



# LGBT LAWFARE IN RESPONSE TO HETEROSEXUAL NATIONALISM AND THE RETENTION OF THE ANTI- SODOMY LAWS IN ZAMBIA

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## 1 Introduction

According to an Afrobarometer survey, Zambia ranks as the eighth most homophobic country on the African continent, recording only 7 per cent tolerance levels of sexual and gender minorities, with the most tolerant, Cape Verde, scoring 74 per cent and the least, Senegal recording 3 per cent.<sup>1</sup> This may come as a surprise, considering that Zambia hardly makes the news for homophobia compared to equally low-ranking countries on the continent. However, attention was drawn to Zambia when in 2019, the American Ambassador condemned the sentencing of a homosexual couple to 15 years in prison.<sup>2</sup> This attracted international attention when the Zambian government requested his recall, with the President stating that ‘Zambia would do without USAID if America ties homosexuality to aid’.<sup>3</sup> The statement expressing government policy on sexual and gender

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1 B Dulani, G Sambo & KY Dionne ‘Good neighbours? Africans express high levels of tolerance for many, but not for all’ Afrobarometer Dispatch 74 (1 March 2016) 12 [https://afrobarometer.org/sites/default/files/publications/Dispatches/ab\\_r6\\_dispatchno74\\_tolerance\\_in\\_africa\\_eng1.pdf](https://afrobarometer.org/sites/default/files/publications/Dispatches/ab_r6_dispatchno74_tolerance_in_africa_eng1.pdf) (accessed 21 February 2021). While the survey presents data collected in 2016, it is still reflective of the general attitudes that are held about sexual and gender minorities in Africa.

2 ‘US press statement on the severe LGBTI sentencing in Zambia’ issued on 29 November 2019. The statement can be found at ‘Jailing of Kapiri gay couple to 15 years horrifies US envoy’ *Lusakatimes* 29 November 2019 <https://www.lusakatimes.com/2019/11/29/jailing-of-kapiri-gay-couple-to-15-years-horrifies-us-envoy/> (accessed 30 January 2020).

3 See ‘US recalls ambassador to Zambia after gay rights row’ *BBC* 24 December 2019 <https://www.bbc.com/news/world-africa-50901537>; and ‘US ambassador recalled after dispute with Zambian government over gay rights and corruption’ *CNN* 25 December 2019 <https://edition.cnn.com/2019/12/25/politics/daniel-foote-zambia-ambassador/index.html> (both accessed on 21 February 2021).

minorities was supported and applauded by religious and traditional leaders as well as the Zambian public at large.<sup>4</sup> To the sexual and gender minority rights' community and their allies, it was a reminder that LGBT lawfare would not be easy in Zambia.<sup>5</sup>

Zambia criminalises consensual same-sex relations through the Penal Code, and occasionally sexual and gender minorities get arrested for engaging in consensual same-sex conduct. Despite this, there have not been any cases brought to court to directly challenge the criminalisation of consensual same-sex conduct or for the enforcement of LGBT rights. As such the nature of lawfare over LGBT rights in Zambia is limited to the state opposing the recognition of LGBT persons, and LGBT groups organising and pushing back. This chapter discusses the LGBT lawfare in response to heterosexual nationalism in Zambia. It starts by discussing the nature of heterosexual nationalism in Zambia, then highlights the impact of heterosexual nationalism and the anti-sodomy laws on the rights of sexual and gender minorities. The Chapter further discusses the LGBT response to the heterosexual nationalism, and the anti-sodomy laws. It concludes with recommendations on how the sexual and gender minorities movement can effectively engage in LGBT lawfare in Zambia.

## 2 Legal framework: Zambia's anti-sodomy laws

Zambia is among the 30 African states that criminalise consensual same-sex sexual conduct between adults.<sup>6</sup> It does so through the Penal Code, Chapter 87 of the Laws of Zambia, and in particular sections 155, 156 and 158. These provisions fall under the heading 'offences against morality' and the sub-heading, 'unnatural offences'. The provisions were adopted at independence in 1964 from the British colonial government and have remained the same except for an amendment in 2005.<sup>7</sup> This amendment

4 S Mansoor 'Zambia says US Ambassador's position "no longer tenable" after he criticised the gay rights record' *Time Magazine* 29 December 2019 <https://time.com/5755538/us-ambassador-zambia-recalled/> (accessed 11 June 2022).

