



**The right to sexual orientation and LGBTIQ+ rights: a case study of Zimbabwe
and Nigeria**

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ABSTRACT

The Constitution of Zimbabwe and the federal Constitution of Nigeria do not protect the right to sexual orientation and LGBTIQ+ rights. In fact, same-sex relationships between consenting adults have been criminalised in both states. This study analyses discrimination on the ground of sexual orientation and examines which human rights are infringed in these states by the sodomy laws. Although sexual orientation is not specifically enumerated as a prohibited grounds of discrimination in the Zimbabwean and Nigerian Constitutions, this study argues that international human rights law is evolving to include sexual orientation as a prohibited ground of discrimination.

To support this conclusion, relevant findings of international human rights treaty bodies, such as the Human Rights Committee, and regional instruments including the African Charter are examined. Further support is found in landmark judgments of national courts in other jurisdictions, such as Botswana, and other regional human rights courts, which, although not authoritative in Africa, have persuasive value. This research explores how, and, to what extent, these international human rights law obligations are binding on Zimbabwe and Nigeria.

As a consequence of the criminalisation of sodomy laws in Zimbabwe and Nigeria, LGBTIQ+ people face stigmatisation, arrest, imprisonment and violence, and their rights to privacy, human dignity, health, and equality are infringed despite that these rights are guaranteed to everyone. Moreover, homosexual couples do not enjoy the same rights as heterosexual couples regarding marriage, choosing a life partner, adopting children, and forming a family.

In answering the research questions, the doctrinal method of legal research is utilised. The study concludes with making recommendations to strengthen the constitutional and legal framework to protect the rights of LGBTIQ+ persons in the two states.

Keywords: *LGBTIQ+, non-discrimination, sexual orientation, equality, human dignity, privacy*

CHAPTER 1

INTRODUCTION AND BACKGROUND

1. INTRODUCTION AND BACKGROUND

In some African countries, the gay, lesbian, bisexual, transgender, intersex, and queer communities are subjected to serious discrimination, stigmatisation, and prejudice.¹ This study pays specific attention to Zimbabwe and Nigeria. This study is not a comparative study of the two countries, but it is an analysis on how the two countries approach LGBTIQ+ rights. I chose Zimbabwe because it is my home country and I have seen how LGBTIQ+ persons are treated by society, the government, and their families, and how their rights are constantly violated. I have also seen several women getting married to gay men and later discover that the marriage was nothing but a way for the husband to hide his sexual orientation from his family, friends, and society, leaving the women in an unhappy and sometimes abusive marriage. This will be explained later in Chapter 3 by a short story, 'Of Lovers and Wives', from *Walking Still*. I chose Nigeria for an analysis on how religion (the Sharia law and Christianity) has contributed to the violation of LGBTIQ+ persons' human rights and how Nigeria has failed to fulfil its international obligations in this regard. Some African countries still regard homosexuality as a sin, crime, or disease,² and their main reason for opposing homosexuality is the argument that it is un-African³ and against religious norms and values.⁴ Homosexuals are persecuted, given long prison sentences, and in some countries, given death penalties. As citizens of their respective countries, LGBTIQ+

¹ E Cameron, 'Constitutional protection of sexual orientation and African concepts of humanity'. (2001) 118 South African Law Journal 642.

² Welle Deutsche, 'Why is homosexuality still taboo in many African countries?'. <<https://amp.dw.com/en/why-is-homosexuality-still-taboo-in-many-african-countries/a-51528737>> (accessed on 22 June 2022).

³ C Ngwena, What is Africanness? *Contesting Nativism in Race, Culture and Sexualities*. (Pretoria University Law Press 2018), 181.

⁴ M Epprecht, 'The Unsayings of indigenous homosexualities in Zimbabwe: Mapping a blindspot in an African masculinity' (1998) 24 Journal of South African Studies 631, BBC 'Homosexuality: Is it un-African?' 11 October 1999. <https://www.tandfonline.com/doi/abs/10.1080/03057079808708594> (accessed on 28 November 2022).

persons have the same rights to privacy, dignity, equality, and health as other citizens, despite their sexual orientation. States and state actors have a duty to enforce criminal laws equally and take steps to prevent death threats, prevent discrimination, and amend existing laws to ensure that everyone is treated equally. No one individual has more rights than another. The focus of this dissertation is on sexual orientation as a prohibited ground of discrimination.

In Nigeria, homosexual acts have been illegal under federal law since 1901. The penalty is up to 14 years' imprisonment (in southern Nigeria), whereas the maximum punishment in the 12 northern states that have adopted Shari'a law is death by stoning for men, while women are flogged and imprisoned for up to six months.⁵ Nigeria also signed into law the Same-Sex Marriage Prohibition Act (SSMPA), which criminalises same-sex relations between consenting adults. It also bans the formation of anti-gay organisations.⁶ As a result, LGBTIQ+ Nigerians flee to other countries that permit and protect lesbian and gay rights.⁷

In Zimbabwe, being gay has been illegal since 1891 as part of the British South African Company Rule of Rhodesia.⁸ Sexual orientation is not included in the prohibited grounds of discrimination in Section 56(3) of the Constitution.⁹ Further to that, Section 78(3) of the Zimbabwean Constitution prohibits 'persons of the same sex' from marrying each other. The criminalisation of homosexuality was inherited from colonial English law. However, English law later transformed and now accepts homosexuality. An Australian Judge, Michael Kirby, mentioned that Asia used to follow English law, which showed bias and discrimination against gay men, but this changed when discriminatory laws against homosexuals were removed by the courts. However, in

⁵ n 4 above.

⁶ <<http://www.theguardian.com/world/2014/jan/13/nigerian-president-signs-anti-gay-law>>. (accessed on 15 September 2021).

⁷ A O Tayo, 'From near death to detention in USA, this is the story of LGBTQ+ activist' Edefe Okporo, 2018. <<https://www.simonandschuster.com/books/Asylum/Edefe-Okporo/9781982183745>> (accessed on 15 September 2021).

⁸ Ibid.

⁹ Constitution of Zimbabwe Amendment (No. 20) Act, 2013 [Zimbabwe].

Zimbabwe, this discrimination is still ongoing. There is no recognition of same-sex sexual activities, or same-sex marriages, and same-sex couples are not allowed to adopt children. LGBTIQ+ persons are not permitted to work openly in the military; there are no anti-discrimination laws regarding sexual orientation, and there are no laws regarding gender identity or expression.¹⁰

Zimbabwe still upholds anti-LGBTIQ+ laws, even after the stepping down of the former President Robert Mugabe in 2017, who was well known for his hate speech against gay people, saying that they are 'worse than pigs and dogs'.¹¹ Furthermore, section 73 of Zimbabwe's Criminal Law Codification and Reform Act¹² criminalises consenting sex between same-sex adults. The treatment of the LGBTIQ+ community in Zimbabwe has contributed to the relocation of Zimbabwean gays and lesbians to other countries that protect LGBTIQ+ rights. An example of migration is Tatelicious Karigambe-Sandberg, a Zimbabwean human rights activist and the first transgender person to come out openly as such on social media, who relocated to Sweden.

All these events and the serious hatred and homophobic behaviour in both Zimbabwe and Nigeria raise questions about whether LGBTIQ+ rights are regarded as human rights in these countries, what it means to be human, and for whom the human rights architecture is designed. Whose human rights matter, and whose do not? This study will not only show how these countries have violated the above freedoms but also how these questions should be answered if the international human rights framework is to be taken seriously.

1.1 PROBLEM STATEMENT

The Constitution of Zimbabwe and the federal Constitution of Nigeria do not protect the right to sexual orientation or LGBTIQ+ rights. Same-sex relationships between

¹⁰ C C Chikura, 'Zimbabwe's LGBT community: why civil rights and health issues go hand in hand'. 30 January 2018. <<https://theconversation.com/amp/zimbabwes-lgbt-community-why-civil-rights-and-health-issues-go-hand-in-hand-905446>> (accessed on 20 June 2022).

¹¹ <https://www.reuters.com/article/us-zimbabwe-rights-lgbt-idUSKCN1BF03Z> (accessed on 25 January 2023).

¹² Chapter 9:23 of Act 23/2004.

consenting adults have been criminalised in both states. As a result of the criminalisation of sodomy laws in Zimbabwe and Nigeria, LGBTIQ+ people face stigmatisation, arrest, imprisonment, and violence, and their rights to privacy, human dignity, health, and equality are infringed, despite the fact that these rights are guaranteed to everyone. Moreover, homosexual couples do not enjoy the same rights as heterosexual couples regarding marriage, choosing a life partner, adopting children, and forming a family. Homosexuality is a common phenomenon and is said to have existed in Africa as well as in other parts of the world since time immemorial.¹³ We live in a world where heterosexuality is the dominant or privileged principal sexual orientation, while homosexuality is a minority sexual orientation that has been criminalised and/or marginalised in many countries in Africa and beyond. As a result, even homosexuals adopt negative beliefs about their sexual identity. Accordingly, they are afraid to live openly as homosexuals. These misconceptions affect most people's core beliefs and become difficult to change.¹⁴

The LGBTIQ+ community is not protected from state abuse or societal discrimination. Several international instruments recognise the right to sexual orientation and non-discrimination. The instruments include the Yogyakarta Principles and the UN Independent Expert on Sexual Orientation and Gender Identity (SOGI). Through the National Coalition for Gay and Lesbian Equality (NCGLE) and the South African Human Rights Commission (SAHRC), South Africa challenged the common law crime of sodomy, which criminalised consensual sex between same-sex adults. The South African Constitutional Court held it to be unconstitutional.¹⁵ The South African Constitution is at times used as a reference in this dissertation because it is one of the few African countries that protects LGBTIQ+ rights and the right to sexual orientation. Lessons can be drawn from South Africa's experience.

¹³ David Phillip, *Moffies: Gay life in Southern Africa* 1st edn, (1 January 2000).

¹⁴ Ibid.

¹⁵ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (CCT11/98) [1998] ZACC 15, 1999 (1) SA 6, 1998 (12) BCLR 1517 (9 October 1998).

The conceptual problem is that sexual orientation and gender identity are not included in the national laws of Zimbabwe and Nigeria, on the contrary, these two countries have criminalised same-sex relations, but international human rights law is moving to accept LGBTIQ+ rights. The problem statement is how international human rights law can be utilised, with a particular focus on equality rights and non-discrimination, to protect the human rights of LGBTIQ communities in Zimbabwe and Nigeria.

Considering the strides made in the strengthening of an evolving legal norm to non-discrimination based on sexual orientation on the international level, this study explores the expansion of equality and non-discrimination to include the right to sexual orientation in these two countries. It further looks at the violations of a wide range of other human rights to which members of the LGBTIQ+ community are subjected even though these rights are guaranteed to everyone.

1.2. AIM AND OBJECTIVES

1.2.1 The aim of this research is to examine LGBTIQ+ rights and the right to sexual orientation in the Zimbabwean and Nigerian constitutions.

1.2.2. The specific objectives are to:

- i. ascertain the international and regional human rights instruments regarding the protection of LGBTIQ+ rights and the right to sexual orientation;
- ii. ascertain the shortcomings in the Zimbabwean and federal Nigerian Constitutions in relation to LGBTIQ+ rights and the right to sexual orientation; and
- iii. make recommendations on the constitutional and legal framework of LGBTIQ+ rights and sexual orientation in Zimbabwe and Nigeria.

1.3 RESEARCH QUESTIONS

In line with the above-mentioned objectives, this study attempts to answer the main research question: to what extent do the Constitution of Zimbabwe and the federal Constitution of Nigeria protect the right to sexual orientation and LGBTIQ+ rights?

A number of research sub-questions are also addressed in an effort to develop an answer to the main research question, namely:

- i. To what extent and how does international human rights law protect the right to sexual orientation and LGBTIQ+ rights, and what are the state's obligations in this regard?
- ii. What are the existing equality and other relevant provisions in the Constitution of Zimbabwe and the federal Constitution of Nigeria, and how can they include the protection of non-discrimination on the basis of sexual orientation?
- iii. To what extent and how are Zimbabwe and Nigeria bound by international human rights law that protects LGBTIQ+ rights and sexual orientation?
- iv. What recommendations can be made to strengthen the constitutional and legal framework of the right to sexual orientation and LGBTIQ+ rights in Zimbabwe and Nigeria, and what lessons can be learned from other countries like South Africa and Botswana?

1.4 DEFINING LGBTIQ+ AND FOREIGN CASE LAW

The acronym LGBTIQ+ will be used in this dissertation, and it refers to lesbians, gays, bisexuals, transgender people, intersex people, and queer people.¹⁶ The term evolved from the gay and lesbian rights movements in the 1970s and 1980s. It is an evolving

¹⁶ Kuykendall Emily, 'What the A in LGBTQIA+ Stands for', Buddy Project. The A in LGBTQIA+ stands for asexual, aromantic, and agender. Bisexual is when a person is attracted to both men and women as sexual partners, gay is a person who is primarily attracted to people of the same sex (men attracted to other men), lesbian is (a women attracted to other women) and they are often referred to as (homosexuals), queer is a term used to refer to the LGBTI community, as an umbrella term for non-heterosexual and non-cisgender, transgender refers to a person who changes their gender expression to match their gender identity, intersex persons are not necessarily homosexual, some are heterosexual. The plus refers to other sexual minorities not included in the acronym. Other sexual minorities include: a-sexuals (or a-romantic or a-gender) and is sometimes included in the term LGBTQIA+.

ideology.¹⁷ Equality, as defined by the South African Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA), refers to the full and equal enjoyment of rights and freedoms.¹⁸ Equal protection means that a state must not deny its citizens equal protection of its laws and must treat each person in the same way it treats others in the same circumstance or situation.¹⁹

Malta adopted the Gender Identity, Gender Expression, and Sex Characteristics Act in 2015 (the 2015 Act). It was the first law to prohibit surgery and treatment of the sexual characteristics of minors without their informed consent.²⁰ It also prohibits discrimination based on sex characteristics. Article 3(4) of the 2015 Act states that a person shall not be required to provide proof of surgery for gender reassignment and hormonal therapy because that will be a violation of their right to gender identity.

In *ND v. Attorney-General*,²¹ the court held that the failure of the gender marker to match ND, a transgender man's gender identity, including his physical appearance, subjected him to serious insecurity, a risk of harm, and discrimination. Furthermore, the court held that the Registrar's refusal to change ND's gender markers violated his rights to privacy, equal protection, freedom from degrading and inhuman treatment, freedom of expression, and protection from discrimination.²²

In *Audrey Mbuqua v. Kenya National Examinations Council (KNEC)*,²³ the main question before the Court was whether the governing law of the KNEC permitted Audrey, as a transgender individual, to change her name on her academic certificate

¹⁷ Merriam-Webster, 'LGBTQIA can also be defined as 'lesbian, gay, bisexual, transgender, queer/questioning (one's sexual or gender identity), intersex, and asexual/ aromantic/ agender'. <https://www.merriam-webster.com/dictionary/LGBTQIA> (accessed on 6 October 2022).

¹⁸ Section 1 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

¹⁹ https://www.law.cornell.edu/wex/equal_protection (accessed on 2 February 2023).

²⁰ Article 14 of the Gender Identity, Gender Expression and Sex Characteristics Act 2015.

²¹ *ND v Attorney-General* MAHGB-000449-11.

²² *Ibid*, para 198.

²³ JR case No 147 of 2013, <http://kenyalaw.org/caselaw/cases/view/101979/> (accessed 4 February 2023).

and remove the existing male designation. She could not use her degree because, on paper, she was a male, but her physical appearance was that of a female. Audrey was diagnosed with gender identity disorder and depression. She later went through hormonal treatment and changed her name from Andrew to Audrey and decided to change her National ID card, passport, and academic papers to reflect her changed gender from male to female. The High Court of Kenya in Nairobi issued a mandate to the KNEC to change the name on and remove the existing gender designation from an academic certificate, as requested by a Kenyan transwoman. The court based its decision on Articles 10 and 28 of the Kenyan Constitution, which promote human dignity and respect. The Alteration of Sex Description and Sex Status Act²⁴ of South Africa also allows alteration of sex description and sex status in the population register.

1.4.1 JUSTIFICATION FOR PROTECTING SEXUAL ORIENTATION RIGHTS

The objective of this research is to examine the possibility of protecting LGBTIQ+ rights and the right to sexual orientation in the Zimbabwean and Nigerian constitutions. This dissertation examines which human rights are infringed by criminalising sodomy and discriminating against the LGBTIQ+ community in Zimbabwe and Nigeria. These rights include but are not limited to the rights to privacy, personal liberty, human dignity, the right to life, the right to equality, the right not to be discriminated against on any grounds, and the right to sexual orientation. These human rights are very important to the existence of human beings and should not be limited in an open and democratic society unless it is in the interest of justice or the public interest to do so.

Everyone is equally entitled to human rights protection without discrimination.²⁵ The 'right to equality', the 'right to dignity', and 'non-discrimination' are of paramount importance and are protected in the United Nations Charter,²⁶ the Universal Declaration of Human Rights (UDHR), and human rights treaties, which will be discussed in more detail in Chapter 2. It is argued here that the equality and non-

²⁴ Act No 49 of 2003.

²⁵ The Universal Declaration of Human Rights was adopted by the United Nations General Assembly (Res 217 A (III)) on 10 December 1948.

²⁶ United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

discrimination clauses in the UDHR should be interpreted to include the right to sexual orientation. This is because the introduction of the UDHR is unambiguous. It provides that all human beings are born free and equal in dignity and rights.²⁷ This equality pledge provided by international human rights is applicable to ‘everyone’. Although the Universal Declaration is not a treaty, the provision on equality and non-discrimination is now part of customary international law and has acquired *jus cogens* status.²⁸ The Inter-American Court of Human Rights in *YATAMA v. Nicaragua*²⁹ has convincingly argued that equality and non-discrimination have obtained *jus cogens* status, the Court held that: ‘at the current stage of the evolution of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens*. The juridical framework of national and international public order rests on it, and it permeates the whole juridical system.’ The status of equality and non-discrimination was reiterated in *Atala Riffo and Daughters v. Chile*.³⁰

A norm of *jus cogens* is a peremptory norm that is accepted by the community of states as a whole and cannot be set aside unless by another norm of *jus cogens*. No derogation is allowed from this norm. Peremptory norms reflect and protect crucial values of the international community; they are more superior than other rules of international law and are applied at the universal level.³¹ Any treaty that goes against

²⁷ Article 1 of the UDHR.

²⁸ *Inter alia*, the prohibition against slavery and slavery-related acts, torture and racial discrimination which are incorporated in the UDHR have acquired the level of customary international law and has attained ‘*jus cogens*’ status. (UDHR Article 1).

²⁹ Serie C No.127, Inter-American Court of Human Rights (IACrHR), 23 June 2005. Para 185, ‘This principle is fundamental for the safeguard of human rights in both international and national law, it is a principle of peremptory law. Consequently, States are obliged not to introduce discriminatory regulations into their laws, to eliminate regulations of a discriminatory nature, to combat practices of this nature, and to establish norms and other measures that recognize and ensure the effective equality before the law of each individual. A distinction that lacks objective and reasonable justification is discriminatory’.

³⁰ The Inter-American Court of Human Rights, 24 February 2012, Para 78-79. www.corteidh.or.cr/docs/casos/articulos/seriec_127_ing.pdf. (accessed on 2 February 2023) and www.corteidh.or.cr/docs/casos/articulos/seriec_239_ing.pdf. (accessed on 2 February 2023) respectively.

³¹ Chapter 5: Peremptory norms of general international law (*jus cogens*), Conclusion 3: General nature of peremptory norms of general international law (*jus cogens*). <https://legal.un.org/ilc/reports/2019/english/chp5.pdf> (accessed on 28 November 2022).

a *jus cogens* norm is void and has no legal force.³² Any party to a treaty that is void because it conflicts with a peremptory provision (*jus cogens*) has an obligation to eliminate any such law that is in conflict with *jus cogens* and create laws that are in line with the *jus cogens* norm that they violated.

While equality rights and non-discrimination as fundamental human rights have been recognised as norms of *jus cogens*, this does not necessarily answer the question whether non-discrimination on the basis of sexual orientation is covered by the same level of protection. This study seeks answers to the latter. Interestingly, the Inter-American Court has unambiguously affirmed in the case of *Atala Riffo and Daughters v. Chile* that sexual orientation is indeed a category protected by Article 1(1) of the American Convention on Human Rights.³³

The elevated status of *jus cogens* norms is also reinforced by the fact that a reservation to a treaty does not have any legal effect if it is contrary to a *jus cogens* norm.³⁴ Despite the UDHR, and subsequent international human rights law treaties that include non-discrimination and equality, the real-life experience of members of the LGBTIQ+ community is that they are still targets of discrimination and acts of violence because of their sexual orientation or gender identity.

The right to sexual orientation refers to a person's enduring ability to have deep romantic, emotional, or physical feelings for and to be attracted to people of a particular sex or gender.³⁵ The South African Constitution includes sexual orientation under

³² Ibid, Conclusion 10: Treaties conflicting with a peremptory norm of general international law (*jus cogens*).

³³ *Atala case*, Para 91, 'the Inter-American Court establishes that sexual orientation and gender identity of persons is a category protected by the Convention. Therefore, any regulation, act, or practice considered discriminatory based on a person's sexual orientation is prohibited. Consequently, no domestic regulation, decision, or practice, whether by state authorities or individuals, may diminish or restrict, in any way whatsoever, the rights of a person based on his or her sexual orientation'.

³⁴ Ibid, Conclusion 13: Absence of effect of reservations to treaties on peremptory norms of general international law (*jus cogens*).

³⁵ 'World Bank 2020 *Sexual Orientation and Gender Identity in Contexts Affected by Fragility, Conflict, and Violence*. World Bank, Washington, DC. © World Bank at 6.

prohibited grounds of discrimination³⁶ and was the first African country to do so. It is an important human right, and prohibiting such relationships is a violation of the rights to non-discrimination, privacy, and human dignity. Freedom to sexual orientation includes protection for bisexuality (someone who is sexually and emotionally attracted to both sexes (male and female) rather than just to people of one particular sex or gender.³⁷ The United Nations human rights treaty bodies such as those of the “International Covenant on Civil and Political Rights (1966)³⁸ Universal Declaration of Human Rights,³⁹ International Covenant on Economic, Social and Cultural Rights⁴⁰ and Convention on the Elimination of All Forms of Discrimination Against Women”,⁴¹ affirm that everyone should enjoy all human rights without discrimination based on sexual orientation, gender identity, expression, or sexual characteristics.⁴²

In the Human Rights Committee case of *G v. Australia*, a ruling was made in favour of a married transgender person being given a birth certificate that correctly identifies the person’s gender identity.⁴³ The ruling strengthened not only privacy and family rights but also the right to be free from discrimination. The Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity on the International Day against Homophobia, Transphobia and Biphobia held on 17 May 2017, issued a statement urging state parties to adopt and implement effective measures to prohibit violence and anti-discrimination laws by including gender identity,

³⁶ Section 9 of The Constitution of the Republic of South Africa, 1996.

³⁷ AP Bell, MS Weinberg and SK Hammersmith: *Sexual Preference, ‘Its Development in Men and Women’* (1981).

³⁸ Article 2(1) and Article 26.

³⁹ Article 2 and 7.

⁴⁰ Article 2.

⁴¹ Article 2(f).

⁴² UN Office of the High Commissioner for Human Rights (OHCHR), *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law*, September 2012, HR/PUB/12/06. [accessed 6 June 2022]. Pg 52-53.

⁴³ *G v Australia*, UNHRC, Communication No. 2172/2012, CCPR/C/119/D/2172/2012.

expression and sexual orientation as prohibited grounds of discrimination.⁴⁴ Independent Experts and Special Rapporteurs are part of the Special Procedures, which is the largest body of independent experts in the UN Human Rights system. They address country-specific situations or thematic issues in all parts of the world. They are independent from any government or organisation and work in their individual capacity.⁴⁵ This study argues that it is prohibited to differentiate people's rights based on their LGBTIQ+ status in the same way that it is prohibited to differentiate people based on colour, race, sex, and other grounds.

1.5 THE RIGHT TO 'SEXUAL ORIENTATION' AND LGBTIQ+ RIGHTS

In Zimbabwe and Nigeria, gays and lesbians do not enjoy the same equal rights as heterosexuals. Legislation criminalising same-sex marriage essentially deprives gays of their dignity and most basic human rights, leaving them completely vulnerable and, in some instances, virtually side-lined.⁴⁶ The criminalisation of private and consensual sex between adults violates the rights to privacy and equality and directly or indirectly affects the rights to health, life, non-discrimination, work, the right to form a family, and the rights to freedom of expression and association.

In addition to human rights law treaties affirming equality and non-discrimination, there are soft law declarations on sexual orientation. Relevant in this context are the Yogyakarta Principles of 2007 and 2017.

1.5.1 INTERSEX

Not much has been written about intersex individuals because of a lack of knowledge regarding this group of people. Intersex persons are born with sex characteristics (including genitals, gonads, and chromosomes) that do not fit their physical appearance or the typical binary notions of male or female bodies (their genitals do

⁴⁴ Independent Expert on sexual orientation and gender identity, <https://www.ohchr.org/en/special-procedures/ie-sexual-orientation-and-gender-identity> (accessed on 9 February 2023).

⁴⁵ <https://www.ohchr.org/en/special-procedures/ie-sexual-orientation-and-gender-identity>. (accessed on 28 November 2022).

⁴⁶ A Rudman, 'The protection against discrimination on sexual orientation under the African human rights system' (2015) 15(1) *African Human Rights Law Journal* 5.

not match their physical appearance). In some cases, intersex traits are visible at birth, while others only start showing up at puberty. An intersex person may be identified as male, female, or both. Due to their difference, intersex persons are often stigmatised and subjected to human rights violations, including violations of their right to health and physical integrity, to be free from torture and ill-treatment, and to equality and non-discrimination.⁴⁷ There are many different traits or categories that fall under the umbrella term “intersex”.

In *Mokgadi Caster Semenya v. International Association of Athletics Federations*, Caster Semenya and athletes like her were required to take medication to maintain their testosterone levels within an acceptable limit to be permitted to compete in the female classification.⁴⁸ Caster Semenya has a hormone disorder that causes her to naturally have a higher level of testosterone (46 XY DSD). Semenya refused to submit to hormone treatment, with poorly understood side effects, to lower her testosterone levels as a precondition for being allowed to take part in women’s competitions. She contested this rule and argued that it was discrimination on the grounds of sex and a violation of her right to human dignity and personality rights. Semenya complained that the order by the International Amateur Athletic Federation was a violation of Article 3 (prohibition of inhuman or degrading treatment) and Article 8 (right to respect for private life), Article 14 (prohibition of discrimination), Article 6 (right to a fair hearing), and Article 13 (right to an effective remedy) of the European Convention on Human Rights.⁴⁹

⁴⁷ United Nations Free & Equal. <https://www.unfe.org/wp-content/uploads/2017/05/UNFE-Intersex.pdf> (accessed on 18 December 2022).

⁴⁸ CAS 2018/0/5794 Mokgadi Caster Semenya v International Association of Athletics Federations https://www.tas-cas.org/fileadmin/user_upload/CAS_Award_redacted_Semenya_ASA_IAAF.pdf (accessed on 24 January 2023).

⁴⁹ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS, available at: <https://www.refworld.org/docid/3ae6b3b04.html> (accessed on 2 February 2023).

1.5.1.1 THE YOGYAKARTA PRINCIPLES⁵⁰

The Yogyakarta Principles were endorsed by the International Commission of Jurists, the International Service for Human Rights, and human rights experts from around the world at Gadjah Mada University on Java from November 6 to 9, 2006. These principles are not enshrined in treaties and therefore are not legally binding under international human rights law. However, the Principles are intended to serve as an aid for interpreting human rights treaties.

1.5.1.2. THE 2007 YOGYAKARTA PRINCIPLES

The 2007 preamble recognises human rights violations based on sexual orientation and gender identity that challenge the integrity and dignity of an individual. These principles are important for addressing sexual orientation rights, which is the subject of this dissertation, and they can assist in identifying how Zimbabwe and Nigeria can best implement sexual orientation rights in their constitutions.

This principle outlines a number of rights that are violated as a result of discrimination and non-recognition under the law of sexual orientation rights. These include the rights to universal enjoyment of human rights, non-discrimination, and recognition before the law; the right to human and personal security; economic, social, and cultural rights; right to expression, opinion, and association; the right to participation in cultural and family life; and the rights of human rights defenders.

The 2007 Yogyakarta Principles mentioned intersex only briefly. In its handbook on Promoting and Protecting Human Rights in relation to Sexual Orientation, Gender Identity and Sex Characteristics,⁵¹ the Asia Pacific Forum of National Human Rights Institutions (APF) mentioned that 'the principles do not deal properly with the application of international human rights law with regards to intersex persons. They do

⁵⁰ The Yogyakarta Principles, Principles on the application of International Human Rights Law in relation to sexual orientation and gender identity. March 2007.

