

MIDLANDS STATE UNIVERSITY

FACULTY OF LAW

APPROVAL FORM

The undersigned certify that they have read and recommended to the Midlands State University for acceptance a research project entitled *A Critical Analysis of the Prohibition of Sodomy and Same Sex Marriages in Zimbabwe: A Human Rights Perspective* submitted by Victor Gwinyai Madzikatire (R09854J) in partial fulfillment of the requirement of the Bachelor of Laws Honours Degree (HLLB) at Midlands State University.

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DECLARATION

I, Victor Gwinyai Madzikatire, do hereby declare that this dissertation is the result of my own investigation and research, except to the extent indicated in the acknowledgement, references and by comment included in the body of the report, and that it has not been submitted in part or full for any other degree at any other university.

.....

STUDENT SIGNATURE

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DATE

DEDICATION

To all the Lesbians, Gays, Bisexuals, Transexuals and Intersexed persons who are discriminated against in Zimbabwe on the basis of their sexual orientation

ACKNOWLEDGEMENTS

To God I thank you for shining my path with your light and for being there for me always.

To M. G Madzikatire and R Madzikatire: mhamhanadaddymakaitabasa with your sound advice and the support you have shown to me over the years. I love you for making my life worthwhile and shaping the man I am today.

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LIST OF ABBREVIATIONS

LGBTI	Lesbians, Gays, Bisexuals, Transsexuals and Intersexed persons
ACHPR	African Charter on Human and Peoples' Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
CODE	Criminal Law Codification and Reform Act (Chapter 9.23)

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Chapter1

1.1 Introduction

A same-sex marriage is ‘the ceremonial union of two people of the same sex. It is a marriage or marriage like relationship between two women or two men’.¹ This is a highly contentious concept. It is defined primarily, by the sexual orientation of the individuals. Sexual orientation² refers to the direction of an individual sexual and emotional attraction, whether to individuals of a different sex (heterosexual), same sex (homosexual) or both sexes (bisexual.)³ Consequently, sexual orientation has been protected in other jurisdictions as a ground of non-discrimination.⁴ This was due to the realization that sexual orientation can be used as a ground of discrimination. This results in the creation of a sexual minority which is united by their close connection with the right holder’s minority sexual orientation.⁵ Therefore, this has culminated in the recognition of the rights-related claims of people whose sexual and gender identity challenge social and cultural prescriptions as a distinct branch of human rights law.⁶ This is due to an appreciation of the fact that human rights are indivisible, interrelated and interdependent through the equal and non-discriminatory application of the law.

Accordingly, this thorny issue has had limited, but growing acknowledgment under international law.⁷ This has been attributed to the realisation that sexual minorities face institutional and legal barriers with regards to the effective exercise of their rights. Some of the barriers are laws which prohibit same-sex marriages and laws which criminalise consensual same sex relations. Thus, sexual orientation has been seen as a ground with which sexual minorities are discriminated against. Consequently, this has led to a lacuna in the law, which has been satisfied by a movement which advocates for the rights which accrue to sexual minorities. This is due to the

¹ Garner B.A, Black’s Law Dictionary, 8 ed (2004)

²See also Garner BA op cit note 1 states that, ‘there has been a trend in recent years to make sexual orientation a protected class’.

³it can also include further groups like intersex and transsexuals

⁴Section 9 (3) of the South African Constitution provides as follows: ‘ 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.

⁵N. Bamforth ‘Lesbian and Gay Rights’ in Smith R.K.M and Van den Anker C, *The Essentials of Human Rights* (2005) 1st Edition, Hodder Arnold 226-228

⁶These have been termed sexual minorities by N. Bamforth op cit note 5 at 226

⁷ See the Yogyakarta Principles on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity

respect of the inherent nature of human rights with the focus being on the need for equal protection of sexual minorities against all forms of discrimination, violence, and hate speech to those offered (theoretically) to the majority.⁸

From the above, Zimbabwe recently enacted a new Constitution which has a Declaration of Rights.⁹ Under the Declaration of Rights, marriage rights¹⁰ are protected. Therefore, this paper will outline the extent if any, that the Constitution recognises the rights of sexual minorities in Zimbabwe focusing mainly on the prohibition of same sex marriages and the criminalisation of sodomy.

1.2 Background to the study

Zimbabwe is a democratic¹¹ society with some of its founding values and principles being the recognition of the inherent dignity and worth of each human being¹² and the recognition of the equality of all human beings.¹³ The Constitution accordingly provides the core elements for which human rights and freedoms can be realised through the application these fundamental safeguards. In doing so it ‘enshrines the pivotal concept and practice of human dignity, and promotes the achievement of equality and the advancement of human rights and freedoms.’¹⁴

The Constitution is the cornerstone of a constitutional democracy. Therefore, the fundamental values of dignity, equality and freedom are to be used in its interpretation. These principles are condensed as rights. Section 51 of the Constitution provides for the right to dignity.¹⁵ In addition, Section 56 of the Constitution is the equality and non- discrimination clause. These provisions

⁸M Epprecht (2012) ‘The Constitution Process and Sexual minority Rights in Zimbabwe’ Solidarity Peace Trust available at <http://www.solidaritypeacetrust.org/1226/the-constitution-process-and-sexual-minority-rights-in-Zimbabwe/> (accessed 7 March 2014)

⁹Chapter 4 of the Constitution of Zimbabwe Amendment (No.20) of 2013

¹⁰“78*Marriage rights*

- (1) Every person who has attained the age of eighteen years has the right to found a family.
- (2) No person may be compelled to enter into marriage against their will.
- (3) Persons of the same sex are prohibited from marrying each other.

¹¹Section 1 of the Constitution

¹² Section (3) (1) (e)

¹³ Section (3) (1) (f)

¹⁴ Devenish GE, A Commentary on the South African Bill of Rights, (1999), 1st Edn, Butterworths at page11

¹⁵Regrettably, sexual orientation is not included among the prohibited grounds of discrimination.

combined are meant to strengthen the autonomous nature of an individual. This is by giving him/her some inalienable rights which are to be protected and made realisable by the State.

It is against this backdrop that section 78 of the Zimbabwean Constitution provides for marriage rights as follows:

“78 Marriage rights

- (1) Every person who has attained the age of eighteen years has the right to found a family.
- (2) No person may be compelled to enter into marriage against their will.
- (3) Persons of the same sex are prohibited from marrying each other.”

Thus, the Zimbabwean Bill of Rights makes marriage rights justiciable but in Section 78 (3) outlaws same-sex marriages.

Furthermore, consensual same sex relations are criminalised under Criminal Law Codification and Reform Act (Chapter 9:23) [Code]. Section 73 (1) provides for the crime of sodomy as follows:

- (1) Any male person who, with the consent of another male person, knowingly performs with that other person anal sexual intercourse, or any act involving physical contact other than sexual intercourse that would be regarded by a reasonable person to be an indecent act, shall be guilty of sodomy.

The combined effect of these provisions is that consensual same sex relations between males and same sex marriages are prohibited. It can be submitted that this is discrimination on the ground of sexual orientation. This is compounded by the fact that the Constitution has a self-contained non-discrimination clause which only prohibits discrimination on the basis of ‘sex’ and not sexual orientation’.¹⁶ Therefore the non-discrimination clause’s scope is limited as it is not open-ended, thus no additional grounds can be admitted that are not explicitly listed.¹⁷

¹⁶Section 56 (3) of the Constitution of Zimbabwe reads as follows:

(3) “ every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race , colour , tribe, place of birth, ethnic nor social origin, language, class, religious belief, political affiliation, opinion, custom, culture, sex, gender...”

¹⁷Esau Mandipa, ‘The Suppression of Sexual Minority Rights: A Case Study of Zimbabwe’: Unpublished: a paper presented during a Sexual Minority Workshop in Mozambique, October 2013

Zimbabwe is a signatory to the International Convention on Civil and Political Rights which in Article 2 (1) prohibits discrimination on the basis of 'sex'. The term 'sex' has been interpreted as containing sexual orientation by the United Nations Human Rights Committee.¹⁸ Consequently, Article 2 (2) requires State parties to bring their law in line with the Covenant. This means that there should be recognition of the equality and non-discriminatory nature of human rights with the absence of discrimination on the basis of sexual orientation.

1.3 Statement of the problem

It appears that the prohibition of same sex marriages under Section 78 (3) of the Constitution of Zimbabwe is discriminatory against Lesbians, Gays, Bisexuals, Transsexuals, and Intersexed people (LGBTI). This seems inequitable against the framework that heterosexuals are accorded the right to found a family.¹⁹ However, it is submitted that sexual minorities are hindered from marrying each other and creating a family because of their sexual orientation. In addition, sodomy laws, in particular, section 73 (1) of the Code appears to be discriminatory against gay men. It is submitted that these laws make sexual minorities a vulnerable group due to the explicit legal prohibition of same sex relations. Therefore they are prone to human rights violations solely because of their sexual orientation.

Conversely, LGBTI's should be accorded the same rights legal obligations as all other citizens. However, the Constitution denies them marriage rights by prohibiting same sex marriages and the law omits them from the protection of the law and criminalises same sex conduct between consenting adults. It is submitted that the focus then is not on the exclusionary effect of the law, but rather the human rights implications which are manifest in the aforementioned laws. This research therefore aims to critically analyse the prohibition of same sex marriages and sodomy in Zimbabwe from a human rights perspective.

Furthermore, Zimbabwe is a party to International Human Rights Instruments that provide for protection from discrimination on the ground of sexual orientation from which it is arguable same-sex marriages, sexual orientation and sexual minorities find protection. The prohibition of

¹⁸*Toonen v Australia*, Communication No 488/1992, 31 Mar 1994, CCPR/C/50/D/488/1992, para 8.7

¹⁹See Section 78 (1) of the Constitution.

same-sex marriages in Zimbabwe therefore appears to be a violation of its International obligations.

