SEXUAL ORIENTATION AND ZIMBABWE'S CONSTITUTION:

A CASE FOR INCLUSION

EXECUTIVE SUMMARY

Although democracy is about the rule of the majority, the majority does not have unfettered power. A democratic constitution must incorporate various fundamental rights in order for it to be democratic. These fundamental rights are not determined by majority opinion, but are regarded as inalienable and inherent. These rights have been integrated into all international human rights treaties. Zimbabwe has ratified the International Covenant on Civil and Political Rights and has thus undertaken to respect the rights of equality and privacy. The right to equality protects gay and lesbian identity, the right to privacy, and consensual adult gay and lesbian conduct. The right to equality implies respect for difference. No person should be deprived of opportunity solely on the basis of an irrelevant personal characteristic. Such a deprivation constitutes unfair discrimination. To deny a job simply on the basis of a person's gender, when the fact is unrelated to the ability to perform the required work, is an affront to the person's dignity.

Identity of treatment may also result in substantive inequality. To equally deny maternity leave to women as well as men results in equality through a failure to acknowledge a difference in circumstances and sex. Unfair discrimination thus results from the unequal treatment of equals and the equal treatment of unequals. Gays and lesbians have the personal characteristic of same sex attraction. This characteristic is irrelevant to their contribution to the community or ability to perform work. Yet gays and lesbians encounter unfair discrimination solely on this basis.

The right to privacy recognises that there is an area in each individual's life which ought to remain free from government intrusion. Sexuality is a most private area of a person's life. It ought not to be interfered with unless there are legitimate reasons to do so. International jurisprudence reveals that public morality alone is an insufficient basis to intrude upon private sexual acts which cause no harm to others. There is no legitimate basis for government interference in gay and lesbian sexual acts where these take place in private between consenting adults.

However, neither the right to privacy alone nor a general right to equity of all persons is sufficient to protect the dignity of the gay and lesbian community and to prevent unfair discrimination. The International Declaration of Human Rights declares a general right to equality but lists specific grounds upon which discrimination is proscribed where these grounds have historically been the targets of unfair discrimination. Sexual orientation is one such ground and thus should likewise receive specific mention. A right to privacy alone is an inadequate safeguard for gay and lesbian rights, since gays and lesbians are not discriminated against solely on the basis of what they are perceived to do, but who they are. Accordingly, Zimbabwe's new constitution requires rights to privacy and a right to equality, in which sexual orientation receives specific mention.

SEXUAL ORIENTATION AND ZIMBABWE'S NEW CONSTITUTION: A CASE FOR INCLUSION

THE NATURE OF HUMAN RIGHTS

The Universal Declaration of Human Rights was adopted by the General Assembly of the United Nations in 1948. Since then Human Rights has become the idea of our time[1]. While several Human Rights instruments form the progeny of the Universal Declaration of Human Rights (UDHR), the purpose of each is to give effect to those rights outlined in the original declaration. Almost every member state of the United Nations has adhered to at least one of these major human rights instruments, whether it is the comprehensive International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights, or regionally based human rights instruments such as the African Charter on Human and People's Rights, the American Convention on Human Rights or the European Convention for the Protection of Human Rights and Fundamental Freedoms. All these instruments adopt, with minor variations, the fundamental rights and freedoms outlined in the original Declaration, its basic philosophy and jurisprudence. The Universal Declaration of Human Rights is, as will be seen shortly, no modest document. Its basic principles have profound implications on questions of governance and sovereignty. That this is so may be either a cause for surprise or explanation for the fact that the Government of Zimbabwe entered into the International Covenant on Civil and Political Rights without fanfare or notice to the public[2].

The importance of the Declaration is contained in its rubric. It is Universal. It is a Declaration. It declares Rights. And it declares Rights which inhere in humanity.

The rights declared are held to be *Universal*. Hence while the Declaration may be conspicuously Western in tone and form, it is now accepted that the substantive rights in the document apply universally, across nations and across cultures. Accordingly, no culture or tradition can justify a departure from the Declaration's fundamental rights. There are no arguments that may justify a violation of fundamental rights that justify torture, genocide, slavery, racism etc. on the basis that such practices form part of a State's sacred traditions or cultural practices. If a right is shown to be a fundamental right it cannot be diminished by cultural traditions[3]. This universality is a marked departure from the pre-Second World War position. Whereas then the manner in which a State treated its citizens was its own concern, today it forms the substance of international relations and diplomacy[4]. Certainly, adherence to the norms of the Charter may be formal, nominal or hypocritical in the case of some States. But when charged with violation of a human right, the State response is not usually to deny the existence of the right itself, but to acknowledge the right and to seek to justify the violation[5].

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[1] Henkin, L, (Ed) *The International Bill of Rights* (Columbia University Press, 1981) p.1

[2] The Covenant was acceded to in May 1991 and ratified in August 1991

[3] During its report to the United Nations Human Rights Committee on 25th and 26th March, 1998, the Zimbabwean government was subjected to strident criticism on precisely this basis when it attempted to justify homophobic legislation on the basis of cultural relativism. Further details on the report can be found at the Website address http://www.un.org/news.

[4] Henkin *op. cit.* p. 2

[5] It is precisely because Robert Mugabe refused to acknowledge the very existence of human rights as they pertain to the gay and lesbian community that his pronouncements caused such an international furore, one which may not have occurred had the rights been acknowledged and an attempt made to excuse their violation.

Secondly, the document is a *Declaration* of Human Rights. It does not purport to legislate, prescribe or bring the rights into being, but to declare and recognise what is already known to exist prior to the Declaration. Thus the rights exist independently of any government and inhere in each individual by virtue of each person's very humanity. These rights are accordingly seen as natural and "derive from the inherent dignity of the human person". The rights are "inborn", "inviolable". By definition then, fundamental human rights do not depend upon State approval for their existence. As rights they differ from other legal rights, say those under contract, which may be sold or alienated. Fundamental human rights, existing by virtue of the holder's very humanity, cannot be bought or negotiated, and cannot be reduced to a mere privilege dependant on State beneficence. As they derive from attributes of the human personality they exist perpetually and universally for all people and for all nations regardless of historical, cultural, ideological, economic or other differences. If then, sexual orientation rights are shown to be part of these fundamental rights, those who object to sexual orientation rights on the basis of cultural difference, object not so much to rights arising from sexual orientation, but to the very principle of Human Rights itself[6].

The fundamental human rights that are of concern for these purposes are primarily those of equality and privacy.