⁵¹ Asia Pacific Forum of National Human Rights Institutions (June 2016). Promoting and Protecting Human Rights in relation to Sexual Orientation, Gender Identity and Sex Characteristics. Asia Pacific of National Human Rights Institutions.

not make a clear distinction between sex characteristics.⁵² These issues are therefore addressed in the Yogyakarta Principles plus 10 update. The new update prevents intersex children from unintentionally changing their sexual characteristics.⁵³

1.5.1.3. 2017 YOGYAKARTA PRINCIPLE PLUS 10

Its preamble recalls the developments and principles of international human rights law and its intention to regularly update them. It defines gender expressions and gender characteristics, applies these grounds to the original principles, and recognises the intersectionality of the grounds adopted in the principles and their intersectionality with other grounds.

The rights outlined in this principle include the right to state protection, the right to legal recognition, the right to bodily and mental integrity, freedom, and decriminalisation. This will be discussed in full in the next chapter.

1.5.2. OTHER GENERAL RIGHTS

The right to establish a family is legally recognised in Article 18 of the 1981 African Charter on Human and Peoples' Rights.⁵⁴ However, the government does not recognise same-sex families and denies the rights it grants to heterosexual families. In both Zimbabwe and Nigeria, lesbian, gay, and bisexual couples are not allowed to adopt, not even children of their same sex partner. The best interest of a child is of supreme importance as stated in Article 3 of the CRC⁵⁵ and Article 4 of the ACRWC.⁵⁶ In the South African case of *McCall v. McCall*, the court decided which parent could preserve physical, moral, emotional, and mental health and ensure the well-being of

⁵² Ibid.

⁵³ Ibid. Asia Pacific Forum of National Human Rights Institutions (June 2016).

⁵⁴ Organisation of African Unity (OAU), *African Charter on Human and Peoples' Rights (Banjul Charter)*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (accessed on 6 June 2022).

⁵⁵ UN General Assembly *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, 3 (accessed on 6 June 2022).

⁵⁶ Organisation of African Unity (OAU) *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990) (accessed 6 June 2022).

the child when determining ,the best interest of the child.⁵⁷ As discussed in Chapter 3, lesbian, gay, and bisexual students may not enjoy their right to education due to the precarious environment created by their school peers and educators, for example, in state-owned universities in Zimbabwe.

1.6 RESEARCH METHODOLOGY

This research critically analyses the legal inequality and discrimination of LGBTIQ+ persons and the extent, if any, of the application of the right to sexual orientation and gender identity in Zimbabwe and Nigeria. In answering the above research questions, the doctrinal method of research is used. A doctrinal methodology refers to a way of conducting research that is usually thought of as ‘typical legal research’.⁵⁸ A doctrinal approach focuses on case law, statutes, and other legal sources. The primary sources used include the Zimbabwean and Nigerian constitutions. Case law from Zimbabwe and Nigeria is also used. The case law includes, but is not limited to, *Nathanson v. Mteliso & Others*,⁵⁹ *Banana v. The State, Supreme Court of Zimbabwe (29 May 2000)*,⁶⁰ *LZ (homosexuals) Zimbabwe v. Secretary of State for the Home Department*,⁶¹ and the South African Constitutional Court judgment in *National Coalition for Gay and Lesbian Equality v. Minister of Justice*.⁶² Relevant pieces of legislation and international human rights instruments such as the International Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Discrimination Against Women are also used. Reference is made to opinions by treaty bodies such as the United Nations Human Rights Committee and to secondary sources such as journal articles and books.

⁵⁷ 1994 (3) SA 201 (C).

⁵⁸ <https://law.indiana.libguides.com/dissertationguide> (accessed on 27 January 2023).

⁵⁹ HB 176/19 HB 1873/14 [2019] ZWBHC 135.

⁶⁰ 2000 (1) ZLR 607 (S).

⁶¹ CG (2011) UKUT 00487 (IAC).

⁶² 1999 (1) SA 6 (CC), [1998] 12 BCLR 1517 (CC).

1.7 ETHICAL CONSIDERATIONS

The researcher is aware of the plagiarism policy of the University of Venda. Therefore, the study will carefully avoid plagiarism. Work from other writers is properly acknowledged and referenced in accordance with the School of Law and OSCOLA guidelines. The study does not fabricate information, conceal the truth, or impart misleading information about the current legal position regarding the right to sexual orientation and gender identity of the LGBTIQ+ community in Zimbabwe and Nigeria. This study does not contain any information that was unethically gathered. The study does not involve conducting interviews with human or animal subjects. It is primarily based on a literature review, in which both primary and secondary sources of law will be used. This is realised by visiting law libraries and using internet sources. The study is conducted with the most diligent observance of the highest level of integrity and objectivity. In accordance with the policies of the University of Venda, the researcher has obtained ethical clearance to conduct this study, even though it is a purely doctrinal one.

1.8 LITERATURE REVIEW

There is now a consensus among scholars that homosexuality exists in every society and that this group is marginalised and in need of legal protection from discrimination. LGBTIQ+ people consistently face serious violence, discrimination, and multiple human rights abuses by the criminal justice system.⁶³ Amnesty International has decided that the outright criminal ban on same-sex sexual activity is considered a violation of human rights.⁶⁴ Amnesty International is an organisation dedicated to promoting all human rights enshrined in the UDHR and international human rights instruments.

The late Archbishop Desmond Tutu of South Africa is known for his fight for lesbian and gay rights. He once mentioned that it is blasphemous to reject the LGBTIQ+

⁶³ Crime Prevention & Criminal Justice Module 9 Key Issues: Discrimination and violence against individuals that identify as, or are perceived to be, LGBTI, unodc.org, (accessed on 19 November 2021).

⁶⁴ Amnesty International, Amnesty International Report 2016/2017, 21 February 2017.

community and banish them from the church as if they were subhuman. Tutu also mentioned that it was blasphemy to question whether they were children of God or not.⁶⁵ Desmond Tutu also mentioned that, if sexual orientation is something a person can choose, then lesbians and gays will be the craziest for choosing something that exposes them to hostility, discrimination, and suffering'.⁶⁶

Mandipa⁶⁷ investigates the inadequacies of Zimbabwe's legal framework to protect and promote the rights of LGBTIQ+ people. The 2013 Constitution of Zimbabwe prohibits same-sex marriage, and Zimbabwe's criminal code still punishes sodomy.⁶⁸ This continued criminalisation of homosexuality has hampered the protection of gay rights in the country. Zimbabwe still has a long way to go in promoting and protecting LGBTIQ+ rights because church leaders, politicians, and society view homosexuality as against cultural and societal norms, a threat to the country, and a disgrace.⁶⁹ Mandipa believes that several legislative reforms to protect and promote the rights of sexual minorities need to be implemented in Zimbabwe, starting with the constitution. He went on to say that Section 56 of the Constitution, which criminalises sodomy, is discriminatory against homosexuals, and its continued criminalisation serves to stifle gay rights, including freedom of association, freedom of choice, inherent dignity, and privacy. Therefore, it should be decriminalised.

In addition, Mandipa writes that the Zimbabwean Republic Police (ZRP) and its agents continuously harass the LGBTIQ+ community. Arbitrary arrests, detentions, and constant raiding are also common among members of this group and the organisations

⁶⁵ Desmond Tutu cited in Dunton C and Pulmberg M, *'Human Rights and Homosexuality in Southern Africa'*, 2nd edition, Nordiska Afrikainstitutet, 1996.

⁶⁶ Ibid.

⁶⁷ E Mandipa, 'The suppression of sexual minority rights: A case study of Zimbabwe' in S Nawase & A Jjuuko (eds), *Protecting the human rights of sexual minorities in contemporary Africa* (Pretoria University Law Press 2017) 151.

⁶⁸ Criminal Law (Codification and Reform) Act, Cap 9:23, sec 73.

⁶⁹ A Mare, 'Not yet Uhuru for LGBTI people in Zimbabwe' in Heinrich Boll Foundation *Struggle for equality: Sexual orientation, gender identity and human rights in Africa* (2009) 29.

that represent them.⁷⁰ This clearly shows how the Zimbabwean Constitution lacks adequate protection of LGBTIQ+ rights. To make matters worse, the 2013 Constitution includes a rule against same-sex marriage. Mandipa also believes that most judges and prosecutors in Zimbabwe are conservative and not independent, and therefore have little or no hope of protecting and promoting LGBTIQ+ rights and the rights to sexual orientation.⁷¹ This study shows how sexual orientation rights and LGBTIQ+ rights can be integrated into a country's legal framework and how governments can protect these rights. Additionally, this study describes a state's obligations to its citizens, which apply to everyone regardless of their sexual orientation.

Furthermore, Zimbabwe's ZANU-PF government, along with some ministers, opposes the recognition of LGBTIQ+ rights, and with ZANU-PF in the ruling, new laws protecting the rights of this group are less likely to be implemented.⁷² Mandipa also states that the media plays a crucial role in disseminating information and colouring perceptions. However, the Zimbabwean media is very hostile when it comes to reporting on sexual minority rights.⁷³ There is a culture of denial of LGBTIQ+ rights, and this culture is prevalent in the public media. Stories depicting LGBTIQ+ people as moral outcasts are often featured in newspapers, radio shows, and television programmes.⁷⁴ Mandipa concludes that Zimbabwe still has a long way to go in realising sexual minority rights.

⁷⁰ In Zimbabwe, the most known LGBTI organisation is the Gays and Lesbians Association of Zimbabwe (GALZ). Police Officers have been raiding GALZ offices with impunity over the past years.

⁷¹ L Madhuku, 'The appointment process of judges in Zimbabwe and its implications for the administration of justice' (2006) 21 Southern African Public Law 345; see also, L Madhuku 'Constitutional protection of the independence of the judiciary: A survey of the position in Southern Africa' (2002) 4 Journal of African Law 234.

⁷² Z Murwira, 'No space for gay rights in the Constitution' *The Herald* 6 July 2012. The current Minister for Information and Broadcasting services also recently ushered sentiments to the effect that there is no place for gay rights in Zimbabwe – see L Gumbo 'Copac in gay storm' *The Herald* 7 May 2012 <<http://www.herald.co.zw/copac-in-gay-storm/>> (accessed on 21 June 2022).

⁷³ 'GALZ LGBTI rights violations report, 2011'. <<https://76crimes.files.wordpress.com/2012/08/violations-report-a54.pdf>> (accessed on 9 February 2022).

⁷⁴ 'Editorial Comment: Gay rights cannot be foisted onto the world' *Chronicle* 7 October 2015 <<http://www.chronicle.co.zw/editorial-comment-gay-rightscannot-be-foisted-onto-the-world/amp/>> (accessed on 21 June 2022).

Muparamoto⁷⁵ argues that laws enacted to deem homosexual characteristics as socially unacceptable behaviour deprive this group of people of the legal protection that is given to other citizens. In his paper, he discusses how LGBTIQ+ people in Harare perceive, understand, and deal with former President Robert Mugabe's shameful hate speech, 'worse than dogs'.⁷⁶ He explores the impact of this on the self-awareness of this marginalised group.

The topic of LGBTIQ+ rights has been increasingly discussed and debated in recent years. In South Africa, common law prohibited same-sex relationships, and this was challenged in the case of *National Coalition for Gay and Lesbian Equality v. Minister of Justice*.⁷⁷ Section 20 of the Sexual Offences Act 23 of 1957 embodied the common law position on sodomy and its criminalisation. Sodomy was also included as a Schedule 1 offence in the Criminal Procedure Act 51 of 1977, and it was also included in the Schedule of the Security Officers Act 92 of 1987. In *casu*, the Constitutional Court held that the criminalisation of sodomy (a sexual relationship between two adult men) constitutes discrimination against gay men on the grounds set out in Section 9(3) of the Constitution of the Republic of South Africa, 1996.

Jjuuko⁷⁸ says the concept of cultural relativism is usually raised to support the claim that LGBTIQ+ rights do not fall within the rights recognised by African countries. This ties in with the myth that homosexuality was imported from Europe.⁷⁹ Hence, most African states do not feel obligated to recognise or respect LGBTIQ+ rights. As a result, LGBTIQ+ people are typically abused and forced to keep their sexual orientation and gender identity a secret. Failure to do so will risk the wrath of the public,

⁷⁵ N Muparamoto, 'LGBT individual and the struggle against Robert Mugabe's extirpation in Zimbabwe' (2021) 13(3) *Africa Review*, 2 & 14.

⁷⁶ *Ibid.*

⁷⁷ 1998 (6) BCLR 726 (W); 1998 (2) SACR 102 (W).

⁷⁸ A Jjuuko, 'The protection and promotion of LGBTIQ rights in the African regional human rights system: Opportunities and challenges' in S Nawase & Jiuuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* (Pretoria University Law Press 2017).

⁷⁹ B Bajaha, 'Post-colonial amnesia: The construction of Homosexuality as "un-African"' <<http://www.lse.ac.uk/genderInstitute/pdf/graduateWorkingPapers/bintaBajaha.pdf>>, (accessed on 13 October 2021).

the government, or both. The African Charter on Human and Peoples' Rights is the principle human rights instrument in the African human rights system and is the reference for all other instruments. However, LGBTIQ+ rights are not explicitly mentioned in the African Charter. Nevertheless, it is important to note that this does not mean that the African Charter omits these rights.⁸⁰ On the contrary, it serves as a reminder that all rights apply to LGBTIQ+ people just like everyone else.

The African Commission has adopted Resolution 275 dedicated to LGBTIQ+ rights and has addressed LGBTIQ+ issues in a variety of ways, and NGOs have also sought to protect LGBTIQ+ rights.⁸¹ This is largely because human rights treaties do not explicitly protect the rights of LGBTIQ+. Nonetheless, according to Jjuuko, this is slowly changing as both human rights groups and NGOs are taking LGBTIQ+ rights issues in Africa more seriously. Protecting LGBTIQ+ rights in Africa will be easy to achieve if African institutions are maximised. This study briefly mentions South Africa and Botswana as being among the few African countries that have successfully made changes to their domestic laws to protect the rights of LGBTIQ+ persons.

Adebanjo⁸² states that Nigeria is a predominantly homophobic country. Cultural and religious beliefs play a large role in this regard. Prejudice against same-sex relationships has its foundation in the belief that same-sex relationships are alien to African culture and to the two major religions practiced in Nigeria: Christianity and Islam.⁸³ Prior to the enactment of the Same Sex Marriage (Prohibition) Act 2013, the Criminal Code Act (applicable in the South),⁸⁴ the Penal Code Act (applicable in the North), and Shariah Law (applicable in 12 Northern states) already criminalised

⁸⁰ Constitutive Act of the African Union 2001 art 4(m).

⁸¹ *The Minister of Justice and Constitutional Development & 11 Others v Southern African Litigation Centre* (SALC) (867/15) [2016] ZASCA 17 (15 March 2016).

⁸² AT Adebanjo, 'In search of a middle ground, addressing cultural and religious influences on the criminalization of homosexuality in Nigeria' AT Adebanjo in *Advancing Sexual and Reproductive Health and Rights in Africa* 1st ed, Routledge 2021. Chapter 9.

⁸³ AT Adebanjo, 'Culture, morality and the law: Nigeria's anti-gay law in perspective' (2015) 15(4) *International Journal of Discrimination and the Law* 256.

⁸⁴ Cap C38, Laws of the Federation 2004.

homosexuality.⁸⁵ Adebajo argues that religious and cultural influences shaped the demonisation of homosexual relationships in Nigeria. Adebajo proves that compromise is possible despite cultural, moral, or religious sentiments. He shares the inspirational story of Reverend Father Paul Kelly as a lesson in tolerance despite opposing beliefs. He concludes that following in the priest's footsteps in this regard will change the perception of homosexuality in Nigeria.⁸⁶

In addition, another Nigerian author, Onuora-Oguno⁸⁷ says that in most African countries, and Nigeria in particular, same-sex sexual orientation is strongly denounced in religious and social spheres. Homosexuals continue to face discrimination, inhumane and cruel treatment, and are deprived of rights such as freedom of association. The Constitution of the Federal Republic of Nigeria (1999) (Nigeria's Constitution), as amended, provides for equality and prohibits all forms of discrimination.⁸⁸ However, the Criminal Code and Penal Code prohibits homosexual relationships.⁸⁹ Onuora-Oguno says that despite international law recognising the need to protect the rights of people who identify as LGBTI people, Nigeria continues to discriminate against lesbians and gay people.⁹⁰ This deep-rooted homophobia was legally upheld by the enactment of the Same-Sex Marriage (Prohibition) Act (SSMPA) of 2013. This Act appears to go against the Nigerian Constitution's desire to prohibit

⁸⁵ These are Bauchi, Borno, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Niger, Sokoto, Yobe and Zamfara.

⁸⁶ The Pew Research Centre 'The Global Divide on Homosexuality' 2013. <<http://www.pewresearch.org/global/2013/06/04/the-global-divide-on-homosexuality/>> (accessed on 21 June 2022).

⁸⁷ AC Onuora-Oguno, 'Protecting same-sex rights in Nigeria: Case note ob Teriah Joseph Ebah v Federal Government of Nigeria' in S Nawase & A Jiuuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* (Pretoria University Law Press 2017).

⁸⁸ Federal Republic of Nigeria Constitution 1999, 42(1).

⁸⁹ Section 214, same sex relations are treated as 'unnatural carnal knowledge'.

⁹⁰ AC Onuora-oguno, Same-Sex Marriage Prohibition Bill in Nigeria – Any human rights implications? AfricLaw11 June 2013 <<https://africlaw.com/2013/06/11/same-sex-marriage-prohibition-bill-in-nigeria-any-human-rights-implications/amp/>> (accessed on 21 June 2022).

discrimination on the basis of sex, religion, or tribe; conditions of birth; freedom of association;⁹¹ and the right to express one's beliefs while pursuing a private life.⁹²

Referring to the Same-Sex Marriage (Prohibition) Act (SSMPA), Ayeni⁹³ says there is nothing un-African about homosexuality. When a leader claims that homosexuality is un-African or un-Nigerian, they are basing their argument on a number of points. First, homosexuality is against the spirit of the religions practised by Nigerians (Christianity and Islamic religions) and Africans (Christianity or African traditional religion). Religious leaders, legislators, government officials, and courts use this to justify discrimination against LGBTIQ+ individuals. In 2004, at a meeting of over 300 African bishops held in Nigeria, President Olusegun Obasanjo defined homosexuality as 'clearly un-Biblical, un-natural, and absolutely un-African'.⁹⁴ Ayeni further says the former Primate of the Church of Nigeria (Anglican Communion), Most Reverend Peter Akinola⁹⁵ (as head of over 17 million Nigerian Anglicans and head of an African Anglican Bishop's group with a total flock of over 44 million), compared homosexuality to affiliating with baboons, lions, and dogs. This is a clear indication of the homophobic reactions that Nigerian society has towards the LGBTIQ+ community. As a result, the realisation of LGBTIQ+ and sexual orientation rights is difficult to achieve.

Ayeni is of the view that African culture does not tolerate homosexuality and same-sex relations; therefore, he examines the practices of same-sex relations in precolonial Nigeria, aiming to repudiate the common belief that homosexuality is un-African. This

⁹¹ Section 40 of the Nigerian Constitution.

⁹² Ibid.

⁹³ VO Ayeni, 'Human rights and the criminalisation of same-sex relations in Nigeria: A critic of the same-sex marriage (Prohibition Act)' in S Nawase & A Jiuuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* (Pretoria University Law Press 2017).

⁹⁴ Canada: Immigration and Refugee Board of Canada, *Nigeria: Situation of homosexuals and their treatment under sharia (August 2004- February 2005)*, 15 February 2005, NGA43276.E, available at: <<https://www.refworld.org/docid/42df61452f.html>> (accessed 21 June 2022).

⁹⁵ 'Obasanjo backs bishops over gays' BBC News, 17 October 2004, <http://news.bbc.co.uk/2/hi/africa/3955145.stm> (accessed on 24 January 2023).

investigation specifically underlines the role of colonial law and other foreign legal systems in developing a legal ban on same-sex relationships in Nigeria.⁹⁶

While the above provides an overview of the writings of relevant authors, this study adds by examining the constitutions of Zimbabwe and Nigeria in relation to non-discrimination on the ground of sexual orientation and LGBTIQ+ rights in the light of emerging norms in international human rights law and the obligations of states to respect, protect, and fulfil human rights, in particular the right to dignity, privacy, non-discrimination, and equality. The study argues that the criminalisation of same-sex relations violates the non-discrimination provisions in the constitutions of the two countries and infringes on the dignity and privacy of LGBTIQ+ persons, despite the fact that these rights are guaranteed to every person.⁹⁷

1.9 LIMITATION OF THE STUDY

Limitations of this study are that there are few to no cases about LGBTIQ+ rights that are reported in both Nigerian and Zimbabwean courts because, in most cases, the people would have been victimised in the streets, tortured, threatened, and sometimes killed before they even made it to the courts for justice. Hence the reason why most information about LGBTIQ+ rights and sexual orientation rights is found on social media or in newspapers and not in documented court cases. The other problem is that the police harass and torture lesbians and gays, so it becomes very difficult for this minority group to get justice. Instead, they suffer in silence. Laws criminalising sodomy give the public a key to abuse LGBTIQ+ persons without any fear of prosecution, thereby leading to a lot of human rights violations against this minority group. This study does not discuss each category of LGBTIQ+ separately, but the term is discussed in general. Although gender identity is mentioned here in terms of the SOGI and in declarations, this study does not discuss gender identity in depth because it is beyond the scope of this dissertation.

⁹⁶ n 93 above.

⁹⁷ Section 57 of the Zimbabwean Constitution and section 38 of the Nigerian Constitution.

1.10 CHAPTERS OUTLINE

This work comprises of five chapters.

Chapter 1: Introduction and background

The chapter provides an introduction and background to the study. It outlines the research problem and the research methodologies to be adopted in this study and explains the importance of conducting this research. The main aim of the study as well as research objectives are outlined in the chapter. The chapter also examines existing literature on the subject and refers to sources such as international law, treaties, textbooks, and other relevant published articles on the topic.

Chapter 2: An examination of international human rights laws that protect the right to sexual orientation and LGBTIQ+ rights

This chapter examines relevant international human rights law that protects the right to sexual orientation and LGBTIQ+ rights and the states' obligations in this regard.

Chapter 3: An analysis of the lack of protection of LGBTIQ+ rights in Zimbabwe and Nigeria

This chapter analyses the shortcomings in the protection of LGBTIQ+ rights in Zimbabwe and Nigeria. Both the Zimbabwean and Nigerian constitutions are analysed to demonstrate gaps in the protection of LGBTIQ+ rights and set out how LGBTIQ+ rights can be included in these two countries' constitutions.

Chapter 4: Arguments against the prohibition of sodomy and same sex marriages: a human rights perspective

The chapter examines arguments against sodomy laws and provides a rationale for decriminalisation. It also scrutinises the prohibition of same-sex marriages and arguments in favour of the recognition of same-sex marriage. The chapter further provides legal reasons why LGBTIQ+ rights should be incorporated into the Zimbabwean and Nigerian constitutions.

Chapter 5: Recommendations

The chapter provides recommendations on what can be done to ensure that LGBTIQ+ persons are given equal protection, their rights are recognised, and sodomy laws are prohibited in Zimbabwe and Nigeria.

1.12 CONCLUSION

This chapter provides a background and history of LGBTIQ+ rights in Zimbabwe and Nigeria, specifically the lack of protection and realisation of LGBTIQ+ rights and sexual orientation in the two countries, which at present still have harsh punishments for the LGBTIQ+ community. The chapter comprises an abstract, an introduction, and the Yogyakarta Principles. It is further discussed in the literature review what other scholars such as Victor Oluwasina Ayeni, Azubike Chinwuba Onuora-Oguno, Adetoun T. Adebajo, Jjuuko (from Uganda), Kudzai Mashinga, Nelson Muparamoto, and Esau Mandipa (from Zimbabwe) have written about sexual orientation and gender identity. Furthermore, this chapter outlines the problem statement, research methodology, research questions, aims, and objectives of this study and the chapter outline.

CHAPTER 2

AN EXAMINATION OF INTERNATIONAL HUMAN RIGHTS LAWS THAT PROTECT THE RIGHT TO SEXUAL ORIENTATION AND LGBTIQ+ RIGHTS

2.1 INTRODUCTION

Sexual orientation is one of the most debatable subjects in human rights law and in society. Stereotypes and discrimination regarding LGBTIQ+ rights and sexual orientation rights are prevalent in many societies. Human rights defenders, lawyers, and other activists seek to ensure social justice and guarantee the dignity of lesbian, gay, bisexual, and intersex people. LGBTIQ+ persons are denied access by law to practise their basic civil, political, social, and economic rights. However, it is important to note that this group does not claim any exceptional or additional rights. They only want to enjoy the same rights given to heterosexual persons.

This chapter primarily focuses on international human rights law, which provides an international legal framework in the form of treaties, customary international law, general principles of international law, and judicial decisions. International instruments that protect the "right to sexual orientation and non-discrimination" and the rights of LGBTIQ+ people and their connection to the Zimbabwean and Nigerian constitutions will be discussed. In addition, this chapter describes how these two countries are bound by international human rights instruments.

International law is binding on all parties that sign and ratify a particular treaty.⁹⁸ Article 26 of the Vienna Convention on the Law of Treaties states that 'every treaty in force is binding upon the parties to it and must be performed by them in good faith'.⁹⁹ Failure to comply with treaty obligations can result in sanctions, or the state party will be forced to fulfil its obligations. Article 53 of the Vienna Convention states that any treaty that

⁹⁸ Bentham Jeremy *An Introduction to the Principles of Morals and Legislation* London: T Payne, (1789) 6.

⁹⁹ United Nation, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p.331.

is inconsistent with a peremptory norm of general international law is void.¹⁰⁰ This chapter is trying to answer what the status of the prohibition of discrimination on the basis of sexual orientation is in international human rights law. Is it treaty law, or does it qualify as a norm of customary international law or as a principle of international law? It is argued here that the right to non-discrimination on the grounds of sexual orientation is increasingly being accepted by states as an emergent norm or soft law and will be discussed as the chapter unfolds.

2.1.2 INTERNATIONAL AND REGIONAL INSTRUMENTS

The right to sexual orientation and LGBTIQ+ rights are directly and indirectly affirmed in several international human rights treaties or conventions. Treaties play a major role in the codification and development of international law and are very important in the development of international law. The purpose of this chapter is to examine the evolving international human rights norms on sexual orientation and show how Zimbabwe and Nigeria are bound by the international treaties that they have ratified. Moreover, this chapter endeavours to provide a framework that governments may adopt to ensure that the right to sexual orientation and LGBTIQ+ rights are protected.

In Zimbabwe, an international treaty or any agreement signed is not binding until it has been approved by the Parliament.¹⁰¹ After the Parliament approves a treaty, it will be binding in international law and will not affect Zimbabwe's internal or domestic law until it has been incorporated into the law by an Act of Parliament.¹⁰² In Nigeria, treaties do not automatically have the force of law; they must be enacted into law by the National Assembly.¹⁰³ Zimbabwe and Nigeria follow a dualist approach regarding treaties. But

¹⁰⁰ Vienna Convention on Law of Treaties, 1969, United Nation, Treaty Series, vol. 1155, p 331.

¹⁰¹ Section 327(2)(a) of the Constitution of Zimbabwe Amendment (No. 20) Act 2013. "An international treaty which has been concluded or executed by the President does not bind Zimbabwe until it has been approved by Parliament".

¹⁰² Section 327(2)(b) of the Constitution of Zimbabwe Amendment (No. 20) Act 2013. "An international treaty which has been concluded or executed by the President does not form part of the law of Zimbabwe unless it has been incorporated into the law through the Act of Parliament".

¹⁰³ Section 12(1) of the 1999 Constitution of the Federal Republic of Nigeria. 'No treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly'.

customary international law, is part of the law of Zimbabwe, unless it is inconsistent with the Constitution or an Act of Parliament.¹⁰⁴ Prohibition on discrimination is part of customary international law and *jus cogens*, and such rights should be extended to non-discrimination based on sexual orientation.

The prohibition of discrimination on the basis of race is part of customary international law, and it can be argued that it is a *jus cogens*. For customary international law to be established, there should be general or widespread state practise and *opino juris* that back the practise and norm as a legal one. However, many countries still have laws, policies, and practises that discriminate on the basis of sexual orientation; thus, from these contradictory practices, no generally accepted state practise regarding a right to sexual orientation can be deduced.

2.2 THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR)

The Universal Declaration of Human Rights is against discrimination of any kind, which may result in torture and inhumane treatment, as enshrined in Article 5 of the UDHR.¹⁰⁵ The late former President Robert Mugabe once referred to gay men as ‘worse than dogs and pigs’.¹⁰⁶ Takunda Amina is a gay man who was chased away from home, forced to marry, labelled as a disgrace by his parents, and whose parents claimed that even the best spiritual healers failed to cure him of being gay, as if being gay is a disease. All this shows the inhuman and degrading treatment received by the LGBTIQ+ community from their own family, the government, the church, and society.¹⁰⁷ Although the Universal Declaration is not a treaty and as such does not

¹⁰⁴ Section 326(1) of the Zimbabwean Constitution.