1.4 Research aims and objectives

- a) To critically analyse the prohibition of same sex marriages and sodomy in Zimbabwe from a human rights perspective.
- b) To examine the International Human Rights instruments to which Zimbabwe is party to which guarantee same-sex marriages
- c) To explore the criminal law statutes which contain the prohibitions of same sex relations and to canvass the effects thereof to people belonging to sexual minorities in Zimbabwe
- d) To give specific and general recommendations and conclusions.

1.5 Literature review

The recognition of sexual minority rights as human rights has been controversial due to the arguments which have been advanced for and against their acknowledgment.²⁰ A number of books and articles have been written on this broad subject. Nonetheless, it is not easy to find extensive literature that addresses the issue of discrimination on the ground of sexual orientation and the prohibition of same-sex marriages in the Zimbabwean context.

Henriet de Ru '*The Recognition of Same Sex Unions in South Africa*'²¹, provides the religious arguments which proscribe same sex marriages. The author submits that marriage is the creation of God and as such is governed by natural law. Douglas W Kmiec²² '*The Procreative Argument for Proscribing Same Sex Marriage*' argues that marriage is based on the State interest for the encouragement of procreation. Pierre de Vos '*Same-sex Marriage, the Right to Equality and the South African Constitution*' (1996) explores on the unconstitutionality of the common-law prohibition on same-sex marriages.²³ P J Visser & J M Potgieter *Introduction to Family Law* (1994) argue that the right to equality before and equal protection of the law and the prohibition

²⁰N. Bamforthop cite note 5 at 227

²¹Henriet de Ru *The Recognition of Same Sex Unions in South Africa* (unpublished LLM thesis, University of South Africa, 2009) 10-13

²²Douglas W Kmiec 'The Procreative Argument for Proscribing Same Sex Marriage (2004- 2005) 32 Hasting Constitutional law Quarterly 653

²³Pierre de Vos ' Same-sex Marriage, the Right to Equality and the South African Constitution' (1996) 11 SAPL 335

of unfair discrimination on the ground of sexual orientation ‘may possibly result in matrimonial law being changed to provide legal protection in some instances and even to provide for the legal recognition of marriages’ between homosexual persons.²⁴

However, Elsie Bonthuys ‘Irrational Accommodation: Conscience, Religion and Same Sex Marriages in South Africa’²⁵ argues that clerical authority over the institution of marriage has been eroded with marriage achieving a secular legal status. With Brenda Grant ‘Comments and cases on Same sex Marriage’²⁶ highlighting that the use of procreation as the sole test for allowing or disallowing marriage of necessity would require an inquiry into the capacity or willingness to procreate. Pierre de Vos and Jaco Barnard ‘Same-sex Marriage, Civil Unions and Domestic Partnerships in South Africa: Critical Reflection on an Ongoing Saga’²⁷ argue that the equalization of marriage rights of same sex and heterosexual is one step along the eradication of homophobia. Brenda Grant²⁸ argues that the exclusion of homosexuals from marriage serves to deny the benefit of the law for an already disadvantaged group in society.

Battaglia ‘Religion, Sexual Orientation, and Self-Realization: First Amendment Principles and Anti-Discrimination Laws’²⁹ submits that the law continues to stigmatise gay people through sodomy laws. Milton ‘*South African Criminal Law and Procedure Volume II Common Law Crimes*’³⁰ argues that the crime of sodomy is directed and intended to penalise homosexuality among males. He further argues that the criminal prohibition of sodomy is based on nothing more than moralistic prejudice against a particular form of sexual gratification. Pierre de Vos ‘*On the Legal Construction of Gay and Lesbian Identity and South Africa’s Transitional Constitution*’ explores the criminalization of homosexual conduct between adults³¹. Edwin

²⁴ P J Visser & J M Potgieter, Introduction to Family Law 2 ed, 6-7, (1994), Cape Town, Juta

²⁵ Elsie Bonthuys ‘Irrational Accommodation: Conscience, Religion and Same Sex Marriages in South Africa’ (2003) Vol 125 (Part 3) SALJ

²⁶ Brenda Grant ‘Comments and cases on Same sex Marriage’ (1996) 12 SAJHR 568

²⁷ Pierre de Vos and Jaco Barnard, ‘Same-sex Marriage, Civil Unions and Domestic Partnerships in South Africa: Critical Reflection on an Ongoing Saga’ 795 SALJ 2007 at 804

²⁸ Brenda Grant op cit note 26

²⁹ Jack M Battaglia ‘Religion, Sexual Orientation, and Self-Realization: First Amendment Principles and Anti-Discrimination Laws’ 76 U. Det. Mercy L. Rev. 189 1998-1999

³⁰ J R L Milton South African Criminal Law and Procedure Volume II Common Law Crimes 3rd Edition, Juta and Company (1996) 248 - 258

³¹ Pierre de Vos ‘On the Legal Construction of Gay and Lesbian Identity and South Africa’s Transitional Constitution’ (1996) 12 SAJHR 265 at 274-9

Cameron '*Sexual Orientation and the Law*³² highlights the unconstitutionality of the criminal prohibition of sexual acts between homosexuals³³. With, Pierre de Vos³⁴, arguing that the criminalization of sodomy in private between consenting males constitutes discrimination which is based on sexual orientation, and that such a provision affects their right to dignity and the provision regarding equality and non- discrimination. The work has informed some of the arguments and conclusions made in this research.

Julie Debeljak, *Rights and Democracy: A Reconciliation of the Institutional Debate* explores the relationship between human rights and democracy in the safeguarding of minority rights in a written constitution to see the justifications of certain prohibitions which may be evident in a written constitution.³⁵ Cameron E, *Constitutional Protection of sexual orientation and African Conceptions of humanity*³⁶ argues that sexual minority rights are protected under the principle of constitutionalism. Consequently, the foundation of the constitution is for the protection of unpopular minorities who are unable to assert their entitlements through the electoral process. Therefore, to rely on popular expression of distaste, dislike or hatred for unpopular minorities as a justification for withholding constitutional protection from them is to misunderstand the very essence of constitutionalism.

The sources of information aforementioned, aided the writer with some of the observations, conclusions and arguments which are forwarded in this dissertation.

1.6 Assumptions

This research is premised on the assumption that the prohibition of sodomy and same sex marriages in Zimbabwe, has led to an avenue for human rights violations against gay people. The work also assumes that the adoption of laws that guarantee sexual orientation as a protected

³²Edwin Cameron '*Sexual Orientation and the Law*' 1992 3 SAHRYB 87,

³³E. Cameron op cite note 32 at p88- 92

³⁴Pierre De Vos '*Sexual orientation and the right to equality in the South African Constitution: National Coalition For Gays and Lesbian Equality and Another v Minister of Justice and Others*' SALJ Vol 117 Juta and Co Ltd 17 -25 at page 24-25

³⁵Julie Debeljak, *Rights and Democracy: A Reconciliation of the Institutional Debate* 1st Edn (2003) in Campbell, Goldsworthy and Stone, *Protecting Human rights Instruments and Institutions*, Oxford University Press

³⁶ Cameron E (2001); *Constitutional Protection of sexual orientation and African Conceptions of humanity*; Volume 118; Juta & Co Ltd

ground of discrimination can assist to guarantee the effective realisation of the rights of sexual minorities in Zimbabwe.

1.7 Research Methodology

The author followed a qualitative approach to probe the issues under discussion. Thus, this work relies extensively on desktop research. Both primary and secondary sources of data which deal with the concept of sexual orientation that include Statutes, international human rights instruments, books and journal articles were all consulted. The author also had access to the internet sources. The International and regional Human rights instruments have also been consulted with a view to analyse the extent to which Zimbabwe can be best informed.

1.8 Summary of Chapters

Chapter 1

This Chapter is the introductory Chapter which gives the background to the research, the problem statement, methodology, assumption, and shows some of the sources consulted.

Chapter 2

This chapter analyses the concept of same sex marriages and sexual orientation in light of what problems are associated with the prohibition of same-sex marriages. It further provides the rationale for the prohibition of same sex marriages. In converse, the Chapter also gives arguments in favour of recognition of same sex marriages.

Chapter 3

This chapter offers a critical analysis of the Constitution and Sodomy laws and the extent to which they affect sexual minority rights. The analysis is conducted in light of best practices with regards to recognition of same sex marriages at the International level.

Chapter 4

This chapter will examine Zimbabwe's obligations under International and Regional Human Rights instruments to which Zimbabwe has ratified and evaluate this framework against the Constitution of Zimbabwe with regards to the recognition of same sex marriages.

Chapter 5

This chapter will give specific and general recommendations and concludes the research.

Chapter 2

The arguments for and against the prohibition of sodomy and same sex marriages and the human rights issues thereon

2.1 Introduction

The concept of marriage in general and same sex marriages in particular has not been defined under legislation in Zimbabwean law. Thus the law only provides the formalities which have to be complied with regards to the formalization of the institution of marriage.³⁷ Consequently, same sex marriages are excluded from the ambit marriage rights in our Constitution.

This chapter will give a background as regards the rationale for the prohibition of same sex marriages on the one hand and the arguments in favour of recognition of same sex marriages on the other hand. It will be submitted that religious and moral grounds have been proffered for the non-recognition of same sex marriage.³⁸ This is because the lack of procreative potential of the union is viewed as unnatural, hence the prohibition of same sex marriages.³⁹ This will be juxtaposed with a human rights based approach which favours the recognition of same sex marriage. The approach focuses more on abandoning prejudicial conceptions which are associated with moralistic and religious beliefs. This is because they fuel discriminatory tendencies.⁴⁰ Thus, the approach focuses on the recognition of difference, diversity and inclusivity.⁴¹ This will be bolstered by the argument that marriage does not focus solely on procreation but rather they are numerous contractual and other related benefits which are favorable to the parties entering into it. Therefore, parties who want to enter into the relationship should not be denied of the consequent benefits by reason of sexual orientation.