5 In this Chapter, sexual and gender minority rights are LGBT rights are used interchangeably.

6 See Human Dignity Trust 'Map of countries that criminalise LGBT people' (2022) <https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation/> (accessed 11 May 2022). At the time of this book chapter the latest country to decriminalise its anti-sodomy laws in Africa was Botswana which did so in December, 2021.

7 Parliament of Zambia *Hansard*, 9 September 2005. The amendment in 2005 was not a direct act of LGBT lawfare against sexual and gender minorities. Rather it was motivated by the moral panic at the time in relation to the protection of children from sexual abuse. As such, the Zambian Legislature increased the punishment for sexual offences in relation to children, to life imprisonment across the board. As such, section 155(c)(i) was introduced, making 'carnal knowledge against the order of nature

increased the punishment from a *maximum* of 14 years, to a *maximum* of life imprisonment and *minimum* of 15 years. The amendments did not attract any international attention. As it stands section 155 states that any person who has carnal knowledge against the order of nature or permits a male person to have carnal knowledge of him or her is liable upon conviction to imprisonment for not less than 25 years and may be liable to imprisonment for life. Section 156 states that any person who attempts to commit any of the offences specified in section 155 commits a felony and is liable, upon conviction of not less than seven years but not exceeding 14 years. Section 158 criminalises gross indecency ‘whether in public or private between persons of the same sex or *any other person* (male or female)<sup>8</sup> and carries a penalty of 25 years in prison’. The provisions were drafted based on the Queensland Criminal Code, first introduced to Africa in Northern Nigeria, then to Colonial East Africa and later to Malawi and finally Zambia.<sup>9</sup>

These provisions, constituting the anti-sodomy laws of Zambia, are often misunderstood and misinterpreted/mischaracterised to mean that they criminalise homosexual identity rather than the conduct described in the relevant provisions. Therefore, they are exclusively applied against homosexual persons and other sexual and gender minorities in Zambia, even where acts of sodomy or gross indecency have not occurred. However, from a strict criminal law point of view, sexual orientation and gender identity are not elements of the offences. The provision itself is self-evident in that ‘*any person* who has carnal knowledge with another person or permits a *male* person to have carnal knowledge of *him or her*’ – signifying that the conduct can either be *heterosexual* or *homosexual*. Two aspects stand out regarding the identity of the actors in the offence. First, the generality of the provision in stating that ‘any person’ implies that heterosexual, homosexual, gender non-conforming and all other categories or identities are included. Second, ‘permitting a male person to have carnal knowledge of *him or her* against the order of nature’ signifies both homosexual and heterosexual sodomy. In essence, the provision is

with a child’ liable to punishable for a minimum of 25 years and maximum of life imprisonment. The same penalty applied to rape and defilement of children.

8 Emphasis added.

9 ‘Criminal laws on homosexuality in African nations’ (2020) *Global Legal Research Center* <https://www.loc.govsearch/?fa=partof:law+library+of+congress&q=homosexuality+in+Africa> (accessed 21 February 2022). For a detailed discussion of how the anti-sodomy laws came to Africa and eventually to Zambia, which was the last country to have a Penal Code in Commonwealth Africa, see HF Morris ‘A history of the adoption of codes of criminal law and procedure in colonial Africa 1876-1935’ (1974) 18 *Journal of African Law* 6; and R O’Regan ‘Sir Samuel Griffith’s Code Criminal Code’ (1991) 7 *Australian Bar Review* 141.

indiscriminate regarding sexual orientation or gender identity, and by its exact drafting, rules out the exclusive applicability of the provisions to sexual and gender minorities.<sup>10</sup>

