) *Journal of East African Studies* 1

Ramsay L M 'The Church of England, homosexual law reform and the shaping of the permissive society, 1957-1979' (2018) 57 *Journal of British Studies* 108

Reaume D G 'Discrimination and dignity' (2003) 63 *Los Angeles Law Review* 53

Reddy V 'Decriminalisation of homosexuality in South Africa in post-apartheid South Africa: A brief case history review from sodomy to marriage' (2006) *Agenda: Empowering Women for Gender Equity* 156

Roa R & Klugman B 'Considering strategic litigation as an advocacy tool: a case study of defence of reproductive rights Colombia' 22 *Reproductive Health Matters* 31

Rhonheimer M 'The true meaning of social justice: A catholic view of the Hayek (academic paper)' (2016) 35 (1) *Economic Affairs* 35

Rudman A 'The protection against discrimination based on sexual orientation under the African human rights system' (2015) 15 *African Human Rights Law Journal* 1

Sanders AJGM 'Homosexuality and the law: A gay revolution in South Africa' (1995) 41 *Journal of African Law* 100

Sebba L 'The Creation and evolution of criminal law in colonial and post-colonial societies' (1999) 3 *Crime, History & Society Journal* 71

Sheikh D 'The road to decriminalisation in India: Litigating India's anti-sodomy laws' (2014) 16 *Yale Human Rights and Development Law Journal* 104

Sigel R B 'Dignity and sexuality claims on dignity in transnational debates over abortion and same-sex marriage' (2012) 10 (2) *International Journal of Constitutional Law* 355

Steinman A C 'The core meaning of human dignity' (2016) *Potchefstroom Law Journal* 23
Tamale S 'Exploring the contours of African sexualities: Religion, law and power' (2014) 14 *African Human Rights Law Journal* 150

Sogunro A 'Citizenship in the shadows: Insights on queer advocacy in Nigeria' (2018) 45 *College Literature* 632

Toensing H J 'Women of Sodom and Gomorrah: Collateral damage in the war against homosexuality' (2005) 21 (2) *Journal of Feminist Studies in Religion* 61

Thompson J T 'The origin, migration and settlement of northern Ngoni' (1981) 34 *The Society Malawi Journal* 9

Van Klinken A 'Homosexuality, politics and Pentecostal nationalism in Zambia' (2014) 20 *Journal of Christian Studies* 256

Van Klinken A 'Gay rights, the devil and the end times: Public religion and the enchantment of the homosexuality debate in Zambia' (2013) 13 *Journal of Religion* 23

Van Klinken A 'The homosexual as the antithesis of biblical manhood? Heteronormativity and masculinity politics in Zambia' (2011) 17(2) *Journal of Gender and Religion in Africa* 126

Van Klinken A & L Phiri '"In the image of God": Reconstructing and developing a grassroots African queer theology from urban Zambia' 21 *Theology & Sexuality* 53

Van der Pas K 'Conceptualising strategic litigation' (2021) *Oñate Socio-legal Series* 14

Vashit L 'Re-thinking criminalisable in India: Constitutional morality as a restraint to criminalisation' (2013) 55(1) *Journal of the Indian Law Institute* 73

Wright B 'Self-governing codification of English criminal law and the empire: Th Queensland and Canadian experiences' (2007) 26(1) *University of Queens Land Law Journal* 40

Reports

Action Aid 'Corrective Rape' (2011) https://www.actionaid.org.uk/sites/default/files/doc_lib/correctiveraperep_final.pdf
Amnesty International *Making love a crime: criminalization of same sex conduct in Sub-Saharan Africa* (2013)

Bajaha B 'Post-colonial amnesia: The construction of homosexuality as un-African' (2016) https://www.lse.ac.uk/gender/research

Diversity and anti-discrimination at FIFA (2017) 3 https://resources.fifa.com/image/upload/diversity-and-anti-discrimination-at-fifa.pdf?cloudid=zxfj6wm19g7tgk0yfw8t

Flores A *Social acceptance of LGBTI people in 175 countries and locations between 1981-2020* (2021) The Williams Institute

Human Dignity Trust 'The criminalisation of consensual same-sex sexual relations across the Commonwealth-Developments and Opportunities' (2016)