This will be followed by an analysis of the problems associated with prohibition of same sex marriage and consensual sodomy. The issue under focus is the human rights violations which are associated with discrimination which focuses on sexual orientation. It will be submitted that in an open and democratic society which is founded on principles of equality and dignity, the

³⁷The Marriage Act (Chapter 5:11) in its interpretation section 2 defines thus: "marriage" means a marriage under this Act; the Customary Marriages Act (Chapter 5:07) defines a customary marriage thus: "customary marriage" means a marriage between Africans;

³⁸Henriet de Ru op cite note 21 at 10-13, Douglas W Kmiecop cite note 22 at 654-667

³⁹Tshepo L Mosikatsana 'The Definitional Exclusion of Gays and Lesbians from Family Status' (1996) 12 SAJHR 549, Edwin Cameron op cite note 32, Lorraine Wolhuter 'Equality and the Concept of Difference: Same Sex Marriages in the light of the final Constitution' (1997) 114 SALJ 389, Pierre de Vos and Jaco Barnard op cite note 27 at 804

⁴⁰Jack M Battaglia op cite note 27 at page 195, Kevan Botha & Edwin Cameron 'Sexual orientation' (1994) 5 *South African Human Rights Yearbook* 281 at 285

⁴¹Lorraine Wolhuter op cite note 39

failure to recognize sexual minorities by the express prohibition of same sex marriage and consensual sodomy is undesirable. This is largely so because it provides an avenue for human rights violations as sexual minorities are seen as defective human beings who are not worthy of protection.

2.2 The rationale for the prohibition of same sex marriages.

Traditionally marriage has been defined as the union of one man and one woman to the exclusion of all others.⁴² This is on the argument that the institution of marriage is designed for procreation. Thus any sexual activity which is not designed for procreation should not be protected by law. As a result, this has led to the prohibition of same sex marriage and consensual sodomy.

Religion, in particular Christianity has been used to define the concept of marriage. In *Corbett v Corbett*⁴³ it was agreed that ‘... marriage as understood in Christendom may... be defined as the voluntary union for life of one man and the woman to the exclusion of all others.’ This has been supported by moral arguments which conceive marriage as being ‘ordained by God since biblical times and any form of sexual activity between two males or two females is against the law of nature and therefore the law of God’.⁴⁴ Henriët de Ru⁴⁵ states that the institution of marriage was contended to be the creation of God and no creation of the state or even of the Church. Consequently marriage was created as a sacrament which was instituted by God. Therefore its essential elements were determined by natural law hence it could not be varied by human legislation or by the consent of the parties.

However, Elsie Bonthuys⁴⁶ argues that clerical authority over the institution of marriage has been eroded. This has been superseded with the idea of marriage as a secular legal status with its requirements and consequences being determined by the State. This has replaced the idea of marriage as a sacrament thus the movement from marriage being a moral status to a legal status.

⁴² H R Hahlo *The South African Law of Husband & Wife* (1985) 21; Craig Lind “Sexual Orientation, Family law and the Transitional Constitution” 1995 SALJ 481, see also Tshepo L Mosikatsana op cite note 39 at 550

⁴³ [1970] 2 All ER 99, see also *W v W* 1976 (2) SA 308 at 310E

⁴⁴ Tshepo L Mosikatsana op cite note 39 at 550

⁴⁵ Henriët de Ru op cite note 21 at 10-13,

⁴⁶ Elsie Bonthuys op cite note 25 at 482

It can be argued that the law should be dynamic and flexible to accommodate diversity and difference. Consequently marriage should be conceived as the legal institutionalization of a union between two persons that gives rise to proprietary and contractual consequences. This is because moral considerations often lead to discriminatory tendencies and stigma which is attached to LGBTI persons because of their gender identities. As a result the conception of marriage should be expanded to accommodate same sex marriages through a respect for the equal treatment of citizens.

Further, it has been argued that the purpose of marriage is linked to the procreation potential of partners and the ability to bear children. Tshepo L Mosikatsana⁴⁷, cites Southey J⁴⁸ who he argues relies on this restrictive and formalistic conception of marriage. He argues that:

‘One of the principal purposes of the institution of marriage is the founding and maintaining of families in which children will be produced and cared for, a procedure which is necessary for the continuance of the species... that principal purpose of marriage cannot, as a general rule be achieved in a homosexual union because of the biological limitations of such a union. It is this reality that is recognized in the limitation of marriage to persons of opposite sex.’

It therefore appears that the decisive factor for the prohibition of same sex marriages is the inability to procreate. However, Brenda Grant⁴⁹ argues that to use procreation as the sole test for allowing or disallowing marriage of necessity would require an inquiry into the capacity or willingness to procreate. The author argues further that if the primary purpose of a traditional heterosexual marriage is procreation, then it is a blind weapon to ban homosexual marriages and justify discrimination. This is because the heterosexual marriage is possible even where there is a lack of procreation. As a result, the distinction is not based on capacity to procreate, but rather on sexual orientation. The author concludes by stating that the exclusion of homosexual couples from the benefit of the institution of marriage cannot be sustained by reasons of procreation and notions of traditional family.

⁴⁷ Tshepo L Mosikatsana ‘ The Definitional Exclusion of Gays and Lesbians from Family Status’ (1996) 12 SAJHR 549 at 560

⁴⁸ Layland v Ontarion (Minister of Consumer and Commercial Relations) (1993) 104 DLR (4th) 214 (Canada)

⁴⁹ Brenda Grant op cite note 26 at 573

It can be argued that the test of procreation as the soul of a valid marriage is a delusion. This is so because there has been the development of techniques for assisted reproduction. Thus, through modern technology lesbians are capable of having children through sperm insemination whilst gays can also have children through adoption. As a result, the test of procreation is not in tandem with the modern world. This is because the procreative argument for proscribing same sex marriages has outlived its usefulness.

Nevertheless, Douglas W Kmiec⁵⁰ argues that maintaining marriage as an institution between a man and a woman is based on the state's interest for the encouragement of procreation and its (marriage) responsible treatment by heterosexual couples. The author dismisses the claims by advocates for same sex marriages who argue that marriage is a fallacy for the infertile and aged partners thus it should be opened up to accommodate same sex couples. Additionally, the author argues that this argument is unpersuasive as the procreative state interest does not depend upon excluding from marriage those who cannot physically procreate because of age or infertility.⁵¹ He intimates, further, that the promotion and responsible exercise of procreation as a vital and compelling state interest logically separates same sex couples from non-procreative classes.⁵² He submits that it is more questionable whether the state can rationally be indifferent to sustaining its population by giving the public sanction to individuals, who because of their physical reality and the nature of their sexual relationship cannot procreate.⁵³

It can be argued that the exclusion of same sexed individuals from marriages is not warranted as procreation may be one of the purposes of marriage. However, it is not itself a decisive factor as to whether or not a marriage is to continue. Marriage in effect regulates conjugal relationships including procreation but it is not limited to such. In *Rattigan v Chief Immigration Officer Zimbabwe*⁵⁴, Gubbay J stated that:

'Marriage is a juristic act sui generis. It gives rise to physical, moral and spiritual community for life (more realistically as long as the marriage endures) and to confer sexual privileges exclusively upon each other. Conjugal love embraces 3 components:

⁵⁰ Douglas W Kmiec op cite note 22 at 656

⁵¹ Douglas W Kmiec op cite note 22 at 656

⁵² Douglas W Kmiec op cite note 22 at 656

⁵³ Douglas W Kmiec op cite note 22 at 657

⁵⁴ 1995 (2) SA 182 (ZS) at 188B

- i.) Eros (passion)
- ii.) Philia (companionship) and
- iii.) Agape (self-giving brotherly love).⁷

Therefore there are numerous other benefits which as outlined suggest the view that procreation may not be the sole purpose for marriage.

On the other hand, consensual sodomy has been criminalized on the premise that it is unnatural. Milton⁵⁵ argues that the crime of sodomy is directed and intended to penalize homosexuality amongst males. This view is premised on natural law. The author argues that the principal arguments advanced for criminalizing sodomy are that it subverts the institution of the family and that homosexuals corrupt and pervert young persons.⁵⁶ The author goes on to state that the argument that homosexuality subverts the institution of marriage makes sense only if it is assumed that all humans enter into exclusively homosexual relationships which is not patently the case.⁵⁷ He concludes that the criminal prohibition of sodomy is based on nothing more than a moralistic prejudice against a particular form of sexual gratification. He states that it serves no rationale object of criminal law and is demeaning and discriminatory.⁵⁸

Furthermore, homosexuality was prohibited because it was thought that it was a psychological disease which could be cured.⁵⁹ In *S v K*⁶⁰ it was held that ‘in many of these cases, the desire to commit these unnatural offences [between adults] stems from some form of disease.’ As a result it was argued to be as a result of choice. Angelo Pantanzis⁶¹ argues that sex was medicalised in the 19th Century. To this end, people were classified by their sexual inclination. This led to the popularization of the medical model of homosexuality as a disease.⁶² This defined gay identity. However, homosexuality was declassified from the list of mental disturbances.⁶³ It was

⁵⁵ J R L Milton op cite note 30 at 250

⁵⁶ J R L Milton op cite note 30 at 249

⁵⁷ J R L Milton op cite note 30 at 249

⁵⁸ J R L Milton op cite note 30 at 250

⁵⁹ See Angelo Pantanzis “The problematic nature of Gay Identity” 1996 12 SAJHR 291 at 298

⁶⁰ 1973 (1) SA 87 (RA) at 90 C-D

⁶¹ Angelo Pantanzis op cit note 59 at 298

⁶² Supra at 298

⁶³ Sexual minorities and the work of the United Nations Special Rapporteur on Torture, A paper submitted by the International Gay and Lesbian Human Rights Commission to Sir Nigel Rodley, Special Rapporteur June 5, 2001 at page 9 states as follows; ‘The World Psychiatric Association (WPA) removed homosexuality from the roster of

acknowledged that homosexuality is not as a result of choice thus it was not an illness, disturbance or perversion biological imbalances. Thus, homosexuality is natural as heterosexuality.