¹⁰⁵ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III). (*Article 1, “Men are born free and equal in dignity and Rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”*). In my view, discrimination based on sexual orientation and gender identity does not service public interest as everyone is born free and equal and deserves equal protection of the law. Furthermore, the punishment that these people receive are severe like stoned to death in Northern Nigeria which is also against the Convention against Torture and other cruel, inhuman or Degrading Treatment or Punishment.

¹⁰⁶ <https://www.reuters.com/article/us-zimbabwe-rights-lgbt-idUSKCN1BF03Z> (accessed on 2 August 2022).

¹⁰⁷ J Moyo, *Worse than dogs and pigs: life as a gay man in Zimbabwe*. (Thomson Reuters Foundation, 4 September 2017).

create legal obligations for countries except when the provisions reflect customary international law, it is an expression of the fundamental values that are shared by all members of the international community, including Zimbabwe and Nigeria. The UDHR has a profound influence on the development of international human rights law.

2.2.1 UNITED NATIONS

2.2.1.1 Article 1 of the International Labour Organisation (ILO) Convention (No. 111) on Discrimination in Employment or Occupation of 1958¹⁰⁸

This treaty does not itself prohibit discrimination based on sexual orientation but allows states to add additional grounds. Article 1(1)(a) provides that discrimination includes any distinction, exclusion, or preference made based on race, colour, sex, religion, political opinion, national extraction, or social origin that is capable of invalidating or damaging equality of opportunity or treatment in employment or occupation. This article refers to an unenumerated list of distinctions, prohibitions, or preferences, which is meant to imply that other grounds of discrimination may be included. It can be argued that sexual orientation discrimination should be included in the prohibited grounds of discrimination. Either the Parliament or the judiciary in individual countries must take the necessary measures to ensure that LGBTIQ+ rights are incorporated into national laws and the community enjoys the same rights as heterosexual citizens. The LGBTIQ+ community typically faces employment problems because of their sexual orientation, which violates anti-discrimination provisions set out in the ILO Convention.

Zimbabwe has ratified all eight core ILO labour conventions including the ILO Convention on Discrimination in Employment and Occupation, which was ratified in 1999. The Zimbabwean Constitution states that, when interpreting the law, courts must consider international law and all treaties and conventions to which Zimbabwe is a party.¹⁰⁹ In view of discrimination based on sexual orientation, Zimbabwe needs

¹⁰⁸ International Labour Organisation (ILO), Discrimination (Employment and Occupation) Convention, C111, 25 June 1958, C111.

¹⁰⁹ Section 46(c) of the Constitution of Zimbabwe Amendment (No. 20) Act 2013 [Zimbabwe], 22 May 2013.

decisive action to honour the commitments it made when it signed the ILO Convention. The Zimbabwean Constitution includes a non-discrimination clause, and guarantees gender equality¹¹⁰ and equality of all people,¹¹¹ but it does not recognise LGBTIQ+ rights and activities as prohibited grounds of discrimination. Homosexuals are subject to social discrimination and restriction laws. Under these circumstances, homosexuals are also discriminated against at work.¹¹²

Nigeria ratified the ILO Convention on October 2, 2002, and it is still in force. Since 1960, it has been a member of the ILO and has ratified 42 international labour conventions, of which 26 are in force, 5 are condemned, and 8 are repealed.¹¹³

The Convention promotes equality of opportunity and treatment, and it demands that each state party put in place a national policy aimed at eliminating all forms of discrimination in relation to employment and occupation. Ratification makes the convention legally binding at the international level.

The constitutions of Zimbabwe and Nigeria adopt a dualist approach to international law, which means that international treaties do not apply to domestic law unless they are passed by statute and incorporated into national law as mentioned above.¹¹⁴ Both Zimbabwe and Nigeria have ratified the International Labour Organisation (ILO) Convention. However, these two countries have not incorporated the treaty into their domestic law. The LGBTIQ+ community suffer in these countries because they have no laws to protect their rights. Ratification gives states an obligation to comply with the provisions of the treaty. The ILO (111) provides a non-discrimination clause with an open list of grounds of discrimination but does not create an immediate obligation to

¹¹⁰Section 3(g) of the Constitution of Zimbabwe Amendment (No. 20) Act 2013 [Zimbabwe], 22 May 2013.

¹¹¹Section 3(f) of the Constitution of Zimbabwe Amendment (No. 20) Act 2013 [Zimbabwe], 22 May 2013.

¹¹² Zimbabwe Congress of Trade Unions, Comments on the Implementation of ILO Core Labour Standards in Zimbabwe, 12 October 2011.

¹¹³ https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:103259 (accessed on 24 January 2023).

¹¹⁴ Section 327 (2) (b) of the Zimbabwean Constitution and section 12(1) of the Nigerian Constitution.

include sexual orientation in the conventions. However, one can argue that sexual orientation can also be included in such grounds since the list is not exhaustive and Zimbabwean and Nigerian court may choose to interpret the provision to include sexual orientation.

2.2.1.2. Article 26 of the International Covenant on Civil and Political Rights of 1966¹¹⁵

Regarding sexual orientation rights, the International Convention on Civil and Political Rights (ICCPR) is important. In *Toonen v. Australia*¹¹⁶ the Human Rights Committee (HRC) noted that the references to 'sex' in ICCPR Article 2 paragraph 1 (non-discrimination)¹¹⁷ and Article 26 (privacy) must be understood in such a way that they include sexual orientation. Article 26 of the ICCPR protects equality before the law and equal protection of the law without discrimination.¹¹⁸ The HRC made this remark about sexual orientation being included within the enumerated ground of "sex," but did not decide the case on Article 26 nor explain that its interpretation that sexual orientation is already covered in the enumerated category of "non-discrimination on the basis of sex" The Human Rights Committee determined that the facts of the Toonen case indicated a violation of Articles 2(1) and 17(1) (protection against arbitrary interference with privacy) of the ICCPR.¹¹⁹ Because of this, Australia repealed laws criminalising sex between men in Tasmania. With this case, the Human Rights Committee sets a guideline within the UN human rights system by acting against discrimination against lesbians, gays, and bisexuals. In a later case, *Young v. Australia*, the HRC found that

¹¹⁵ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, 0.171.

¹¹⁶ Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

¹¹⁷ Ibid, para 8.7.

¹¹⁸ Toonen case, para 6.9 'the Tasmanian authorities concede that sexual orientation is an "other status" for the purposes of the Covenant' Para 8.7.

¹¹⁹ *Toonen case*, para 9.

the denial of a pension to a same-sex partner was indeed a violation of Article 26 of the ICCPR in that it discriminated ‘on the basis of his sex or sexual orientation.’¹²⁰

The Human Rights Committee is an independent body of experts that oversees the implementation of the ICCPR by state parties. Its work is to promote the enjoyment of civil and political rights, which has resulted in several changes in laws, policies, and practices. The decisions or ‘views’ of the HRC are not judgements and are not legally binding. However, the state parties are under ‘an obligation to take the views under consideration in good faith’.¹²¹ The ‘views’ of the HRC are regarded as authoritative interpretations of the ICCPR by a quasi-judicial body. The decisions of the HRC will not have any domestic legal effect if the domestic legal order does not incorporate the ICCPR or the First Optional Protocol.¹²²

Zimbabwe’s accession¹²³ to the ICCPR was on May 13, 1991. The treaty was adopted and opened for signature by General Assembly Resolution 2200A (XXI) of December 16, 1966. Nigeria ratified the ICCPR on July 29, 1993. However, the ICCPR has not been incorporated into Nigeria’s national laws in accordance with Section 12 of the Nigerian Constitution (as amended),¹²⁴ although the provisions of the Covenant are incorporated into most of the country’s domestic laws. An example of this is Chapter 4 of the Constitution, which deals with the protection of civil and political rights.¹²⁵ Other

¹²⁰ *Young v Australia* CCPR/C/78/D/941/2000; Communication No 941/2000 (2003). [Young v. Australia, Comm. 941/2000, U.N. Doc. A/58/40, Vol. II, at 231 \(HRC 2003\) \(worldcourts.com\)](#) (accessed on 9 February 2023).

¹²¹ Oxford Human Rights Hub [States are Bound to Consider the UN Human Rights Committee’s Views in Good Faith | OHRH \(ox.ac.uk\)](#); John Dugard *International Law A South African Perspective* (3rd edition) 319.

¹²² <https://www.cambridge.org/core/books/un-human-rights-treaty-bodies/legal-status-of-decisions-by-human-rights-treaty-bodies-in-national-law/A55EAB5EC469B3F1E4C15B7491BDD151> (accessed on 24 January 2023).

¹²³ Accession refers to an act in which a state accepts the offer to become a party to a treaty already negotiated and signed by other states. It has the same legal effect as ratification.

¹²⁴ Constitution of the Federal Republic of Nigeria [Nigeria], Act No. 24, 5 May 1999, (rev. 2011). (Section 12(1) Implementation of treaties, “No treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly”.)

¹²⁵ Section 37(2)(a)(b) of the Zimbabwean Constitution and Section 12(1) of the Nigerian Constitution.

domestic laws protecting civil and fundamental freedoms include the Violence Against Persons (Prohibition) VAP Act,¹²⁶ the Administration of Criminal Justice Act, (ACJA),¹²⁷ the Anti Torture,¹²⁸ the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act,¹²⁹ and the Laws of the Federation of Nigeria (LFN) 2004).¹³⁰

Despite the fact that the covenant's provisions cannot be directly enforced in Nigerian courts, the international human rights treaties that Nigeria has ratified enjoy persuasive power in domestic courts. Sections 1(3) and 4(5) provide that if another federal or state law conflicts with a provision of the Constitution, the Constitution shall prevail, and that other law shall be null and void with regard to such conflict.¹³¹ It is stipulated that treaty-protected rights are primarily guaranteed by Chapter four of the Constitution. In situations where customary law, Islamic law, or any other law is inconsistent with the Constitution, the Constitution shall prevail. However, this is not the case with the northern part of Nigeria, which practises Sharia law, where human rights violations are committed against the LGBTIQ+ community and the state is silent about these.¹³²

2.2.1.3. Article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984¹³³ (CAT)

This treaty is important because it is not limited to state actors (governments), as torture is defined broadly in Article 1 as intentionally inflicting severe physical or mental pain or suffering in order to obtain information or a confession from the person or a

¹²⁶ Nigeria: Violence Against Persons (Prohibition) Act, 2015 (VAPP) [Nigeria], 25 May 2015.

¹²⁷ The Administration of Criminal Justice Act, 2015.

¹²⁸ The Anti-Torture Act 2017, A 205-211.

¹²⁹ Nigeria: Act No. 2 of 1983 African Charter on Human and People's Rights (Ratification and Enforcement) Act, Cap 10 LFN 1990, 17 March 1983.

¹³⁰ Nigeria; Criminal Code Act [Nigeria], Cap C38 LFN 2004, 1 June 1916.

¹³¹ Sections 1(3) and 4(5) n 97 above.

¹³² <https://outrightinternational.org/our-work/sub-saharan-africa/nigeria> (accessed on 24 January 2023).

¹³³ UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p.85.

third party, punishing a person for an act he is suspected to have committed, or threatening him or using force for reasons based on discrimination of any kind, and where such pain and suffering are not investigated or prevented by the state.¹³⁴

Zimbabwe has not yet ratified the treaty. However, while the Zimbabwean Constitution (No. 20) Act 2013¹³⁵ prohibits torture, much more needs to be done to strengthen the fight against torture in Zimbabwe. For example, there are no laws explicitly prohibiting torture in Zimbabwe other than the ban contained in that country's 2013 constitution.¹³⁶ This also contributes to the suffering of the LGBTIQ+ community because of ill-treatment by the police and mobs.

Section 73 of the Criminal Law (Codification and Reform) Act¹³⁷ considers all sexual activity between same sex persons to be sodomy and is punishable by imprisonment and/or a fine. Police officers also tend to use this provision to harass members of the LGBTIQ+ representative organisations as well as illegally search and seize their property.¹³⁸

Section 15 of the Constitution specifically prohibits cruel, inhumane, and degrading treatment and torture. Torture is not a crime under the Criminal Law (Codification and Reform) Act.¹³⁹ The Government of Zimbabwe should at least ratify and nationalise the Convention's provisions against torture and other cruel, inhuman, or degrading treatment or punishment. Torture must be criminalised under the Criminal Code and

¹³⁴ Ibid, article 1.

¹³⁵ Section 53 of the Constitution of Zimbabwe Amendment (No. 20) Act 2013 [Zimbabwe], 22 May 2013. (Zimbabwe Constitution 2013).

¹³⁶ Amnesty International Zimbabwe: *Human Rights Agenda* 6-22; Zimbabwe Human Rights NGO Forum *Zimbabwe: Human Rights* 2-67.

¹³⁷ Criminal Law Act, sec 73(1).

¹³⁸ 'GALZ statement on the raid of its offices on 20 August 2012' <https://www.thezimbabwean.co/2012/08/galz-statement-on-the-raid/> (accessed on 14 October 2022).

¹³⁹ 23 of 2004.

under all other laws regulating state security agents such as the police, army, and state security agents.¹⁴⁰

Nigeria signed the CAT on July 28, 1988, and ratified it on June 28, 2001. Nigeria has accepted an inquiry procedure under Article 20 of the Convention. On July 27, 2009, it also ratified the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (OPCAT).¹⁴¹ The ratification of the OPCAT created legal and political obligations on the Republic of Nigeria to comply with and implement the provisions of the Convention at the domestic level. The Nigerian Constitution also prohibits torture and other inhuman or degrading treatment.¹⁴² Nigeria also endorsed the Anti-Torture Act in 2017, which makes broad provisions for punishing the acts of torture and other cruel, inhuman, and degrading treatment or punishment and imposes punishments for committing such acts.¹⁴³ Despite all these laws against torture and inhuman treatment, lesbians, gays, bisexuals, and transgender groups in Nigeria are severely punished, thereby violating the provisions against torture and inhuman treatment and punishment.¹⁴⁴

2.2.1.4 Article 2 of the Convention on the Rights of the Child of 1989 (the CRC)

This article prohibits discrimination and gives governments a mandate to protect their citizens from discrimination. This treaty is relevant in addressing sexual orientation

¹⁴⁰ Zimbabwe United Nations Universal Periodic Review, 2011. (*Zimbabwe Human Rights Organisations*, 14 March 2011).

¹⁴¹ Ratification, Reporting & Documentation for Nigeria, Office of the High Commissioner for Human Rights, United Nations, available at: https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=Nigeria (accessed on 29 July 2022).

¹⁴² Section 34(1)(a) of the Constitution of the Federal Republic of Nigeria, 'no person shall be subject to torture or to inhuman or degrading treatment.'

¹⁴³ 'Welcome to hell fire' Torture and other ill-treatment in Nigeria published by Amnesty International, September 2014; available at: <https://www.amnesty.org/en/wp-content/uploads/2021/07/afr440112014en.pdf> (accessed on 29 July 2022).

¹⁴⁴ Bureau of Democracy, Human Rights, and Labour, 2008 Human Rights Report: Nigeria, U.S. DEPT. OF STATE, available at <http://www.state.gov/j/drl/rls/hrrpt/2008/af/119018.htm>. 8 Art. 130.

discrimination.¹⁴⁵ In Zimbabwe and Nigeria, same-sex couples cannot adopt children because of their sexual orientation. Children whose parents are lesbians or gay are taken away by the state and placed in children's homes. This act is a violation of the child's right to a family and is not in the best interest of the child.

Zimbabwe ratified the CRC in September 1990. It went on to implement the Zimbabwe Children's Act, Chapter 5:06, to put the CRC into effect.¹⁴⁶ Despite the non-discrimination provisions in the Constitution, national legislation remains inconsistent with this mandate when it comes to LGBTIQ+ individuals. Section 58(1)(v) of the Child Act states that one cannot adopt a child of a different gender than themselves unless they are jointly adopting with their spouse. This provision discriminates against LGBTIQ+ people because the ban on same-sex relationships prevents them from adopting children of the same sex. This is a violation of Article 2 of the CRC because homosexual individuals do not enjoy the same rights as heterosexual individuals when it comes to adoption, yet the article prohibits any form of discrimination. It should be noted that homosexuals enjoy the right to form a family and should be allowed to do so without discrimination based on their sexual orientation. They should be given the same recognition and enjoyment of rights as heterosexual couples.

Nigeria passed the CRC on January 26, 1990, and it was ratified on April 19, 1991. Nigeria adopted the Child's Right Act in 2003, thereby fulfilling its obligation under the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child to implement provisions of a treaty in its national laws for it to be binding on them. However, Nigeria operates a federal system of government, and the law does not automatically become applicable in all 36 states. The Nigerian Country Representative on the United Nations International Children's Emergency Fund (UNICEF), Mr. Peter Hawkins, stated that 25 states in Nigeria have

¹⁴⁵ The United Nation. 1989. "Convention on the Rights of the Child." Treaty Series 1577 (November): 3.

¹⁴⁶ Zimbabwe: Children's Act [Zimbabwe], Chapter 5:06, 27 October 1972.

complied with child rights laws and 11 states have yet to do so.¹⁴⁷ Gays and lesbians are not included in the list of persons permitted to adopt under the Child Act.¹⁴⁸

By ratifying the CRC and the African Children's Charter, the Nigerian government has a general obligation to ensure that their provisions are applied in a consistent and rational way. The government also took an obligation to discourage religion, culture, custom, or traditional practises that were inconsistent with the Charter. Yet, the government is failing to live up to this obligation by implementing laws that discriminate against LGBTIQ+ people living in the northern region that practises Sharia law. A constitutional order must guarantee unity across the country. There should be no gaps in conflicting laws, especially at the state or local levels or based on religion or custom.¹⁴⁹ However, this is not the case in Nigeria. The southern part of Nigeria and the northern part operate as two different countries in terms of the laws that govern LGBTIQ+ individuals.

Zimbabwe and Nigeria violate the CRC by not allowing same-sex couples to adopt children in the same way as heterosexual couples do. LGBTIQ+ couples also cannot adopt children of their same-sex partner. They infringe LGBTIQ+ individuals' rights to family life and a child's right to private and family life. In this regard, these two countries must abide by the regulations of the convention since they are parties to it and are bound by its regulations and mandates as they have enacted national legislation that supports the Convention on the Rights of the Child.

¹⁴⁷ Janet Ogundepo, 'More states urged to domesticate Child Rights Act, empower girl child'. punchng.com. 10 October 2021.

¹⁴⁸ Section 129 of the Child Rights Act, 2003.

¹⁴⁹ Dr Usang Maria Assim, 'Why the Child's Rights Act still doesn't apply throughout Nigeria' University of the Western Cape. September 24, 2020 <https://theconversation.com/amp/why-the-childs-rights-act-still-doesnt-apply-throughout-nigeria-145345> (accessed on 14 October 2022).

2.2.1.5. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) of 1981

This treaty is relevant in cases of discrimination against lesbian, bisexual, or transgender women.¹⁵⁰ CEDAW represents three main principles: the elimination of discrimination against women, equality between men and women, and the state's willingness to achieve both goals.¹⁵¹ Some scholars argue that the term 'woman' can be understood to include all persons who are identified as such,¹⁵² while others suggest that the treaty's definition of 'discrimination' includes sexual orientation or anyone who is discriminated against because of their gender identity.¹⁵³ Article 16 of CEDAW requires states to ensure that women have equal rights to enter into marriage and to freely choose on the basis of 'equality of men and woman'.¹⁵⁴ However, most African countries, including Zimbabwe and Nigeria, do not recognise marriages between same-sex couples. Same-sex marriage has been prohibited in Zimbabwe's Constitution since 2013, and the constitution was amended to define marriage as being between a man and a woman only.¹⁵⁵ The Zimbabwean Criminal Law (Codification and Reform) Act criminalises same-sex acts between men as 'sodomy'.¹⁵⁶

In May 2019, President E.D. Mnangagwa's Cabinet accepted modifications to Zimbabwe's marriage law, which bans both child marriages and same-sex

¹⁵⁰ The United Nations. 1988. "Convention on the Elimination of All Forms of Discrimination against Women." Treaty Series 1249: 13.

¹⁵¹ Ibid.

¹⁵² Elsie Meyer, 'Designing Women: The Definition of "Women" in the Convention on the Elimination of All Forms of Discrimination Against Women' (2016) 16 CHI. J. INT'L L. 553.

¹⁵³ Sophie M Claiver, Objection Overruled: The Binding Nature of the International Norm Prohibiting Discrimination Against Homosexual and Transgendered Individuals, (2012) 35 FORGHAM INT'L L.J. 384, 390-94.

¹⁵⁴ CEDAW art.16.

¹⁵⁵ The Marriage Act (Chapter 5:11), 1964.

¹⁵⁶ Section 73 of the Criminal Law (Codification and Reform) Act 23 of 2004.

marriages.¹⁵⁷ In Nigeria, the Same Sex Marriage (Prohibition) Act, 2013, was passed to prohibit same-sex marriages. Based on these limitations, advocates may argue that LGBTIQ+ individuals are deprived of their right to enter into marriage and to choose their spouses. Robina Gallagher is of the view that, while there are important cultural perspectives to consider, international support for same-sex marriage through a reinterpretation of CEDAW could inspire member states to implement domestic laws that recognise same-sex marriage.¹⁵⁸

Zimbabwe signed the CEDAW with no reservations in 1991 and ratified it in 1997. However, Zimbabwe still needs to accept the recommendations of the Universal Periodic Review (UPR) on sexual orientation and gender identity and has not implemented laws protecting the rights of LGBTIQ+ people. The UPR is a body of the United Nations Human Rights Council that reviews the human rights records of all UN States and their implementation. It is a valuable tool to challenge and encourage states to protect the rights of people, including LGBTIQ+ persons. It also aims to help states meet their international obligations and mitigate the human rights crisis.¹⁵⁹

LGBTIQ+ people in Zimbabwe routinely face systematic discrimination from pervasive patriarchal hegemony within their communities and largely enforced by the state through its arbitrary arrests, torture, and inhumane treatment towards this community. The state and government of Zimbabwe use culture, religion, and tradition as a basis to continue with their hate speech and discrimination towards LGBTIQ+ persons with proclamations that homosexuality largely contributed to the dissolution of society's ethical structure.¹⁶⁰

¹⁵⁷ 'Same sex marriages Banned in Zim'. *newsdzezimbabwe*. 10 May 2019.

¹⁵⁸ Robina Gallagher, redefining 'CEDAW' to include LGBT rights: Incorporating prohibitions against the discrimination of sexual orientation and gender identity, <https://gould.usc.edu/why/students/orgs/ilj/assets/docs/29-4-Gallagher.pdf> (accessed on 14 October 2022).

¹⁵⁹ Independent Expert on sexual orientation and gender identity, 2017 <https://www.ohchr.org/en/specia:-procedures/ie-sexual-orientation-and-gender-identity> (accessed on 18 October 2022).

¹⁶⁰ Gays and Lesbians of Zimbabwe (GALZ), Report on Discrimination against Women in Zimbabwe based on sexual orientation and gender identity, 51th session. 6 January 2012. www.galz.co.zw.

Nigeria signed CEDAW on 23 April 1984 and ratified it on 13 June 1985. The Nigerian Same-Sex Marriage (Prohibition) Act of 2013 has led to abuse and harassment of LGBTIQ+ persons by police officers and the public. This law created ways in which people could carry out homophobic violence without fear of being punished by the law.¹⁶¹ The SSMPA gave the police a pass to treat LGBTIQ+ people in any way they please.¹⁶²

In my opinion, Zimbabwe and Nigeria, as signatories and parties to the CEDAW, should extend the prohibition of discriminatory laws to include LGBTIQ+ people and provide national laws and legislation that protect the rights of this minority group. The treaty is binding on Zimbabwe and Nigeria on the international level, but on the national level it is only binding after it has been incorporated into their domestic laws, which Zimbabwe and Nigeria have not done yet.

2.2.2 THE AFRICAN UNION

2.2.2.1 THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS (*Banjul Charter*) of 1986¹⁶³

The African Charter on Human and Peoples' Rights, which was approved by the Organization of the African Unity (OAU), which is now known as the African Union (AU), is the most extensively ratified regional human rights agreement. It is ratified by more than fifty countries. Article 2 of the ACHPR is the non-discrimination clause. The article uses the term "or other status," and it has been argued that the phrase should be interpreted to include sexual orientation as stipulated in the case of Zimbabwe

¹⁶¹ <https://www.hrw.org/report/2016/10/20/tell-me-where-i-can-be-safe/impact-nigerians-same-sex-marriage-prohibition-act> (accessed on 2 August 2022).

¹⁶² Nigeria: Harsh Law's Severe Impact on the LGBT Community. 20 October 2016. <https://www.hrw.org/news/2016/10/20/nigeria-harsh-laws-severe-impact-lgbt-community> (accessed on 27 January 2023).

¹⁶³ Organisation of African Unity (OAU), African Charter on Human and Peoples' Rights (Banjul Charter) 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

Human Rights NGO Forum v. Zimbabwe.¹⁶⁴ To this end, the prohibition of same-sex marriages and consensual same sex activities between adults is in direct conflict with the non-discrimination clause in the ACHPR.

The Banjul Charter mentions the principle of equality before the law, and equal protection of the law like the UDHR and the ICCPR.¹⁶⁵ Rights can be limited in accordance with Article 27(2) of the African Charter, but the state has an obligation to demonstrate the reason for such limitations. However, with regards to Zimbabwe and Nigeria, the reason for the limitation of the right to sexual orientation is, in my view, unjustified, as homosexuals do not enjoy the right to equality and equal protection of the law like heterosexual individuals. According to Article 3, every individual shall be "equal before the law... and entitled to the equal protection of the law." It is argued here that sodomy laws thus violate Articles 3 and 2 of the Banjul Charter because the latter guarantees the enjoyment of rights and freedoms "without distinction of any kind" and includes "other status," which must be read to include sexual orientation as mentioned by the *African Commission in Zimbabwe Human Rights NGO Forum v. Zimbabwe* as mentioned above.¹⁶⁶

Progress has been made since the African Commission on Human and People's Rights (the African Commission) adopted a ground-breaking resolution in 2014 (Resolution 275) on the protection against violence and other human rights violations against persons based on their real or imputed sexual orientation or gender identity.¹⁶⁷

¹⁶⁴ Communication 245/2000 21st Activity report of the African Charter on Human and Peoples' Rights (May- November 2006) January 2007 EC.CL/322 (X) paragraph 169, '...the aim of this principle is to ensure equality of treatment for individuals irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age or sexual orientation. The African Commission has held in Communication 211/98 that the right protected in Article 2 is an important entitlement as the availability or lack thereof affects the capacity of one to enjoy many other rights.'

¹⁶⁵ Article 3 of the Banjul Charter states that everyone shall be "equal before the law" and is entitled to "equal protection of the law". Article 28 further provides that "every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance".

¹⁶⁶ n 164 above.

¹⁶⁷ Adopted at the 55th Ordinary Session of the African Commission in Luanda, Angola, 28 April- 12 May 2014. <http://www.achpr.org/sessions/55th/resolutions/275/> (accessed on 20 July 2022).

Subsequently, the African Commission¹⁶⁸ once more referred to sexual orientation at its meeting in Niger, the 60th Ordinary Session in Niamey, from May 8 to 22, 2017. The Commission, in its general comment on torture, mentioned that "corrective rape" and "forced anal testing" are listed as acts of sexual and gender-based violence that may amount to torture and ill-treatment in the African Charter. The Commission also mentioned that African governments have an obligation to protect vulnerable groups from limitations on their rights to assemble freely, including grounds based on their sexual orientation and gender identity.¹⁶⁹

Commissioner Reine Alapini Gansou, who is a Special Rapporteur on Human Rights Defenders in Africa, presented a report advocating for human rights defenders and mentioned that countries "must remove punitive and restrictive laws that undermine the rights to freedom of association and assembly, including those based on sexual orientation, identity, and gender expression." This submission is relevant in regard to Nigeria, which does not allow the formation of groups that advocate for sexual orientation and LGBTIQ+ rights.¹⁷⁰

The Commission also submitted that Africa-based non-governmental organisations and human rights defenders must be supported, and they must encourage local and regional leaders to apply African human rights standards to sexual orientation and gender identity issues, and the Commission should always interpret the African Charter in a way that ensures the protection and promotion of human rights for all Africans.¹⁷¹

Although the non-recognition of LGBTIQ+ persons in the Constitutions of Zimbabwe and Nigeria and the criminalization of sodomy seem to be a direct violation of Article

¹⁶⁸ W Isaack, 'African Commission Tackles Sexual Orientation, Gender identity'. <https://www.hrw.org/news/2017/06/01/african-commission-tackles-sexual-orientation-gender-identity>. (accessed on 24 January 2023).

¹⁶⁹ 60th Ordinary Session of the African Commission on Human and Peoples' Rights. 08-22 May 2017. <https://www.achpr.org/sessions/resolutions?id=417> (accessed on 24 January 2023).

¹⁷⁰ Ibid.