OUT LGBT Well-being Hate crimes against lesbian, gay, bisexual and transgender (LGBT) people in South Africa (2016) https://out.org.za/wp-content/uploads/2020/10/Hate-Crimes-Against-LGBT-People-in-South-Africa-21-November-2016-Web.pdf

Panos Institute *Towards non-discrimination on the basis of sexual orientation and gender identity in Zambia* (2013)

Long S 'Before the law: Criminalizing sexual conduct in colonial and post-colonial southern African societies' https://www.hrw.org /reports/2003/safrica

Muller A & Daskilewicz K 'Are we doing alright: Realities of violence, mental health and access to healthcare related to sexual orientation and gender identity and expression in Zambia' (2019)

The Other Foundation *Canaries in the Coal mine: An analysis of the spaces for LGBTI activism in Zambia-Country Report* (2017) 17 http://theotherfoundation.org/wp-content/uploads/2017/02/Canaries_Zambia.pdf

The Other Foundation *Progress preludes: A survey of attitudes towards homosexuality and gender non-conformity in South Africa* (2016) https://theotherfoundation.org/wp-content/uploads/2016/09/ProgPrudes_Report_d5.pdf

Transbantu Association of Zambia, '*findings of human rights violation report* (2013-2015)

National Scientific Research Centre (NSRC) & Panos Institute Southern Africa *Combating HIV among men having sex with men in Zambia* (2016)

Nyeck S N & Sherperd D *The economic cost of stigma and discrimination in South Africa* (2019) https://williamsinstitute.law.ucla.edu/wp-content/uploads/Impact-LGBT-Discrimination-South-Africa-Dec-2019.pdf

'Report of the United Nation Special Rapporteur on the sale of children, child prostitution and child pornography' (2004) E/CN.4/2004/9 124

SADC-LA *Independence of the judiciary in eSwatini, Zimbabwe and Zambia* (2021) 39-71. https://www.derebus.org.za/wp-content/uploads/2021/06/SADC_LA_Judicial_Report_On_Eswatini_Zimbabwe_and_Zambia_2021.pdf

Wolfenden Report (1957)

FHI 360/ NAC 'Understanding the legal barriers to accessing HIV/AIDS services by key populations: Findings of expert panel meetings in Zambia' (2019)

United Nations Development Programme (UNDP) *Zambia legal environment assessment for HIV, TB and sexual productive health rights* (2019)

'Zambia Census Report' (2010)

Papers

Olowu D 'The nature and Character of the African state' (1994) 4. Paper presented at the 15th AAPAM round table, Banjul, The Gambia

Constitutions and Legislation

Buggery Act, 1533

Constitution of Zambia, Act No. 2 of 2016

Indian Code 1861

Matrimonial Causes Act of 1857

Penal Code Chapter 87 of the Laws of Zambia

Offences against the Persons Act 1828

Offences against the Persons Act 1861

Northern Rhodesia Penal Code 1931

Queensland Criminal Code 1897

Cases

International cases

African Commission Human and Peoples Rights

Amnesty International v Zambia (1999) ACHPR/Comm/212/98

Centre for Minority Rights *Development* (*Kenya*) *and Minority Rights Group v Kenya* (2003) ACHPR/Comm/27603

Free Legal Assistance Group and Others v Zaire (2000) AHRLR 74

Legal Resources Foundation v Zambia (2001) ACHPR/Comm /211/98

Social and Economic Rights Action Centre v Nigeria (2002) ACHPR/Comp/155/ 96

Zimbabwe Human Rights NGO Forum v Zimbabwe (2006) AHRLR 128 (ACHPR 2006)

European Court of Human Rights

Dudgeon v UK (1981) ECtHR

Salgueiro da Silva Motua v Portugal (2010) ECHR/Comm/33290/96A

X and Others v Austria Application 19010/07

Human Rights Committee

Joslin v. New Zealand, (2002) Comm 902/1999/CCPR

Toonen v Australia Com no. 488/1992, UN Doc CCPR/C/50/D

Inter-American Court of Human Rights

Karen Atala and Daughters v Chile (2012) IACHR/Comm/Doc/22/1

Domestic Cases

Botswana

Letswelestse Mosthidiemang v Attorney General (2019) MAHGB-00591-16

Tapela and Others v Attorney General (2018) 2 BLR 118 (CA)