2.3 The rationale for the recognition of same sex marriages.

Underlying the recognition of same sex marriages is the idea of the diversity of the forms of sexual orientation particularly the tolerance of homosexuality. Thus, marriage should be extended to homosexuals regarding the core principles of inclusivity and difference. As outlined above, marriage has many legal consequences and to deny them to homosexuals on the basis of their sexual orientation has a bearing on principles of equality and non-discrimination. It is submitted that where marriage rights are provided for, they should be accorded to consenting partners regardless of their sexual orientation.

The human rights model is premised on the fact that homosexual orientation is not because of choice but rather a natural sexual variant unlinked to pathology.⁶⁴ It is argued that sexual orientation is an involuntary status that it sets in at an early age. It is now agreed that it is unamenable to techniques designed to change it.⁶⁵ It has been held⁶⁶ that since sexual orientation is a 'deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs.'⁶⁷ Thus the acknowledgement of the unassailable characteristics of sexual orientation has encouraged the appreciation of the rights which accrue to homosexuals.

As a result, the heterosexual definition of marriage in legal circles does not take into account the nature of human difference and diversity. This has in effect denied the consequent rights which accrue as a result of marriage. Elsie Bonthuys⁶⁸ argues that sexual orientation is an equality issue, rather than an issue of morality. Therefore, the views of particular persons as to the

disorders in its Diagnostic and Statistical Manual-III (DSM-III) in 1971. The World Health Organization (WHO) followed suit, removing homosexuality from its International Classification of Diseases-10 (ICD-10) in 1992.'

⁶⁴ Edwin Cameron op cit note 32 at 92 footnote 38

⁶⁵ See the LGBT manual for ABGLT – Brazilian Gay, Lesbian, Bisexual, Transvestite and Transsexual Association at page 13

⁶⁶ National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 1999 (1) SA 6 (CC) (1998 (12) BCLR 1517

⁶⁷ National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others op cit note 66 at 1520

⁶⁸ Elsie Bonthuys op cit note 26 at 482

morality or immorality of same sex relationships should not determine whether couples are entitled to the benefits afforded to others.⁶⁹

Lorraine Wolhuter⁷⁰ states that the concept of formal equality has focused on the similarity between heterosexual and homosexual couples.⁷¹ Highlighting that, since homosexual couples may live together in a like relationship of intimacy and interdependence like their heterosexual counterparts, they are entitled to certain legal benefits like co-ownership of property and medical and taxation benefits among others that are accorded to heterosexual married couples.⁷² Further, the discourse of substantive equality in the legal sphere will necessitate the reformulation of the definition of marriage.⁷³ The author argues additionally that it is ‘because of difference from heterosexual people, rather than because of their sameness, that homosexual must be accorded the ability to marry those of their own sex’.⁷⁴ The author concludes that the emphasis on the procreation of children rather than the proprietary and contractual consequences of marriage highlights the difference between heterosexual and homosexual couples and obscures gays and lesbians themselves.

It can be argued that this approach is in line with the recognition of the equal worth of individuals in society, particularly LGBTI persons. Rather than focusing on the procreative potential, marriage is a *sui generis* contract. It comes with status and further proprietary and contractual consequences. As a result, marriage should be afforded to consenting parties regardless of their sexual orientation. The focus then should not be on the parties to the relationship but rather the consequences which come therefrom.

As a result, advocates of same sex marriage argue that marriage should be conceived as the legal institutionalization of a union between two persons that gives rise to proprietary and contractual consequences. Furthermore, Pierre de Vos and Jaco Barnard⁷⁵ state that equalization of marriage rights of same sex and heterosexual people is one step along the eradication of homophobia. To

⁶⁹ Elsie Bonthuys op cit note 26 at 482

⁷⁰ Lorraine Wolhuter op cit note 39 at 390

⁷¹ Lorraine Wolhuter op cit note 39 at 391

⁷² Lorraine Wolhuter op cit note 39 at 392

⁷³ Lorraine Wolhuter op cit note 39 at 393

⁷⁴ Lorraine Wolhuter op cit note 39 at 393

⁷⁵ Pierre de Vos and Jaco Barnard op cite note 27 at 804

this end, there is the call for the recognition of the rights of those whose choices upset the majority. Edwin Cameron⁷⁶ argues that the Constitution is the core instrument through which gays and lesbians can be safeguarded from morally irrational and indefensible discrimination.

Consequently the exclusion of homosexuals from the benefit of marriage denies them of the recognition of the rights of homosexuals to conduct their personal relationships with dignity. Accordingly, a failure to extend marriage to homosexuals negates the essential right to equality since it is from this institution that may benefits stem from.⁷⁷

It is submitted that the failure to accord full legal recognition to same sex relationships in general and same sex marriage in particular contributes to the stigmatization of gay people. This is in addition to the fact that their rights especially to equality and the equal protection of the law are also affected. This is because same sex marriages function more or less the same way as opposite same sex marriages and with legal recognition can similarly serve society.

2.4 The problems associated with prohibition of same sex relations.

The prohibition of same sex marriage and criminalization of sodomy perpetuates stigmatization and discrimination against homosexuals. These provisions are prima facie a violation of the rights to equality and non-discrimination and dignity of LGBTI persons which are provided for in the Zimbabwean Constitution. Brenda Grant⁷⁸ argues that the exclusion of homosexuals from marriage serves to deny the benefit of the law for an already disadvantaged group in society. This propagates human rights violations in the form of insults⁷⁹, humiliation and indignity. This is because the law provides an avenue for the sexual orientation of LGBTI persons to be disregarded with preference being accorded to heterosexual relationships. It is submitted that such provisions degrade, belittle and demean LGBTI's human rights.

⁷⁶ Edwin Cameron op cit note 32 at page 100

⁷⁷ Craig Lind op cit note 42 at 573

⁷⁸ Brenda Grant op cite note 26 at 573-4

⁷⁹ See 'Zimbabwe President says homosexuals are worse than pigs and dogs' available at <http://www.africaundisguised.com/newsportal/story/Zimbabwe-president-says-homosexuals-are-worse-pigs-dogs> (accessed 22 March 2014) Robert Mugabe criticises Barack Obamas gay rights stance available at <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/Zimbabwe/10200191/Robert-Mugabe-criticises-Barack-Obamas-gay-rights-stance.html> (accessed 22 March 2014)

Further, Edwin Cameron⁸⁰ submits that legal stigma is one of the problems which are associated with criminal prohibition of sodomy and same sex marriages. Battaglia⁸¹ submits that the law as well as governmental policies continues to stigmatise gay people through sodomy laws. Additionally, to call someone gay or lesbian is considered to be defamatory. It is thus apparent that LGBTI persons face attitudinal and societal barriers for the effective realization of their right to sexual orientation.

Be that as it may, Kevin Botha and E Cameron⁸² submit that because of the immutability of sexual orientation, sexual minorities tend to be uncohesive. This is due to fear of victimization and harassment. As a result, they have an inability to effectively counter discrimination which necessitates their inclusion as a vulnerable group.⁸³ To this end, homosexuals face homophobia which is “an irrationally negative attitude toward gay people”.⁸⁴ This has led it to be classified as institutional, cultural, personal and interpersonal homophobia.⁸⁵ Battaglia⁸⁶ argues that the more extreme manifestations of homophobia include verbal abuse⁸⁷, harassment and physical violence in its diverse forms.

Summing up, in *S v Banana*⁸⁸, Gubbay CJ (as he then was) confirmed the remarks of Ackermann J⁸⁹ on the human rights issues which stem from the proscription of sodomy as follows:

⁸⁰Edwin Cameron op cit note 32 at 92- 95

⁸¹ Jack M Battaglia op cit note 29 at page 195

⁸²Kevan Botha & Edwin Cameron op cit note 40 at 285

⁸³Kevan Botha & Edwin Cameron op cit note 40 at at 284

⁸⁴Battaglia op cit note 29 at 195; Homophobias have been broken into four categories. Personal homophobia:refers to a personal belief system, or prejudice, that sexual minorities are generally inferior to heterosexuals.

Interpersonal homophobia: ‘manifests when a personal bias or prejudice affects relations among individuals, transforming prejudice into... discrimination.’ Institutional homophobia: ‘refers to the ways in which governments, businesses, educational, religious, and professional organizations, systematically discriminate on the basis of sexual orientation or identity.’ Cultural homophobia: ‘refers to the social norms or codes of behaviour that, although not expressly written into law or policy, nonetheless work within a society to legitimize oppression’.

⁸⁵Battaglia op cit note 29 at 195

⁸⁶Battaglia op cit note 29 at 195-6

⁸⁷See ‘Zimbabwe President says homosexuals are worse than pigs and dogs’ available at <http://www.africaundisguised.com/newsportal/story/Zimbabwe-president-says-homosexuals-are-worse-pigs-dogs> (accessed 22 March 2014) Robert Mugabe criticises Barack Obamas gay rights stance available at <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/Zimbabwe/10200191/Robert-Mugabe-criticises-Barack-Obamas-gay-rights-stance.html> (accessed 22 March 2014)

⁸⁸ 2000 (3) SA 885 (ZS) at 909

⁸⁹ National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 1999 (1) SA 6 (CC) (1998 (12) BCLR 1517

“The criminalisation of sodomy in private between consenting males is a severe limitation of a gay man's right to equality in relation to sexual orientation, because it hits at one of the ways in which gays give expression to their sexual orientation. It is at the same time a severe limitation of the gay man's rights to privacy, dignity and freedom. The harm caused by the provision can, and often does, affect his ability to achieve self-identification and self-fulfilment. The harm also radiates out into society generally and gives rise to a wide variety of other discriminations, which collectively unfairly prevent a fair distribution of social goods and services and the award of social opportunities for gays.”