¹⁷¹ African Commission on Human and Peoples' Rights Sessions, <https://www.achpr.org/sessions/resolutions?id=417> (accessed on 24 January 2023).

3 of the ACHPR, this has not been confirmed by the African Commission or Court. Laws criminalising sodomy make it appear as if LGBTIQ+ persons are second-class citizens whose rights can be limited for the comfort of the majority, leaving this minority group vulnerable to the society's homophobic behaviour. In *Legal Resources Foundation v. Zambia*,¹⁷² the African Commission held that "justification cannot be derived solely from popular will, and as such cannot be used to limit the responsibilities of state parties in terms of the Charter." It can be argued that the denial of marriage rights to LGBTIQ+ persons leads to inequality and differentiates individuals based on their sexual orientation. The fact that most of the society is heterosexual and against homosexuality does not justify the limitations on rights that the LGBTIQ+ community receives in Zimbabwe and Nigeria.

To add more, Article 18 of the ACHPR guarantees individuals the right to find a family, and it must be protected by the state. This is important as it prevents the discrimination of LGBTIQ+ persons by prohibiting same-sex marriage based on sexual orientation. To this end, one can argue that since all human beings are equal before the law, where marriage rights are provided for, they should be accorded to consenting partners regardless of their sexual orientation. It can be argued that the ACHPR guarantees protection of same-sex marriages because the interpretation of marriage rights and the concept of family are flexible enough to provide for any form of family imaginable.

The African Commission gave a mandate to state parties to guarantee that human rights defenders work in a comfortable environment free of stigma or criminal prosecution as a result of their human rights protection activities, including the rights of sexual minorities.¹⁷³ It further gives states an obligation to end all acts of violence and abuse, whether committed by state or non-state actors, starting by passing and efficiently applying suitable laws that prohibit and punish all forms of violence affecting sexual minorities, ensuring suitable enquiry, and diligently prosecuting perpetrators. States are also mandated to establish legal mechanisms that are quick to respond to

¹⁷² Communication No. 211/98 (2001).

¹⁷³ n 172 above.

the needs of victims.¹⁷⁴ The protection in the Banjul Charter is not denied to groups simply because the Charter does not explicitly list that group by name. As Article 2 presents a non-exhaustive list, nothing prevents the inclusion of LGBTIQ+ rights by courts or legislatures in the prohibited grounds of discrimination under "other statuses."

Furthermore, Resolution 275 states that corrective rape, physical assaults, torture, murder, arbitrary arrests, detentions, and forced disappearances on the basis of sexual orientation and gender identity that are happening in Africa amount to violations of Article 3 (equal protection of the law), Article 4 (respect of life and the integrity of the person), and Article 5 (prohibition of torture and other cruel, inhuman, and degrading treatment or punishment of the Banjul Charter).¹⁷⁵

In 2017, the Commission issued the Guidelines for the Policing of Assemblies by Law Enforcement in Africa, which clearly refers to protection based on sexual orientation and gender identity.¹⁷⁶ Another 2017 report by the African Commission's Expert Committee on the Rights of People Living With HIV/AIDS (PLHIV) entitled "HIV, the Law, and Human Rights in the African Human Rights System: Key Challenges and Opportunities for Rights-Based Responses" clearly recognised the LGBTIQ+ community as a major population that needs "specific protection and access to HIV and health services." The report made recommendations on how to address the rights of LGBTIQ+ persons that are constantly being violated.¹⁷⁷ In the same year, the Special Rapporteur on Human Rights Defenders in Africa also made a presentation to

¹⁷⁴ A Rudman, 'The protection against discrimination based on sexual orientation under the African human rights system' (2015) 15 *African Human Rights Law Journal* 1-27 <http://dx.doi.org/10.17159/1996-2096/2015/v15n1a1>. <http://www.ahrlj.up.ac.za/rudman-a> (accessed on 20 July 2022).

¹⁷⁵ Resolution on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence, adopted in 2007.

¹⁷⁶ African Commission on Human and People's Rights. Guidelines for the policing of assemblies by law enforcement in Africa. Banjul; ACHPR, 2017 (African Commission on Human and People's Rights, 2017).

¹⁷⁷ African Commission's Expert Committee on the rights of PLHIV. HIV, the Law and Human Rights in the African Human Rights System: Key Challenges and Opportunities for Rights-Based Responses. Banjul: ACHPR, 2017 (African Commission on Human and Peoples' Rights).

the African Commission, highlighting the harassment faced by human rights defenders working on issues related to sexual orientation and gender identity. They called for the eradication of laws that undermine freedom of association and discriminate against those fighting for queer rights.¹⁷⁸ Similarly, the 2017 "Draft Principles on the Declassification and Decriminalization of Petty Offenses in Africa," represented by the Special Rapporteur on Prisons, Conditions of Detention, and Policing in Africa, called for the elimination of laws that criminalise same-sex activities between adults.¹⁷⁹ The 2017 activity report of the Commission for the Prevention of Torture in Africa to the African Commission also gave states a mandate to protect all persons who are at increased risk for torture, especially LGBTIQ+ individuals.¹⁸⁰

Recently, the African Commission denied observer status to three human rights organisations on the basis that "sexual orientation is not an expressly recognised right or freedom under the African Charter." Moreover, it stated that sexual orientation is "against African values."¹⁸¹ This is a reversal of the gains made in recent years and the African Commission's earlier statements and pronouncements regarding sexual orientation, in particular, Resolution 275.¹⁸²

Zimbabwe has been a state party to the Banjul Charter since ratifying the treaty in 1986. Despite being party to the Charter, which encourages states to promote and protect human rights, Zimbabwe unfortunately continues to violate the provisions of the Charter by arbitrary arresting and harassing LGBTIQ+ people. In Zimbabwe, there

¹⁷⁸ African Commission on Human and People's Rights. The Special Rapporteur on Human Rights Defenders in Africa. Banjul: ACHPR, 2017.

¹⁷⁹ African Commission on Human and People's Rights. 'Draft Principles on the Declassification and Decriminalisation of Petty Offences in Africa'. African Commission on Human and People's Rights. Banjul: ACHPR, 2017.

¹⁸⁰ African Commission on Human and People's Rights. Commission for the Prevention of Torture in Africa. Banjul: ACHPR, 2017 (African Commission on Human and Peoples' Rights).

¹⁸¹ African Commission final Communique for the 73rd ordinary session, 20 October to 9 November 2022 [Final Communiqué of the 73rd Ordinary Session of the African Commission on Human and Peoples' Rights | African Commission on Human and Peoples' Rights \(au.int\)](#) See African Commission: Protect and promote LGBTIQ+ rights - ARTICLE 19).

¹⁸² [African Commission: Protect and promote LGBTIQ+ rights - ARTICLE 19](#)).

are no anti-torture laws or any laws that protect the rights of LGBTIQ+ individuals. The same can also be said of the Federal Republic of Nigeria, which is also a state party to the African Charter on Human and Peoples' Rights. Nigeria ratified the African Charter on June 22, 1983, but still violates the provisions of the Charter by harassing, torturing, and not protecting LGBTIQ+ persons in Nigeria, as will be discussed in the next chapter.

2.2.3 THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

To achieve the objective of this study, the dissertation briefly examines the work of both the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR) which significantly developed the law regarding the protection of sexual orientation and gender identity (SOGI) within the framework of the American Convention on Human Rights. Although the American Convention does not make direct reference to SOGI, the IACHR and the IACtHR developed SOGI-related jurisprudence based on the cases submitted for review, according to their institutional functions. Judgments of the Inter-American Court do not have an authoritative status in Africa, but they can be examined for their contribution to the development of norms of international human rights law.

In *Atala v. Chile*,¹⁸³ the court referred to Chile's international liability against discrimination and interference in private and family life. A mother was removed from the custody and care of her daughters because of her sexual orientation. The Court determined that the rights of Karen Atala and her daughters were violated. These included their rights to equality and non-discrimination, protection of privacy and dignity, protection of the family, the rights of children, and judicial guarantees of due process. This was the first judicial decision of the Inter-American System regarding SOGI.

The Inter-American Court ruled that sexual orientation and gender identity are included within "any other social condition" and therefore constitute protected grounds under Article 1(1) of the Convention. This means everyone must enjoy them without

¹⁸³ I/A Court HR, Case of *Karen Atala Riffo and daughters v Chile*. Merits, Reparations and Costs. Judgement of 24 February 2012. Series C No 239. Available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_239_ing.pdf (accessed on 22 August 2022).

discrimination of any kind. The Court repeated that equality and non-discrimination are jus cogens norms and therefore the foundation of international public law. The IACtHR considered that sexual orientation and gender identity must be added to the prohibited grounds for discrimination because of the changing nature of the interpretation of treaties based on Article 29 of the American Convention on Human Rights. To this end, any regulation, act, or practise that discriminates against a person based on their sexual orientation is prohibited. No domestic regulation, decision, or practice, whether by state authorities or individuals, may reduce or limit the rights of a person based on his or her sexual orientation.¹⁸⁴ This is an important court decision from a comparable regional human rights system and may guide African countries in their quest to decriminalise sodomy and protect sexual orientation rights.

The Court established that the rights to life (Article 4), physical integrity (Article 5), and personal freedom (Article 7) under the American Convention must be valued and guaranteed in accordance with Article 1(1) of the ACHR, which includes an obligation on the state to exercise due diligence when investigating all acts of violence, including acts of violence committed by private actors, and a duty to avoid impunity.¹⁸⁵

2.2.4 THE COUNCIL OF EUROPE

Regional European treaties are not applicable in Africa. However, they can be of value in comparing how other regional conventions are interpreted by relevant regional courts of human rights. This can help Zimbabwe and Nigeria adopt some of the important concepts that are important for the realisation of sexual orientation rights.

¹⁸⁴ *Atala v Chile*, para 91.

¹⁸⁵ *Velasquez- Rodriguez v Honduras*, the Inter-American Court on Human Rights, Judgment of 21 July 1989. The State must ensure the free and full exercise of the rights recognised by the Convention to every person subject to its jurisdiction. This obligation implies the duty of State Parties to organize the governmental apparatus and all the structures through which public power is exercised so that they are capable of juridically ensuring the free and full enjoyment of human rights.

2.2.4.1. Articles 8 and 4 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1949

The Convention does not mention sexual orientation directly.¹⁸⁶ However, the significance of this Convention (ECHR) was highlighted in a number of cases in which the European Court of Human Rights found that laws punishing adult consensual sex done in private are discrimination and a violation of the right to private life in Article 8 of the ECHR.¹⁸⁷ This Court was the first international body to rule that the criminalization of sexual orientation is a violation of human rights. In 1997, the European Commission on Human Rights (formerly the first body for individual complaints) held that laws that require a higher age of consent for male homosexual relationships than for heterosexual ones are discrimination and violate the provisions of Article 14 of the ECHR regarding the state's obligation to respect the enjoyment of the right to privacy without any distinction.¹⁸⁸ The Court also held that banning homosexuals in the military is a breach of Article 8 (the right to privacy and family life) of the ECHR.¹⁸⁹ In 2000, the Court also ruled that, if a state convicts a man for having homosexual group sex in private, it is in violation of the Convention.¹⁹⁰

In *Salguero da Silva Mouta v. Portugal*¹⁹¹ it was ruled that sexual orientation cannot be a reason to deny custody to a homosexual father because it is a violation of the father's right to family life under Article 8 of the ECHR. The Court confirmed that Article

¹⁸⁶ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedom, as amended by Protocols Nos. 11 and 14, 4 November 1950.

¹⁸⁷ *Dudgeon v UK*, 1981, *Norris v Ireland*, 1988, *Modinos v Cyprus*, 1993.

¹⁸⁸ *Sutherland v the United Kingdom*, 25186/94, Council of European Court of Human Rights, 27 March 2018. <https://www.refworld.org/pdfid/51e6b8ab4.pdf> (accessed on 25 January 2023).

¹⁸⁹ *Lustig-Prean and Beckett v UK*, [1999] ECHR 71.

¹⁹⁰ *A.D.T v United Kingdom* [2000] ECHR 402.

¹⁹¹ *Salguero da Silva Mouta v Portugal*, 33290/96, Council of Europe: European Court of Human Rights, 21 December 1999, available at <https://www.refworld.org/cases.,ECHR,51e6b80c4.html> (accessed on 24 January 2023).

14 of the ECHR (non-discrimination) was to be interpreted to include sexual orientation.¹⁹²

2.3 WHAT ARE THE STATES' OBLIGATIONS IN THE PROTECTION OF HUMAN RIGHTS?

2.3.1 States' obligation to protect the right to private life

The states' legislative, administrative, and judicial authorities have a duty to respect, promote, and protect the right to private life. The HRC made the observation that obligations enforced by Article 17 of the ICCPR entail the adoption of laws and other mechanisms that give effect to the prohibition of arbitrary and unlawful interferences with the right to privacy and the protection of this right.¹⁹³ These obligations give states a mandate to investigate and report acts by private persons or entities and issues relating to privacy mentioned in Article 17, which must be protected by law.¹⁹⁴ Furthermore, everyone must have a defence mechanism to protect himself against unlawful interferences that occur, and there must be an efficient remedy against the perpetrators.¹⁹⁵ In the case of *Toonen vs. Australia*, the HRC ruled that, with regards to Article 17 of the ICCPR, it is unquestionable that adult consensual sex done in private is a private matter.¹⁹⁶ The HRC found that criminalising homosexual acts is unreasonable, especially when trying to prevent the spread of HIV/AIDS, and dismissed submissions that the issues considered were moral issues and entirely domestic affairs.¹⁹⁷

¹⁹² Ibid.

¹⁹³ Human Rights Committee, *General Comment No. 16, (Article 17), The right to respect of privacy, family, home and correspondence, and protection of honor and reputation*, para 1.

¹⁹⁴ Human Rights Committee, *General Comment No. 31, Nature of the General Legal Obligation Imposed on State Parties*, para. 8.

¹⁹⁵ Human Rights Committee, *General Comment No. 16*, para.11.

¹⁹⁶ *Nicholas Toonen vs Australia, Communication No. 488/1992*, para. 8.2, in UN Doc. CCPR/C/50/D/488/1992 of 4 April 1994.

¹⁹⁷ *ibid*, para 8.4.

The HRC in *Toonen vs. Australia* concluded that the criminalization of homosexual practises constitutes an arbitrary interference with the right to privacy, including adult consensual sex done in private.¹⁹⁸ Sexual orientation is a private exhibition of human personality and a right to private life. It is unquestionable that adult consensual sex done in private is a matter of privacy; hence, gender identity and sexual orientation are intimate parts of private life. States have an international obligation to guarantee the right to a private life, including an obligation not to interfere with private life and to prevent attacks by third parties on the private life.

Domestic courts also established interpretations with regards to privacy. The Constitutional Court of Colombia considered the ICCPR and the Colombian Constitution and found that sexuality, whether heterosexual or homosexual, is an important aspect of humans and their personalities and is therefore included in the wider context of sociability. The full constitutional protection of an individual with regards to personality rights and its free development (Colombian Constitution Articles 14 and 16) includes the process of independent belief and decision regarding one's own sexuality.¹⁹⁹

The South African Court has arrived at a theory of privacy in sexuality that includes both decisional and relational elements. It states that privacy ensures that everyone must have private intimacy and independence without any outside interference. If one expresses their sexuality and acts with consent without violating anyone's rights, such an invasion is a breach of people's privacy.²⁰⁰

¹⁹⁸ *Toonen case*, para 8.2, See also the Concluding observations of the Human Rights Committee on Chile, CCPR/C/79/Add.104 of 30 March 1999, para. 20.

¹⁹⁹ Judgment No. C-098/96 of 7 March 1996, available at <http://www.unilibrebaq.edu.co/html/providencias/C-098-96.htm> (accessed 13 June 2022).

²⁰⁰ Judgment of 9 October 1998, *National Coalition of Gay & Lesbian Equality and Another v Minister of Justice and Others*, Case CCT11/98, para. 32.

2.3.2 States' obligation to protect the right to life

Under international human rights law, the obligation to protect the right to life is a norm of *jus cogens*.²⁰¹ Accordingly, a state may not, under any circumstance,²⁰² take actions that suspend their duty to protect the right to life. The absolute protection of the right to life is applicable to everyone under the jurisdiction of the State.²⁰³

This right entails that no one shall be deprived of their life arbitrarily. The Inter-American Court of Human Rights has highlighted that a state must implement all necessary measures to protect and preserve threats to the right to life, establish an effective legal system to investigate, punish, and compensate any deprivation of life by state officials and private individuals, and guarantee the right to unconstrained access to conditions for a dignified life.²⁰⁴

A state should not deprive a person of the right to life because of his or her sexual orientation. The imposition of capital punishment for sexual relations between consenting adults or extrajudicial executions or killings for reasons of sexual orientation are violations of the right to life.²⁰⁵ The UN General Assembly has reaffirmed the obligation of the states to protect the right to life of all persons under their jurisdiction and has called all state parties to thoroughly investigate all cases of killings committed for any discriminatory reasons, including sexual orientation, and to punish the perpetrators before a competent, independent, and impartial judiciary and ensure that such killings committed by security forces, paramilitary groups, or private

²⁰¹ Article 4 of the ICCPR, Article 15 of the European Convention on Human Rights, Article 27 of the American Convention on Human Rights, Article 5 of the Arab Charter on Human Rights. The African Commission does not provide any limitations to this right therefore, limitations on this right can never be justified by emergencies or special circumstances. Also see African Commission on Human and Peoples' Rights, Case of Media Rights Agenda and Constitutional Rights Project v. Nigeria, Communication No. 105/93,128/94,130/94 and 152/96, 1998, paras. 67-68

²⁰² European Court of Human Rights, *McCann and Other v. United Kingdom*, *doc. cit.*, para. 147, see also *Human Rights and Fight against International Terrorism, The Council of Europe Guidelines*, March 2005, Guideline XV.

²⁰³ *Chahal v. The United Kingdom*, Application No. 22414/93, para. 80.

²⁰⁴ Judgment of 6 April 2006, Case of *Baldeon-Garcia v. Peru*, paras 82-82.

²⁰⁵ *Report of the Special Rapporteur on extrajudicial, summary, or arbitrary executions, Mr. Phillip Alston, Addendum: Mission to Guatemala*, A/HRC/4/20/Add.2; 19 February 2007.

forces are neither overlooked nor authorised by government officials or personnel.²⁰⁶ Some states in Nigeria, by imposing laws under Sharia law that promote the killing of homosexual men, are in serious violation of the right to life as mandated by the UN General Assembly.

Under Article 6 of the ICCPR and the American Convention on Human Rights, death sentences may only be imposed for the most serious crimes, and sexual orientation does not fall under this umbrella. The HRC has affirmed that homosexual acts cannot be regarded as the "most serious crimes."²⁰⁷ The right to life establishes a legal duty on the state to prevent actions by its agents that deprive a person of life based on his or her sexual orientation. States are obliged to take all necessary steps to prevent and punish perpetrators and to also address any acts in society that inspire or facilitate such crimes, whether they are from agents of the state or third parties. This includes enacting criminal law that encourages individuals to stop such violations and ensures that there are law-enforcement mechanisms to prevent, suppress, and punish any infringement of such provisions.²⁰⁸ This positive obligation should not be neglected, as most violations of the right to life in relation to sexual orientation occur through the actions of state agents and their unwillingness or failure to take positive steps to secure life.

In Nigeria, Article 134 of the Zamfara Sharia Penal Code²⁰⁹ provides that whoever commits the offence of lesbianism shall be punished with caning, which may extend to fifty lashes, and in addition be sentenced to a term of imprisonment, which may extend to six months.²¹⁰

²⁰⁶ General Assembly, Resolution 57/214, *Extrajudicial, summary, or arbitrary executions*, of 18 December 2002, para, 6 and resolution 61/172, *Extrajudicial, summary, or arbitrary executions*, 16 December 2006, para 5(b).

²⁰⁷ Concluding Observations of the Human Rights Committee: Sudan, UN Doc. CCPR/C/79/Add.85, 19 November 1997, para. 8.

²⁰⁸ European Court of Human Rights, Judgment of 26 July 2007, Case of *Angelova and Iliev v. Bulgaria*, Application No. 55523/00, para 93.

²⁰⁹ Zamfara: Sharia Penal Code Law 2000, Law No.10 of 2000.

²¹⁰ In Bauchi: 'imprisonment which may extent to five years. In in Kano and Katsina: stoning to death'.

In Zimbabwe, LGBTIQ+ people are tortured, harassed, and arbitrarily arrested. Organisations representing them are raided by the police. For the past few years, Section 73 of the Criminal Law (Codification and Reform) Act,²¹¹ which criminalises sexual intercourse between people of the same sex, has been used to harass suspected gay people in Zimbabwe.²¹² Police officers also tend to use the provision to harass members of the representative organisations for LGBTIQ+ people.²¹³ Zimbabwe and Nigeria have an obligation to protect the right to life of every citizen under their jurisdiction without any discrimination (including the LGBTIQ+ community). This means that even with laws criminalising homosexual activities in place, the Zimbabwean and Nigerian governments must ensure that the right to life is protected at all costs.

2.3.3 States' obligations to prevent, investigate and punish torture and ill-treatment

States have three positive obligations regarding both torture and ill-treatment: Firstly, they must take steps such as training law enforcement personnel to ensure that the prohibitions against torture and ill-treatment are enforced. Secondly, they must quickly and effectively make investigations regarding any allegations of torture or ill-treatment taking place in their territories, prosecute all perpetrators, and if found guilty, punish them with appropriate penalties considering the seriousness of their crime. Thirdly, they must provide an effective remedy and reparation to the victims of such acts.²¹⁴

The Human Rights Committee has reminded States that prohibition of torture and other cruel, inhuman, or degrading treatment is a jus cogens norm and is absolute in

²¹¹ Act 23 of 2004.

²¹² 'GALZ LGBTI rights violations report, 2011'. <https://76crimes.files.wordpress.com/2012/08/violations-report-a54.pdf> (accessed on 10 August 2022).

²¹³ 'GALZ statement on the raid of its offices on 20 August 2012' <https://www.thezimbabwean.co/2012/08/galz-statement-on-the-raid/> (accessed on 14 October 2022).

²¹⁴ Committee against Torture, General Comment No.2, Implementation of Article 2 by State Parties, paras. 24 & 7, Human Rights Committee, General Comment No. 13, The Nature of the General Legal Obligation Imposed on State Parties to the Covenant, para. 16.

nature.²¹⁵ The principle of non-refoulement is found in the Refugee Convention, meaning that a refugee may not be returned to the country of origin if there is a serious risk of violation of human rights.

As a minority group, LGBTIQ+ persons are vulnerable in their societies, and this increases their exposure to torture. The UN Special Rapporteur on Torture came to the conclusion that discrimination against members of sexual minorities increases their risk of being tortured. Incidents of torture against sexual minority individuals indicate that this group was subjected to violence of a sexual nature, such as corrective rape or sexual assault, as punishment for contravening gender barriers or going against nature.²¹⁶

With regard to discrimination based on sexual orientation, the UN Special Rapporteur on Torture has pointed out that, such discrimination suggests that this group is considered to be less important by law enforcement agencies and not fully entitled to equal protection before the law like heterosexual individuals.²¹⁷ LGBTIQ+ individuals are also included in the vulnerable group that is discriminated against, and the principle of non-refoulement also applies to them in regards to torture and ill-treatment²¹⁸ regardless of their sexual orientation. The right to freedom from torture and ill-treatment is generally recognised and protected by international human rights law, both treaty and customary law, and states have an obligation to prevent, investigate, and punish torture and ill-treatment.

2.4 CONCLUSION

In a nutshell, based on the discussion of international law treaties and conventions regarding the "right to sexual orientation and gender identity," it is clear that this right

²¹⁵ The *Report of the Special Rapporteur on torture, Mr. Theo van Boven*, UN document. E/CN.4/2002/137 of 26 February 2002, para 14.

²¹⁶ Report of the Special Rapporteur UN Doc. E/CN.4/2004/56, 23 December 2003.

²¹⁷ *Report of the Special Rapporteur on the question of torture and other cruel, inhuman, or degrading treatment or punishment*, E/CN.4/2002/76, 27 December 2001, Annex III, P. 11.

²¹⁸ Interim report of the Special Rapporteur of the Commission on Human Rights on torture and other cruel, inhuman, or degrading treatment or punishment, UN Doc. A/59/324, September 1, 004, para. 39.

is not a privilege but is evolving into a legal right and deserves states' protection. Most of the above treaties were signed and ratified by Zimbabwe and Nigeria, respectively. What's left is for these two countries to enact laws at the domestic level to give effect to such treaties. There is no justification as to why they have not yet implemented domestic laws to give effect to the treaties they ratified other than an excuse for them to implement discriminatory laws in their states, which as a result has led to inhumane treatment of the LGBTIQ+ community.

Zimbabwe and Nigeria's legal framework is inadequate for the realisation of their international obligations under the various international human rights instruments they have ratified. LGBTIQ+ persons are treated as second-class citizens in terms of their full enjoyment of the rights to human dignity, equality, health, and privacy, and the legal and social consequences of marriage are denied to them.

In ensuring the full enjoyment of human rights by the LGBTIQ+ community, states are obliged to enact criminal laws that discourage and sanction violence against individuals based on sexual orientation and set up effective systems for reporting hate-motivated acts of violence. Provide training to law enforcement officers, monitor places of detention, and provide a system for victims to seek remedies. States should repeal laws criminalising homosexuality, including all legislation that criminalises private sexual conduct between consenting adults. It has been argued, on the basis of the interpretation given by human rights treaty bodies and by regional human rights courts in Europe and the Americas, that a norm has developed in international human rights law that prohibits states from discriminating on the grounds of sexual orientation. As a consequence, states have international obligations to respect, protect, and fulfil human rights in this regard. This includes providing education and training to prevent discrimination and stigmatisation of LGBTIQ+ persons and investigating and prosecuting state and private actors that use violence against this community. Moreover, states should safeguard freedom of expression, association, and peaceful assembly for all LGBTIQ+ persons and their organisations and ensure that any restrictions on these rights are not discriminatory on grounds of sexual orientation.

States are also obliged to promote a culture of equality and diversity that encompasses respect for the rights of LGBTIQ+ persons.²¹⁹

The international community is progressively moving forward by recognising the LGBTIQ+ community and acknowledging its notable absence in human rights jurisprudence in many African countries. It is recommended that Zimbabwe and Nigeria catch up with the changing norms and laws regarding the protection and full enjoyment of human rights. Despite these improvements, however, a lack of protection remains in Africa due to the absence of a binding pronouncement by the regional human rights court on the inclusion of sexual orientation as a prohibited ground of discrimination. This leaves states free to implement discriminatory policies against LGBTIQ+ members with little accountability, although statements and declarations, such as Resolution 275 by the African Commission, point to the development of a soft law norm.

²¹⁹International Human Rights Law and Sexual Orientation & Gender Identity, <https://www.unfe.org/wp-content/uploads/2017/05/International-Human-Rights-Law.pdf> (accessed on 20 July 2022).

CHAPTER 3

AN ANALYSIS OF THE LAWS AND VIOLATIONS OF LGBTIQ+ RIGHTS IN ZIMBABWE AND NIGERIA

3.1 INTRODUCTION

The LGBTIQ+ community faces serious discrimination and stigmatization, the threat of violence, and other human rights violations. Many African countries seem to suggest that homosexuality is un-African and against the teachings of the Christian and Muslim religions,²²⁰ which seems to be a reason why they are intolerant of freedom of sexual orientation, gender identity, and LGBTIQ+ rights. This study focuses on Zimbabwe and Nigeria only. I chose Zimbabwe because it is my home country and I have seen how LGBTIQ+ persons are treated by society, the government, and their families, and how their rights are constantly violated. I have also seen several women getting married to gay men and later discover that the marriage was nothing but a way for the husband to hide his sexual orientation. This is also illustrated by the following short story.

In the novel, *Walking Still* by the late Charles Mungoshi, there is a short story 'Of Lovers and Wives'.²²¹ Although the writer was not writing as an advocate for the LGBTIQ+ community (he actually criticised how homosexuality has destroyed marriages and, according to him, is a threat to the human race), but it is one of the stories that can take us into the day-to-day lives of LGBTIQ+ persons in Zimbabwe. This story shows how gay men use marriage as a way of hiding their sexual orientation while secretly meeting their homosexual partners. In "Of Lovers and Wives," Shamiso is married to Chasi, who is secretly "married" to Peter. Peter has moved in to stay with them under the pretence that he is a best friend and more like a brother to Chasi. Thus, Chasi and Peter made love in their offices and at parties, and they turned a blind eye to society and chose to live their own lives. However, they made Shamiso feel like

²²⁰ Christianity also states: 'let he who is without sin cast the first stone' and expresses love for other persons: 'love each other'.