EQUALITY AND NON-DISCRIMINATION

The importance given to the principles of equality and non-discrimination in the UDHR can be gathered from the opening lines of the Declaration:

> *Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world…*

The bedrock nature of the right to equality has been emphasised time and again by commentators and in international fora where it has been held to be:

> *In a substantial sense the most fundamental of the rights of man. It occupies the first place in most written constitutions. It is the starting point of all other liberties*[7].

Similarly:

> *Of all human rights, the right to equality is one of the most important. It is linked to the concepts of liberty and justice, and is manifested through the observance of two fundamental and complementary principles of international law. The first of these principles, that "all human beings are born free and equal in dignity and rights", appears in the Universal Declaration of Human Rights*[8]*; the second, the principle of non-discrimination has been solemnly reaffirmed in Article 1 of the Charter of the United Nations. It is upon those two principles that all the instruments on human rights adopted since 1945 are based…*[9]

Zimbabwe is a signatory to and has ratified the International Covenant on Civil and Political Rights, the most widely ratified Convention and widely accepted agreement on human rights apart from the UDHR itself. Equality and non-discrimination constitute the single dominant theme of the Covenant[10]. Like the UDHR,

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[6] Heinze, E, *Sexual Orientation: A Human Right* (Matinus Nijhoff Publishers, 1995) p. 68

[7] Henkin *op. cit*. p. 247

[8] Article 1

[9] Henkin *op. cit*. p. 247

[10] Henkin *op. cit*. p. 246

the opening words of the preamble of the Covenant affirm the rights of equality. By Article 2 (1) a State undertakes to respect and ensure the rights recognised by the Covenant:

> *To **all** individuals within its territory and subject to its jurisdiction … without distinction of **any kind** such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or **other status**.* [emphasis added]

This right to equality is repeated in all other international human rights instruments, the European Convention, Article 14, the African Charter, Articles 2 and 3, the Cairo Declaration on Human Rights in Islam Article 1, American Declaration of the Rights and Duties of Man, Article 2, to name a few.

THE NATURE OF THE RIGHT TO EQUALITY AND NON-DISCRIMINATION

The right to equality has spawned an extensive and complex jurisprudence, for the right is by no means self-explanatory. Non-discrimination and equality are not synonymous or tautological. Non-discrimination should instead be regarded as the means to an end, and the end is that of equality. Furthermore, equality does not imply identity. Indeed, it suggests the opposite. If all individuals shared identical personal characteristics, there would be no need for a right to equal protection of the law, for any difference in treatment could not, under such a scenario, be ascribed to discrimination on the basis of a personal characteristic. This may seem obvious. Yet States often seek to justify the violations of the right to equality precisely on this ground that the individuals discriminated against "are different". I shall return to this point later. Equality then has to do with non-discrimination on the basis of personal characteristics, whether that characteristic be a natural attribute (such as race or gender); nurture (such as language); or chosen (such as religion).

Equality does not require a blanket prohibition on discrimination. If a clearly identifiable group has historically been subjected to a diminished allocation of state resources on the basis of race, for example, the principle of equality might require positive discrimination, in the form, say, of an affirmative action programme in order to promote equality. Discrimination may be required to ensure equality in either areas as well. Principles of equality are not satisfied if a law equally prohibits maternity leave to parents regardless of gender. Equality of opportunity in the work place requires discrimination to redress an imbalance in the duties of infant care placed on women. In short, discrimination exists in the unequal treatment of equals and the equal treatment of unequals.

Discrimination is also inevitable and desirable in some cases. If the State wishes to select the best employees for a limited number of posts in a State enterprise, it may design a test to determine who will perform best in those posts and may then discriminate against those who perform badly. Equality then does not prohibit discrimination. It prohibits "unfair" or "invidious" discrimination. The question, which then arises, is what constitutes unfair or invidious discrimination? At the core of this question is the determination of whether the discrimination serves a legitimate purpose, and is no broader in application than is required to serve that purpose. In the words of the European Court of Human Rights:

> *The principle of equality is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there*

is no reasonable relationship of proportionality between the means employed and the aim sought to be realised[11].

The jurisprudence of Supreme Court of the United States is well developed in this regard and is mirrored in other jurisdictions, albeit with differing terminology[12]. The United States Supreme Court has distinguished three kinds of discrimination each of which gives rise to a different level of judicial review. Laws, which discriminate on the basis of some natural and immutable characteristic, such as race, are regarded as "suspect classifications" subject to "strict scrutiny". The legislator must satisfy the court that the discrimination serves a "compelling government interest". Few laws meet this rigorous test. A second level of quasi-suspect discrimination is subjected to "intermediate scrutiny". Discrimination on the basis of gender would fall into this category. Here the requirement is that the law bears a substantial relationship to an important government interest. These two levels attract rigorous judicial review and jointly fall within a category known as "heightened scrutiny". Classifications falling outside these two levels may still be subject to judicial review, but the onus then lies with the complainant who must show that the legislation complained of does not bear any rational relationship to a legitimate government purpose[13].

THE NEED TO SPECIFY SEXUAL ORIENTATION

From discussion above, two issues arise for the purposes of this paper. Firstly, whether discrimination on the basis of sexual orientation can be excluded from the requirement of equality demanded by international law, on the basis that it serves a legitimate government purpose, such as public morality, and secondly, if not, whether sexual orientation should appear, or needs to appear, explicitly in anti-discrimination clause or whether it is adequately dealt with in a catch-all phrase which prohibits discrimination on the basis of any "other status". To address these issues it is necessary to consider what is meant by "sexual orientation".

Sexual Orientation

While sexual orientation immediately brings gay rights to mind, there is nothing in the phrase itself that requires that this be so. We all have a sexual orientation, whether it is homosexual, heterosexual, bisexual, asexual, transsexual, intrasexual, etc.

Sexual orientation encompasses more than sexual conduct. It may also encompass the direction of sexual attraction and a concomitant life-style. The term "homosexual" is of very recent vintage; the suggestion being that it entered our lexicon around 1850[14]. This is not of course because no one engaged in same-sex activity prior to this date, but because same-sex activity was merely an action, what one *did*, not what one *was*. While legal prohibitions on same-sex activity existed in ancient civil and canonical codes -

sodomy was a category of forbidden acts; the perpetrator was nothing more than the juridical subject of them. The nineteenth-century homosexual became a personage, a past, a case history, and a childhood, in addition to being a type of life, a life form, and morphology, with an indiscreet anatomy and possibly a mysterious physiology

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[11] *Belgian Linguistic Case*, 11 Y.B. European Conventions on Human Rights 832, 1968 at p. 34. Quoted in Henkin *op. cit.* at p. 261

[12] Compare for example *President of RSA v. Hugo*, 1997(4) SA 1 CC

[13] Heinze *op. cit.* p. 232

[14] Harvard Law Review Editors *Developments – Sexual Orientation and the Law*, Harvard Law Review 102 No. 7, Mau 1989 pp 1511 – 1671 at p. 1514

... The sodomite had been a temporary aberration; the homosexual was now a species[15].