2.5 Conclusion

It is submitted that the religious and moralistic arguments proffered for the prohibition of same sex marriages are irrational and based on a misconception of the consequences of marriage. As a result, they focus on procreation as the soul of marriage. However, this is not in tandem with technological advancements witnessed in the modern world which has seen same sex couple being able to have children. Thus, it is submitted that the traditional conception of marriage seems to discriminate homosexuals on the basis of sexual orientation. Moreover, the criminalization of consensual same sex relations serves to promote discriminatory tendencies which fuel the suppression of sexual minorities. Further, the problems of stigmatization and discrimination further call for a human rights based approach to safeguard the rights of unpopular minorities. This is because homosexual orientation is not a result of choice but it is an immutable characteristic which is inherent to some individuals. As a result, there is the need for the adoption of a more elastic conception of marriage and the recognition of consensual sodomy so that substantive equality can be achieved. Accordingly, marriage should be conceived as the legal institutionalisation of a union between two persons that gives rise to proprietary and contractual consequences.

Chapter 3

A critical analysis of the prohibition of sodomy and same-sex marriages from a human rights perspective

3.1 Introduction

In Chapter 2, the rationale for the prohibition and recognition of same sex marriages was discussed. This was juxtaposed against the discriminatory tendencies which are apparent as a result of the prohibition of same sex marriages and the criminalization of sodomy. It was further highlighted that the human rights based approach which favours the recognition of the rights of sexual minorities is desirable in a democracy. As a result, this chapter offers a critical analysis for the prohibition of same sex marriage and sodomy in Zimbabwe from a human rights perspective.

It will be submitted that Section 78 (3) of the Constitution seems to be discriminatory against LGBTI persons. As a result, it appears that the law is inadequate for the promotion and protection of the rights of LGBTI persons. It will be submitted that LGBTI persons are excluded from the ambits of marriage. Given that marriage is a status which comes with many legal consequences and benefits which are exclusive to married partners to deny them to homosexuals on the basis of their sexual orientation has a negative bearing on principles of equality and non-discrimination. Further, the legal status and the benefits which accrue as a result of marriage in Zimbabwe are therefore the sole preserve of heterosexuals.

This will be followed by analysis of the rights to equality and non-discrimination⁹⁰ and dignity.⁹¹ An analysis of these provisions will be to see their relation to the marriage rights provision which prohibits same sex marriages from a human rights perspective. Further, it will be argued that Constitution protects LGBTI persons as the non- discrimination clause contains 'sex' as a prohibited ground of discrimination. Sex has been defined under international law as including sexual orientation.⁹² However, this section has its own flaws which militate against the rights of LGBTI persons. Additionally, the Code will be analysed to see the implications of sodomy laws from a human rights perspective.

It will be argued that although Zimbabwe's Constitution was the result of a referendum which was in tandem with the law, the majority of Zimbabweans favoured the non-recognition of the rights of LGBTI. It will be submitted that the protection of LGBTI persons cannot be left to the majority. Thus the relationship between democracy and the protection of sexual minorities that is

⁹⁰ See Section 56 of the Constitution

⁹¹ See Section 51 of the Constitution

⁹² The term 'sex' has been interpreted as containing sexual orientation by the United Nations Human Rights Committee

LGBTI persons will be looked at. It will be concluded that Zimbabwe's legal framework is inadequate for the protection of people of homosexual orientation. Rather than promoting the realization of the rights of LGBTI persons, it provides an avenue for further human rights violations. This is by the blanket ban of same sex marriages and the continued existence of sodomy laws.

3.2 The Constitution and Marriage Rights

Prior to 2013, the Constitution did not have a marriage rights clause within its Bill of Rights. However, Zimbabwe adopted a new constitution through a referendum and it came into force as a whole document on 22 August 2013. The new constitution made inroads for Marriage rights to be justiciable under its Declaration of Rights. It is against this background that the marriage rights provision will be looked at to see its human rights implications.

3.2.1 The Marriage Rights Provision

Section 78 of the Zimbabwean Constitution provides for marriage rights as follows:

“78Marriage rights

- (1) Every person who has attained the age of eighteen years has the right to found a family.
- (2) No person may be compelled to enter into marriage against their will.
- (3) Persons of the same sex are prohibited from marrying each other.”

It is submitted, that the definition of marriage in Zimbabwe excludes same sex marriages. The provision gives rise to the questions as to why the provision shows a wanton disregard and explicit denial of the rights of LGBTI persons to marry and found a family. This is because marriage has many legal consequences and to deny them to homosexuals on the basis of their sexual orientation is inequitable and prima facie proof of discrimination based on sexual orientation. It can be thus concluded that the framers of the Constitution provided the scapegoat for the discrimination of LGBTI persons through Section 78 (3).

Further, the prohibition of same sex marriages has the effect of creating a favoured class of citizens who are in this instance heterosexuals. To this end, they are accorded the right to found a family and to contract into marriage. As a result, heterosexuals are seen as having more rights over LGBTI persons due to their sexual orientation. Subsequently, they acquire a legal status

which has a lot of benefits and regulates their relationship between themselves and their dealings with third parties. This has led the definition of marriage to be the sole preserve of heterosexuals and naturally closed to same sex couples⁹³. It is submitted that where marriage rights are provided for, they should be accorded to consenting partners regardless of their sexual orientation.

Equally, LGBTI's should be accorded the same rights and legal obligations as all other citizens. However, the Constitution denies them marriage rights by prohibiting same sex marriages. It is submitted that exclusionary effect of the law creates a minority group effectively united by their minority sexual orientation which has negative human rights implications on LGBTI. Brenda Grant⁹⁴ puts it thus:

‘ When the law recognizes heterosexual marriages but not homosexual marriages, it is sending a message of endorsement to heterosexuals and a message of disapproval to homosexuals, effectively telling homosexuals that they are outsiders, not full members of the community.’

The author concludes that the exclusion merely serves to deny the benefit of the law for an already disadvantaged group in society. To this end, Section 78 (3) is an affront to the principles of non- discrimination and equality before the law.

It can be argued that the provision denies LGBTI persons the possibility of family life and has the problem of time-locking the concept of marriage. Tshepo L. Mosikatsana⁹⁵ argues that such a definition underlines the heterosexual, monogamous and consensual nature of traditional marriage; however such definitions of marriage make the erroneous assumption that there is consensus about family life and the role of the family in society. The author submits as follows:

‘Families have long been viewed among the most essential and universal units of society. This sense of the shared experience of family has led to an often unexamined consensus, regarding what exactly constitutes a family. Thus “[W]e speak of families as though we all knew what family are,” we see no need to define the concepts embedded within the term.’⁹⁶

It can be argued that the exclusion of same sex couples from marriage has the total effect of denying LGBTI persons the right to found a family only because of their sexual orientation. As a

⁹³Hohengarten, Same-Sex Marriage and the Right to Privacy 1994 Yale Law Journal 1495 1496

⁹⁴ Brenda Grant op cite note 26 at 568

⁹⁵Tshepo L. Mosikatsana op cite note 39 at 550

⁹⁶ Ibid at 550

result, the concept of marriage in Zimbabwe has been secluded from the dynamic nature of a family as it seems to be an evolving concept.

3.2.2 A Violation of LGBTI Constitutional Rights to Equality and Non-discrimination Provision and Dignity?

3.2.2.1 The right to Equality and Non-discrimination

Section 56 (3) of the Constitution provides that:

“Every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race, colour, tribe, place of birth, ethnic or social origin, language, class, religious belief, political affiliation, opinion, custom, culture, sex, gender, marital status, age pregnancy, disability or economic or social status, or whether they were born in or out of wedlock.”

It begs mention that in the first drafts of the Constitution, the non-discrimination clause provided for non-discrimination on the basis of ‘circumstances of birth,’ ‘natural difference or condition’ and ‘other status’. However ZANU-PF rejected the drafts on the sole reason that such provision could be read as including non-discrimination based on sexual orientation.⁹⁷ This is indicative of the intended exclusion of the recognition sexual orientation as a protected ground in the Zimbabwean Constitution due to the concept of democracy and majority rule.

It is submitted that the intended exclusion of sexual orientation as a prohibited ground of discrimination was meant to deprive LGBTI persons of their rights to protection from discrimination. This is compounded by the fact that the Constitution has a self-contained non-discrimination clause which only prohibits discrimination on the basis of ‘sex’ and not sexual orientation. Therefore the non-discrimination clause’s scope is limited as it is not open-ended, thus no additional grounds can be admitted that are not explicitly listed.⁹⁸ The position would have been different for the LGBTI people if the non-discrimination clause was not exhaustive as is the position with the non-discrimination clause of the African Charter on Human and Peoples’ Rights.⁹⁹ This is because where a group suffers from discrimination on the basis of an inherent

⁹⁷ M Epprecht (2012) op cit note 8

⁹⁸ Esau Mandipa op cit note 17

⁹⁹ See Article 2 of the African Charter on Human and Peoples’ Rights, the non-discrimination clause, which makes use of the term ‘or other status.’

characteristic the best way to safeguard their interests is by proscribing the discrimination complained of.

However, it is interesting to note that the Constitution provides that a court, tribunal, forum or body must take into account international law and all treaties and conventions in which Zimbabwe is a party.¹⁰⁰ Zimbabwe is a signatory to the International Convention on Civil and Political Rights which in Article 2 (1) prohibits discrimination on the basis of 'sex'. The term 'sex' has been interpreted as containing sexual orientation by the United Nations Human Rights Committee.¹⁰¹

Thus, it can be argued that the prohibition of same sex marriages contradicts Section 56 (3). This is because it discriminates against LGBTI persons on the basis of sex. To this, end there should be recognition of the equality and non-discriminatory nature of human rights with the absence of discrimination on the basis of sexual orientation. Consequently, equality should look at the eradication of a disadvantage towards a group and the creation of conditions which focus on their positive interaction with society.