²²¹ Mungoshi Charles *Walking Still: Of Lovers and Wives* Baobab Books, 1997. Pg 105.

an outsider in her own marriage, as Chasi was always spending time with his lover Peter. Chasi's family portrays him as an outcast, and they want nothing to do with him and his family. After 17 years of marriage, Shamiso finds out about Chasi and Peter's relationship. Peter then commits suicide because he feels that his relationship with Chasi was not sustainable. In this story, Charles Mungoshi tries to teach the Zimbabwean society that if you abandon the way of living accepted by the society, in this case, (choose to be homosexual), the society will also withdraw their obligations to be part of you and you will suffer alone without their help, as exemplified by Peter's death.²²² The story is mentioned here to show that society pressures homosexuals to conform to societal expectations, which leads to unhappy and abusive marriages, and how society portrays the same sex relationship negatively.

I chose Nigeria to give an analysis on how religion (the Sharia law and Christianity) has contributed to the violation of LGBTIQ+ persons' human rights and how Nigeria has failed to fulfil its international obligations in this regard. The similarities between Zimbabwe and Nigeria are that they both signed a number of international treaties that support the protection of human rights without any form of discrimination, but they are failing to live up to their obligations by constantly violating the rights of LGBTIQ+ persons. The difference between these two countries is that in Zimbabwe, religion is not the main cause of discrimination and ill-treatment of LGBTIQ+ persons, but rather the society and its attitude towards this group of people, while in Nigeria, religion (Sharia law and Christianity) is the main agent of discrimination and ill-treatment of the LGBTIQ+ community.

It is important to note that the rationale behind accepting same-sex sexual orientation is based on the notion that all human beings are equal, despite their different sexual orientations or gender identities,²²³ and should be treated as such. In relation to the protection and realisation of LGBTIQ+ rights in Zimbabwe and Nigeria, the right

²²² https://www.thepatriot.co.zw/old_posts/an-africa-centred-critique-of-walking-still-a-close-analysis-of-of-lovers-and-wives/ accessed on 17 April 2023.

²²³ United Nations, Human Rights Office of the High Commissioner: 'Born Free and Equal', Sexual Orientation and Gender Identity in International Human Rights Law. <https://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf> (accessed on 2 August 2022).

approach to getting the sympathy of the courts is to make an argument based on the existing human rights that are supposed to be enjoyed by everyone, such as the right to health, privacy, human dignity, equality, and family life, and the argument is that these rights should be enjoyed by everyone, whatever their sexual orientation may be. However, this is not the case with Zimbabwe and Nigeria, as these rights are constantly violated simply because a person is gay or lesbian.

The main problem is that Zimbabwe and Nigeria do not consider gay rights to be human rights. The Universal Declaration of Human Rights guarantees everyone the right not to be discriminated against; the list is non-exhausted, and it is argued that this includes sexual orientation and freedom from sex/gender identity discrimination on grounds of sex or other status.²²⁴ As discussed above, the Universal Declaration as a General Assembly Resolution is not legally binding as such, but the rights guaranteed therein can become binding as customary international law if they meet the criteria of state practice and *opinio juris sive necessitatis*. Equality and non-discrimination are regarded not only as customary international law but as *jus cogens*. As has been discussed above, in many parts of the world, sexual orientation has now been included as a prohibited ground of discrimination. But a closer look at the laws and state practises of Zimbabwe and Nigeria shows that these two countries have not accepted the inclusion of sexual orientation.

3.2 ZIMBABWE

In Zimbabwe, the violation of human rights by sexual minorities who are identified as LGBTIQ+ is increasing. Religion (Christianity and the African Traditional Religion) views homosexuality as a sin, and the criminalisation of same-sex relations creates a hostile environment for the LGBTIQ+ community. The mere existence of laws criminalising homosexuality acts negatively and affects societal perceptions about homosexuality, puts gays and lesbians at risk of torture and discrimination, and allows

²²⁴ UDHR Articles 1,2,3,5,7,12,16,18,19,20,22, and 23.

homophobic behaviours that prevent the LGBTIQ+ community from living openly.²²⁵ In Zimbabwe, not only are the rights of LGBTIQ+ people not recognised, but violations of LGBTIQ+ people's rights often go unpunished as the government argues that they are protecting the public order.

3.2.1 THE LAW

THE CONSTITUTION

Zimbabwe adopted a new constitution, which came into force on August 22, 2013.²²⁶ This Constitution does not recognise the rights of gays and lesbians.²²⁷ The equality and non-discrimination clause in the Constitution provides a list of grounds for non-discrimination. However, sexual orientation and gender identity are not included.²²⁸ This indicates that the new Constitution excludes sexual minority rights even though other neighbouring countries like Botswana and South Africa have implemented laws that decriminalise sodomy.

Moreover, the Constitution of Zimbabwe specifically prohibits same-sex marriage. Article 78(3) of the Constitution states that same-sex couples are not allowed to marry each other.²²⁹ The common law prevents gay men and, lesbians from fully expressing their sexual orientation.²³⁰ Same-sex sexual relations between men are criminalised and can result in custodial sentences.²³¹ There is no legislation regarding gender

²²⁵ 'As mothers and custodians of our heritage, we stand solidly behind our president and leader on his unflinching stand against homosexuality. Human rights should not be allowed to dehumanize us'. ZANU-PF Women's League, 1995.

²²⁶ Constitution of Zimbabwe Amendment (No.20) Act 2013 [Zimbabwe], 22 May 2013.

²²⁷ Canada: Immigration and Refugee Board of Canada, Zimbabwe: Treatment of sexual minorities, including legislation, state protection, and support services (2009- March 2012), 14 May 2012, ZWE104069.E, available at: <https://www.refworld.org/docid/50b5f0b02.html> (accessed on 9 August 2022).

²²⁸ Ibid, sec 56(3).

²²⁹ Constitution of Zimbabwe, Amendment (No. 20) Act 2013 [Zimbabwe], 22 May 2013.

²³⁰ 2010 Country Reports on Human Rights Practices- Zimbabwe, <https://www.refworld.org/docid/4da56d720.html> (accessed on 9 August 2022).

²³¹ Article 78(3) of the Constitution of Zimbabwe [2013].

identity, and transgender people are not legally acknowledged. As a result, transgender women are more likely to be prosecuted as if they were men.²³²

Zimbabwe ratified the African Charter on Human and People's Rights in 1986 and the International Covenant on Civil and Political Rights (ICCPR) on May 13, 1991. Under Article 4 of the African Charter, citizens of Zimbabwe have the right to respect for life and integrity of the person, which may be explained as a type of privacy right for gays and lesbians. This means that the LGBTIQ+ community has the right to be free from unwarranted publicity, unwarranted appropriation of their personality, and unlawful interference in their private business. Any sexual activity that they engage in privately should be respected the same way that the sexual activities of heterosexual persons are respected. Article 5 of the African Charter can also be used in cases involving sexual orientation because it protects the inherent dignity of human beings.

Article 12 of the UDHR specifically prohibits arbitrary interference with privacy. In addition, Article 17 of the ICCPR ensures the right to privacy and its full enjoyment without any arbitrary and unlawful interference. Article 17(2) provides for protection against interference or attacks. In 1996, Section 11 of the Zimbabwean Constitution was amended²³³ to limit the right to privacy where such right may prejudice the public interest. In my view, homosexuality does not in any way prejudice the public interest because it is between two consenting adults and is done in private, so any discrimination and criminalisation towards sexual minority rights are unjustifiable.

Furthermore, the UN Committee on the Rights of the Child in its report on 7 March 2016 noted that, although the Convention has a non-discrimination clause, Zimbabwean laws remain inconsistent with those provisions. The Committee stated that its concern is the high levels of discrimination against lesbian, gay, bisexual,

²³² UNHRC, Universal Periodic Review of Zimbabwe 26th Session October 2016, Joint submission by: Sexual Rights Centre, GALZ, and COC Netherlands (page 2-3), October 2016.

²³³ Section 11 provides as follows: 'whereas persons in Zimbabwe are entitled, subject to the provisions of this Constitution, to the fundamental rights and freedoms of the individual specified in this Chapter, and whereas it is the duty of every person to respect and abide by the Constitution and the laws of Zimbabwe, the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations on that protection as are contained herein, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the public interest or the rights and freedoms of other persons.'

transgender, and intersex children, and children affected or infected by HIV/AIDS.²³⁴ The United Nations Convention on the Rights of the Child is a legally binding international agreement that sets out the civil, political, economic, social, and cultural rights of every child, regardless of their race, religion, or abilities.

THE CRIMINAL LAW (CODIFICATION AND REFORM) ACT

This Act regulates criminal conduct and does not extend any protection to LGBTIQ+ people. It criminalises same sex activities between consenting adults (sodomy).²³⁵ Section 73 of the Criminal Law (Codification and Reform) Act²³⁶ states that any man who has anal sexual intercourse with another man, even with that other man's consent, or commits any indecent act shall be guilty of sodomy and liable to a fine up to or exceeding level fourteen or imprisonment for a period not exceeding one year, or both. This section has been used to harass suspected gay people in Zimbabwe.²³⁷ Police officers also use this section to harass members of the representative organisations for LGBTIQ+ people.²³⁸

After 2006, the law was extended to criminalise two people of the same sex holding hands, hugging, and kissing, defining such acts as sexual crimes. Section 136 of the Criminal Law²³⁹ which finds a person guilty of fraud if they misrepresent themselves to another person, is used against transgender people and other gender non-

²³⁴ UN Committee on the Rights of the Child, 'Concluding observances on the second periodic report of Zimbabwe' (paragraph 26), 7 March 2016. http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&TreatyID=10&TreatyID=11&DocTypeID=5 (accessed on 2 August 2022).

²³⁵ Criminal Law (Codification and Reform) Act 23 of 2004.

²³⁶ Ibid, sec 73(1).

²³⁷ GALZ LGBTI rights violations report, 2011. https://www.medico.de/fileadmin/migrated/document_media/1/galz-lgbti-rights-violations-report-2011.pdf (accessed on 2 August 2022).

²³⁸ 'GALZ statement on the raid of its offices on 20 August 2012. <https://www.thezimbabwean.co/2012/08/galz-statement-on-the-raid/> (accessed on 14 October 2022).

²³⁹ Zimbabwe: Criminal Law (Codification and Reform) Act, [Chapter 9:23] Act 23/2004.

conforming persons for misrepresenting themselves.²⁴⁰ In 2014, Zanu-PF youth league member Farai Mteliso conducted a citizen's arrest of transgender activist Ricky Nathanson, handing her over to the police for wearing female clothes, masquerading as a woman, and using a female toilet, under this particular law.²⁴¹

While the country's Constitution protects freedom of expression, this freedom is not extended to LGBTIQ+ people, who are particularly vulnerable if they present themselves in gender non-conforming ways. Chapter 10:04 of the Censorship and Entertainment Control Act²⁴² prohibits importing, producing, and disseminating "undesirable publications," such as pictures, statues, and others. This law has been used to confiscate GALZ's (a Zimbabwean NGO that advocates for LGBTIQ+ rights) pamphlets and publications. With all these laws and stigmatisation from society, it is ironic that the government of Zimbabwe states that being homosexual is only regarded as criminal in Zimbabwe once you publicly commit homosexual acts because sexual acts done in private are also criminalised.²⁴³

The joint submission by the Sexual Rights Centre, GALZ, and COC Netherlands (an organisation that advocates for LGBTI rights in the Netherlands) to the United Nations Human Rights Council (UNHRC) Universal Periodic Review of Zimbabwe 26th Session, October 2016, stated that: "The Constitution of Zimbabwe of 2013 clearly prohibits same-sex marriages (Section 78 (3)). Transgender people's gender identity is not legally recognised in court proceedings or law enforcement, which results in dehumanising and unfair treatment under the law, and transgender women are likely to be prosecuted under the "sodomy" law.

To add, the Southern Africa Litigation Centre noted in its report on September 27, 2016 that "Zimbabwe does not have a specific law that allows transgender people to

²⁴⁰ An analysis of spaces for LGBTI activism in Zimbabwe, http://theotherfoundation.org/wp-content/uploads/2017/02/Canaries_Zimbabwe/pdf (accessed on 18 October 2022).

²⁴¹ Ibid.

²⁴² Act No. 37 of 1967.

²⁴³ Voice of America (VOA), 'Gay Zimbabweans Fight Stigma, Harsh Laws' 12 January 2017. <https://www.voanews.com/a/zimbabwe-gay-rights-lgbt/3673999.html>. (Accessed on 2 August 2022).

change the gender marker on their birth documents, or other official documents," and "there are no laws or policies that provide for hormonal treatment, or any other gender-affirming healthcare for transgender people."²⁴⁴

PROTECTION OF LGBTIQ+ RIGHTS IN ZIMBABWE

Although the Constitution is promising in that it embodies generous provisions that can be read to extend protection to LGBTIQ+ people in Zimbabwe, there are slim chances for improvement in Zimbabwe because of the following reasons: lack of political will, judicial conservatism and perceptions of bias, hostile media, and religion. These will be discussed below.

JUDICIAL CONSERVATISM AND PERCEPTIONS OF BIAS

In Zimbabwe, judges and magistrates are not independent of the ZANU-PF government. Given the ZANU-PF's self-declared position that it is hostile to sexual minority rights and the fact that both the former and current presidents have stated that they are not willing to go against the constitutional provisions that criminalise sodomy, it becomes difficult for the magistrates and judges to embrace the rights in question. In addition, the Bench is also conservative as opposed to being liberal.²⁴⁵ It can be argued that, even if the Constitution contains generous provisions that may extend protection to LGBTIQ+ people, like the right to equality and non-discrimination,²⁴⁶ and the right to dignity,²⁴⁷ the current crop of judges and magistrates appears not to be in a position to recognise sexual minorities; therefore, there are slim prospects for the recognition and promotion of sexual minorities' rights in Zimbabwe.

²⁴⁴Southern Africa Litigation Centre, 'Laws and Policies Affecting Transgender Persons in Southern Africa', 24 September 2016. <http://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/Transgender-rights-in-Zimbabwe.pdf>. (accessed on 2 August 2022).

²⁴⁵ D Matyszak, 'Creating a compliant judiciary in Zimbabwe' in K Malleson & PH Russell (eds) *Appointing judges in an age of judicial power, critical perspectives from around the world* (2006).

²⁴⁶ Section 56(3) of the Constitution of Zimbabwe Amendment (No. 20) Act 2013 [Zimbabwe], 22 May 2013 (Zimbabwe Constitution 2013).

²⁴⁷ Ibid, section 52.

3.2.2 POLITICS AND POLITICISATION OF HOMOSEXUALITY

The protection, promotion, and fulfilment of sexual orientation rights have become a central point of political contestation.²⁴⁸ The independence of the judiciary is important in an open and democratic society. However, in Zimbabwe and Nigeria, politics and the church often get in the way of the court's decision making. The politicisation of the judiciary has more to do with its active stance in electoral politics than legal reasoning.²⁴⁹ Zimbabwean and Nigerian societies are not flexible and open to change yet or to accepting people despite their differences. Politicians tend to follow what the society wants or what they consider to be moral to win elections; therefore, political parties do not want to find themselves advocating for LGBTIQ+ rights in their elections because they fear losing followers, and as sexual minorities are a small group, they tend to follow what the crowd wants. Laws criminalising sodomy do not work in the public interest. Public opinion should not be used to limit rights in an open and democratic society. Public opinion on its own is not a reasonable ground for discrimination, yet politicians tend to follow what the public considers immoral and criminalise homosexuality.

Antagonism and advocacy against LGBTIQ+ rights have emanated from politicians, claiming that they want to conserve socio-cultural and religious sentiments to mobilise support from voters. They have participated actively in opposing LGBTIQ+ rights in the courts, proposed legal reforms for more strict laws against sexual minorities, and used adverse political rhetoric against those rights by senior political figures in the Executive and the Legislature, even though there is now greater awareness of and visibility for LGBTIQ+ lives and concerns.²⁵⁰ Politicised homophobia is also common in Southern Africa, and Zimbabwe, after the late President Robert Mugabe's famous hate speech that gays are worse than dogs, is one of the leading African countries with regards to the politicisation of homosexuality. The current President Mnangagwa

²⁴⁸ Adrian Jjuuko- et al, *Queer Lawfare in Africa: Legal strategies in contexts of LGBTIQ+ Criminalisation and Politicisation* (University of Pretoria, 2022) 138.

²⁴⁹ Ibid.

²⁵⁰ A Ibrahim 'LGBT rights in Africa and the discussive role of international human rights law' (2015) 15 *African Human Rights Law Journal* 263.

also made a public announcement that he protects the constitution, and the constitution does not accept homosexuality. The President of the opposition party, Nelson Chamisa, also made a statement that God created Adam and Eve, not Adam and Steve. More details will be discussed in the following subheadings.

GOVERNMENT ATTITUDES AND SOCIETAL TREATMENT

The government remains hostile to LGBTIQ+ rights with continued police arrests, which have taken the form of mass arrests and more targeted arrests. Politicians, including the President and former President, have made statements linking LGBTIQ+ persons to people not worthy of recognition or citizens not entitled to the full enjoyment of human rights. The general attitude towards same-sex relationships is negative in Zimbabwe. Many consider homosexuality a foreign import that undermines the country's Christian and traditional values.²⁵¹ Politicians, traditional leaders, and religious leaders have publicly rejected LGBTIQ+ persons. LGBTIQ+ persons generally do not openly express their sexuality or gender identity in their workplaces or within their families.

GALZ criticised Zimbabwean laws for contributing to hate speech against LGBTIQ+ persons. Victims rarely report such crimes to the police, in part because of a fear of being outed. Privileged individuals may be able to be more open about their sexual orientation and identities, but still only within their like-minded social circles.

The United States State Department's (USSD) 2017 Human Rights Report for Zimbabwe stated that the late former President Mugabe and ZANU-PF leaders publicly criticised the LGBTIQ+ community, rejecting the promotion of LGBTIQ+ rights as contrary to the country's values, norms, traditions, and beliefs.²⁵²

The same report found that there were no reported cases of same-sex sexual activities throughout the year. However, they noted that the police were detaining individuals

²⁵¹ <https://www.amerainternational.org/zimbabwe-lgbti-resources/> (accessed on 2 August 2022).

²⁵² United States State Department (USSD), 'Country Report on Human Rights Practices 2017-2018. Zimbabwe (Section 6), 20 April 2018. <https://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper> (accessed on 2 August 2022).

suspected of being gay for up to 48 hours before releasing them. Additionally, the new president, Emmerson Mnangagwa, does not seem to have departed from Robert Mugabe's homophobic views and has rejected recommendations on LGBTIQ+ rights.

In November 2016, the then Vice President, Emmerson Mnangagwa, who is currently the President of Zimbabwe, said: "They cannot accept issues of gays and homosexuality because it is unlawful in Zimbabwe".²⁵³ The Permanent Secretary in the Ministry of Justice, Legal, and Parliamentary Affairs, Virginia Mabhiza, was quoted as saying, "We have rejected two broad categories of recommendations, namely, same-sex marriages and the Rome Statute." These recommendations were made by European countries at the United Nations Human Rights Council Working Group meeting to embrace homosexuality.²⁵⁴

On January 16, 2014, a transgender activist was arrested in Bulawayo after entering a female toilet. At the police station, she was forced to strip in front of five police officers to verify her gender (whether she was male or female). The police did not seek her consent to conduct the examinations. She was told of the reasons for her arrest on the third day after spending two nights in a holding cell. She was charged with criminal nuisance for wearing female clothes and using a female toilet. The criminal charge was later withdrawn. The civil trial on unlawful arrest and malicious prosecution took place from July 25 to 27, 2017.²⁵⁵

The SALC and the Sexual Rights Centre provided support in *Nathanson v. Mteliso & Ors*,²⁵⁶ and Justice Francis Bere of the Bulawayo High Court in Zimbabwe found that the conduct of the police was entirely unacceptable, irrational, and inhumane and delivered a significant judgement against the Zimbabwean police, awarding Ricky

²⁵³ The Herald, 'Zimbabwe resists gay rights push', 7 November 2016. <https://www.herald.co.zw/zimbabwe-resists-gay-rights-push/> (accessed on 2 August 2022).

²⁵⁴ Zimbabwe Resists Gay Rights Push, 07 November 2016. <https://allafrica.com/stories/201611070617.html> (accessed on 18 October 2022).

²⁵⁵ The Southern Africa Litigation Centre, Zimbabwe: Challenging unlawful arrest of transgender woman Rights of LGBTI Persons, Ongoing Cases, 28 Jul 2017. <https://www.southernafricalitigationcentre.org/2017/07/28/zimbabwe-challenging-unlawful-arrest-of-transgender-woman/> (accessed on 2 August 2022).

²⁵⁶ HB 176 of 2019, HC 1873 of 2014 [2019] ZWBHC 135 (14 November 2019).

Nathanson, a transgender woman and activist, 400,000 Zimbabwean dollars in damages. The Zimbabwean High Court found that transgender people have the same rights as all citizens. The court affirmed the rights and freedoms of transgender people and expressed its hope that its decision will contribute to the recognition and tolerance of minority rights in the country.²⁵⁷ The court further said that basic police procedure demands that before one is arrested, he or she be advised of the reasons for the arrest. Police officers are not given a blank check, as it were, to blindly arrest a person. The SALC stated that the LGBTIQ+ community is targeted by police officers, and they hope this case sets an important precedent and sends a message to all persons, including law enforcement agents and state and non-state actors, that impunity will not be tolerated in constitutional democracies.²⁵⁸

In 2009, members of the Zimbabwe Women's National Team were in the spotlight after it was decided that all women soccer players should wear dresses and "more feminine attire" to root out lesbianism in soccer. Stereotyping of women and gender expression has led to restrictions on women's expression of gender.²⁵⁹

POLICE TREATMENT

The Global Press Institute states that police often enforce the Criminal Law (Codification and Reform) Act, leading to widespread arrest.²⁶⁰ The police ordered LGBTIQ+ activists to leave the 16 days of Activism March, which was organised by women's organisations in Bulawayo, citing the criminal law as a reason to exclude the

²⁵⁷ The Southern African Litigation Centre's press release, <https://www.southernafricalitigationcentre.org/2019/11/18/breaking-news-zimbabwe-high-court-awards-damages-in-ground-breaking-judgement-in-favour-of-ricky-nathanson-a-transgender-woman-and-activist/> (accessed on 2 August 2022).

²⁵⁸ Ibid.

²⁵⁹ Zimbabwe women's soccer team rocked by sex, drug abuse scandal, 11/12/2009. www.newszimbabwe.com (accessed on 2 August 2022).

²⁶⁰ Global Press Institute (GPI) 4 December 2009. Getrude Pswarayi. 'Gay in Zimbabwe: Arrests, Limited Access to Health Care.' <http://www.globalpressinstitute.org/global-news/Africa.zimbabwe/gay-zimbabwe-arrests-limited-access-health-care> (accessed on 2 August 2022).

LGBTIQ+ community.²⁶¹ The discrimination against the LGBTIQ+ community as a result of the criminal law violates freedom of speech, freedom of expression, freedom of conscience, and freedom of assembly.

In 2010, police raided the home of the director of GALZ and the GALZ office. The police searched the office and personal email accounts, seized documents and computers, and arrested two GALZ staff members²⁶² after the launch of the national constitution at the Reform Outreach Program, where GALZ was seeking to remove discriminatory laws and secure constitutional protection for LGBTIQ+ people.²⁶³ The 2010 Country Report states that the GALZ staff members were acquitted on the charge of possessing pornographic materials. However, sources indicate that the two staff members were charged with undermining the authority of President Mugabe.²⁶⁴ This report was signed by the following organisations: ARC-International, Human Rights Watch, the International Gay and Lesbian Human Rights Commission, JASS-Just Associates, and Protection International.²⁶⁵ It is also noted that the two members were beaten while in police custody. The former director of GALZ was arrested on several occasions for engaging in gay and lesbian activism. GALZ reported two separate incidents in 2011 in which a male member and four male friends were charged with disorderly conduct and two female members were detained on allegations that they were practising homosexuality. GALZ expresses concern about the arbitrary detentions of its members.

²⁶¹ Inter Press Service (IPS). 2 December 2010. Zanele Ndebele. 'Zimbabwe: Days of Activism Not for All, Say Police.' <http://www.ips.org/Africa/2010/12/Zimbabwe-sixteen-days-of-activism-not-for-all-saypolice/> (accessed on 2 August 2022).

²⁶² Alert: Gays and lesbians of Zimbabwe (GALZ) Raids and Arrests. <https://www.asylum.org/docs/sexualminorities/ZimbabweGALZ052419.pdf>. (accessed on 2 August 2022).

²⁶³ Ibid.

²⁶⁴ 'Zimbabwe: Drops Charges Against Rights Defenders.' <https://www.iglhrc.org/cgi-bin/iowa/article/pressroom/pressrelease/1136.html> (accessed on 2 August 2022).

²⁶⁵ <https://www.hrw.org/news/2010/05/30/zimbabwe-drop-charges-against-rights-defenders> (accessed on 18 October 2022).

However, there is hope that the police will stop harassing members of the LGBTIQ+ community after a magistrate punished the police for homophobia and hysterical conduct. The members of the Zimbabwe Republic Police humiliated and insulted a Mbare resident before they arrested and detained him on allegations that he contravened national lockdown regulations.²⁶⁶ The ZRP officers accused Tinashe Maumbe, Reward Majoni, and Tinashe Majoni of being homosexuals, arguing that such conduct is unacceptable in Zimbabwe. Maumbe called Tinashe Chinopfukutwa of ZLHR (Zimbabwe Lawyers for Human Rights) to represent him and sued ZRP Commissioner-General Godwin Matanga, Home Affairs and Cultural Heritage Minister Kazembe Kazembe, and a police officer named Mabika. Maumbe demanded payment of up to ZWL900,000 for damages for unlawful arrest, detention, humiliation, and embarrassment. On November 4, 2022, Magistrate Dhlamini granted a judgement in favour of Maumbe and ordered the payment of ZWL800,000 as compensation for violation of his right to human dignity due to allegations of homosexuality. The right to dignity is guaranteed in Section 51 of the Constitution. Out of ZWL800,000, ZWL400,000 was for damages for unlawful arrest and detention, while ZWL400,000 was for compensation for inhuman and degrading treatment.²⁶⁷

LACK OF POLITICAL WILL

The current ZANU-PF government is not receptive to the idea of recognising, protecting, and promoting sexual minority rights. Zimbabwe still has a long way to go in this regard. The President of Zimbabwe, E.D. Mnangagwa, stated in an interview held with an American news channel (CNN) that the Constitution does not accept same-sex marriages, and LGBTIQ+ rights are not going to be implemented in the Constitution any time soon. In an article entitled "President Mnangagwa: "Zimbabwe is open for business," CNN stated that "Gay rights are not changing any time soon." Same-sex marriage is banned in Zimbabwe, and that does not appear to be changing any time soon under Mnangagwa's leadership. President Mnangagwa went on to say that "those people who want it are the people who should canvass for it, but it is not

²⁶⁶ This information is not from the case directly, but I got it from an internet source.

²⁶⁷ Zimbabwe Lawyers for Human Rights, 'ZIM Court Punishes ZRP for Homophobia and Hysterical Conduct'. (zlht.org.zw), <https://www.zlhr.org.zw/?p=2918> (accessed on 2 February 2023).

my duty to campaign for this; in our constitution it is banned, and it is my duty to obey my constitution."²⁶⁸

Furthermore, the leader of the opposition party, Citizens Coalition for Change (CCC), Nelson Chamisa, stated that God created Adam and Eve and not Adam and Steve when responding to his opinion on LGBTIQ+ persons.²⁶⁹ This shows that there is little hope for the realisation of sexual orientation rights in Zimbabwe because the leaders of the political parties are outspoken about their position on the topic and do not want to entertain any recognition of homosexuality. The Zimbabwean community is very much against homosexuality, and political leaders are afraid that if they support the LGBTIQ+ cause, they might risk losing political followers. Prohibiting same-sex marriages is a violation of Section 56(1) of the Zimbabwean Constitution (the right to equality) because LGBTIQ+ persons are entitled to enjoy the same rights as heterosexual persons when it comes to choosing a life partner.²⁷⁰

If the Constitution states that all persons are equal and deserve equal protection of the law, the mere fact that the Zimbabwean president, the police, and the community at large are not willing to implement LGBTIQ+ rights, accept LGBTIQ+ persons, and provide protection for this minority group clearly indicates how the right to equality is being limited. Such a limitation, in my view, is unreasonable and unjustifiable, and this calls for scrutiny and amendment of the law and policies to include the protection of LGBTIQ+ rights. The laws available do not promote and protect LGBTQ+ rights, but measured against international human rights law, the Zimbabwean Constitution falls short of contemporary human rights standards such as equality and dignity. Moreover, not protecting LGBTIQ+ rights to equality, non-discrimination, and dignity also

²⁶⁸ CNN, President Mnangagwa: Zimbabwe is open for business', 24 January 2018.

²⁶⁹ https://en.m.wikipedia.org/wiki/Nelson_Chamisa (accessed on 14 November 2022).

²⁷⁰ *All persons are equal before the law and have equal protection and benefit of the law.*

infringes Section 56(1)²⁷¹ and Section 51²⁷² respectively, of the Zimbabwean Constitution.