In other words the homosexual became, in the nineteenth century, a category, a class; in the same way that race is a category or class. Whether one is homosexual or heterosexual or otherwise is, in contemporary society, regarded as an essential feature of one's identity. People are defined, and define themselves according to their sexuality in the same way one may be defined or define oneself as black or white. Whether one regards a homosexual orientation as a matter of "nature" or ""nurture" is not relevant to this point. The point is: sexuality, whether existing by virtue of biology or nurture, has been constructed as a defining aspect of identity. Sexual orientation is more than sexual conduct. For the purposes of human rights law:

Sexual orientation denotes real or imputed acts, preferences, lifestyles, or identities, of a sexual or affective nature, in so far as these conform to or derogate from a dominant normative-heterosexual paradigm[16].

The law has generally been more concerned with same-sex conduct. But it is important to note that sexual orientation is broader than this. As Edwin Cameron observes:

The law has been less concerned with homosexual identity than with homosexual conduct. But social discrimination at large occurs principally on the basis of what people perceive as categories of sexual orientation. In other words, men and women are discriminated against not only because they perform sexual acts with others of their own gender, or because they accept for themselves the labels gay or lesbian, but because they are perceived as likely or disposed to perform homosexual acts – even if they never do[17].

The discrimination on the basis of sexual orientation thus targets who a person is, or is perceived to be, not what that person does.

Legitimate Government Purpose?

Having considered the concept of sexual orientation, the question arises as to whether sexual orientation may be excluded from the requirements of equality demanded by international law. In considering this point it is necessary to review equality jurisprudence.

To determine whether there has been a violation of the requirement of equality, both international and domestic human rights jurisprudence adopts a three-stage test, though the terminology may differ[18]. The first test is to determine whether there has been discrimination on the alleged ground, the second, whether that discrimination serves a legitimate government purpose, and the third, whether the legislation is no broader than is required to achieve that purpose. This approach may be illustrated by applying it to a concrete example, which arose in Zimbabwe in 1995.

Each year Zimbabwe hosts an International Bookfair. While primarily designed for publishers, various non-governmental organisations are invited by the organisers to participate. GALZ, a homophile organisation which lobbies for gay and lesbian rights,

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[15] Michel Foucault, *The History of Sexuality* (Pantheon, New York, 1978) p. 43

[16] Heinze *op. cit.* p. 60

[17] Cameron, Edwin *Sexual Orientation and the Constitution: A Test Case for Human Rights* 110 (1993) SALJ 450-472 at p. 452. A gay activist when writing the article, from which the quote is taken, Edwin Cameron was later appointed a judge.

[18] c.f. Belgian Linguistic Case No. 11 *supra*

sought to participate in the 1995 Bookfair. Government issued a directive to the organisers, who were to some extent dependant on the Government's cooperation to host the Fair, to bar the participation GALZ[19]. This directive was repeated in 1996. However, when it became uncertain that the organisers would heed the directive, Government declared a ban on the presence of GALZ, and *ex post facto*, sought a legal basis for the ban by invoking the Censorship Act. But the directive and ban were issued not on the basis of any acts that the members of GALZ would perform or the material they might display, but who the members were, that is, because the members were perceived as having a homosexual sexual orientation. GALZ challenged the "ban" in the High Court of Harare. During the hearing in Judges' Chambers, Justice Sandura asked the Attorney-General's representatives how the Censorship Act could provide for the ban of a stand, and secondly, unknown publications. The reply was to admit that the true objective was to bar GALZ itself, as they did not want the organisation at the Bookfair, regardless of what it intended to display[20].

Applying the jurisprudence outlined above it is clear that the attempt to bar GALZ from the Bookfair violated the right to equality and freedom from discrimination. The first requirement, that there has been discrimination is obviously met. The second test, whether the discrimination serves a legitimate government purpose must also be resolved in favour of GALZ. An appeal to public morality as the government's legitimate interest fails because the government sought to bar, not immoral behaviour or undesirable publications but people. It sought to bar people simply on the basis of who they are, that is, that they do not conform to the prevailing heterosexual normative paradigm. In other words, rather than seeking to enforce a legitimate government objective, the State sought to bar GALZ solely on the basis that its members are "different". To return to the point raised earlier[21], it is precisely because of difference that equality jurisprudence acquires meaning. If all individuals were the same, there would be no need for prohibitions on discrimination. Difference therefore, cannot in itself be a reason not to apply equality requirements of international law and does not constitute "a purpose". It would be easy to ensure observance of the right to non-discrimination on the basis of sexual orientation if everyone were heterosexual. The equality clause would be meaningless in this context. It is precisely because other forms of sexuality exist that a principle of non-discrimination on the basis of sexuality acquires meaning. As was noted in a judgement from the South African Constitutional Court dealing with discrimination on the basis of sexual orientation:

> *It is easy to say that everyone who is just like 'us' is entitled to equality. Everyone finds it more difficult to say that those who are 'different' from us in some way should have the same equality rights that we enjoy. Yet so soon as we say any…group is less deserving and worthy of equal protection and benefit of the law, all minorities and all of…society are demeaned. It is so deceptively simple and so*

[19] See Dunton, C and Palmberg, M. Zimbabwe – The Book Fair Drama Current African Issues 19 (June, 1996) Human Rights and Homosexuality in Southern Africa at p. 9 for the text of the directive.

[20] In fact, the Censorship Act was wholly inappropriate for the government's objectives and did not even start to legitimate government's "ban". The discrimination was thus arbitrary in the sense that it was not in compliance with any law. The questions, therefore, of whether the "ban" served a legitimate purpose did not arise, since the ban itself was unlawful. GALZ was thus successful in obtaining the necessary interdict allowing their participation at the Fair.

[21] p. 4

devastatingly injurious to say that those who are handicapped or of a different race, or religion, or colour or sexual orientation are less worthy[22].