To this end, Elsje Bonthuys¹⁰² argues that the purpose of the equality right is to promote a society where each person is accorded equal moral worth, and in which systematic inequality and disadvantage are eradicated and substantive equality actively promoted. The author further states that substantive equality seeks on the one hand to break and remedy cycles of disadvantage and to address social exclusion caused by stigma and stereotyping or forms of violence. On the other hand it also seeks to affirm and celebrate different gendered identities, facilitate positive participation and help create conditions for equality freedom and justice for men and women.¹⁰³

It is submitted that the right to equality and non-discrimination is meant to promote the recognition of the minority rights of people who are disadvantaged in society and who fail to fully participate in society. In this case, LGBTI's are a sexual minority. LGBTI people are disadvantaged because of the interplay between those people who are united by the right holder's minority sexual orientation which in interaction with social, legal and attitudinal barriers may

¹⁰⁰ Section 46 (c)

¹⁰¹ *Toonen v Australia*, Communication No 488/1992, 31 Mar 1994, CCPR/C/50/D/488/1992, para 8.7

¹⁰² Elsje Bonthuys op cit note 25 at 482

¹⁰³ Elsje Bonthuys op cit note 25 at 483-4

hinder their full and effective participation in society on an equal basis with others. As a result the right to equality and non-discrimination play a fundamental role in the recognition of sexual minority rights.

Thus this provision should be read as extending protection to LGBTI persons having regard to the *Toonen* case. In addition, Section 3 of the Constitution of Zimbabwe contains the values upon which it is founded. Among them is the recognition of the inherent dignity and worth of every human being¹⁰⁴ and recognition of the equality of all human beings¹⁰⁵. The importance of these founding values lies in that they are the main pillars upon which Zimbabwe as a state is founded on. Not only do they act as guiding principles to those tasked with the interpretation and enforcement of the constitution, but they are the bulwark of the constitutional order. Consequently, the said founding principles are non-derogable and any law or conduct inconsistent with them would definitely stand to be condemned as void to the extent of such inconsistency.

Similarly, Section 46 (b) of the interpretation section of the Declaration of Rights, suggests that when interpreting the Bill of rights a court , tribunal, forum or body must promote values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom, and in particular, the values and principles set out in Section 3.¹⁰⁶ It is submitted that these principles provided for in Section 3 are commendable as they are meant to instill the recognition of the human worth and dignity of any member of society. Thus not only relate to the constitution by giving it a framework for the realisation of justice in society but it gives it a foundation for the conceptualisation of justice as rights.¹⁰⁷ This means that the realization of equality can be achieved by looking at the circumstances and the context of each right. As a result if marriage rights are provided for they should take into account for both heterosexuals and LGBTI persons.

¹⁰⁴ Section 3 (1) (e)

¹⁰⁵ Section 3 (1) (f)

¹⁰⁶ Section 3 contains the founding values of Zimbabwe

¹⁰⁷ Dworkin 'A Trump over Utility' in M.D.A. Freeman Lloyd's Introduction to Jurisprudence 7th Edition at p541

However, despite having such progressive provisions¹⁰⁸, Section 78 (3) can be argued to fall short of these principles.

3.2.3 The right to dignity

Section 52 of the Constitution provides as follows:

“Every person has inherent dignity in their private and public life, and the right to have that dignity respected and protected”

The right to dignity has been recognised as being intricately linked with other human rights as it forms the groundwork for the realisation of all the other rights. In *S v Makwanyane*¹⁰⁹ it was stated that:

‘Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in ... [the Bill of Rights]’

Further, in *National Coalition for Gays and Lesbians Equality v Minister of Home Affairs*¹¹⁰, it was agreed that:

‘Human dignity is harmed when individual or groups are marginalised ignored or devalued, and is enhanced when laws recognise the full place of all individuals and groups...in society.’

Therefore, the significance of the provision on the inherent dignity of all men need not be underestimated, especially in so far as it applies to LGBTI persons. These are normally treated as if they were less human than other human beings. In *Dawood v Minister of Home Affairs*¹¹¹, the Court had this to say;

“Human dignity informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all other rights. ..’

This is bolstered by Section 3 (1) (e) of the Constitution which recognises the inherent dignity and worth of each human being as one of Zimbabwe’s founding values and principles. This goes

¹⁰⁸Section 3 of the Constitution and Section 46 (b) of the Constitution

¹⁰⁹ 1995 (3) SA 391 (CC) para 328

¹¹⁰ 2000 (2) SA (1) (CC)

¹¹¹2000 (3) SA 936 (CC)

a long way to reinforce the argument that having this provision under the founding values is highly commendable as it will always act as a constant reminder to the constitutional adjudicators not to derogate from such important and founding principles upon which Zimbabwe is built.

Further, the principle of dignity entails the fact that “individuals are seen and appreciated in their concrete reality and respected for what they actually represent in their family and personal lives”.¹¹² Thus LGBTI person’s dignity can be only realised when they are recognised for who they are and not what society expects them to be. Therefore a failure in Section 78(3) to recognise their relationships negates the concept of dignity and cuts the self-worth of LGBTI individuals.

In the *Dawood* case¹¹³ it was held that the right to dignity must be interpreted to afford protection to the institution of marriage and family life. Van Heerden J stated thus:

“...The decision to enter into a marriage relationship and to sustain such a relationship is a matter of defining significance, if not most people, and to prohibit the establishment of such a relationship impairs the ability of the individual to achieve personal fulfilment in an aspect of life that is central in my view, such legislation would clearly constitute an infringement of the right to dignity. It is not only legislation that prohibits the right to form marriage relationship that will constitute an infringement of the right to dignity, but any legislation that significantly impairs the ability of spouses to honour their obligations to one another that would limit that right...”¹¹⁴

Viewed in this light, the prohibition of same sex marriage infringes on the attainment of the freedom to be oneself of LGBTI persons which negates the conception and application of the right to dignity. It is submitted that this prohibition is degrading and therefore impacts the realisation of other rights as a result. This is because human rights are inalienable and interrelated. Therefore the prohibition of same sex marriage has brought more problems and human rights violations for LGBTI individuals. This leads to the seclusion of LGBTI persons in society as they are devalued and seen as less human than heterosexuals.

¹¹²Elsje Bonthuys op cit note 25 at 483

¹¹³2000 (3) SA 936 (CC)

¹¹⁴At para 28

In *Minister of Home Affairs v Fourie*,¹¹⁵ the Constitutional Court of South Africa concluded that ‘the family life of gay and lesbians is in all significant respects indistinguishable from those of heterosexual spouses and in human terms as important¹¹⁶’. It further stated that, when the law fails to recognize the relationship of same-sex couples,

‘The message is that gays and lesbians lack the inherent humanity to have their families and family lives in such same-sex relationships respected or protected. It serves in addition to perpetuate and reinforce existing prejudice and stereotypes. The impact constitutes a crass, blunt, cruel and serious invasion of their dignity.’¹¹⁷the underlining is mine for emphasis

It is submitted that the prohibition of same sex marriages contradicts the rights to dignity as it allows for discrimination which is based on sexual orientation. However, this is incompatible with the right to dignity as all human beings regardless of sexual orientation should be respected and valued due to an acknowledgement of their inherent worth as human beings.

Apart from the Constitution, Section 73 (1) of the Code is inimical to LGBTI people.

3.3 An Analysis of Section 73 (1) of the Code

Consensual same sex relations are criminalised under Criminal Law Codification and Reform Act (Chapter 9.23) [Code]. Section 73 (1) provides for the crime of sodomy as follows:

- (1) Any male person who, with the consent of another male person, knowingly performs with that other person anal sexual intercourse, or any act involving physical contact other than sexual intercourse that would be regarded by a reasonable person to be an indecent act, shall be guilty of sodomy.

As of fact the Code does not extend any protection to homosexuals and criminalises sodomy. This is by the prohibition of consensual same sex relations between males.

It is worthy to note that criminal law is there to prohibit crimes and not to enforce the morality and religion as there is no fine divide between law and morality.¹¹⁸ As a result, the prohibition of

¹¹⁵2006 (1) SA 524 (CC)

¹¹⁶2006 (1) SA 524 (CC) at 546D-E/F

¹¹⁷2006 (1) SA 524 (CC) at 546E-G/H, quoting from the judgment in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* supra note 103 at 33E-G.

¹¹⁸J R L Milton op cit note 30

consensual same sex relations for consenting adults seems unjustified. Milton¹¹⁹ argues that the crime of sodomy is directed and intended to penalize homosexuality amongst males. This view is premised on natural law. The author states that the criminal prohibition of sodomy is based on nothing more than a moralistic prejudice against a particular form of sexual gratification. He states that it serves no rationale object of criminal law and is demeaning and discriminatory.¹²⁰

It can be argued that offence of sodomy as it stands, not only punishes the sexual expression of gay men but it also degrades, belittles and devalues gay men in society. Thus it is submitted that to punish both male and female non-consensual anal rape as sodomy is now due in our legal system. This is because the criminalization of consensual sodomy is indicative of discrimination which is based on sexual orientation of the individuals. N. Bamforth¹²¹ argues that:

“The forced denial of sexual feeling which follows on the heels of the prohibition or severe restriction of consenting sexual activity between adults can cause profound misery, as well, as infantilizing the adults involved... It is also highly demeaning and damaging to the moral dignity of all concerned to deny relationships between people of the same sex the same level of respect is offered to heterosexual relationships and to deny fair treatment to LGBT individuals. Subject to the requirement of consent, which also stems from respect for moral dignity the ability to express oneself sexually and to form loving relationships is an important aspect of anyone’s human rights”¹²²

To this end, it is submitted that sexual intercourse per anum between men should be classified having regard to the relationship between the parties and the fundamental element thereon should be the issue of consent. As a result, non-consensual sexual intercourse per anum should be criminalised only. This is because the sodomy offence builds insecurity and vulnerability into the gay men. Thus the legal stigma which is attached to homosexuals makes them prone to abuse and human rights violations.