These provisions are justified and retained on the grounds of religion, morality, and culture. In Zambia they are particularly justified and retained on the basis that the Constitution ‘acknowledges the supremacy of God Almighty and declares the Republic of Zambia as a Christian Nation while upholding a person’s right to freedom of conscience, belief or religion’.<sup>11</sup> While the legal effect of the declaration is debatable, in no other issue has the declaration been referred to the more than in the political mobilisation and lawfare against sexual and gender minority rights with the view of retaining the anti-sodomy laws in Zambia.<sup>12</sup> In effect, the justification for, and the retention of the anti-sodomy laws represents a form of heterosexual government rationality (governmentality)<sup>13</sup> that contests the diversity of sexual citizenship, while respecting other diverse forms of citizenship such as religious and political citizenship.<sup>14</sup>

Considering the above, I argue that Zambia has created a form of ‘heterosexual nationalism’ that informs their retention of anti-sodomy laws

- 10 Notably no heterosexual couples have been arrested under the anti-sodomy laws. This lends to the conclusion that the laws are understood to apply exclusively to sexual and gender minorities in Zambia. See S Pierre ‘Exploring discourses and actions of othering homosexual citizens by officers of the Zambia Police service in Lusaka, Zambia’ Master’s dissertation, Van-Hall Larenstain University of Applied Science, 2013.
- 11 Preamble of the Constitution of Zambia, para 1. In 1991, following a constitutional review process, Zambia was declared a Christian nation through a clause in the Preamble. Subsequent constitutional amendments in 1996 and 2016 retained the declaration with the majority of the population supporting the retention of the declaration. For a detailed discussion of the declaration see AM Cheyeka ‘Zambia, a “Christian nation” in the post Movement for Multiparty Democracy (MMD) era, 2011-2016’ (2016) 6 *International Journal of Humanities and Social Sciences* 167.
- 12 A Van Klinken ‘Homosexuality, politics and Pentecostal nationalism in Zambia’ (2014) 20 *Studies in World Christianity* 259.
- 13 M Foucault ‘Governmentality’ in C Gordon et al (eds) *The Foucault effect: Studies in governmentality* (1991) 88; and C Gordon ‘Government rationality: An introduction’ in C Gordon et al (eds) *The Foucault effect: Studies in governmentality* (1991) 1-3. Gordon notes that concept of governmentality can be understood from different perspectives. This chapter uses the concept in the context of how government rationalises its decisions and what informs this rationality. Foucault himself states that ‘governmentality is a zone of research not fully formed and hence the concept itself is not a full product’ but can be referred to in different contexts that relate to political power.
- 14 M Waites ‘United Kingdom: Confronting criminal histories and theorising decriminalisation as citizenship and governmentality’ in C Lennox & M Waites (eds) *Human rights, sexual orientation and gender identity in the commonwealth: From history and law to development activism and transnational dialogue* (2013) 145, 174.

despite the harm that these laws cause on sexual and gender minorities. For this purpose, I define heterosexual nationalism as a governmentality that rejects the diversity of sexual citizenship using the principles of nationalism and state sovereignty to affirm a constructed heteronormative culture and identity which is protected by the retention of anti-sodomy laws.<sup>15</sup> Heterosexual nationalism therefore contests the recognition of sexual and gender minorities as a vulnerable class of citizens but instead labels them as social, cultural, and religious deviants. In this regard, heterosexual nationalism is the ground on which lawfare is waged against sexual and gender minorities in Zambia.

### **3 Heterosexual nationalism and the justification for retaining the anti-sodomy laws in Zambia**

#### **3.1 The nature of heterosexual nationalism**

Primarily this chapter contends that heterosexual nationalism in Africa generally and Zambia in particular, has a number of characteristics; it perceives Western liberal democracies as an enemy that advocates the rights of sexual and gender minorities; it is sustained by the state but driven by both state and non-state actors such as the media, religious and traditional leaders; it rationalises the retention of anti-sodomy laws as a deterrence to homosexuality; it feeds the mischaracterisation of the anti-sodomy laws; it rationalises the negative impact of these laws on sexual and gender minorities as a justified consequence of their sexual deviance; it stands on the principles of state sovereignty whenever calls for decriminalisation are raised and ignores international human rights obligations with regard to sexual and gender minorities (human rights exceptionalism). Heterosexual nationalism also views sexual and gender minorities as a threat to Zambia's nation-statehood and thus excludes them from the construction of 'nation' and 'nationality' thereby denying them their citizenship rights. In Zambia, as in other heterosexual nationalist countries homosexuality is therefore seen as the decent and normal sexual citizenship that fulfils this ideal. In this regard, Van Klinken rightly observes that in Zambia