The landmark decision laid down by the ECtHR in the 1981 case of *Dudgeon v. United Kingdom*²⁷³ states that Section 11 of the Criminal Law Amendment Act 1885, which criminalises homosexual acts in England, infringes on the European Convention on Human Rights because it unjustifiably interferes with one's private life. South Africa was the first country in the world to expressly mention non-discrimination on the basis of sexual orientation among other prohibited grounds of unfair discrimination in its constitution. In the *National Coalition of Gay and Lesbian Equality and Another v. Minister of Justice and Others*²⁷⁴ the court ruled that sodomy laws were unconstitutional because they infringed Section 9 of the Constitution (the equality clause), which included 'sexual orientation'²⁷⁵ as a prohibited ground of discrimination. In the Zimbabwean case of *Banana v. State*²⁷⁶ although the majority judgement did not find in favour of the applicant, the dissenting judgement has some interesting points to note in relation to LGBTIQ+ rights in Zimbabwe.

The dissent in the above case questioned whether the common law crime of sodomy is reasonable and justifiable since it only punishes males and not females for the same act, and stated that the law that criminalises anal sex between consenting adults should be held unconstitutional on the ground that it discriminates against gender and the right to equality. In their dissenting judgement (per Chief Justice Gubbay and Justice Ebrahim), they also found that most people in society find sodomy acts morally unacceptable, but public disapproval is not sufficient to criminalise an act. It raises the question of whose values the state is protecting and promoting. After quoting

²⁷¹ All persons are equal before the law and have the right to equal protection and benefit of the law.

²⁷² Every person has inherent dignity in their private and public life, and the right to have that dignity to be respected and protected.

²⁷³ App No 7525/76, [1981] ECHR 5, (1982) 4 EHRR 149, IHRL 31 (ECHR 1981).

²⁷⁴ 1999 (1) SA 6 (CC).

²⁷⁵ Section 9(3) of the South African Constitution.

²⁷⁶ 2000 (1) ZLR 607 (S).

Professor Ronald Dworkin's work "Taking Rights Seriously" (1978), Justice Gubbay and Justice Ebrahim stated that they were not convinced that in a democratic society like Zimbabwe, it is justifiable to make an act criminal because a segment, maybe a majority, of the citizens consider it to be unacceptable. The judges in their dissenting judgement stated that the courts cannot be dictated to by public opinion; otherwise, there would be no need for constitutional adjudication. And those who are entitled to claim protection under the law include the marginalised members of society. The dissent also asked why the acts between females were not criminalised for the same act. The dissent also opined that sodomy laws have a harmful impact on gay men.²⁷⁷

3.2.3 SOCIETY

EDUCATION, EMPLOYMENT, AND HOUSING

GALZ director Chester Samba reported in a November 2016 Standard newspaper article that: "Several LGBTIQ+ persons have reported that their employment contract was terminated after supervisors and colleagues discovered their sexual orientation." Members of the LGBTIQ+ community in Zimbabwe are evicted from their homes or from places they rent if the landlord finds out about their sexual orientation. Some are expelled from school by the headmasters, or they withdraw from school after facing a lot of criticism from their peers and teachers.²⁷⁸ This was also reported in the 2017 USSD report. Persons belonging to the LGBTIQ+ community also have higher rates of unemployment because most employers don't want to associate themselves with homosexuals.²⁷⁹ In February 2003, 45 girls were expelled from Langham High School because they were suspected to be lesbians (deprived of their right to education because of their sexual orientation).²⁸⁰ In 2010 and early 2011, twenty girls from

²⁷⁷ Edwin Cameron 'Sexual Orientation and the Constitution: A Test for Human Rights' (1993). https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/soaf110§ion=63 (accessed on 25 January 2022).

²⁷⁸ Country Policy and Information Note Zimbabwe: Sexual orientation and gender identity and expression, version 4.0. January 2019. https://asswerts.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/775001/CPIN_ZIM_SOGIE_V4.0e_Jan_2019_pdf (accessed on 10 August 2022).

²⁷⁹ Ibid.

²⁸⁰ 45 Girls expelled for lesbianism, The Herald, February 2003.

Eveline School in Bulawayo were arrested and questioned by the police for being "lesbians." The girls were not entitled to legal representation, and their families were not contacted.²⁸¹ All the girls were under the age of 18. The Bulawayo Provincial Education Director, Mr. Dan Moyo, condemned acts of lesbianism at schools, saying the practise was awful and unacceptable.²⁸² In an April 2016 document, Outright recorded that due to the harsh laws and public condemnation, especially by former President Robert Mugabe, members of the LGBTIQ+ community are regularly stigmatised, discriminated against, and denied access to services and benefits that are enjoyed by heterosexual persons, such as the right to health, privacy, equality, human dignity, and personal liberty.²⁸³

In the case of *LZ (homosexuals) Zimbabwe v. Secretary of State for the Home Department*,²⁸⁴ the Upper Tribunal of the United Kingdom (Immigration and Asylum Chamber) noted that the former late president Mugabe was very homophobic because he blamed LGBTIQ people for Africa's ills and referred to them as 'worse than dogs'.²⁸⁵ The Upper Tribunal noted that the public expression of homophobia in Zimbabwe is politically motivated.²⁸⁶ In its decision, they held that although some gay men and lesbians suffer discrimination, harassment, intimidation, violence, and blackmail from the general public and the police, there is no general risk to gays and lesbians, although personal circumstances may place some persons at risk. Such personal circumstances include, but are not limited to, LGBTIQ+ rights activists and other persons who openly campaign for LGBTIQ+ rights in Zimbabwe, and being openly gay may increase risk. This minority group faces the risk of arbitrary arrest by the police

²⁸¹ Police question 20 Eveline High School girls for lesbian activity, The Chronicle, 3rd August 2010.

²⁸² Ibid.

²⁸³A Survey of Laws Impacting on the Human Rights of LGBT Persons

in Selected Southern African Countries, 1 April 2016. <https://outrightinternational.org/content/survey-laws-impacting-human-rights-lgbt-person-selected-southern-african-countries> (accessed on 10 August 2022).

²⁸⁴ CG [2011] UKUT 487 (IAC) (26 January 2012), heard on 13/14 October 2011.

²⁸⁵ *LZ case*, paragraph 20.

²⁸⁶ Ibid, paragraph 103.

and harassment by state agents and may be at increased risk of persecution.²⁸⁷ The fact that LGBTIQ+ individuals cannot express themselves publicly because of a fear of prosecution or stigmatisation shows that their rights are clearly limited and there is no full enjoyment of their human rights.

LGBTIQ+ persons are regarded as outcasts and a disgrace to their family and community, and sometimes they are chased out of their homes by their families.²⁸⁸ A Mutare family disowned their son (Tafadzwa Maswa) because he was gay. Tafadzwa's grandmother spoke on Manicaland's Diamond FM, saying:

*What broke my heart the most is that I caught him red handed indulging with another man on my bed. How could he curse my bed in such a manner?*²⁸⁹

BLACKMAIL

According to GALZ, blackmail is a common problem among homosexuals in Zimbabwe. Blackmail usually occurs when one partner is financially dependent on the other and blackmails the wealthy partner when the relationship ends to continue receiving money or when a sexual partner threatens to report the other for transmitting HIV, which could result in 15 years in prison. According to a Zimbabwean lawyer affiliated with GALZ, police in a homophobic society are more likely to believe the blackmailer than the person being blackmailed.²⁹⁰

HOSTILE MEDIA

The media is so vital when it comes to broadcasting news. However, the Zimbabwean media is too aggressive in their reporting on sexual minority rights.²⁹¹ There is a culture

²⁸⁷ para 116 of *LZ case*.

²⁸⁸ *Ibid*.

²⁸⁹ <https://zero.pindula.co.zw/amp/mutare-family-disowns-gay-son/> (accessed on 19 December 2022).

²⁹⁰ 'Dealing with blackmail; Notes from a Zimbabwean Lawyer.' By Dereck Matyszak in *Nowhere to Turn: Blackmail and Extortion of LGBT People in Sub-Saharan Africa*. <http://www.iglhrc.org/binary-data/ATTACHMENT/file/000/000/484-1.pdf> (accessed on 2 August 2022).

²⁹¹ Actus Reus:-GALZ https://galz.org/wp-content/uploads/2018/08/Violations-Report_Print_Final-1-1.pdf (accessed on 10 August 2022).

of denial of LGBTIQ+ rights, and this culture is extensive within the public media. Often, stories that portray LGBTIQ+ people as moral outcasts are given prominence in the newspapers, radio, and television broadcastings.²⁹²

Tatelicious Karigambe-Sandberg faced several incidences of hate speech. She is a transgender woman and human rights activist, but people on social media still call her a "male." She wrote a letter begging for help after her house was burned down and her car was vandalised after she openly announced her status as a transgender. She received threats, including a package with three-gun bullets and a note stating that she was being watched. She was also denied access to health care when the clinic refused to give her ARVs after the late former President Robert Mugabe ordered so.²⁹³ Nehanda Radio published on social media (Facebook) that Tatelicious flaunts her new female body; this was reiterated by homophobic comments on social media. The community at large still considers her a male. Some of the comments included, but were not limited to, the following:

Western idea God will not recognise you in heaven', 'is he a she, in God's eyes its he', 'if she does not have monthly period then she is a man. Look out you guys there, there are men who change to women just to get into the sex-trade. There is money to be made if one is clever. Easy money', 'it's sad that people change themselves to something else when God created them the way he saw beautiful. Only God knows why.'²⁹⁴

It is indicative of how LGTBIQ+ and transgender people in Zimbabwe are degraded. The media reinforces homophobic attitudes and utterances. The late former President Robert Mugabe once stated that all gay people without children should be arrested. 'I

²⁹² 'Editorial Comment: Gay rights cannot be foisted onto the world' Chronicle 7 October 2015 <https://www.chronicle.co.zw/editorial-comment-gay-rightscannot-be-foisted-onto-the-world/> (accessed on 2 August 2022).

²⁹³ <https://www.alaskanstogether.org/mstatelicious91> (accessed on 14 November 2022).

²⁹⁴ <https://m.facebook.com/NehandaRadio/posts/10157240184190156> (accessed on 14 November 2022).

should like to shut them-up in some room and see if they get pregnant, if they don't, then it is jail because they claimed they can have children'.²⁹⁵

A South African celebrity cancelled an appearance in Zimbabwe after a Christian group tried to ban him from entering the country because he is gay. Somizi Mhlongo was banned from coming to Zimbabwe for a show he was hired to perform because of his sexual orientation. Leaders of the Apostolic Council, a coalition of more than 600 Christian groups, wrote a letter to President Mnangagwa saying that Zimbabwe does not tolerate homosexuality and Somizi's visit will disturb their spirituality and affect their children because it will look as if they are accepting homosexuality in Zimbabwe.²⁹⁶ This move reinforces the stand taken by Zimbabweans against gays, even from other countries. Instead of advocating for their rights to be protected, social media publishes homophobic comments about gays and lesbians.

RELIGION

Religion is one of the major factors in Zimbabwe contributing to the non-recognition of same-sex marriage because homosexuality is regarded as unnatural²⁹⁷ and against morality. In *EG & 7 Others v. Attorney General (Kenya)*,²⁹⁸ the court ruled that the idea that homosexuality is against morality is not a reasonable limitation on the right to privacy and the right to dignity. Zimbabwe is predominantly Christian, and the definition of marriage under Christianity excludes same-sex marriages. In the English case of *Corbett v. Corbett*, it was held that marriage as understood in Christendom may be defined as "the voluntary union for life of one man and one woman to the exclusion of all others."²⁹⁹ This definition has been used as justification for criminalising same-sex

²⁹⁵ <https://www.washingtonblade.com/2013/07/08/zimbabwe-president-arrest-gays-who-dont-conceive-children/> (accessed on 14 November 2022).

²⁹⁶ Somizi Mhlongo: Gay TV star cancel Zimbabwe trip after churches complain. 4 November 2021. <https://www.bbc.com/news/world-africa-59161936.amp> (accessed on 14 November 2022).

²⁹⁷ L Wolhuter, 'Equality and the concept of difference: Same sex marriages in the light of the final constitution' (1997) 114 South African Law Journal 389.

²⁹⁸ Petition 150 & 234 of 2016.

²⁹⁹ *Corbett v Corbett* [1970] 2 ALL ER 99. See also the case of *W v W* 1976 2 SA 308, 310E.

acts, and it is argued that marriage is ordained by God and any act that includes people of the same sex is against the will of God.³⁰⁰ Churches in Zimbabwe openly deny sexual minority rights, and they call for the healing of LGBTIQ+ people.³⁰¹ As a result, there is a great deal of stigma and rejection from churches towards LGBTIQ+ people in Zimbabwe.

The USSD 2016 Report, published on March 3, 2017, stated that traditional and church leaders encourage discrimination against LGBTIQ+ persons. For example, Emmanuel Makandiwa, leader of the United Family International Church (UFIC), continued to host shows on television and radio during which he “healed” members of the LGBTIQ+ community as if being gay or lesbian is a disease that should be cured.³⁰²

3.3 NIGERIA

3.3.1 THE LAW

THE CONSTITUTION

In January 2014, Nigeria enacted the Same-Sex Marriage Prohibition Act. According to its preamble, the purpose of the Act is "to prohibit a marriage contract or civil union entered into between persons of the same sex, the solemnization of the same, and for related matters." The Act prohibits all marriage contracts or civil unions entered into between persons of the same sex.³⁰³ It goes ahead and denies these institutions the benefits normally given to heterosexual marriages.³⁰⁴ Same-sex marriages concluded

³⁰⁰ TL Mosikatsana, 'The definitional exclusion of gays and lesbians from family status' (1996) 12 South African Journal on Human Rights 550.

³⁰¹ 'Zim prophet says gays are mental rejects' <https://www.mambaonline.com/2014/04/02/homophobic-zim-prophet-attacks-gays/> (accessed on 10 August 2022).

³⁰² Ibid.

³⁰³ Section 1(1) of the Same Sex (Prohibition) Act 2014. It is an offence punishable by imprisonment for 14 years to enter into these now criminalised unions (section 5(1)).

³⁰⁴ Section 1(1) of the Same Sex (Prohibition) Act 2014.

in other countries are illegitimate once the couple move to Nigeria.³⁰⁵ Solemnisation of gay marriages in places of worship is strictly prohibited³⁰⁶ and any certificate issued for the purpose of marriage between people of the same sex is invalid.³⁰⁷ The Act only recognises marriages concluded between couples of the opposite sex.³⁰⁸ The Act goes further to state that it is illegal to register gay clubs, societies, or organisations;³⁰⁹ and the campaigns for LGBTIQ+ rights, marches, and meetings are also prohibited.³¹⁰ It is also illegal to register, operate, or participate in gay clubs or organisations, or to make a public show of same-sex romantic relationships.³¹¹ This is a violation of freedom of association, assembly,³¹² and expression,³¹³ which are guaranteed in the constitution. Nigeria has one federal constitution, but it does not extend its constitutional protection to the northern area. Political parties use anti-sodomy laws to gain followers during elections. Politics plays a role by appealing to popular sentiments. In Nigeria, some laws are not enforced in the northern part of the country, where Sharia law is applicable.

CRIMINALISATION OF SAME SEX SEXUAL CONDUCT

Chapter 21 of the Nigerian Criminal Code criminalises certain sexual conducts and terms them "offenses against morality." Sections 214 and 215 of this Chapter prescribe a sentence of fourteen years' imprisonment for "carnal knowledge of any person against the order of nature."³¹⁴ This is the language traditionally used to

³⁰⁵ Section 1(2) of the Same Sex (Prohibition) Act 2014.

³⁰⁶ Section 2(1) of the Same Sex (Prohibition) Act 2014.

³⁰⁷ Section 2(2) of the Same Sex (Prohibition) Act 2014.

³⁰⁸ Section 3 of the Same Sex (Prohibition) Act 2014.

³⁰⁹ Section 4(1) of the Same Sex (Prohibition) Act 2014.

³¹⁰ Ibid.

³¹¹ Section 5(2) of the Same Sex (Prohibition) Act 2014.

³¹² Section 40 of the 1999 Constitution of Nigeria.

³¹³ Section 39 of the 1999 Constitution of Nigeria.

³¹⁴ Nigeria: Criminal Code Act, Cap C38 LFN 2004, 1 June 1916. sec 214-15.

penalise same-sex sexual activity. Additionally, Section 217 of the Criminal Code states as follows: any man who commits an act of gross indecency with another man, whether in private or in public, or makes another man commit such an act with him, is guilty of an offence punishable to three years in prison.³¹⁵

Punishment is severe in Nigeria's twelve northern states, which have adopted Sharia law. In those states, adults convicted of engaging in same-sex sexual activity may be subject to execution by stoning.³¹⁶ The Zamfara Sharia Penal Code in Section 130 stipulates that sodomy is an act when a person has anal sex with a person of the same sex, and anyone forced to do such an act on another person is guilty. This definition extends to the anal sexual intercourse of women and is not limited to male-to-male sexual relations.

Article 133 states that any woman who has anal sex with another woman through her sexual organ or by means of stimulation or sexual excitement of one another has committed the offence of lesbianism. Article 134 of the Zamfara Sharia Penal Code³¹⁷ provides that, "whoever commits the offence of lesbianism shall be punished with caning which may extend to fifty lashes and in addition be sentenced to a term of imprisonment which may extend to six months".³¹⁸

SAME SEX MARRIAGE (PROHIBITION) ACT, 2013

The Same-Sex Marriage (Prohibition) Act, 2013, was enacted by Nigeria's National Assembly in December 2013 and signed into law by the President on the 7th day of January 2014. Although the law's title refers to "same-sex marriage," the scope of the law is much broader. In addition to prohibiting same-sex marriage, it states that "the registration of gay clubs, societies, and organisations, their sustenance, processions,

³¹⁵ Ibid, sec 217.

³¹⁶ Bureau of Democracy, Human Rights, and Labour. 2008 Country Reports on Human Rights Practices, 25 Feb 2009. <https://2009-2017.state.gov/j/drl/rls/hrrpt/2008/af/119018.htm> (accessed on 10 August 2022).

³¹⁷ Zamfara: Sharia Penal Code Law 2000, Law No.10 of 2000.

³¹⁸ In Bauchi (northeastern Nigeria): 'imprisonment which may extent to five years. In Kano (northern Nigeria) and Katsina (north-central Nigeria): stoning to death.

and meetings is prohibited.³¹⁹ Additionally, the public display of a same-sex relationship, directly or indirectly, is prohibited.³²⁰ This law criminalises any of the following acts:

- i. "A person who enters into a same-sex marriage contract or civil union commits an offence and is liable on conviction to a term of 14 years' imprisonment."³²¹
- ii. Living together with a same-sex partner as husband and wife even without marriage or a civil union.³²² Such relations can be investigated, and the criminal penalty is 14 years' imprisonment.
- iii. Administering, aiding, or abetting, or even merely witnessing, a same-sex marriage or civil union is a criminal offense, and the sentence is a term of 10 years' imprisonment.³²³
- iv. registering with, operating, or participating in a "gay" organisation. Under the law, an offence is an offence, and a person will be liable on conviction to a term of 10 years imprisonment".³²⁴
- v. Supporting the registration, operation, or sustenance of "gay" organisations, processions, or meetings is an offence punishable by 10 years' imprisonment.³²⁵

In response to the enactment of the Same Sex Marriage (Prohibition) Act (SSMPA), The African Commission's Special Rapporteur on Human Rights Defenders in Africa, Mrs. Reine Alapini- Gansou, issued a press release noting that she is deeply

³¹⁹ Section 4(1) of the Same Sex Marriage (Prohibition) Act, 2013.

³²⁰ Section 4(2) of the Same Sex (Prohibition) Act, 2013.

³²¹ Section (5)1 of the Same Sex (Prohibition) Act, 2013.

³²² Section 7 of the Same Sex (Prohibition) Act, 2013.

³²³ Section 5(3) of the Same Sex (Prohibition) Act, 2013.

³²⁴ Section 5(2) of the Same Sex (Prohibition) Act, 2013.

³²⁵ Section 5(3) of the Same Sex (Prohibition) Act, 2013.

concerned about the consequences this law may have on sexual minorities who are already vulnerable as a result of social prejudice.³²⁶ Furthermore, she stated her concern with regard to Sections 4(1) and 5(2), which prohibit and provide for penalties against defenders of the rights of lesbian, gay, bisexual, and transgender (LGBTIQ+) people. These provisions undermine the work of human rights defenders and violate the right to freedom of association and assembly.

3.3.2 POLITICS AND POLITICISATION OF HOMOSEXUALITY

The criminalisation of same-sex relationships in Nigeria is usually the outcome of calculated political strategies by the political elite rather than popular distress. Criminalizing legislation on sexuality is often slipped into the statute books without the knowledge, involvement, or awareness of much of the public.³²⁷ Most of the public will only be involved through brief media coverage. Laws enacted by legislatures serve political or religious agendas rather than reflecting popular distress.³²⁸ The SSMPA does not only criminalise same-sex relationships but also the formation of organisations advocating for such, solemnising a same-sex marriage, or even witnessing the marriage. This means that organisations and individuals in Nigeria cannot claim to be LGBTIQ+ or queer activists without running the risk of prosecution under the SSMPA. This is the reason why most organisations working on queer rights are registered as sexual and reproductive health organizations.³²⁹ The debate on sexual orientation in the Nigerian political context has always been initiated and concluded by politicians and religious leaders.³³⁰ Sexual orientation rarely becomes a

³²⁶ Special Rapporteur on Human Rights Defenders in Africa, Press Release on the Implication of the Same Sex Marriage [Prohibition] Act 2013 on Human Rights Defenders in Nigeria, <https://www.achpr.org/pressrelease/detail?id=232> (accessed on 10 August 2022).

³²⁷ A Sogunro, 'Against 'the Order of nature': towards the growth of queer lawfare in Nigeria in Adrian Jjuuko, et al, *Queer Lawfare in Africa: Legal strategies in contexts of LGBTIQ+ Criminalisation and Politicisation*: (University of Pretoria, 2022) 138. Pg 206.

³²⁸ Adrian Jjuuko, et al, *Queer Lawfare in Africa: Legal strategies in contexts of LGBTIQ+ Criminalisation and Politicisation*: (University of Pretoria, 2022) 138. Pg 220.

³²⁹ A Sogunro, 'Citizenship in the shadows: Insights on queer advocacy in Nigeria (2018) 45 College Literature 632.

³³⁰ n 327 above, page 228.

topic of public concern until political or religious influence triggers it as a distraction from more problematic areas. Politicians argue that homosexuality is a threat to culture and morals in society, and they threaten to employ more strict punishments and laws to prevent the growth of the LGBTIQ+ community.

3.3.3 SOCIETY

There are a few organisations that advocate for LGBTIQ+ rights, but they do not mention that they will be advocating for LGBTIQ+ rights as they would be at risk of having their licence revoked or not being allowed to register the organisation. These organisations include, but are not limited to, The Initiative for Equal Rights (TIER), Queer Alliance (QA), Initiative for Advancement of Humanity (IAH), Access to Good Health Initiative (AGHI) (in the southern zone), Women's Health and Equal Rights Initiative (WHER), and International Centre for Advocacy on Rights to Health (ICARH) in the northern zone. Most of these organisations when advocating for LGBTIQ+ rights, do not do so directly; rather, they use an integrative approach where they advocate for existing human rights like the right to equality, dignity, and access to health and argue that such rights are supposed to be enjoyed by everyone without any discrimination. This is because if they try to bring a case about LGBTIQ+ rights to court, it will not even get a chance to be heard.

On January 14, 2014, former United Nations High Commissioner for Human Rights, Navanethem Pillay, called the SSMPA a "draconian new law" that worsens an already bad situation.³³¹ Pillay stated that she has never seen a piece of legislation that, in so few paragraphs, directly violates so many basic, universal human rights. This law violates the rights to privacy and non-discrimination, the freedom of expression, association, and assembly, and the freedom from arbitrary arrest and detention. Moreover, the Joint United Nations Programme on HIV/AIDS (UNAIDS) and the Global Fund to Fight AIDS, Tuberculosis, and Malaria (Global Fund) warned that the SSMPA

³³¹ Ibid.

would impede access to HIV services for LGBT people in Nigeria,³³² thereby also violating the full enjoyment of the right to health care.

CASE STUDIES³³³

The following does not provide the real names of the victims to protect their identities. The cases were reported, but they did not go to court, and there were no judgments. This is one of the limitations of this study, as discussed above in Chapter 1.

Patrick, 19 July 2019, Lagos State (Kidnapping)

Section 365 of the Criminal Code³³⁴ states that any person who unlawfully detains another person without his consent or deprives someone's personal liberty is guilty of an offence and liable to imprisonment for two years. Patrick was supposed to meet a friend he met online, but when he arrived at the location, he was attacked by a group of men who took him to an unfinished room. They claimed that he tried to recruit their friend to his "gayness" online, and they tortured him. They called his family to pay a ransom for his release with the threat that they were going to expose this person's sexual orientation and kill him. The family paid 80,000 naira, and he was dropped off at a bus stop to find his way home.³³⁵ This case is an example of a violation of the rights to personal liberty and freedom from torture. The state is quiet about these violations, and the victims never get justice.

³³² UNAIDS and the Global Fund express deep concern about the Impact of a new law affecting the AIDS response and human rights of LGBT People in Nigeria, January 14, 2014. <https://www.unaids.org/en/resources/presscentre/pressreleaseandstatementarchive/2014/january/20140114nigeria> (accessed on 10 August 2022).

³³³The Initiative for Equal Rights, Human Rights Violations based on Real or Perceived Sexual Orientation and Gender Identity in Nigeria, 2018. <https://www.theinitiativeforequalrights.org/wp-content/uploads/2019/12/2019-Human-Rights-Violations-Reports-Based-on-SOGI.pdf> (accessed on 10 August 2022).

³³⁴ Nigeria: Criminal Code Act [Nigeria], Cap C38 LFN 2004.

³³⁵ The Initiative for Equal Rights, Human Rights Violations based on Real or Perceived Sexual Orientation and Gender Identity in Nigeria, 2018. <https://www.theinitiativeforequalrights.org/wp-content/uploads/2019/12/2019-Human-Rights-Violations-Reports-Based-on-SOGI.pdf> (accessed on 10 August 2022).

Kanoyo, June 6, 2019, Enugu (Assault and Battery and Degrading Treatment)

Section 252 of the Criminal Code³³⁶ states that, any person who strikes or applies force to a person, indirectly or directly, without his consent or if the consent is obtained by fraud, making gestures, or threatening to apply force, such a person has committed assault.

Kanoyo's uncle searched his bag and found condoms, lubricants, and a douche. He then interrogated and tortured him. His uncle found some chats that show he was gay and nude photographs. He beat Kanoyo and locked him in his room. When the neighbours came to ask what was happening, he told them that Kanoyo was gay, and they all agreed that he ought to spend time in jail to realise how serious his crime was. His uncle called the police, who then detained and further tortured him..³³⁷ This is a violation of the right to privacy and freedom from torture, inhumane, and degrading treatment.

Deyo, October 11, 2019, Lagos Sexual Assault

Section 352 of the Criminal Code³³⁸ states that:

'any person who assaults another with intent 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'.

Section 357³³⁹ states that,

'any person who has unlawful carnal knowledge of a woman or girl, without her consent or if the consent was acquired by force or threat, or in the case of a married women by means of personating her husband, is guilty of an offence called rape'.

³³⁶ Ibid.

³³⁷ Ibid.

³³⁸ Ibid.

³³⁹ Ibid.

Section 1 of the Violence Against Persons (Prohibition) Act 2015 states that a person commits rape if he or she intentionally penetrates the vagina, or anus, or mouth of another person with any part of his body, without the consent of the other person, or if the consent is obtained by force, or threat, or fraud, or in the case of a married woman, by impersonating his or her spouse.

Deyo met a new friend on social media and agreed to meet at a popular restaurant. When she arrived, she got a text from the friend asking her to come outside. When she did, she was approached by a soldier who ordered her to follow him under threat of arrest. When she arrived at the car, she found another soldier in the driver's seat. He told her that he was the one chatting with her all along and had proof that could get her arrested for lesbianism. They drove her to a lonely house where they asked her to pay 500, 000 naira or be locked up in the guard room while he was holding a gun. She begged to be released, but instead he touched and raped her without using protection, took her phone, and later that night let her go.³⁴⁰

Titus, February 12, 2019, Lagos (Arbitrary Arrest and Unlawful Detention)

Section 364(2) of the Criminal Code states that any person who unlawfully imprisons someone within Nigeria and prevents him from knowing the reasons for his arrest, the location he is, or allows any person to have access to him during the detention is guilty of a felony and is liable to ten years imprisonment.

Titus went to the police station to bail out his friends out who were detained because of an argument that happened between them. When he arrived at the police station, Titus was also detained because the Divisional Police Officer (DPO) claimed the argument was a lovers' quarrel, which drew attention because they were gay. As a result, the DPO believed that he too was a gay man for coming to bail out his gay friends and ordered that he be locked up as well.³⁴¹ This is a violation of the right not to be arbitrarily arrested.

³⁴⁰ Ibid.