3. 4 Majority Rule and Democracy

¹¹⁹ J R L Milton op cit note 30 at 249-250

¹²⁰ J R L Milton op cit note 30 at 272

¹²¹ N. Bamforth op cit note 5 at 228

¹²² N. Bamforth op cit note 5 at 228

Zimbabwe's Constitution is the result of a referendum which was in terms with the law. It is apparent that the majority of Zimbabweans rejected the recognition of the rights of LGBTI person's.¹²³ This is because democracy favours majority rule. However the excesses of the majority are kept in check through the institution of rights. This is because human rights declare minimum standards of behavior that preclude majorities from acting in certain ways and pursuing certain goals. Julie Debeljak¹²⁴ argues that human rights limit democracy. The author further states that a democracy cannot function without some rules limiting the power of those elected to govern.

On the one hand, Hart¹²⁵ argues that it is impossible that everyone be protected in all his interests, and the interests of the minority must yield to the concern of the majority for its safety. He thus relies on the fact that in a democracy, the majority makes the laws and they should be followed regardless of the consequences on minority and it is on the utilitarian theory which combines moralistic preferences to see the potential good to the majority of the citizens.

On the other hand, Dworkin¹²⁶ argues that if someone is denied liberty of sexual practice in sexual practice in virtue of a utilitarian justification that depends critically on other peoples moralistic preferences, then he suffers disadvantage in virtue of the fact that his concept of a proper life is already despised by other. Further, he submits that if the utilitarian justification for denying liberty of sexual practice to homosexuals on the majority's moralistic preferences about how the minority should live is unpleasant. This is because the minority will suffer because others find the lives they propose to lead as disgusting. The author concludes that this is not justifiable, in a society that is committed to treating people as equals. For that reason, that idea is incompatible with equality that some must suffer disadvantage under the law because others do not like them.

In Zimbabwe it can be submitted that although some rights can be limited they are some rights which are inalienable. Sexual orientation is one of them. As a result, the realisation of the rights

¹²³See 'Zim draft constitution makes homosexuality criminal' available at <http://bulawayo24.com/index-id-news-sc-national-byo-25665.html> (accessed 18 May 2014), Tsvangirai's Party Trying to Smuggle "Gay Rights" Into Zimbabwe's Constitution available at <http://www.africanglobe.net/africa/tsvangirais-party-smuggle-gay-rights-zimbabwes-constitution/> (accessed 18 May 2014),

¹²⁴Julie Debeljak op cit note 34 at 137

¹²⁵R Dworkin op cit note 107 at 545

¹²⁶R Dworkin op cit note 107 at 545

LGBTI persons cannot be left to the majority. For that reason, it can be argued that LGBTI are disadvantaged because of the prohibition of same sex marriages and prohibition of consensual same sex relations. To this end, justice should not only be done but it must be seen to be done, and justice means the recognition of sexual orientation as a protected ground of discrimination.

However, Cameron¹²⁷ argues that sexual minority rights are protected under the principle of constitutionalism. This is because the foundation of the constitution is for the protection of unpopular minorities who are unable to assert their entitlements through the electoral process. He highlights that to rely on popular expression of distaste, dislike or hatred for unpopular minorities as a justification for withholding constitutional protection from them is therefore to misunderstand the very essence of constitutionalism.

Consequently, justice in this instance is the appreciation for the difference and diversity of the forms of gender identity. This is by appreciating the sexual orientation of LGBTI people so that equality can be achieved by the removal of the disadvantages associated with the prohibition of same sex marriages and the criminalization of sodomy. Currently, Section 78 (3) of the Constitution and Section 73 (1) of the constitution are inimical to the self-worth and dignity of LGBTI persons and provide an avenue for human rights violations under the guise of the law.

3.5 Conclusion

It can be submitted that, Zimbabwe's legal framework is inadequate for the protection and promotion of LGBTI persons. This is because the law appears to be discriminatory. Rather than promoting the realization of the rights of LGBTI persons, the Constitution does not provide any tangible benefits for the meaningful promotion of the rights of LGBTI persons. As a result they are treated as unequals and the legal and social consequences of a marriage are denied to them. In addition, sodomy laws, in particular, section 73 (1) of the Code demeans and belittles gay men. It is submitted that these laws make sexual minorities a vulnerable group due to the explicit legal prohibition of same sex relations. These provisions affect their right to dignity and the right to equality and non-discrimination. Therefore they are prone to human rights violations solely because of their sexual orientation. Conversely, LGBTI's should be accorded the same rights legal obligations as all other citizens. However, the Constitution denies them marriage

¹²⁷Cameron E op cit note 32

rights by prohibiting same sex marriages and the law omits them from the protection of the law and criminalises same sex conduct between consenting adults. It is submitted that to rely on the majority, in this discourse will lead to the trampling of the minority rights. This is contrary to the spirit of human rights which are to safeguard the unpopular minorities from the excesses of the majority.

Chapter 4

An analysis of the Regional and International and Human Rights instruments to which Zimbabwe is party to

4.1 Introduction

In Chapter 3, a critical analysis of the prohibition of same sex marriages was obtained from a human rights perspective. It was observed that Zimbabwe's legislative framework is inadequate with regards to the protection of the rights of LGBTI persons. This is because the law prohibits same sex marriage and criminalises sodomy. As a result, LGBTI persons face stigmatisation and human rights violations due to the interaction between their minority sexual orientation and attitudinal and societal barriers. In the end, LGBTI persons are hindered from their full and effective participation in society on an equal level with others. Further, it was submitted that majority rule has the incapacity to sustain the rights of the minorities against discrimination and stigmatisation. In this case, it is the LGBTI persons who face human rights violations because of their difference in sexual orientation from the heterosexual norm. This is reflected by the inclusion of the prohibition of same sex marriages and the intended exclusion of sexual orientation as a protected ground of non-discrimination in the Constitution.

This Chapter will evaluate Zimbabwe's obligations under the African Charter on Human and Peoples' Rights (ACHPPR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR). It will be submitted that the prohibition of same sex marriages and the prohibition of consensual same sex relations constitutes discrimination which is based on sexual orientation and is at variance with Zimbabwe's obligations under these regional and international human rights instruments.

4.2 African Charter on Human and Peoples' Rights

Article 2 of the ACHPR is the non-discrimination clause¹²⁸. The Article makes use of the term ‘or other status.’ This open-ended clause has been interpreted to include sexual orientation. In *Zimbabwe Human Rights NGO forum v Zimbabwe*,¹²⁹ the African Commission has interpreted ‘other status’ in Article 2 of the ACHPR to include sexual orientation. It is submitted that the interpretation is commendable and indicative of the realisation that LGBTI persons face human rights violation on the basis of sexual orientation. Therefore, the prohibition of same sex marriages and consensual same sex sexual intercourse seems to be in direct conflict with the non-discrimination clause of the ACHPR.

Further, Article 3 of the ACHPR provides for the right to equality of all individuals and the entitlement to equal protection of the law. The right to equality seems to be premised on the fact that all individuals shall enjoy the same respect and shall have the same rights. To this end, substantive equality should be canvassed when it comes to issues of sexual orientation so that LGBTI persons are accorded the same rights as heterosexuals. This is in a bid to eradicate all forms of discrimination which is based on sexual orientation. It can be submitted that the non-recognition of LGBTI persons in the Constitution of Zimbabwe and the criminalisation of sodomy falls short of the Article 3 of the ACHPR. As a result, LGBTI persons appear as second class citizens whose inalienable rights can be spared for the majority. However, there can be no justification for the deprivation of the inalienable rights of LGBTI persons on the basis of their sexual orientation. In *Legal Resources Foundation v Zambia the African Commission*¹³⁰ held that “justification cannot be derived solely from popular will, 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 LGBTI persons leads to inequality and differentiates individuals based on their sexual orientation and as such the Zimbabwean Constitution seems to be discriminatory in this regard.

¹²⁸Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

¹²⁹Communication 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

¹³⁰Communication No. 211/98 (2001)

¹³⁰**Article 18**

1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.
2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.

Additionally, Article 18¹³¹ of the ACHPR guarantees individuals the right to found a family. It provides that this institution shall be protected by the state. However, Article 18 does not define the concept of marriage. This is important as it averts the discrimination of LGBTI persons by the prohibition of same sex marriage on the basis of sexual orientation. To this end, it is submitted that bearing in mind the fact that all individuals are equal before the law, where marriage rights are provided for they should be accorded to consenting partners regardless of their sexual orientation. Therefore, it can be argued that the ACHPR guarantees protection of same sex marriages because the interpretation of marriage rights and the concept of family is open-ended to cater for any form of family conceivable. Further, the African Commission is yet to decide on the same and it could take this progressive approach enumerated above.

4.3 International Covenant on Civil and Political Rights

Zimbabwe is a party to the ICCPR¹³². Article 2 (1) of the ICCPR provides for the non-discrimination clause. It has 'sex' as one of its protected grounds. The United Nation Human Rights Committee has interpreted the term 'sex' as including sexual orientation. In *Toonen v Australia* the question before the United Nation Human Rights Committee¹³³ was whether sodomy laws which punish consensual adult homosexual conduct violated protections against discrimination in the ICCPR. It was held that the Tasmanian Code which prohibited consensual same sex relations violated the ICCPR. It further held that sexual orientation was a status protected under the ICCPR from discrimination. In addition, it found that "the reference to sex in Articles 2, para 1 and 26 is to be taken as including sexual orientation."¹³⁴ It is submitted that any law that discriminates individuals on the basis of their sexual orientation will be in conflict with the ICCPR as Article 2 (1) has interpreted in an expansive way. To this end, laws that prohibit same sex marriages and the existence of sodomy laws seem to be ultra vires the ICCPR. This is because these laws discriminate and stigmatise LGBTI persons because of their sexual preferences of the partners. As a result, it appears that Zimbabwe's legal framework is at variance with her International obligations.