Thuto Rammoge and 19 Others v The Attorney General (2016) CACGB 128/14

Britain

R v Burstow (1997) Cr App 14

R v Curtis (1926) CPD 385

R v K and F (1932) EDL 71

Wallace-oon v R [1940] 1 ALL ER 241

India

The National Legal Services Authority v Union of India (2014) SC/1863

Navtej Singh Johar & Others v Union of India (2018) 76/2016

ND v Attorney General (2018) 2 BLR 233 (HC)

Shrinivas Ramchandra Siras v The Aligarh Muslim University (2010) HC 17549

Kenya

Eric Gitari v Non-governmental Coordinating Board (2013) (2015) 440/ KHC
Kanane v Attorney General (1995) 2 BLR 94 (CA)

Kanane v Attorney General (2003) 2 BLR 64

Republic v Kenya national examination council and Attorney general ex prate Audrey Mbugu (2013) eKLR/147

Nigeria

Eugene Meribe v Joshua Egwu (1976) 1 ALL NLR 266

South Africa

Dawood v Minister of home Affairs (2000) 3 SA 936 (CC)

Du Toit v Minister of Welfare and Population Development (2002) ZACC 20

Ehler v Bohler-Uddeholm Africa (2010) ZALC 117

Fourie v Minister of Home Affairs (2005) ZACC 19

Geldenhuys v National Director of Public Prosecutions (2008) ZACC 21

Hoffman v South African Airways (2001) 1 SA 1 (CC) 43

J v Director General , Department of Home Affairs (2003) BCLR 463 (CC)

Langemaat v Minister of Safety and Security (1998) 3 SA12 (T)

Minister of Home Affairs v Fourie (2006) 1 SA 524 (CC) 50

Minister of Home Affairs v Watchenuka (2004) 4 SA

Mohammed v President of South Africa (2001) 3 SA 893 (CC) 55

National Coalition for Gay and Lesbian Equality v Minister of Justice and Others (1998) ZACC 15

S v Matsemel (1988) 2 SA 254 (T) 258

United States of America

Bowers v Hardwick (1986) 478/US/186

Lawrence v. Taxes 539 U.S. 558 (2003)

Zimbabwe

Chikuku v Chidano (1922) SR 55

S v Mupfundza (1982) 1 ZLR 271

Zambia

Christopher Nonde Lusinga v The People (2010) SCJ/ 15/ 2011

Director of Public Prosecutions v Chirwa (1968) ZR 28

Edith Nawakwi v The Attorney General (1991) HP/1724

Emmanuel Phiri v The People (1982) ZR 77

Hatch Brill v The People (2017) CAZ/09/03/2016

Katebe v The People (1975) ZR 13

Kelvin Hang'andu v The Law Association of Zambia (2014) SCZ/36

Kingaipe and Another v Attorney General (2009) HL/ 86.

Monze Muyeka v *Miniva Nakamba* (2015) HP/0974

Mulundika and seven others v the People (1996) ZLR/SC 26

Nsofu v The people SCZ /15/ 2011

Paul Kasonkomona vs The People (2014) HPA/54

Phiri v The People (1982) ZR 77

R v Mubanga and Sakeni (1959) II R & N 169

R v Yohanni Mprokoso (1832) NRLR 152

Roy Clark v Attorney General (2008) ZR 1/ 38

Sara Longwe v Intercontinental hotel (1992) HP/765.