"Difference" is the essence of equality jurisprudence. The United Nations Educational, Scientific and Cultural Organisation at its twentieth session in the Declaration on the Race and Racial Prejudice affirmed:

All individuals…have the right to be different, to consider themselves as different and to be regarded as such[23].

Government thus could not discriminate against GALZ solely on the basis of difference, when the right to be different is itself a human right.

Another way of looking at the issue is to consider that even if Government could show a legitimate purpose in the ban, for example, to prevent the publication of undesirable materials, the ban would still have been a violation of rights due to ill-fit or over-breadth. The over-breadth lay in the fact that the "ban" would encompass more than undesirable materials, and included in its ambit a ban on the presence of individuals. However, since the ban did not have any ostensible legitimate government purpose, the third test does not arise.

Specific Mention

The second issue raised for discussion is whether sexual orientation requires specific mention in an equality or non-discrimination clause. In this regard, the Bookfair scenario illustrates an important point. Those adopting a lifestyle, which differs from the heterosexual normative paradigm, face discrimination regardless of any conduct, in which they may engage. To ensure equality, it is insufficient simply to remove archaic legislation, which seeks to regulate sexual mores. A more general protection is required. The question, which then remains to be answered, is whether that protection is already contained in the prohibition on discrimination based on "any other status". The equality clause of Universal Declaration of Human Rights reads as follows:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, birth or other status[24].

It is clear from this wording and the wording of the international Human Rights Instruments, which followed, that the specific grounds mentioned are intended to be illustrative and not exhaustive. Judgements of the European Human Rights Court remove any doubts in this regard. In *Marckx*, for example the court declared discriminatory treatment of an unmarried mother a violation of the equality provisions, employing the "other status" provision of the Convention[25]. However, the question still persists as to why some grounds are mentioned and not others. The list may be limited only by the somewhat boundless capacity humans have for discrimination. Age, accent, beauty, health, height etc. could all be added. The effect, however, of adding new categories would simply be to dilute and render the inclusion of the original categories

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[22] *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* CCT11/98 at para. 22.

[23] Quoted in Heinze *op. cit.* p. 209. And see *Wisconsin v Yoder* 406 U.S. 205 (1972), a case concerning the Amish, on the right to be different.

[24] Article 2

[25] *Marckx v Belgium* Judgement of 13th June, 1979, Series A No. 31 and see Heinze *op. cit.* p. 224. See also *Inze v Austria* Judgement of 28th October, 1987, Series A No, 126; and *Darby* Judgement of 23rd October, 1990, Series A, No. 187.

meaningless. One might as well have a clause which states merely "all people are equal in dignity and rights". The drafters of The Universal Declaration of Human Rights, however, felt that specific recognition of some categories was required. This is partly due to the fact that the genesis and motivation for the Declaration was the Second World War. The horror of the Holocaust had degraded humanity as a whole. The opening statement of the United Nations Charter thus expressed the determination to "reaffirm faith in fundamental human rights, in the dignity and worth of the human person" which had been adulterated by the supremacist ideology of the Nazi regime. The experience of the Holocaust thus made it fitting that specific mention was made of discrimination on the basis of race. In this way, expression was given to the determination of the Charter, that there should never again be another Holocaust.

Other failures of human rights in the area of equality has led to the expansion of categories receiving special mention, there now being some 23 categories[26] mentioned in various human instruments. This then begs a further question, that is, when does a group become a category for the purposes of human rights jurisprudence? Why, for example, should human rights jurisprudence focus upon the category of sexual orientation and not, for example, height?

Sexual Orientation as a Distinct Category

Once again, it is to the jurisprudence of the United States Supreme Court to which we may turn to determine when a group might be regarded as a distinct classification which will attract "heightened scrutiny" and to determine whether the law in question violates the provision of equal protection of the law.

The first criterion is that the group in question must have suffered "a history of purposeful discrimination". The second is that the discrimination embodies "a gross unfairness that is sufficiently inconsistent with the ideals of equal protection to term it invidious". The third that the class is, by its numbers or its history, politically powerless.

Systematic Discrimination

The first requirement is less restrictively phrased in international law than in American jurisprudence. International law does not require a history of discrimination but rather "systematic" discrimination[27]. There can be little doubt that gays and lesbians meet this requirement. Gays and lesbians have "historically been the object of pernicious and sustained hostility"[28].

The most obvious area of discrimination against gay men in Zimbabwe is in criminal law. Roman-Dutch common law, from which Zimbabwean law is derived, has never treated perceived sexual deviance lightly. Initially, a sexual act was regarded as deviant if it were not directed solely at procreation. Any such act was regarded as sodomy. The law then evolved so that sodomy came to mean sex *per anum* between two males[29]. The Criminal Law (Codification and Reform) Act has now returned the law to a position which more closely resembles the original Roman Dutch law in its definition of sodomy. In earlier versions of the common law, a confluence of racial and sexual intolerance forbade sex between Jew and Christian regardless of the gender of the

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[26] Heinze *op. cit*. p. 221

[27] Heinze *op. cit*. p. 227

[28] *Watkins v U.S. Army* 847 F.2d 1329. It is worth remembering that it is not only Jews, Blacks and Gypsies who were exterminated by the Nazia, but also homosexuals.

[29] see Propotkin *Getting to the Bottom of Sodomy in Zimbabwe* Unpublished paper University of Zimbabwe, Faculty of Law

parties involved[30]. Racist and anti-Semitic ideology concluded that such congress could not be aimed at producing offspring. The prevailing procreation fetish was thus violated and the act thus regarded as sodomy. The emphasis on sex as unlawful and sinful unless solely as a procreative act is well illustrated by the example given the Roman-Dutch jurist Leyser[31] of a case of a man charged with adultery. The procreation fetish required ejaculation in situ for the crime to be more that merely an attempt. The accused in that case sought to avoid the charge by alleging that he had withdrawn prior to ejaculation. In the result he was found guilty of committing the sin of Onan. Instead of the fine which would have been imposed for the offence of adultery, the greater sin of wasting the seeds of reproduction attracted a flogging and banishment – and that after a brief consideration by the judges as to whether the death penalty should be imposed[32]. Technically the death penalty was applicable for masturbation, whether solitary or assisted but the "high frequency of the offence makes it difficult and almost impossible to enforce the penalty"[33]. Sodomy at that time was a species of unnatural offence. An unnatural offence was any sexual act not aimed at procreation. Since then, the common law evolved so that "unnatural offences" have moved from their rationale in the procreation fetish to be directed almost exclusively against the gay community. Hence, consensual heterosexual anal or oral sex is no longer regarded as "sodomy" or an unnatural offence.[34]. Yet homosexual anal and oral sex remain a crime. The embodiment of this discrimination in the system of criminal justice throughout the history of Zimbabwe, both pre- and post-colonial independence satisfies the requirement of both systematic and historical discrimination.