³⁴¹ ICCPR, 1966.

3.4 SUBSTANTIVE VIOLATIONS OF THE ICCPR BY ZIMBABWE AND NIGERIA

Article 6 of the ICCPR (the right to life), proclaims that, "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life".³⁴² Article 7 (freedom from torture and other cruel, inhumane, or degrading treatment or punishment) declares that nobody can be "subjected to torture or to cruel, inhuman, or degrading treatment or punishment."³⁴³ The Human Rights Committee's General Comment No. 20 established that the purpose of the prohibition against torture and cruel, inhuman, or degrading treatment is to "protect both the dignity, physical, and mental integrity of a person."³⁴⁴

Article 9 of the ICCPR protects the right to liberty and security of the person. Specifically, it states that "no one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law."³⁴⁵ Despite this provision, the above cases are indicative of many arbitrary arrests, and the state is not doing anything to stop them. It should be noted that this right applies to everyone regardless of their sexual orientation, but it seems as if the rights of LGBTIQ+ persons' rights are not considered human rights.

In Zimbabwe and Nigeria, as mentioned above, there is no specific legislation enacted that prohibits torture and violence, hence the reason why the LGBTIQ+ community suffers at the hands of the police and society at large. Zimbabwe and Nigeria are in violation of the ICCPR and their constitutional provisions that prohibit discrimination and unfair treatment, encourage equality of all before, and protect the rights to health,

³⁴² ICCPR, 1966.

³⁴³ Ibid.

³⁴⁴ Human Rights Committee, Gen. Comment 20, Art 7 (Forty-fourth session, 1992), Compilation of Gen. Comments and Gen. Recommendations Adopted by Human Rights Treaty Bodies, 2, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994) available at <http://www1.umn.edu/humanrts/gencomm/hrcom20> (accessed on 10 August 2022).

³⁴⁵ Ibid.

privacy, dignity, personal liberty, freedom of expression and association, and the right to form a family by criminalising same-sex acts between consenting adults and not implementing laws that protect the LGBTIQ+ community.

In Nigeria, 'corrective rape' is not uncommon.³⁴⁶ Violence against lesbian women is prevalent in Nigeria and the state is unresponsive.³⁴⁷ Many are afraid to report sexual crimes committed against them for fear that the police will perpetuate the abuse or humiliate them. Women who are sexual minorities face discrimination for being women as well as discrimination related to their sexual orientation, gender identity, and gender expression. These multiple layers of discrimination make it extremely challenging to address these cases. In 1994, the Human Rights Committee held that states are obligated to protect individuals from discrimination on the basis of their sexual orientation.³⁴⁸ This position is reflected in later decisions by the Committee.³⁴⁹

The right not to be discriminated against, the right to equality and equal protection, and the obligation to respect, protect, and guarantee human rights without discrimination lie at the heart of the ICCPR. The ICCPR imposes obligations on States Parties to ensure that they respect these rights and comply with these obligations. Article 2(2) stipulates that state parties must enact the necessary laws or other measures to give effect to the rights recognised in this Covenant.³⁵⁰ Not only does Nigeria fail to protect non-discrimination and equality rights, but it also actively encourages violations of these rights. As noted above, Nigeria's criminal law provisions discriminate against sexual minorities and violate the ICCPR. Moreover, these laws undermine Nigeria's obligation to protect, respect, and enforce the human

³⁴⁶ Keren Lehavot and Tracy L. Simpson, Incorporating Lesbian and Bisexual Women into Women Veterans' Health Priorities, June 27, 2013. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3695269/> (accessed on 10 August 2022).

³⁴⁷ The Initiative for Equal Rights, Human Rights Violations based on Real or Perceived Sexual Orientation and Gender Identity in Nigeria, 2018

³⁴⁸ *Toonen v. Australia*, communication No. 488/1992 (CCPR/C/50/D/488/1992).

³⁴⁹ *X v. Colombia*, communication no. 1361/2005 (CCPR/C/89/D/1361/2005), para. 9.

³⁵⁰ ICCPR.

rights of all persons under its jurisdiction by contributing to a pervasive environment of homophobia.

Sexual minorities find it very difficult to seek redress from relevant government agencies for fear of stigma, state violence, and discrimination. This is in direct contradiction to Article 26 of the ICCPR, which states that all people are equal before the law and all must enjoy the same level of protection before the law.³⁵¹ The existence of discriminatory laws creates an atmosphere in which violations are rampant. It creates a sense of innocence in the perpetrator and fear in the victim. Religious and traditional sentiments, discriminatory laws, and a hostile social environment instil fear in the LGBTIQ+ community, and they suffer from a life of limited access to justice. They are often reluctant to take legal action against their perpetrators, which makes police abuse more visible and exposes them to stigma and discrimination. This discrimination often extends to family and friends and continues to create an atmosphere of fear and insecurity. Zimbabwe also violates the right to equality and non-discrimination by refusing to recognise homosexual relationships. Its Constitution does not include sexual orientation among the prohibited grounds of discrimination. The sexual minority group is also denied access to basic rights such as the right to health care, employment opportunities, and the rights to privacy, dignity, and equality.

Articles 19, 21, and 22 of the ICCPR guarantee the rights to freedom of expression, assembly, and association, respectively. Article 19(1) states that everyone has the right to express their opinions without interference. Article 21 states that the exercise of this right is unrestricted, except for restrictions provided for by law. Article 22 states: "Everyone has the right to freedom of association." In Nigeria, LGBTIQ+ individuals are denied freedom of association and assembly. Registration of gay clubs, associations, and organisations, as well as their entertainment, marches, and gatherings, is prohibited. Zimbabwe, like Nigeria, bans homosexuality. The consequences of being gay were discussed above.

³⁵¹ See also the African (Banjul) Charter on Human and Peoples' Rights, art. 3, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at <http://www.achpr.org/instruments/achpr/> (accessed on 10 August 2022).

Article 17(1) stipulates that no one shall be subjected to arbitrary or unlawful interference in his or her private life, family, home, or correspondence, or to an unlawful attack on their reputation.³⁵² Furthermore, Article 17(2) imposes an obligation on states to take legislative and other measures to enforce the prohibition of such interference and attacks.³⁵³ Nigerian laws criminalising same-sex conduct violate privacy rights, according to the HRC case, *Toonen v. Australia*.³⁵⁴ Denial of transgender identity, including but not limited to deprivation of the right to change name or gender, is a violation of the right to privacy. Similarly, the Human Rights Commission in *G v. Australia* has ruled in favour of a female transgender in Australia that the refusal to change the gender on a birth certificate unless divorced from the spouse is claimed to be direct and arbitrary interference with her right to privacy under Article 17 of the Covenant.³⁵⁵

Furthermore, Article 17 requires states to take positive action to protect the right to privacy. Nigeria and Zimbabwe do not allow transgender people to amend their official names and gender markings on official documents. Due to the need to use these documents, transgender people face serious discrimination and barriers to accessing services that are essential for realising their fundamental rights.

3.5 CONCLUSION

The LGBTIQ+ community does not claim any special rights but adheres to the same rights as any other human being. They claim basic rights that are perceived in the 1948 Universal Declaration of Human Rights. By ratifying the ICCPR, the Convention against Torture, and other human rights treaties, Nigeria and Zimbabwe assumed positive obligations to address violence against the LGBTIQ+ community. Nigeria consented to these obligations when it ratified CEDAW, ICCPR, ICESCR, and the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or

³⁵² Ibid, art. 17.

³⁵³ Ibid.

³⁵⁴ *Toonen v. Australia*, U.N. Human Rights Communication No. 488/1992, CCPR/C/50/D/488/1992 (1994).

³⁵⁵ *G. v. Australia*, Communication No. 2172/2012, U.N. Doc. CCPR/C/119/D/2172/2012 (2017).

Punishment. Zimbabwe has ratified various human rights treaties, including the African Charter on Human and People's Rights (ACHPR) and the International Covenant on Civil and Political Rights (ICCPR). The ICCPR provides for equality before the law and the right to non-discrimination based on sex, which the UN Human Rights Committee (HRC) has ruled to include SOGI. Implicitly, any law criminalising consensual sexual relations between adults is in violation of the Covenant. As a party state to the ICCPR, Zimbabwe and Nigeria are obligated to conform to its provisions, despite the government's refusal to recognise LGBTIQ+ human rights. They are obliged to enact domestic laws that give effect to the provisions of all the international treaties the states have ratified.

CHAPTER 4

ARGUMENTS AGAINST THE PROHIBITION OF SODOMY AND FOR SAME SEX MARRIAGES: A HUMAN RIGHTS PERSPECTIVE

4.1 INTRODUCTION

In recent years, sexual minority rights have been a subject of social and political debate in Africa. One of the biggest challenges for advancing sexual minorities' rights in Africa is the lack of awareness that this is a human rights issue. It is important to note that sexual minorities have rights under international and national law. They have the right to privacy, basic human dignity, equality, and non-discrimination.³⁵⁶ As a legal principle, states are under an obligation to protect equal rights for everyone and to grant sexual minorities the equal protection of the law under UN, AU, and domestic law. This study examines basic legal protection, which is a concept misunderstood in most African states. However, a legal obligation does not by itself convert paper rights into actual guarantees in practice. Although legal obligations are not enough, they are, in my opinion, a necessary condition to limit homophobia in Zimbabwe and Nigeria. However, a change in public opinion where society needs to learn to accept everyone with their differences and change of laws that discriminate against the LGBTIQ+ community can be put into practise to address the law's limits, and some points will be listed and discussed in the next chapter.

Lawyers in Africa are not often exposed to the subject of sexual minorities' rights compared to other subjects like women's and children's rights. It is therefore recommended that ample attention be given to sexual minority rights in the curriculum. Lack of knowledge and apathy feed homophobia, leading to the enactment of repressive laws and the attitude of the executive, which contribute to state-sponsored violence against sexual minorities.

³⁵⁶ A Rudman 'The protection against discrimination based on sexual orientation under the African human rights system' (2015) (15(1) African Human Rights Law Journal 35 http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1996-20962015000100002 (accessed on 16 November 2022).

4.2 REASONS FOR INCORPORATING LGBTIQ+ RIGHTS IN THE ZIMBABWE AND NIGERIAN CONSTITUTIONS

Sexual minorities, as right holders under international and national law, are entitled to the right not to be discriminated against, the right to privacy, the right to dignity, the right to equality, freedom from torture and other cruel, inhuman, or degrading treatment, and to all other relevant rights given to everyone.³⁵⁷ The essence of equal protection under the law is that rights are granted in terms of the inclusive language of "every individual," "everyone," and "every person" in both the ICCPR and the African Charter, as well as in the Zimbabwean and Nigerian constitutions. It is unacceptable to restrict rights to a smaller segment of the population when the right has been granted to everyone. It is unreasonable that a court would not entertain allegations of torture just because the alleged victim of torture is gay or lesbian. Moreover, Section 56 of the Zimbabwean Constitution and Section 17 of the Nigerian Constitution assert, respectively, that everyone is equal before the law and must enjoy equal protection, which means that everyone enjoys equal rights and freedoms. The Constitution's equal protection with regards to the right to privacy, human dignity, health, and family life must be enjoyed by homosexual persons the same way they are enjoyed by heterosexual persons. Therefore, Zimbabwe and Nigeria, being parties to the ICCPR and the African Charter, and according to the preamble of their constitutions, which protect human rights and prevent their violations, have an obligation to ensure that these rights are protected and promoted without any form of discrimination.

4.3 EXPLORING THE POTENTIAL FOR DECRIMINALISATION OF SODOMY UNDER THE CONSTITUTION

The existing human rights in both Zimbabwe and Nigeria are explored with a view to supporting the argument for the decriminalisation of sodomy laws and sexual orientation rights. Everyone is equal in law and in dignity. Everyone must enjoy equal treatment, benefits, and protection before the law. It is important to note that human rights are not only for heterosexual individuals; they are also extended to homosexual

³⁵⁷ International Commission of Jurists 'Sexual orientation, gender identity and justice; A comparative law casebook (International Commission of Jurists: Geneva 2012).

individuals, and everyone should be entitled to them. Everyone should receive the same treatment. One cannot say certain human rights do not apply to the LGBTIQ+ community because of their sexual orientation. Even in the presence of sodomy laws, everyone is still entitled to be treated with dignity. Even if the law prohibits sodomy, the national laws still grant the right to privacy, equality, access to health care, personal liberty, and dignity to everyone. The police and society must respect homosexuals' private lives the same way they respect heterosexual individuals. If heterosexuals can form organisations, so should homosexuals without any limitations. There should be equal access to health despite one's sexual orientation. The next section shows how the Botswana courts managed to decriminalise sodomy laws.

4.3.1 BOTSWANA

Kanane v, the State (Kanane case)³⁵⁸ the accused was charged with engaging in unnatural acts and indecent practises in terms of Sections 164 and 167 of the Penal Code. The applicant challenged these two sections, stating that they were discriminatory towards male persons on the grounds of gender and that the section prevented male persons from fully enjoying the right to assemble freely and associate with other persons. Its litigation began in 1994 and continued until 2003, when the Court of Appeal ruled that society was not ready to decriminalise sodomy. President Mogae ordered the police not to arrest people based on their same-sex behaviour. This judgement made three important points, namely: the idea that homosexuality was western and the result of the white man's influence; secondly, the court stated that it was not yet the right time to decriminalise homosexual acts; and lastly, it asserted that Sections 164 and 167 of the Penal Code prohibit practises by any person, regardless of their sexual orientation. The Kanane case concerned the last arrest under Sections 164 and 167 of the Botswana Penal Code. In 2016, the former President of Botswana expressed his view that "we as Africans must admit that the world is changing, therefore, we must leave some of our beliefs and convictions about life behind."³⁵⁹

³⁵⁸ High Court Criminal Trial 9 of 1995.

³⁵⁹ MK Lavers 'Former Botswana president speaks in support of LGBTI rights' Washington Blade 21 January 2016 <https://www.washingtonblade.com/2016/01/21/former-botswana-president-speaks-in-support-of-lgbt-rights/> (accessed on 14 November 2022).

It is important to note how Botswana managed to decriminalise sodomy laws, as it will also help Zimbabwe and Nigeria. In *Attorney-General v. Rammoge*,³⁶⁰ the court found that the human rights group Lesbians, Gays, and Bisexuals of Botswana (LEGABIBO) must be allowed to register as a society, and the court stated that, in Botswana, all persons have the right to form associations regardless of their sexual orientation. The court further declared that the Minister of Labour and Home Affairs' refusal to allow LEGABIBO to be registered was unconstitutional and must be reviewed and set aside on the grounds of illegality.³⁶¹ *Letweletse Motshidiemang v. the Attorney-General* (LEGABIBO as amicus curiae)³⁶² is also a significant case in the decriminalisation of sodomy laws. The court found that it is not the business of the law to regulate private consensual sexual activities between adults. This case proved that LGBTIQ+ people in Botswana experienced serious violence that was never reported; they experienced discrimination based on their sexual orientation and gender identity when accessing health care, and Sections 164 and 167 of the Penal Code are an example of structural stigma. Since the Court of Appeal had earlier ruled that it was not yet time to decriminalise sodomy laws in the *Kanane* case, in the *Letsweletse* case the argument was made that the time had come for decriminalisation. They noted the following points to this effect:

The President of Botswana, Dr. Mokgweetsi Masisi, acknowledged LGBTIQ+ people's rights and said there are a number of same-sex relationships in Botswana and that the LGBTIQ+ community's rights have been violated, and they have suffered in silence because they are afraid of being discriminated against. The president explicitly stated that "...just like other citizens, they deserve to have their rights protected."³⁶³ This was an acknowledgement by the executive that there is a need to protect the LGBTIQ+

³⁶⁰ [2017] 1 BLR 494 (CA).

³⁶¹ Ibid.

³⁶² MAHGB-000591-1 6. 'Botswana; Criminalisation of consensual gay sex is unconstitutional' African Legal Information Institute (12 June 2021) <https://africanlii.org/article/20190612/botswana-criminalisation-consensual-gay-sex-unConstitutional> (accessed 14 November 2022).

³⁶³ 'New president acknowledges LGBTI people's rights' MambaOnline – Gay South Africa online 10 December 2018 <https://www.mambaonline.com/2018.12/10/botswanas-new-president-acknowledges-lgbti-peoples-rights/> (accessed on 14 November 2022).

population in Botswana. The legislature did the same by passing the Employment (Amendment) Act, which protects employees' contracts on the grounds of sexual orientation and gender identity in accordance with Section 23(d). The judiciary finally chipped in by acknowledging that the rights and freedoms of LGBTIQ+ people exist and they need to be protected. In the *Rammoge* case, the court highlighted that "evidence shows that the attitude in Botswana has softened in relation to issues of gay and lesbian rights."³⁶⁴

With all three arms of government being of the same opinion with regards to protecting LGBTIQ+ rights, the court ruled that the time has come to decide on the constitutionality of the sections that criminalise consensual adult same-sex activities.

4.3.2 THE RIGHT TO EQUALITY AND NON-DISCRIMINATION

The right to equality and the right not to be discriminated against are included in the ICCPR,³⁶⁵ the African Charter and all national constitutions in Africa, including the Zimbabwean and Nigerian constitutions. The Zimbabwean Constitution does not include sexual orientation as a prohibited ground of discrimination and allows marriage between persons of the opposite sex only.³⁶⁶ Section 78(3) of the Zimbabwean Constitution prohibits "persons of the same sex" from marrying each other.³⁶⁷ The Nigerian Constitution, on the other hand, prohibits discrimination on the ground of sex.³⁶⁸ The SSMPA is unconstitutional and a violation of the right of LGBTIQ+ persons to non-discrimination on the ground of sex (which also includes non-discrimination based on sexual orientation as per *Toonen v. Australia*). General Comment No. 20 of the CESCR provides that "other status" in the non-discrimination clause must include sexual orientation and gender identity.³⁶⁹ Any law that goes against the non-

³⁶⁴ n 378 above.

³⁶⁵ Article 26.

³⁶⁶ Section 56 of the Zimbabwean Constitution.

³⁶⁷ Section 78(3) of the Zimbabwean Constitution.

³⁶⁸ Section 42 of the Constitution of the Federal Republic of Nigeria 1999.

³⁶⁹ Article 32.

discrimination clause is null by virtue of Section 45(1)(b) of the Nigerian Constitution.³⁷⁰

Both constitutions provide for the right to equality and non-discrimination, and the right to dignity³⁷¹ and the rights to privacy.³⁷² In addition, they place a fundamental constitutional duty on the state to observe, promote, fulfil, respect, and protect individual rights and fundamental freedoms in the Bill of Rights.³⁷³ My argument for the decriminalisation of sodomy laws is based on these rights, which have been mentioned above and are included in the constitutions of Zimbabwe and Nigeria.

Provisions in the SSMPA criminalising homosexuality play a key role in violations against the LGBTIQ+ community and creating an environment prone to violence.³⁷⁴ The Constitution obligates state institutions and public officials to respect, protect, and promote the rights of individuals, and therefore the Nigerian government is obliged to repeal laws that impair the enjoyment of rights, especially those that criminalise sodomy. The same applies to Zimbabwe; the obligation to promote individual rights means that governments must take steps, including legislative action, to eliminate situations that lead to violations of the Bill of Rights.³⁷⁵ Because of the inherently discriminatory nature of the SSMPA of Nigeria and Sections 56 and 78(3) of the Zimbabwean Constitution, which adversely affect the enjoyment of constitutionally guaranteed rights and fundamental freedoms, it is almost impossible for these two governments to meet their obligation to "promote, respect, and protect individual rights."

³⁷⁰ Section 45(1)(b) of the Constitution of the Federal Republic of Nigeria 1999.

³⁷¹ Ibid, sec 34 of the Constitution of the Federal Republic of Nigeria 1999 and section 51 of the Zimbabwean Constitution.

³⁷² Section 37 of the Constitution of the Federal Republic of Nigeria 1999 and section 57 of the Zimbabwean Constitution.

³⁷³ Preamble of the Zimbabwean and Nigerian Constitutions respectively.

³⁷⁴ D Ugwu 'Nigerian same-sex marriage ban infringes individual rights' <http://jurist.org/hotline/2011/12/damian-ugwu-nigerian-marriage.php> (accessed 04 October 2022).

³⁷⁵ *Social and Economic Rights Action Centre v Nigeria*, Communication 155/96 para 466.

Article 26 of the ICCPR gives equal protection to all under the law and prohibits discrimination on several grounds, including "sex." The case of *Courson v. Zimbabwe*,³⁷⁶ was withdrawn before the African Commission decided on it. However, in a statement accompanying one of its communications, the Committee noted that the purpose of the principle of non-discrimination, as enshrined in Article 2 of the African Charter, allows it to be used for many reasons, including sexual orientation. It reiterates that the goal is to ensure equal treatment for everyone. However, this reference to sexual orientation is incidental and does not set a precedent as far as the subject is concerned.³⁷⁷ However, the *obiter dictum* can still be used as an indication of the thinking of the African Commission and gives impetus towards incorporating sexual orientation under the prohibited grounds of discrimination in Zimbabwe and Nigeria.

Though the constitutions of Zimbabwe³⁷⁸ and Nigeria³⁷⁹ do not list sexual orientation as a prohibited ground of discrimination, the listed grounds are not exhaustive. This allows persons suffering discrimination on grounds other than those indicated to mount a challenge.³⁸⁰ This approach was adopted by the ECHR when it mentioned that sexual orientation is included in the term "other status" in Article 14 of the Convention,³⁸¹ since the list is not exhaustive.³⁸² General Comment No. 20 (Non-Discrimination in Economic, Social, and Cultural Rights)³⁸³ of the Committee on Economic, Social, and Cultural Rights (CESCR) also include sexual orientation and

³⁷⁶ *William Courson v Zimbabwe* Communication 136/94, (2000) AHRLR 335 (ACHPR 1995) 8th Annual Activity Report.

³⁷⁷ *Zimbabwe Human Rights NGO Forum v Zimbabwe* Communication 245/02, (2006) AHRLR 128 (ACHPR 2006) (21ST Activity Report) (Zimbabwean Political Violence case) para 168. This observation is made obiter: as the case did not return on the issue of sexual orientation.

³⁷⁸ Section 56(3).

³⁷⁹ Section 42.

³⁸⁰ J Fitzgerald 'The road to equality? The right to equality in Kenya's new Constitution' (2010) 58.

³⁸¹ *Sutherland v United Kingdom* ECHR Application 25186/94, Report of 1 July 1997 para 50.

³⁸² M Thomas 'Teetering on the blink of equality: Sexual orientation and international constitutional protection' (1997) 366 *Boston College Third World Journal* 380.

³⁸³ Article 2, para 2.

gender identity under "other status" in Article 2 on prohibited grounds of discrimination.³⁸⁴ Thus, the open-ended clauses could cover other categories and circumstances that may arise, although these were not initially listed in the legislation.³⁸⁵ This interpretation approach gives judges in Zimbabwe and Nigeria the discretion to extend the list of prohibited grounds for discrimination to include sexual orientation. However, decisions reached by regional human rights bodies such as the ECHR on the decriminalisation of homosexuality are not binding on Zimbabwe and Nigeria, but they have persuasive value.

4.3.3 RIGHT TO HEALTH

CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health, Article 12 states that health is an important human right crucial for exercising other human rights.³⁸⁶ Everyone has the right to enjoy the highest standard of health conducive to living a life of dignity. The right to health is a socio-economic right, and everyone is entitled to its full enjoyment without any distinction between persons. The principle of non-discrimination in relation to health facilities should be enforced and extended to LGBTIQ+ people. The anti-sodomy laws function as a barrier to accessing the right to health for LGBTIQ+ persons. Decriminalizing sodomy will ensure that everyone has access to the right to health without discrimination. The right to health places obligations on states to take proactive measures to ensure state entities respect and protect the right. It is incorporated in the Banjul Charter and the ICCPR, to which Zimbabwe and Nigeria are state parties and, as a consequence, have obligations to fulfil the provisions of the treaties. States should take positive measures not to violate the right to health, including removing any law that prevents the full enjoyment of the right to health. They should raise awareness in society and educate health professionals to treat LGBTIQ+ persons just like any other person when it comes to accessing health care and acquiring medication. States must refrain from interfering with the enjoyment of the right to health. States must protect and fulfil the

³⁸⁴ CESCR General Comment No.20, Article 32.

³⁸⁵ *ibid* 385.

³⁸⁶ <https://www.refworld.org/pdfid/4538838d.pdf> (accessed on 24 December 2022).

right to health of all persons without discrimination. They should educate and sensitise the community, and they should enforce general criminal laws that protect the right to health without any discrimination.

In *Odafe and Others v. Attorney General and others*,³⁸⁷ the plaintiffs, who were HIV/AIDS positive, challenged their continuous detention and segregation and argued that they amounted to breaches of their rights to dignity and freedom from discrimination as guaranteed by Sections 42(1) and 42(2) of the Constitution, respectively. In addition, they argued that the failure of prison officials to provide them with proper medical care and treatment amounted to inhumane and degrading treatment, contrary to Section 34(1)(a) of the Nigerian Constitution and Article 5 of the African Charter on Human and Peoples' Rights, and a breach of their right to life, contrary to Section 33(1)(4) of the Constitution. The court found that since the state has incorporated the African Charter and its socio-economic rights into domestic law, it must observe its provisions.³⁸⁸ This requires the courts to evaluate the state's socio-economic policies for compliance with both the Charter and the Constitution. In this case, the state failed in its obligations. The state has a responsibility to all prison inmates, regardless of the offences they have allegedly committed. The present inmates are in no position to help themselves, even if they wanted to, since they cannot access a doctor. In such circumstances, they should be relocated to a public hospital for treatment. This case is a good example of how the right to health is particularly important and must be enjoyed by everyone. This extends to the LGBTIQ+ community. They must enjoy this right without being harassed, stigmatised, or discriminated against by health care officials in public hospitals.

The Zimbabwean and Nigerian governments are quiet when it comes to sexual minorities' right to access health care, and they do not deal with the lack of access to this right. In Zimbabwe, as mentioned earlier in Chapter 1, the late former President Robert Mugabe once ordered health officials not to give Tatelicious her HIV pills because she came out as a transgender woman. These issues must be addressed

³⁸⁷ Suit No.FHC/PH/CS/680/2003.

³⁸⁸ *Ubani v Director SSS* 1999 11 NWLR Pt. 625 129.

accordingly, and the government must implement laws that guarantee the full enjoyment of the right to health without any limitation.

4.3.4 RIGHT TO PRIVACY

The ECtHR in the 1981 case of *Dudgeon v. United Kingdom* found that sodomy laws violated human rights by unreasonably interfering with an individual's private life. Section 57 of the Zimbabwean Constitution and Section 37 of the Nigerian Constitution protect the right to privacy. The US Supreme Court ruling recognises everyone's right to have spheres of private intimacy in which relationships can be established without any government intervention. As Blackmun J stated in the case of *Bowers v Hardwick*,³⁸⁹ the right of individuals to have intimate relationships in their own homes appears to be at the heart of constitutional privacy protections. A similar view was taken by the US Supreme Court in the cases of *Griswold v. State of Connecticut*³⁹⁰ and *Lawrence v. Texas*,³⁹¹ where it stated that privacy goes beyond the protection of physical space.³⁹² It is a right that allows all people to establish and maintain relationships without outside interference.³⁹³ Similarly, in South Africa, in the case of *National Coalition for Gay and Lesbian Equality v. Minister for Justice*³⁹⁴ the Constitutional Court observed that expressing one's sexuality and forming sexual relationships were at the core of this area of private intimacy.³⁹⁵ The Court ruled that there is a sphere of private intimacy and autonomy where sexual expression between consenting adults is not harmful to anyone. The Court stated that if expressing one's sexuality is done with consent and without harming anyone, an invasion of such is a breach of privacy.

³⁸⁹ *Bowers v Hardwick* 478 (1986) 208.

³⁹⁰ *Griswold v State of Connecticut*, 381 US 479 (1965).

³⁹¹ *Lawrence v Texas* 539 US 558 (2003) para 41.

³⁹² *Ibid.*

³⁹³ *Ibid.*

³⁹⁴ *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 2 SA (CC) 1.

³⁹⁵ *Ibid.*

In the *Toonen case*,³⁹⁶ the HRC found that laws criminalising homosexual relations between consenting adults (Section 122(a) and (c) and Section 123 of the Tasmanian Criminal Code) violated Article 2, paragraph 1, and Article 17 of the ICCPR. The HRC found that these sections allow the police to enter a household if they suspect that individuals living there are involved in homosexual activities, thereby violating the right to privacy.

State interference with privacy is justifiable provided that such intervention is reasonably proportionate to the harm suffered.³⁹⁷ However, private intervention in consensual adult homosexual activity does not protect citizens from harm. It represents perceived symbolism and reinforces prejudice.³⁹⁸ It is therefore unfair to impose criminal penalties on individuals who engage in private consensual homosexual activity, especially when the private consensual heterosexual activity is not a crime.