The People v Francis Mwale (2017) ZR 18

The People v Philip Mubiana and James Mwape (2013) 1B/01/2013

Websites, and online newspaper articles

Boniface D, Sambo G & Y Dionne 'Good neighbours? Africans express high levels of tolerance for many, but not for all' (2016) 12 https://afrobarometer.org/sites/default/files/publications/Dispatches/ab_r6_dispatchno74_tolerance_in_africa_eng1.pdf

Council of Churches in Zambia *Pastoral Letter: From Elections to Justice and Fair Play* (2012) Lusaka. http://www.ccz.org.zm/sites/default/files/CCZ%20pastrolLetter.pdf

'Criminal laws on homosexuality in African nations' (2020) *Global Legal Research Center* https://www.loc.gov/search/?fa=partof:law+library+of+congress&q=homosexuality+in+Africa

Evangelical Fellowship of Zambia *Pastoral Statement on the State of the Nation* http://www.efzsecretariat.org/index.php?option=com_content

'FAZ seeks to introduce gay rights in local league' *The Zambian Reporter* 20 October 2016 https://zambiareports.com/2016/10/20/faz-seeks-introduce-gay-rights-local-league-proposes-disband-div-two-three/

'Gays Marry at Own Risk – Lungu.' Zambia Daily Mail, 9 April. http://www.daily-mail.co.zm/local-news/3599

'Go to hell, Edgar Lungu tells gay rights activists in Zambia' *The Zambian Reporter* 5 February 2013 https://zambianreports.com/2013/05/21/

'KK says no to homosexuality' *The Lusaka Times* 20 0ctober 2010 https://www.lusakatimes.com/2010/10/20/kk-homosexuality

'Kabimba urges Zambians to denounce homosexuality' *Lusaka Times* 22 April 2013 https://www.lusakatimes.com/2013/04/22/kabimba-urge-zambians-reject-and-denounce-people-and-institutions-championing-homosexuality/

Middleton L 'Corrective rape': fight a South Africa scourge' (2011) *Time* *http://content.time.com/time/world/article/0,8599,2057744,00.html*

'outrage over attempt to block anti-gay discrimination in Zambian football' *Mamba online* *https://www.mambaonline.com/2017/02/20/outrage-attempt-block-gay-discrimination-zambian-football/*

'Secret gay indaba' The Daily Nation November 7 (2017) http://www.lusakatimes.com

Smith T *Cross-national difference in attitudes towards homosexuality* (2010) 10 https://williamsinstitute.law.ucla.edu

'Somizi is not welcome in Zambia , Government says' Lusaka Times 21 July 2020 https://www.lusakatimes.com/2019/06/21/somizi-is-not-welcome-in-zambia-government-says/
Speech of the former UNSG Ban Ki Moon, delivered to the Parliament of Zambia on 24 February 2012. https://www.un.org/sg/en/content/statement/secretary-general-remarks-national-assembly-republic-zambia

The Presidents interview and statements can be accessed on https://www.youtube.com/watch?v=DyNQGrwt7Ig&app=desktop

Human Dignity Trust 'The criminalisation of consensual same-sex sexual relations across the Commonwealth-Developments and Opportunities' http://www.humandignitytrust.org

US ambassador recalled after dispute with Zambian government over gay rights and corruption' *CNN* 25 December 2019 https://edition.cnn.com/2019/12/25/politics/daniel-foote-zambia-ambassador/index.html

'US recalls ambassador after gay rights row' *BBC* news 24 December 2019 https://www.bbc.com/news/world-africa-50901537

'We only write about them when they are dead: Hate killings of black lesbians in South Africa' *Mail & Guardian*, 1 July 2021 https://mg.co.za/news/2021-07-01-we-only-write-about-them-when-they-are-dead-hate-killings-of-black-lesbians-in-sa/

‘Zambia: Ban Ki Moon calls for respect of homosexuals and lesbians’ *Lusaka Times* 25 February 2012. https://www.lusakatimes.com/2012/02/25/ban-kimoon-calls-respect-homosexuals-lesbians

‘Zambians Reject UN Secretary Generals call to recognise homosexuality’ *Tumfweko* 26 February 2012. http://tumfweko.com

‘Zambian lawyer defends FAZ gay clause’ 20 November 2016 BBC World Service https://www.bbc.com/sport/football/38044185

‘Zambia’s President say no to homosexuality’ *Sky News*, 2 December 2019. See also https://www.youtube.com/watch?v=DyNQGrwt7Ig

‘Zambians Reject UN secretary Generals call to recognise homosexuality’ http://tumfweko.com
Zambia 2010 census of population and housing national analytical report (2011) 17-18.https://www.zamstats.gov.zm/phocadownload/2010_Census/2010%20Census%20of%20Population%20National%20Analytical%20Report.pdf