Discrimination as Gross Unfairness

Criminal prohibitions on sex between men impact negatively and severely on the lives of gay men. Although there are very few prosecutions of sex between consenting male adults[35], the effect of the law is to reduce the status of gay men to "un-apprehended felons"[36]. Hence President Robert Mugabe shamelessly encouraging this discrimination declared:

> *If you see people parading themselves as lesbians and gays, arrest them and hand them over to the police*[37].

Criminal prohibitions of the physical expression of same-sex love enforce and fosters opprobrium outside the judicial arena. The general public and officials in public positions feel they have the sanction of the law to make noxious discriminatory statements against those who do not conform to the dominant heterosexual normative paradigm. These discriminatory statements utilise the lexicon deployed to demonise difference, which was previously more frequently encountered in racist pronouncements. Those who differ from the dominant group are portrayed as a threat to

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[30] Cameron *op. cit*. p. 453

[31] *Medicat ad Pandect* (Spec 589)

[32] Rcounted in *R v Gough and Narroway* 1926 CPD 159 at 162

[33] Propotkin *op. cit*. p. 6. Mathaeus 1661 par. 48.3.6.8

[34] R v Masuku 1968 RLR 14

[35] Only two such cases have received the attention of the High Court: *S v Roffey*, 1991 (2) ZLR 47; and *S v Derks and Storey* HC-B-124-84

[36] Cameron *op. cit*. p. 455 citing Mohr, R *Gays/Justice – A Study of Ethics, Society and Law* (1988) p. 4

[37] The statement was made during a now internationally notorious speech on Heroes Day Holiday in Zimbabwe, 11th August, 1995. Reported in *The Herald*, 12th August, 1995.

morality, children, national security and development, the family and often civilization itself. Often, the subordinate group is dehumanised and compared to animals, portrayed as sub-human or in some other way less than human[38]. President Mugabe has sought to dehumanise gays and lesbians referring to the community as "sub animal" and behaving "worse than dogs and pigs"[39].

The Supreme Court of Canada in *Vriend v Alberta*[40] (a case dealing with discrimination in employment on the basis of sexual orientation) noted:

> *Perhaps the most important is the psychological harm, which may ensue from this state of affairs. Fear of discrimination will logically lead to concealment of true identity and this will be harmful to personal confidence and self esteem. Compounding that effect is the implicit message conveyed by the exclusion, that gays and lesbians, unlike other individuals, are not worthy of protection. This is clearly an example of a distinction, which demeans the individual and strengthens and perpetrates* [sic] *the view that gays and lesbians are less worthy of protection as individuals in Canada's society. The potential harm to dignity and perceived worth of gay and lesbian individuals constitutes a particularly cruel for of discrimination*[41].

The South African Constitutional Court also noted the impact of criminalisation of consensual gay acts beyond that of dignity and self esteem. Criminalisation encourages blackmail, police entrapment, violence and peripheral discrimination such as refusal of facilities, accommodation and opportunities.

In the Zimbabwean context, blackmail increased markedly after the homophobic pronouncements of President Mugabe. The pronouncements encouraged extortionists to believe that their victims had even more to fear if their sexual orientation were exposed. The frequency of blackmail and the quantum of money demanded rose sharply. Well organised gangs of youths approached and befriended gays at nightspots specifically for the purpose of creating a situation which might enable them to extort money. In the late 1990s, one or two cases of blackmail came to the attention of GALZ each month, although the number has dropped in recent years to three or four cases a year. Nevertheless, this is obviously only a fraction of actual incidents of blackmail. Fear prevents the people from joining GALZ in the first place and fear and lack of an appropriate response from the police also prevents many victims from reporting the problem. When a gay activist tried to lead by example and reported a case of extortion to the police, he himself was arrested. Reports of attempted extortion to police officers has resulted in police officers attempting to displace the extortioner and to demand cash themselves.[42] A former Director of Public Prosecutions has admitted that blackmail is the main effect of the criminalisation of same-sex sexual activity between consenting adults[43]. Widespread blackmail was a major factor influencing decriminalisation in

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[38] This sort of rhetoric should be familiar to all who have encountered over and systematised racism. A review of any of the texts of the apartheid era in South Africa and Nazi Germany shows a striking similarity of language in this regard.

[39] *The Herald*, 12th August. 1995. The statement was widely reported internationally – see, for example, the *Globe and Mail* (Toronto) of the same date.

[40] (1994) 20 CHRR D/358

[41] Quoted with approval in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* CCT11/98 at para. 23

[42] see Propotkin, P *op. cit*. at pp 35-36 and n 88

[43] Phillips, O. Zimbabwean Law and the Production of a White Man's Disease Social and Legal Studies Vol. 6 No 4 (1997) p. 471 at p. 484

English law. The proscription of sodomy between consenting adults was regarded as being "the blackmailer's charter"[44].

Discrimination impacts on gays and lesbians in a plethora of ways of which those accustomed to heterosexual privilege remain completely unaware. It would be impossible to detail every aspect here. The married heterosexual obtains numerous benefits through recognition of his or her partner as such, a privilege denied to gays and lesbians. The denial of facilities and opportunities is another obvious area. Less obvious to the heterosexual may be the fact that, whereas there may be increasing openness about sexual behaviour in the wake of the HIV pandemic, open discussion and access to appropriate information about HIV and safe-sex, readily available to heterosexuals, is constricted for homosexuals. At the moment, Zimbabwe's HIV/AIDS pamphlets and education campaign are exclusively directed to heterosexuals.

However, the National AIDS Council of Zimbabwe has at last recognised how homophobia and repressive laws against same-sex sexual conduct are potentially fuelling the HIV/AIDS epidemic in Zimbabwe. Its strategic plan for 2006 – 2010 unambiguously states that:

> *While homosexuality remains illegal in Zimbabwe, there can be no doubt that there are men who have sex with other men. They are at risk of HIV infection and passing on the virus to their partners, including female partners. Furthermore, international experience has shown that ignoring this group or* ***adopting punitive approaches*** *will only serve to drive MSM underground and reduce opportunities to dialogue with this group*[45] [emphasis added].