The right to privacy should be read to include sexual privacy and human dignity. Sexual acts between consenting adults should be a matter of privacy, and arbitrary state interference should be banned. Homosexual sex should be respected the same way the state respects heterosexual sexual activities. They are considered intimate matters that the state should not interfere with, so why is the state interfering with the private sexual activities of homosexual adults? Is this not discrimination based on sexual orientation? Does it mean private sex is only respected when it comes to heterosexual couples? If that's the case, it is clear that homosexuals' persons do not enjoy equal protection before the law, and they are considered second-class citizens.

The recognition of the right to privacy of homosexuals only lays the basis for the equal application of the law to homosexuals and heterosexuals.³⁹⁹ The right to privacy

³⁹⁶ *Toonen v Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

³⁹⁷ Commonwealth Human Rights Initiative 'The impact of criminalising same-sex sexual conduct in the Commonwealth' (2011) 60.

³⁹⁸ *Ibid*, 61.

³⁹⁹ D Kane 'Homosexuality and the European Convention on Human Rights: What rights' (1998) 11 *Hastings Comparative and International Law Review* 447.

includes the right to have sexual relations done in private and the right to make fundamental decisions about intimate relationships without being punished.⁴⁰⁰ The right to privacy is protected by the ICCPR,⁴⁰¹ and by the Zimbabwean and Nigerian Constitutions. The Human Rights Committee also based its findings in *Toonen* on the right to privacy. Sexual acts between consenting adults done in private by homosexual persons should be respected, and the state should not interfere with such acts the same way it does not interfere with the sexual activities of heterosexual persons. This is the essence of the right to privacy and should be applied to all citizens without discrimination (especially based on sexual orientation).

4.3.5 RIGHT TO HUMAN DIGNITY

Dignity is the right of a person to be valued and respected for their own sake.⁴⁰² Section 51 of the Zimbabwean Constitution and Section 34(1) of the Nigerian Constitution, provide for every person's inherent right to dignity and require that this be respected and protected. Human dignity is an expression of respect and value given to each human being as humanity.⁴⁰³ It gives states a mandate to respect every citizen.⁴⁰⁴ Human dignity can be used as a tool to include sexual orientation rights in Zimbabwe and Nigeria.⁴⁰⁵ Human beings should be respected irrespective of their sexual orientation; homosexuals must be respected and enjoy the same rights as heterosexual individuals because they are all humans. The criminal prohibition against

⁴⁰⁰ E Cameron 'Sexual orientation and the Constitution: A test case for human rights' (1993) 110 *South African Law Journal* 464.

⁴⁰¹ C Heyns and W Kaguongo 'Constitutional human rights law in Africa' (2006) 22 *South African Journal on Human Rights* 673.

⁴⁰² Nnamdi Akani, A critical appraisal of the right to human dignity vis-à-vis the rights of women in Nigeria. December 2019. https://www.researchgate.net/publication/3414664153_A_CRITICAL_APPRAISAL_OF_THE_RIGHT_TO_HUMAN_DIGNITY_VIS_A_VIS_THE_RIGHTS_OF_WOMEN_IN_NIGERIA (accessed on 15 November 2022).

⁴⁰³ E Lorraine 'Human dignity as a rights-protecting principle' (2004) 17 *National Journal of Constitutional Law* 325.

⁴⁰⁴ C Jackson 'Constitutional dialogue and human rights: States and transnational constitutional discourse' (2004) 27 <https://scholarship.law.georgetown.edu/facpub/106/> (accessed on 9 February 2023).

⁴⁰⁵ A Jeffrey 'Dignity, legal pluralism and same-sex marriage' (2010) 75 *Brooklyn Law Review* 794.

gays and lesbians engaging in sexual conduct infringes on their right to human dignity. Therefore, the courts in Zimbabwe and Nigeria must declare Section 78(3) and the SSMPA, respectively, unconstitutional on the basis that they violate the right to human dignity of homosexuals as enshrined in Sections 51 and 34 of the Zimbabwean and Nigerian constitutions, respectively. These laws also go against one of the founding values of the Constitution, as provided in the preamble of these two countries' constitutions: protecting, promoting, and respecting citizens' fundamental human rights. Section 78(3) of the Zimbabwean Constitution and the Nigerian SSMPA violate the human dignity of homosexuals by not allowing them to decide with whom to engage in intimate relations. Denying homosexuals the freedom to choose intimate partners while heterosexuals enjoy this freedom undermines their dignity as inherently "free persons." This law must treat gays and lesbians in the same manner as any other adult citizen.

In *the State v. Willard Chokuramba*⁴⁰⁶ the court ruled that judicial corporal punishment violated Section 53 of the Constitution⁴⁰⁷ and was declared unconstitutional. This Zimbabwean court found that all prisoners shall be treated with respect due to their inherent dignity and value as human beings. The court found that the concept of human dignity must be a "foundational value" when interpreting the constitution. The court asserted that

"Human dignity is inherent in every person all the time and regardless of circumstances or status of the person. All human beings are equal, in the sense that each has inherent dignity in equal measure."

In *Obediah Makoni v. Commissioner of Prisons & Minister of Justice Legal & Parliamentary Affairs*,⁴⁰⁸ in which the applicant challenged life imprisonment without the possibility of judicial review or parole as unconstitutional because it amounts to inhuman and degrading treatment and constitutes a violation of human dignity in

⁴⁰⁶ CCZ 10/19, Constitutional Application No. CCZ 29/15. 3 April 2019.

⁴⁰⁷ Section 53 guarantees the right to be protected from physical or psychological torture or to cruel, inhuman or degrading treatment or punishment.

⁴⁰⁸ Constitutional Application CCZ 48 of 2015 [2016] ZWCC 8 (13 July 2016).

breach of Sections 51 and 53 of the constitution. He argued that his dignity had been violated by the sentence. The court mentioned that Sections 51 and 53 of the Zimbabwean Constitution have a special status. Section 86(3)(b) and (c) stipulate that no law shall limit and no person shall violate the right to human dignity and the right not to be tortured or subjected to cruel, inhuman, or degrading treatment or punishment. This means that these two rights are inviolable and cannot be circumscribed by reference to the rights and freedoms of others, as stated in Section 86(1). It is also important to note that these rights are not derogated from by any law of general application contemplated under Section 86(2).

In *Onuoha Kalu v. The State*⁴⁰⁹ the applicant challenged the constitutionality of the death penalty for murder (Section 319(1) of the Criminal Code of Lagos State in south-western Nigeria). The argument was that this section violates the right to life⁴¹⁰ and human dignity.⁴¹¹ The court ruled that the section did not violate either of the listed provisions because the Nigerian Constitution allowed the penalty. In my view, such a judgement is biased, as the right to life and human dignity are fundamental human rights that must not be limited by the state. Furthermore, the constitution stipulates that the death penalty should be given to serious crimes. In general, homosexual activities cannot be considered serious crimes because they do not harm anyone and are private sexual activities between consenting adults that deserve to be respected by the state. There must be no state interference. These cases are especially important because they show how the Zimbabwean courts have interpreted the right to human dignity in different circumstances, among which one can say that this right should be extended to homosexuals and no law must limit the full enjoyment of this right as there should be equality in human dignity.

⁴⁰⁹ [1998] 13 NWLR 531.

⁴¹⁰ Section 30(1) of the Nigerian Constitution.

⁴¹¹ Section 31(1).

4.3.6 RIGHT TO PERSONAL LIBERTY

Criminalisation of same-sex relationships between consenting adults done in private denies a person's right to choose his or her preferred intimate sexual partner and undermines his individual autonomy. Sexual orientation is innate to a human being and an important attribute of one's personality and identity. The right to liberty also encompasses the right to sexual autonomy. Therefore, this right must be respected and protected by the state.

4.3.7 RIGHT TO FORM ORGANISATIONS AND FREEDOM OF ASSOCIATION

The right to freedom of association is violated when a state refuses to register an LGBTIQ+ organisation or allow clubs and societies that advocate for LGBTIQ+ groups. The Same-Marriage Act in Nigeria states that it is illegal to register gay clubs, societies, or organizations,⁴¹² and the prosecution extends to any activities meant for their sustenance, including processions and meetings.⁴¹³ It is also illegal to register, operate, or participate in gay clubs or organizations, or to make a public show of same-sex amorous relationships.⁴¹⁴ It is further criminal to aid or abet any of these acts or processes.⁴¹⁵ Zimbabwe, on the other hand, does not directly ban LGBTIQ+ organisations from being formed, but these groups are regularly attacked by the police. Chapter 10:04 of the Censorship and Entertainment Control Act⁴¹⁶ prohibits importing, producing, and disseminating "undesirable publications, pictures, statues, and others," and it is this law that has been used to confiscate pamphlets and publications of GALZ (a Zimbabwean NGO that advocates for LGBTIQ+ rights).⁴¹⁷ These acts by Zimbabwe and Nigeria directly infringe on the right to freedom of association, and states must

⁴¹² Sec 4(1) of the Same Sex Prohibition Act 2014.

⁴¹³ Section 4(1).

⁴¹⁴ Section 5(2). The offence is charged with 10 years of imprisonment.

⁴¹⁵ Sect 5(3). The offence is 10 years imprisonment.

⁴¹⁶ Act No. 37 of 1967.

⁴¹⁷ Voice of America (VOA), 'Gay Zimbabweans Fight Stigma, Harsh Laws' 12 January 2017. <https://www.voanews.com/a/zimbabwe-gay-rights-lgbt/3673999.html>. (accessed on 2 August 2022).

ensure that they put in place laws that protect this right in an open and democratic society.

In, *Eric Gitari v. Non-Governmental Coordination Board*,⁴¹⁸ the National Gay and Lesbian Human Rights Commission (NGLHRC) applied to the board to register an organisation under the Non-Governmental Organisation (NGO) Coordinating Bodies Act. The NGO Coordinating Body, a Kenyan government agency, rejected the group's application for registration in March 2013. In rejecting the application, the board said the organisation's name was "unacceptable" and that it could not register because the Kenyan Penal Code criminalises gay and lesbian associations. The organisation challenged the board's decision in the High Court on the grounds that it violates constitutional rights to liberty, equality, and non-discrimination. The High Court found that the Commission had a constitutional duty under Article 21(1) to observe, respect, protect, promote, and implement, among other things, the rights and fundamental freedoms guaranteed in the Bill of Rights and, in particular, to uphold and address the needs of vulnerable groups as stated in Article 21(3).⁴¹⁹ The constitutional duty on the Board, as a state entity, is to uphold the Constitution, which involves protecting, among other rights, the right of freedom of association of "every person," which includes the right to form "an association of any kind." According to the Kenyan court, the Board cannot rely on its own moral conviction as a basis for rejecting an application, as this is outside the Board's mandate and a negation of its constitutional obligations.

4.3.8 FREEDOM FROM TORTURE AND CRUEL, INHUMAN, AND DEGRADING TREATMENT

Freedom from torture and cruel, inhuman, or degrading treatment⁴²⁰ cannot be limited. Section 78(3) of the Zimbabwean Constitution and the SSMPA of Nigeria are contrary to the principles of equality, liberty and human dignity and must be declared unconstitutional. Even if African values and morals were the basis for limiting the

⁴¹⁸ *Eric Gitari v Non-Governmental Coordination Board and 4 Others* [2015], Petition 440 of 2013 High Court of Kenya para 127.

⁴¹⁹ Ibid.

⁴²⁰ Section 53 of the Zimbabwean Constitution, and section 34(1)(a) of the Nigerian Constitution.

application of the Bill of Rights to gays and lesbians, the consequences of denial of LGBTIQ+ rights do not outweigh the effects of murder, illegal imprisonment, police brutality, and discrimination caused by the non-recognition of LGBTIQ+ rights.

Given the constitutional requirements for limiting rights,⁴²¹ the claim that the Bill of Rights does not protect homosexuals and that anti-homosexual laws are justified by African culture and morality is constitutionally untenable. State agencies and all public officers have a duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, minorities, and members of marginalised groups, both ethnic and religious. Gays and lesbians are part of the "vulnerable and marginalised" groups in Zimbabwe and Nigeria, requiring constitutional protection. Their vulnerability and exclusion are based on their sexual orientation.

4.4 INCORPORATION OF INTERNATIONAL LAW

Section 34 of the Zimbabwean Constitution stipulates that the state must enact and implement laws to fulfil its international obligations relating to human rights and fundamental freedoms. Section 12(1) of the Nigerian Constitution states that international law or international treaties become law when incorporated into domestic law. Furthermore, binding international treaties, to which Zimbabwe and Nigeria are parties, obligate states to take affirmative action to meet their international obligations, and the Constitution requires state institutions to enact and implement legislation to meet their international obligations on human rights and fundamental freedoms.

The HRC in *Toonen*⁴²² ruled that anti-sodomy laws constitute discrimination and violate the right to privacy of homosexuals as guaranteed by the ICCPR, regardless of whether the laws are enforced or not.⁴²³ Gay and lesbian people in Zimbabwe and Nigeria face invasions of their privacy. The police break into the houses, harass, and

⁴²¹ Section 45(1) of the Nigerian Constitution, and section 86 (2) limitation of rights should be in terms of a law of general application and must be fair, reasonable, and justifiable.

⁴²² *Toonen* para 8.7.

⁴²³ *Ibid.*

abuse them.⁴²⁴ As Zimbabwe and Nigeria are parties to the ICCPR, which promotes the right to equality, the core values of their constitutions include the right to dignity,⁴²⁵ non-discrimination,⁴²⁶ freedom of association,⁴²⁷ and the freedom from torture and inhuman treatment,⁴²⁸ they have an international obligation to comply with these provisions. For this reason, the anti-sodomy laws are a direct violation of the ICCPR, and they also violate the general principles of universality,⁴²⁹ equality and non-discrimination of human rights under international human rights law.

4.5 CONCLUSION

This chapter advanced a constitutional argument for the decriminalisation of homosexuality in Zimbabwe and Nigeria. It is argued that Section 78(3) of the Zimbabwean Constitution and the SSMPA of Nigeria should be declared unconstitutional by the courts for violating several rights guaranteed by the Constitution and the states' obligations under the ICCPR. Sodomy laws violate the rights to dignity, privacy, health, equality, non-discrimination, freedom of association, and the right to life. These human rights are already protected and enshrined in the Nigerian and Zimbabwean constitutions, and they must apply to everyone without any discrimination. Homosexuals must enjoy the same rights as heterosexuals because they are all equal before the law and must enjoy equal protection of the law. It is unreasonable to limit these rights simply on the basis of homosexuality.

⁴²⁴ Kenya Human Rights Commission, 18.

⁴²⁵ Article 10 of the ICCPR

⁴²⁶ Article 26 of the ICCPR.

⁴²⁷ Article 22 of the ICCPR.

⁴²⁸ Article 7 of the ICCPR.

⁴²⁹ While there has been a lively debate on the universality and relativity of human rights, at least, it can be argued that the basic human rights as non-discrimination and equality in dignity are recognised as belonging to very widely agreed fundamental or core human rights. It is my argument that denial or limitation of these rights would be difficult to accept.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 INTRODUCTION

Previous chapters have analysed the various international human rights instruments that Zimbabwe and Nigeria have ratified and which provide for the protection of LGBTIQ+ rights, prohibit discrimination based on sexual orientation, and advocate for equality of all before the law. Thus, the prohibition of same-sex marriages and the criminalisation of sodomy is a violation of Zimbabwe's and Nigeria's obligations under international law and a violation of human rights. This chapter provides the conclusion and the recommendations addressing the discriminatory tendencies that LGBTIQ+ persons face due to their sexual orientation in a bid to be fully and effectively included as equal members of Zimbabwean and Nigerian societies.

It is therefore submitted that the laws that prohibit same-sex marriage and that criminalise sodomy discriminate against LGBTIQ+ persons based on their sexual orientation and should be declared unconstitutional and void because these laws subject the LGBTIQ+ community to human rights violations that are based on their actual minority sexual orientation. It is argued that Zimbabwe and Nigeria are lagging behind in implementing the international human rights instruments at a domestic level, which delays the realisation of meaningful human rights protection for every citizen, regardless of their sexual orientation. It is submitted in this dissertation that the Constitution, the Criminal Code, and the Same-Sex Marriage (Prohibition) Act need to be amended to capture the best interests of all citizens without any discrimination. In order to achieve the full realisation of LGBTIQ+ rights in Zimbabwe and Nigeria, activists, advocates, and writers need to use strategic litigation processes. Furthermore, the states should be involved in sustained advocacy campaigns and public education on sexual minority rights. This can be done in collaboration with mainstream human rights organisations.

5.2 RECOMMENDATIONS

5.2.1 CONSTITUTIONAL AMENDMENT

Several legal reforms must be adopted in Zimbabwe and Nigeria for the protection and promotion of sexual minority rights, starting with the Constitution. The Zimbabwean Constitution has generous human rights provisions that extend protection to LGBTIQ+ people. These are the equality and non-discrimination clauses, but they must be amended to explicitly include sexual orientation as a prohibited ground of discrimination.⁴³⁰ Alternatively, this may be done by the adoption of the term "any other status," following the list of the grounds upon which discrimination is prohibited. However, the greatest impediment is Section 78(3) of the Zimbabwean Constitution, which clearly states that persons of the same sex are prohibited from marrying each other.⁴³¹

From the explicit provisions of Section 45 of the Nigerian Constitution, it is clear that the fundamental rights guaranteed by the Constitution cannot be restricted on the basis of culture or religion alone. Therefore, the SSMPA cannot be justified simply because it promotes African cultural values. It is argued that certain standards must be adhered to that are compatible with democracy and freedom. The African Charter on Human and People's Rights (African Charter) obliges individuals to uphold African values in the spirit of tolerance.⁴³² By promoting African values in the spirit of intolerance, the SSMPA clearly violates the African Charter, a treaty that forms part of the Nigerian *corpus juris*, having been domesticated pursuant to Section 12 of the Nigerian Constitution. Sodomy must be decriminalised in Zimbabwe and Nigeria. The criminalisation of sodomy is not only discrimination against homosexuals, but its continued criminalisation also serves to suppress general rights such as freedom of association, personal autonomy, inherent dignity, and privacy. As a complement to legislation, measures should be taken aimed at raising public awareness of the need

⁴³⁰ Section 56 of the Zimbabwean Constitution 2013.

⁴³¹ Ibid, section 78(3).

⁴³² African Charter on Human and Peoples' Rights, art 29(7).

to recognise, protect, and promote the rights of LGBTIQ+ persons. Finally, change at the personal level is most important. Individuals can learn to reject hate speech, stigma, and homophobia. The study argues that it is time for Zimbabweans and Nigerians to recognise and respect human differences. LGBTIQ+ people are part of humanity and have equal rights and obligations. A continued culture of denial further fosters discrimination and inhumane treatment of sexual minorities. In Zimbabwe, local LGBTIQ+ organisations, such as the Zimbabwe Gay and Lesbian Association (GALZ), which monitor and report human rights abuses against the LGBTIQ+ community, serve as a starting point to ensure that LGBTIQ+ rights are recognised, protected, and promoted. GALZ has also established networks with local law societies and organisations such as the Zimbabwe Lawyers for Human Rights and continues to operate in a challenging social and political context.⁴³³ In Nigeria, on the other hand, much needs to be done because organisations or clubs that support LGBTIQ+ rights are banned.⁴³⁴

Additionally, the constitution should be amended to define the concept of marriage. This should provide for marriage as the union of two consenting adults, regardless of their sex and sexual orientation. This would facilitate the inclusion of same-sex marriages as a type of marriage. This would also entail the amendment of the Marriage Act and Matrimonial Causes Act to reflect the marriage of persons of the same sex on the one hand and to extend the provisions that govern the proprietary consequences of heterosexual marriages upon their dissolution to same-sex marriages on the other hand.

Alternatively, the legislature could enact a civil partnerships act. This would have the effect of catering for the marriage or civil union (with the same rights and responsibilities as a civil marriage) of same-sex partners and its legal consequences. This is to safeguard their contractual obligations and to pave the way for the formalisation of the institution of marriage for both homosexuals and heterosexuals. In

⁴³³ E Mandipa 'The suppression of sexual minority rights: A case study of Zimbabwe' in S Nawase & A Jjuuko (eds), *Protecting the human rights of sexual minorities in contemporary Africa* (Pretoria University Law Press 2017) 151.

⁴³⁴ Section 5 of Same-Sex Marriage (Prohibition) Act 2013.

South Africa, the Civil Union Act, which was enacted in 2006, provides for the legalisation of same-sex marriages. Another example is the Danish Registered Partnership Act No. 372 of June 7, 1989, in Denmark, which provides for the registration of same-sex partnerships. These have the same consequences as those accorded to married heterosexual couples. Upon their registrations, the partners are subject to the Danish Marriage Acts, tax and social security legislation, as well as the Law of Succession. The registered partners also incur support obligations towards each other. Furthermore, the requirements for the termination of registered partnerships are the same as those for marriages.⁴³⁵

Further, Section 56(3) of the Zimbabwean Constitution can be amended by the inclusion of the term "other status." This has the effect of capturing non-enumerated grounds of discrimination. Thus, sexual orientation can be secured under such a provision to ensure the promotion and protection of LGBTIQ+ persons. Alternatively, Section 56(3) can be amended to include the term "sexual orientation" to strengthen the protection afforded to LGBTIQ+ persons. Section 9(3)⁴³⁶ of the South African Constitution is an example of a non-discrimination clause that provides for sexual orientation as a prohibited ground of discrimination.

5.2.2 REPEAL OF SECTION 73(1) OF THE CODE AND THE SSMPA

It is submitted that Section 73 (1) of the Zimbabwean Code should be repealed as it prohibits consensual same-sex sexual activity between males. This is because it devalues and demeans the dignity of gay men and is incompatible with Zimbabwe's obligations under international law. In Nigeria, the Same Sex Marriage (Prohibition) Act should also be repealed because it contains hate speech, discrimination, and unequal treatment of the LGBTIQ+ community in Nigeria. Section 5(1) of the SSMPA prohibits the entry into a same-sex marriage or civil union with a penalty of fourteen years. Section 5(2) criminalises registering, operating, or participating in gay clubs,

⁴³⁵ Marianne Hojgaard Pedersen 'Denmark: Homosexual Marriages and New Rules Regarding Separation and Divorce' [1991- 1992] J of Family Law 290.

⁴³⁶ The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth.

societies, organisations, or making a public show of a same-sex relationship with a penalty of ten years' imprisonment. Section 5(3) criminalises administering, witnessing, aiding, or abetting the solemnization of a same-sex marriage or union or the support of LGBT organisations with a penalty of ten years' imprisonment.

Sharia law, in twelve northern Nigerian states, criminalises same-sex intimacy between both men and women. In June 2022, a sharia court sentenced three men to death by stoning for same-sex sexual acts in the northern state of Bauchi. In response to the sentence, LGBTIQ+ rights groups voiced fears that this could prompt similar cases in the country's states that apply Islamic law. William Rashidi, director of Equality Triangle, is reported to have said, "This sentencing opens the door for more draconian judgments against LGBTIQ+ persons." It is a call for violence.⁴³⁷

These provisions should be replaced with a section that decriminalises sodomy, same-sex relationships, and same-sex marriages. Therefore, the issue of consent should be the determining factor as to whether or not the offence of sodomy has occurred. This will remove the belittling of homosexuals, which fuels the discriminatory effect contained in the current legislation. *In National Coalition for Gay and Lesbian Equality v. Minister of Justice*⁴³⁸ the South African court found that the criminalisation of sodomy in private between consenting males is a severe limitation of their various rights. As a result, the law was struck down as unconstitutional. The Yogyakarta Principles⁴³⁹ also provides for the repeal of criminal and other legal provisions that prohibit or are, in effect, employed to prohibit consensual sexual activity among people of the same sex who are over the age of consent.

5.2.3 NATIONAL POLICY FOR THE PROMOTION AND PROTECTION OF THE RIGHTS OF LGBTIQ+ PERSONS

It is proposed that Zimbabwe and Nigeria adopt national policies for the promotion and protection of LGBTIQ+ persons. This is to facilitate their full and effective participation

⁴³⁷ <https://www.humandignitytrust.org/country-profile/nigeria/> (accessed on 19 October 2022).

⁴³⁸ [1998] ZACC 15, 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC).

⁴³⁹ Principle 2 recommendation B of the Yogyakarta Principles.

in all spheres of society. This will be aimed at eradicating the misconception that LGBTIQ+ persons are generally inferior to heterosexual persons. This will be aimed at systematically eradicating discrimination based on sexual orientation and gender identity, which legitimises oppression and prejudice meted out to LGBTIQ+ persons. The focus will be on promoting social awareness and the engagement in strategic partnerships that seek to foster the full and effective participation of LGBTIQ+ persons in the day-to-day activities of the country, just like heterosexual persons. In *S v. Banana*,⁴⁴⁰ the court held that Zimbabwe was a conservative society regarding sexual morality, and the court declined to pursue the decriminalisation of consensual sodomy between consenting adults. Thus, for LGBTIQ+ persons to be fully included in the Zimbabwean and Nigerian societies, it is imperative that the focus be on the criminalization and discrimination that hinder their full and effective participation in those societies.

5.2.4 SOCIAL INCLUSION

Human rights advocates and activists must ensure that they include the community, educate them about LGBTIQ+ people, and teach them how to accept everyone despite their differences. They should communicate in a language and tone that everyone understands, educate the judges, and influence people to allow social media to be a platform to learn, educate, and raise awareness rather than a platform that spreads hate speech and circulates discriminatory news.

5.2.5 STRATEGIC LITIGATION

Human rights organizations' advocacy for LGBTIQ+ rights and sexual orientation rights in Nigeria and Zimbabwe must be strategic. This means that they should argue based on existing human rights like the right to privacy, human dignity, health, equality, non-discrimination, freedom of association, and freedom from torture, cruel, inhumane, and degrading treatment. These rights are already enshrined in both constitutions, and they must apply to everyone regardless of their sexual orientation. They must argue that homosexuals must enjoy the same rights that heterosexual

⁴⁴⁰ 2000 (3) SA 88 (ZS).

persons enjoy when it comes to choosing their intimate partners, and the state must not interfere with their right to privacy by invading their private sexual lives.

5.3 CONCLUSION

From chapters two to five, this dissertation critically analyses the right to sexual orientation and LGBTIQ+ rights in Zimbabwe and Nigeria from a human rights perspective. Accordingly, it was indicated that the Zimbabwean and Nigerian legal frameworks are inadequate for the promotion and protection of the sexual orientation rights of LGBTIQ+ persons. As a result, it is fertile ground for discriminatory tendencies, which suppress an environment conducive to the full and effective realisation of LGBTIQ+ rights. Consequently, there is an urgent need to address the problems that emanate from the prohibition of same-sex relationships and the criminalization of same-sex sexual relations by focusing on the inclusion of sexual orientation as a prohibited ground of discrimination. There is also an urgent need to repeal Section 78(3) of the Zimbabwean Constitution as it is discriminatory against LGBTIQ+ persons. Furthermore, there is the need to amend Section 73(1) of the Nigerian Code and the SSMPA, which punishes consensual sodomy between consenting adults as it discriminates, belittles, and devalues gay men for expressing their sexual desires.

Zimbabwe and Nigeria must embrace sexual minority rights. This can be achieved by including sexual orientation as a protected ground of discrimination. Nigeria should repeal the SSMPA. This can be done by the introduction of a Civil Partnerships Act, which will extend the legal consequences of marriage to LGBTIQ+ persons, or by a national policy on the promotion and protection of LGBTIQ+ persons. Zimbabwe and Nigeria need to appreciate the diversity and differences in human existence for the realisation of the rights and rights-related claims of LGBTIQ+ persons. This is to enhance their full and effective participation in society. Lastly but not least, it should be noted that the realisation and protection of LGBTQ+ rights in Zimbabwe and Nigeria would not only benefit the LGBTIQ+ community. It also would help heterosexual couples in the sense that a homosexual will not marry a person of opposite sex, just to cover up their real sexual orientation from the public and continue with their same-sex relations in private. It saves partners from unnecessary trauma, pain, and

heartbreaks, as marriages will now be based on the true intentions of the partners to be with each other rather than one partner trying to hide his or her real sexual orientation from family and society. I conclude that teaching morals alone will not save Zimbabwe and Nigeria. People need to be taught how to respect human dignity and privacy for everyone and stop stigmatising, indoctrinating, and intimidating sexual minorities. Instead, everyone should be accepted despite their differences, in accordance with the developments in international human rights law and the evolving norms of national laws. The realisation of LGBTIQ+ rights is important for the sustainable development goals and the Vision 2030 (leaving no one behind). This vision entails that LGBTIQ+ persons must not be left behind.⁴⁴¹

⁴⁴¹ Universal Values: Principle two: Leave No One Behind (LNOB) is a transformative promise of 2030 Agenda for sustainable development goals. It represents the unequivocal commitment of all UN Member States to end all forms of poverty, end discrimination and exclusion, and reduce the inequalities and vulnerabilities that leave people behind and undermine the potential of individuals and of humanity as a whole. The United Nations Sustainable Development Group. <https://unsdg.un.org/2030-agenda/universal-values/leave-no-one-behind> (accessed on 9 February 2023).

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