¹³² Zimbabwe ratified the ICCPR on 13 May 1991

¹³³ This Committee monitors compliance with and adjudicates violations under the ICCPR

¹³⁴ Nicholas Toonen v Australia, Human Rights Committee, 50th Session, Case no. 488/1992, UN Doc. CCPR/c/50/D/488/1992, at 8.7

Article 26 of the ICCPR recognizes the equality of all people before the law without any discrimination and the right to the equal protection of the law. It requires the law to prohibit any discrimination and to guarantee all persons the equal protection of the law. The presence of the prohibited grounds of inequality and reference to ‘other status’ shows that other non-mentioned grounds like sexual orientation can be included, following the *Toonen* case (supra) . It is submitted that LGBTI persons should be given equal opportunities as those afforded to heterosexual couples. This includes enjoying the legal status of marriage and being able to engage in consensual sexual intercourse regardless of their sexual orientation. However, this possibility cannot be envisaged where there is a prohibition of same sex marriages and the presence of sodomy laws as in Zimbabwe’s legislative framework.

Furthermore, Article 23 of the ICCPR provides the right to found a family and the right to marry. It can be noted that the ICCPR provides for marriages without looking at who the partners are. Further the article does not define what a marriage is nor does it qualify the right¹³⁵. It is an open-ended marriage clause. Therefore, it can be argued that the prohibition of same sex marriages is discriminatory as it focuses on the sexual orientation of the partners.

4.4 International Covenant on Economic Social and Cultural Rights

Article 2 (2) of the ICESCR contains its non-discrimination clause. It is imperative to note that its non-discrimination clause contains the analogous ground of ‘other status’. This is important as it is reactive to the evolving and dynamic concept of non-discrimination over time. As a result it encapsulates the concept of sexual orientation as a protected ground of non-discrimination. The UN Committee on Economic, Social and Cultural Rights¹³⁶ discussed the occurrence of ‘other status’ and outlined that ‘a flexible approach to the ground of “other status” is thus needed to capture other forms of differential treatment that cannot be reasonably and objectively justified and of a comparable nature to the expressly recognized grounds in Article 2 (2). These additional grounds are commonly recognized when they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalization’.¹³⁷ It is submitted that

¹³⁵ Article 23 (1) the family is the natural and fundamental group unit of Society and is entitled to protection by society and the State

(2) The right of men and women of marriageable age to marry and to found a family shall be recognized.

¹³⁶ General Comment No.20, Committee on Economic, Social and Cultural Rights, 10 June 2009, at para 27

¹³⁷ General Comment No.20, Committee on Economic, Social and Cultural Rights, 10 June 2009, at para 27

LGBTI persons are a vulnerable group due to the interaction of their sexual orientation and societal and attitudinal barriers that hinder their full and effective participation in society. As a result, 'other status' can be interpreted to accommodate LGBTI persons under the ICESCR thus laws prohibiting same sex marriages and sodomy laws in Zimbabwe are in not in tandem with it International obligations.

Additionally, Article 10 of the ICESCR provides for the right to found a family. However this provision does not restrict the parties who can enter into the relationship. It is submitted that, the framers of the ICESCR realized the evolving and dynamic nature of a family. Hence, in casu, the widest possible protection would be the extension of the marital contract to LGBTI persons so that they can enjoy the legal benefits which stem from therefrom as heterosexuals. To this end the section 78 (3) Constitution of Zimbabwe falls short of this provision as its definition of marriage has the effect of time-locking this dynamic and evolving concept together with the concept of family. It appears that the inclusion of the prohibition of same sex marriages as an indicator of what a marriage is ex facie suggests discrimination which is based on sexual orientation.

4.5 Conclusion

It is submitted that Zimbabwe's legal framework is inadequate for the realisation of its International obligations under the various international human rights instruments it has ratified. As a result, the Constitution does not provide any meaningful promotion to the rights of LGBTI persons. It can be argued that Zimbabwe's obligation under the various regional and international instruments provide for a generous application of human rights law for the protection of LGBTI persons. Accordingly, it appears that in Zimbabwe, LGBTI persons are treated as unequals and the legal and social consequences of a marriage are denied to them. Further, consensual same sex acts are criminalised which demeans and belittles gay men in particular.

Chapter 5

5.1 Introduction

In Chapter 4, the various International Human Rights Instruments which Zimbabwe has ratified provide for the protection of discrimination on the basis of sexual orientation. Therefore, the prohibition of same sex marriages and the criminalisation of sodomy are indeed a violation of Zimbabwe's obligations under international law.

This Chapter provides the conclusion and the recommendations addressing the discriminatory tendencies which are faced by LGBTI persons due to their sexual orientation in a bid to be fully and effectively included as equal members of the Zimbabwean society.

It is submitted therefore that the laws that prohibit same sex marriage and which criminalise sodomy discriminate LGBTI persons on the basis of their sexual orientation. As a result they face human rights violations which are based on their conceived or actual minority sexual orientation. It can be argued that Zimbabwe is 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 sexual orientation. It will be submitted that both the Constitution and the Code need amendment so as to capture the best practices at International level.

5.2 Recommendations

5.2.1 Constitutional amendment

It is submitted that Section 78(3) of the Constitution should be repealed because it is discriminatory on the ground of sexual orientation. This is in order to capture the best practice at international level by having an open-ended concept of marriage and family. Thus the Constitution should reflect the right to marry and to found a family without discrimination on the basis of sexual orientation or gender identity. This seems to be a safeguard to ensure that the constitution substantively equates the discriminatory treatment which is meted on LGBTI persons.

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 which govern the proprietary consequences of heterosexual marriages upon their dissolution to same sex marriages on the other hand.

Alternatively a Civil Partnerships Act can be enacted. This would have the effect of catering for the marriage of same sex partners and the legal consequences. This is to safeguard their contractual obligations and to pave way for the formalization of the institution of marriage to both homosexuals and heterosexuals. In South Africa, the Civil Union Act which was enacted in 2006 provides for the legalization of same sex marriage by catering for the formalization of their marriages. Further, in Denmark, the Danish Registered Partnership Act No 372 of June 7, 1989, provides for the registration of same sex partnerships. These have the same consequences as those which are 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 marriages¹³⁸.

Further, Section 56(3) of the 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 LGBTI persons. Alternatively, Section 56 (3) can be amended to include the term sexual orientation to strengthen the protection afforded to LGBTI persons. Section 9 (3)¹³⁹ of the South African constitution is an example of a non-discrimination clause which provides for sexual orientation as a prohibited ground of discrimination.

¹³⁸Marianne Hojgaard Pedersen 'Denmark: Homosexual Marriages and New Rules Regarding Separation and Divorce' [1991-92] *J of Family Law* 290.

¹³⁹ Section 9 (3) reads as follows: ‘ 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, sexualorientation, age, disability, religion, conscience, belief, culture, language and birth.

5.2.2 Repeal of Section 73 (1) of the Code

It is submitted that section 73 (1) of the 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. It should be replaced with a section which criminalises sodomy as non-consensual anal rape. Therefore the issue of consent should be the determinant factor as to whether or not the offence of sodomy has occurred. This will remove the belittling of homosexuals which fuels discriminatory effect the current legislation has.

In *National Coalition for Gay and Lesbian Equality v Minister of Justice* supra¹⁴⁰ the court found that the criminalization 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 Principles¹⁴¹ 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 LGBTI persons.

It is submitted that Zimbabwe can adopt a National Policy for the promotion and protection of LGBTI persons. This is to facilitate for their full and effective participation in all the spheres of society. This will be aimed at eradicating the misconception that LGBTI persons are generally inferior to heterosexuals. This will be aimed at systematically eradicating discrimination which is based on sexual orientation which legitimises oppression and prejudice which is meted out on LGBTI persons. Thus its focus will be for promoting social awareness and the engagement in strategic partnerships which seek to foster the full and effective participation of LGBTI persons.

On the other hand, it is imperative to note that the Zimbabwean society seems to be conservative. In *S v Banana*¹⁴² it was held that Zimbabwe was a conservative society on questions of sexual morality and the court declined to pursue the decriminalization of consensual sodomy between consenting adults. Thus for LGBTI persons to be fully included in the Zimbabwean society it is

¹⁴⁰note 103 supra

¹⁴¹ See Principle 2 recommendation B of the Yogyakarta Principles

¹⁴² 2000 (3) SA 885 (ZS)

imperative that the focus should be on the discriminatory tendencies which hinder LGBTI persons from their full and effective participation in the Zimbabwean society.

5.3 Conclusion

From Chapters Two to Five, this dissertation critically analysed the prohibition of same sex marriages from a human rights perspective. Accordingly, it was indicated that the Zimbabwean legal framework is inadequate for the promotion and protection of LGBTI persons. As a result, it is a fertile ground for discriminatory tendencies which suppress an environment conducive for the full and effective realisation of LGBTI persons. Consequently, there is an urgent need to address the problems which emanate from the prohibition of same sex marriages and the criminalisation of same sex sexual relations by focusing on the inclusion of sexual orientation as a protected ground of discrimination. There is also an urgent need to repeal Section 78 (3) of the constitution as it is discriminatory against LGBTI persons. Furthermore, there is the need to amend Section 73 (1) of the Code which punishes consensual sodomy between consenting adults as it discriminates, belittles and devalues gay men for expressing their sexual desires. To this end it is an opportune time for Zimbabwe to clearly embrace sexual minority rights. This can be achieved by the inclusion of sexual orientation as a protected ground of discrimination. This can be juxtaposed with the introduction of a Civil Partnerships Act which will extend the legal consequences of marriage to LGBTI persons. Further, this can be bolstered by a National Policy on the promotion and protection of LGBTI persons. However although Zimbabwe is a conservative society on questions of sexual morality, there is the need for the appreciation of the diversity and difference in human existence for the realisation of the rights and rights related claims of LGBTI persons. This is to enhance their full and effective participation in society.

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A CRITICAL ANALYSIS OF THE PROHIBITION OF SODOMY AND SAME-SEX MARRIAGES: A HUMAN RIGHTS PERSPECTIVE

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