The South African Court had no hesitation in determining that consequences such as these rendered discrimination against gays and lesbians "unfair". It is worth noting that the South African constitution also provides for a right to dignity. The Court held that the common-law provisions pertaining to "unnatural offences" likewise violated this right.

Political Powerlessness

Traditional disadvantages do not imply numerical minority. Women in Zimbabwe, for example, constitute a numerical majority, but have been disadvantaged traditionally. Gays and lesbians, on the other hand are a numerical minority. They will thus never be able to achieve change in the face of prejudice through the political process[46]. However, unlike race, sexuality is not invariably observable. Same-sex attraction is not, in itself, externally visible. Invisibility "provides a potent stimulus for homosexual men and women to closet their orientation from outsiders"[47] in order to avoid vulnerability to prejudice and discrimination. This, coupled with the general fact of non-obviousness, makes it possible for others to deny that gays and lesbians exist, to deny that are reality of variation in human sexuality. The result is to further constrict the political and social power of gays and lesbians[48].

The fact of non-obviousness also fosters the perspective that sexual orientation is not immutable. The implication then is that sexual orientation should not qualify as a

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[44] The Wolfden Report 1957 para. 109 – 113

[45] *Zimbabwe National HIV and AIDS Strategic Plan (ZNASP) 2006 – 2010* p. 20

[46] Having said this, it should not be forgotten that, since gays and lesbians exist across class and cultures, whether one regards them as constituting 1% or 10% of the population they constitute, in an international perspective, one of the world's largest minorities.

[47] Cameron *op. cit*. p. 459

[48] Cameron *ibid*

ground for non-discrimination in the same manner as race, which is immutable. The question as to whether sexuality is nature or nurture has not been resolved, is not likely to be, and is probably not, in any event, relevant. However, the same systems of prejudice are applied to those discriminated against on the basis as race, as to those discriminated against on the basis of sexual orientation. Three points arise in this regard. Firstly, there is judicial authority for the notion that sexual orientation is to be treated as immutable. In *Watkins v US Army*[49], a case concerning discrimination against a gay man in the military the court found that:

> *"Immutability" may describe those traits that are so central to a person's identity that it would be abhorrent for government to penalise a person for refusing to change them…*[50]

As Heinze notes:

> *Psychologists as well as jurists have increasingly noted [homosexuality's] immutability: it can be brutally impeded, but cannot be changed. Attempts to change homosexual orientation through often cruel and humiliating medical or psychological procedure have, at most, shattered a person's sexuality generally, but have never succeeded in specifically changing sexual orientation.*[51]

Secondly, it is wrong to suggest that the law should only protect lifestyles where there is no element of choice, and thirdly, it is universally accepted that discrimination on the basis of immutable characteristics is particularly odious. Those who discriminate against people on the basis of sexual orientation should at least consider the implications of their prejudice should their belief in mutability prove wrong.

From the pronouncements of President Mugabe, quoted above, it is clear that there is no prospect of gays and lesbians obtaining change through executive example and leadership. The legislature has also pandered to populist prejudice, exacerbating hostility towards gays and lesbians in parliamentary debates on the issue[52]. The usual language of prejudice is present throughout. By way of one of many available examples, Member of Parliament Anias Chigwedere stated to parliament:

> *The whole body is far more important than any single dispensable part...when your finger starts festering and becomes a danger to the body you cut it off…. The homosexuals are the festering finger.*[53]

It is interesting to compare this statement with that of Nazi officer explaining his role in the execution of Jews:

> *They are an inferior race…. It's like having a rosebush and the rosebush has got greenfly on it. Then you have to get rid of the greenfly*[54].

The judiciary has likewise been consistent in its support for popular prejudice against gays and lesbians. Although few cases of adult consensual homosexual sex come

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[49] 847 F.2d 1329 (1988)

[50] at p. 1347

[51] see Heinze *op. cit.* at p. 160 and n 17

[52] see in particular the Parliamentary Debates for 28th September, 199, esp. at cols. 2779, 2781 and 8th November, 1995, col. 2988 and 30th November, 1995, col. 4304.

[53] Parliamentary debates, 28th September, 1995 col. 2770

[54] Interview with Jurgen Kroeger, Nazi Execution Squad Interpreter, 1941 – 1942 to whom the statement was allegedly made by a Nazi Officer after the killing of Jews by firing squad, shown in the BBC documentary *Peoples' Century*.

before the courts, the judiciary has been quick to pronounce its condemnation, not of the fact sexual act was with a minor or forced, where this is the case, but of the fact that the sex was with a person of the same sex[55]. Even where the sex is between two consenting adults the judiciary has voiced its prejudice. In the case of *S v Roffey*[56], a case of consensual adult same-sex sex, the magistrate in the court *a quo* in handling down sentence said:

> *Such unscrupulous acts do in my view stink in the nostrils of justice; above all society does look at such offences with abhorrence*[57].

There was found to be no misdirection in the use of this purple prose by the reviewing Judge. Similarly, in a case involving the theft of a computer from the offices of GALZ, in handling down sentence, the magistrate made various disparaging and judicially irrelevant remarks about GALZ, the complainant in the case, and appeared more concerned with the fact that the thief had been at the GALZ's offices than the theft itself[58].

Like the Jews in Nazi Germany, gays have been accused of preying upon and abusing minors. Even the Law Development Commission has not been immune to this kind of vilification. When tangentially[59] considering the decriminalisation of consensual sodomy, the Commission made no attempt to solicit the views of the gay community, but simply noted that the present law was necessary to protect minors. This is despite the fact that heterosexuals predominantly perpetrate child sexual abuse, and no legal prohibitions are placed on consensual sex between heterosexual adults. The Law Development Commission paid no regard to the requirement of proportionality in its recommendation, that is, that the present law includes consenting adults in its ambit and is thus violates human rights by being broader than necessary to attain any legitimate interest in protecting minors[60].

The criteria then for recognition of sexual orientation as a category and one which requires specific protection are obviously present. One point remains to be dealt with in this section, and that is whether the requirement of specific protection is not met in a prohibition of discrimination on the basis of "sex" or "gender". The suggestion would then be that if the discrimination clause includes a prohibition of the basis of "sex" or "gender" there will be no need for a specific mention of "sexual orientation" as it is included obliquely in this category.

Sex Orientation and Sex-discrimination

There are strong grounds supporting the argument that a prohibition of discrimination on the basis of "sex" or "gender" includes a prohibition of discrimination on the basis of sexual orientation[61].

The arguments that this is so range from the obvious to the more subtle. Only the core of these arguments are mentioned here. At an obvious and legalistic level, prohibitions on same-sex are clearly discriminatory on the basis of "sex". A woman may

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[55] see for example *R v B* 1969 (2) RLR 212 at 213 and cf the examples given in Cameron *op. cit.* at p. 457 esp. n 55

[56] 1991(2) ZLR 47 (HC)

[57] at p. 50

[58] The Herald, 27th January, 1999

[59] The Commission's main task in the report in question was to consider the issue of paedophilia.

[60] *Law Development Commission* Report No 63 December, 1997 at p 18.

[61] See generally Heinze *op cit* p 216 et seq.

perform oral sex on a man, but a man may not. A woman may receive anal sex from a man[62], but a man may not etc.. The only distinction which makes the act criminal or otherwise is the participant's gender or sex. Even more obviously, it seems to be accepted that same-sex sexual relations between women are no longer an offence[63]. Thus women may do what men may not do, that is engage in sexual acts with someone of their own sex.

On a more subtle level, discrimination against gays and lesbians constitutes discrimination on the basis of gender as it seeks to entrench gender stereotypes. In the same way the racial oppression under apartheid South Africa required discrete racial classifications, so gender oppression demands that there is no blurring of the lines between genders. Gays and lesbians are often seen as subverting gender stereotypes and are thus seen as threatening to the patriarchal order[64]. This aspect of discrimination on the basis of sex or gender, has been made explicit in CEDAW, the Convention on the Elimination of Discrimination against Women, which in Article 5(a) provides:

> *States parties shall take all appropriate measures:*
>
> > *a. To modify the social cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or superiority of either of the sexes* ***or on stereotyped roles for men and women****;* [emphasis added].

Zimbabwe is a signatory to this convention. Similarly, the judgement of the Human Rights Committee in *Toonen v Australia*[65] found that Tasmania's laws criminalising homosexual activity violated the International Covenant on Civil and Political Rights. In so doing the committee referred to the equality provisions in the covenant and noted that the reference to "sex" in articles 2(1) and article 26 is to be taken as including sexual orientation.

Despite these fairy cogent arguments, judicial precedent and the authority of the Human Rights Committee, even the obvious arguments that Zimbabwe's law proscribing consensual adult male same-sex constitute gender discrimination have failed in our courts. The point was raised by defence Counsel in *S v Banana*[66] who urged against the sole count of consensual sodomy on precisely this basis. In his judgement Chidyausiku JP simply avoided the point, paraphrasing the now notorious judgement of *Bowers v Hardwick*[67], and holding:

> *Does the Constitution create and confer on the homosexual a fundamental right to penetrate another male per anum? ... I am not aware of any provision in the Constitution that creates such a right or seeks to protect an already existing right of a homosexual to penetrate another per anum*[68].

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[62] *R v Masuku* 1968 RLR 332

[63] *S v Kampher* 1997 (4) SA 460 (C) at para. 21 and compare Chidyausiku, JP's tacit acceptance of this in *S v Banana* HH 221-98 at p 71.

[64] See generally in this regard Law, S *Homosexuality and The Social Meaning of Gender* 1988 Wis L. Rev. 187.

[65] Communication No 488/1992

[66] ref.

[67] 478 US 186 (1986)

[68] Chidyausiku, JP does not specifically refer to *Hardwick* but compare *Hardwick* at p 145 and the plagiarism is obvious.

This is despite the fact that in Hardwick's case the argument for the unconstitutionality of Georgia's sodomy laws was based upon the right to privacy (which is not specifically mentioned in the United States Constitution) and not on the basis of sexual discrimination. Hardwick could not advance a gender discrimination argument precisely because the Georgia Statute was, on its face, gender neutral, that is anal sex was prohibited in terms of the statute in question for heterosexual and homosexual sex. And despite the fact that the Toonen case had accepted the very argument that Chidyausiku JP dismissed. The judgement in the Banana case illustrates the difficulty of attaining change through a reluctant and conservative judiciary, and underscores the need for specific mention of sexual orientation.

In summary then, the history of oppression against gays and lesbians together with the inability to attain redress through the political or judicial process indicate that specific mention of sexual orientation is required. Specific mention will prevent the exploitation of any ambiguities or sophistry of equality jurisprudence. It will serve a salutary educative function for our politicians and judiciary who may require specific mention of a group they had found distasteful, before being convinced sexual orientation rights are human rights.

THE RIGHT TO PRIVACY

Like the right to equality, the right to privacy appears in all international and regional rights instruments. Domestically, it appeared in the previous section 11 of our Constitution until removed by Constitutional amendment[69]. This amendment violated Zimbabwe obligations in terms of Article 2(2) of the International Covenant of Civil and Political Rights. The Article requires States to bring their laws into line with the requirements of the Covenant, which are regarded as the very minimum. To amend Zimbabwe's Constitution to remove a pre-existing right required by the Covenant, is a cynical disregard of Zimbabwe's obligations. The Zimbabwe government was subjected to sharp criticism on this amendment when it presented its first report to the United Nations under section 40 of the Covenant, which requires a State to show the steps it has taken to bring its law into line with the Covenant.

Article 17(1) of the Covenant provides:

> *No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*

Article 8(1) of the European Convention on Human Rights likewise provides:

> *Everyone has the right to respect for his private and family life, his home and his correspondence.*

Jurisprudential understanding of what is meant by the right to privacy varies from jurisdiction to jurisdiction, but there is some broad consensus that the right to privacy "embodies a promise that a certain sphere of individual liberty will be kept largely beyond the reach of government"[70]. Implicit in this is that a right to privacy has to do with a right to choose and an understanding that certain decisions are properly for the individual to make. Secondly, privacy has a spatial aspect, an understanding that the State may not intrude into certain places without good cause[71]. The sort of rights that privacy will protect are those which form "a central part of an individual's life". As was stated in the dissenting opinion in Hardwick's case:

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[69] No 14 of 1995

[70] Justice Blackmun, in *Hardwick*'s case at p. 154.

[71] ibid

"Only the most wilful blindness could obscure the fact that intimacy is a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality"[72].

The judicial body concerned with ruling under the International Covenant on Civil and Political Rights – The Human Rights Committee – and the European Court of Human Rights have all found that blanket prohibitions on same-sex sexual activity all violate the right to privacy. In these judgements the courts adopted the threefold test referred to previously: firstly to consider whether the right has been violated, secondly whether the violation serves a legitimate government purpose, and thirdly whether the law in question is no broader than necessary to achieve that purpose.

In each of these judgements the fact that the law violated the right to privacy was never an issue and was usually conceded by the State Party. The defence raised by the State parties has predominantly sought to raise the justification of a legitimate government purpose – the protection of public morals. This argument has been uniformly rejected. Under the European Convention, the judgements have consistently followed the ruling in Dudgeon's case[73] which held that the blanket prohibition on same-sex sex under legislation in the Northern Ireland violated the complainant's right to privacy. For purposes of the European Convention, once interference in the right is established, the level of scrutiny is that the interference "must be necessary in a democratic society". The court was prepared to accept that where morals are concerned that each State is allowed a "margin of appreciation" in order to take into account the varying morals standards of each State. However the judgement went onto to hold that:

The present case concerns a most intimate aspect of private life. Accordingly there must exist particularly serious reasons before interferences on the part of public authorities can legitimate…[74]

The Court took note of the fact that in Northern Ireland there existed:

a strong body of opposition stemming from a genuine and sincere conviction shared by a large number of responsible members of the Northern Irish Community that a change in the law would be seriously damaging to the moral fabric of society[75].

However, the court held that:

The Convention Right affected by the impugned legislation protects an essentially private manifestation of the human personality[76].

And that:

*Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts**, this cannot on its own** warrant the application of penal sanctions when it is consenting adults alone who are involved ... The moral attitudes towards male*

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[72] ibid at p. 155.

[73] *Dudgeon v UK*, Judgement of 30th January, 1981 Series A vol. 45.

[74] At para. 54. Compare *President of RSA v Hugo* 1997(4) SA (CC) at para. 112: *The more vulnerable the group adversely affected by the discrimination, the more likely the discrimination will be held to be unfair. Similarly, the more invasive the nature of the discrimination, the more likely it will be held to be unfair.*

[75] at para. 59.

[76] at para. 60. Compare *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* CCT11/98 para. 30

homosexuality in Northern Ireland and the concern that any relaxation in the law would tend to erode existing moral standards cannot, without more, warrant interfering with the applicant's private life to such an extent [77]. [emphasis added]

The judgement in Dudgeon's case was repeated in the Norris' and Modinos'[78] cases involving similar facts and concerning Ireland and Cyprus respectively. It was also followed in Toonen's case with the same reasoning applied. Toonen's case is particularly relevant since it was determined by the Human Rights Committee which considered the provisions of the International Covenant on Civil and Political Rights, to which Zimbabwe is a signatory.

Given that the right to privacy protects intimate conduct in private between two consenting male adults, are gay rights sufficiently protected through the re-establishment of a right to privacy in Zimbabwe's new constitution? This question has already been partly answered. Dudgeon, Norris, Modinos and Toonen all concern judgements which rule that blanket prohibitions on homosexual conduct, which include in their ambit sexual act between consenting adult males, violate human rights. However these judgements are concerned with sexual acts, and not sexual orientation as a whole. Sexual orientation falls more naturally and conveniently into a provision providing for equality. Furthermore, to rely exclusively on the right to privacy to protect gay and lesbian rights is inadequate. Cameron notes:

The privacy argument establishes only that criminal punishment of private consensual adult homosexual conduct is unconscionable. Recognition of this truth alone barely begins in process of legal protection which proper recognition of the rights of gays and lesbians to equality would entail. In addition, the privacy argument has detrimental effects on the search for society which is truly non-stigmatising as far as sexual orientation is concerned. On the one hand, the privacy argument suggests that discrimination against gays and lesbians is confined to prohibiting conduct between adults in the privacy of the bedroom. This is manifestly not so. On the other hand, the privacy argument may subtly reinforce the idea that homosexual intimacy is shameful or improper: that it is tolerable so long as it is confined to the bedroom – but that its implications cannot be countenanced outside[79].

THE IMPLICATIONS OF SEXUAL ORIENTATION RIGHTS

Opposition to sexual-orientation rights often stems from a mistaken belief that such right will mean that "anything goes" that if rights are given to gays and lesbians that there can likewise be no control placed on those who rape or abuse children[80]. Rights of sexual orientation in no way imply that this is the case. Society nonetheless retains the right to legislate its morality. All law is in a sense the legislation of morality. A law which punishes murder is an enactment of the society's moral abhorrence of the act. But there is an important distinction. The legislation of morality, where the legislation intrudes upon a fundamental right, can only be justified where the proscribed act causes palpable harm to a third person. The rights of equality and privacy are fundamental rights. That does not mean that the law may not discriminate against a rapist. The actions of the rapist cause palpable harm and intrude upon the rights and freedoms of others. None of the cases referred to above suggest that gay men have the

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[77] at para. 60-61.

[78] *Norris v Ireland (*1988) Series A, No 142 and *Modinos v Cyprus* (1993) Series A No.259.

[79] *op. cit.* p. 464

[80] cf the facetious article Coming Soon: A Constitution to Accommodate All Manner of Weirdos in the *Daily News*, 20th August, 1999.

right to engage in non-consensual sex, or sex with child. What they do suggest is that laws preventing gay men from having sex at all cannot be justified. If proscriptions on homosexual behaviour are there to protect children and the vulnerable, then the law must be no wider than it need to be to achieve this purpose. The law protects children from heterosexual adults without imposing a blanket ban on heterosexual sex; it can do the same with homosexuals through the mechanism of an age of consent. Rights of sexual orientation do not require that people are forced to participate in behaviour that they dislike, nor does it require even that they approve of the behaviour. They are free to hold their same opinion, but without forcing them onto others. Gays and lesbians do not demand greater rights than the heterosexual community. They simply demand equality of treatment. If an action is prohibited for a heterosexual, then so it should be prohibited for a homosexual. In short, gays and lesbians simply demand equal rights.

The inclusion or otherwise of sexual orientation rights will be a litmus test for the Constitution makers. It will reveal whether there is a determination to draw a constitution which will comply with Zimbabwe's obligations and undertakings in International Law and the norms of human rights; whether it will comply with the democratic requirement of an acceptance of difference; whether it will seek to build a non-stigmatising society which embraces all its constituents: or whether it will be merely an expression of subservience to those who wield political power.

Exclusion of sexual orientation from the provisions of Zimbabwe's new constitution will be a symptom of an ill-fated constitution and is but the passing whim of prejudice.