[a] discourse of national belonging is anchored on a script of family values. Following this script church organisations [in agreement with the state] not only reinforce a normative, exclusively heterosexual definition of the nation, but also explicitly support the state's criminalisation of same-sex practices. Appealing to the [B]ible and the divine order of creation, as well as to an invented traditional Zambian or African culture, they 'baptise' a post-colonial

15 A country that affirms heterosexual nationalism is referred to as a '*heterosexual nation*' for purposes of this book Chapter.

Zambian nationalist ideology in which heterosexuality is normalised while homosexuality is suppressed and construed as a threat to the nation's moral order.<sup>16</sup>

An example of the extent and emotive nature of the discourse and expressivity of heterosexual nationalism and its complementary relationship with the mischaracterisation of the anti-sodomy laws in Zambia can best be illustrated by looking at the Zambian political leadership's reaction to Ban Ki-moon's statement during his visit to the country in 2012, in his capacity as United Nations Secretary General (UNSG). Ki-moon urged the Zambian government to 'improve its human rights protection by taking advantage of the current constitution making process to prohibit discrimination on the basis of race, gender, age, *sexual orientation, gender identity* and disability'.<sup>17</sup> In response to this statement, the political leadership (reflecting and in unity with the general public) expressed considerable discontent, charging that Ki-moon was misguided because he wished 'to promote homosexuality in Zambia', something which was understood as un-Zambian. Spearheading this displeasure, the political and religious leadership more broadly retorted that 'homosexuality is illegal under the penal code' and that these anti-sodomy laws are necessary to preserve Zambia's sovereign declaration as a Christian nation as well as its cultural and moral values.<sup>18</sup> In the same vein, opposition political leaders responded by stating that the UN and the government had conspired to legalise homosexuality in Zambia and that they would not support its decriminalisation in Parliament.<sup>19</sup>

The net outcome of the visit by the UNSG was that the words 'vulnerable and marginalised groups' were deleted from the discrimination clause of the draft Constitution, which was in the drafting process at the time. Demanding this outcome, the Church mother bodies made a joint statement, which read as follows:<sup>20</sup>

16 Van Klinken (n 12) 256.

17 Speech of the former UNSG Ban Ki-moon, delivered to the Parliament of Zambia on 24 February 2012 UNSG 'Secretary-General's remarks to the National Assembly of the Republic of Zambia [as delivered]' (24 February 2012) <https://www.un.org/sg/en/content/statement/secretary-general-remarks-national-assembly-republic-zambia> (accessed 6 September 2019) (emphasis added).

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

19 As above.

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

As a matter of public concern, it is in this light that some churches have submitted to the Technical Committee of the constitution making process to spell out categorically who the *minority* and *marginalised* groups implied in Article 60 of the first draft constitution really are ... This is so because we do not want to end up with a situation where advocates for homosexuality and related rights sooner or later resort to use or misuse of Article 60 to champion their rights.

The unfolding of events is telling of the religious nature of heterosexual nationalism in Zambia. Also featuring prominently in the discourse of heterosexual nationalism is the assertion of state sovereignty and human rights exceptionalism. The collective discontent with the UNSG's statement to respect the rights of sexual and gender minorities and the subsequent amendment of the draft constitution was seen as Zambia standing up to international bullying in the name of human rights and asserting its sovereignty. In 2019 these themes were fully expressed when the President requested the American Ambassador to Zambia to leave the country following his statement on the conviction and sentencing of two gay men under the anti-sodomy laws.<sup>21</sup> In what has been termed as uncharacteristic and strong from a diplomat, the American Ambassador issued a press statement expressing his disappointment with the sentences adding that corrupt Zambian politicians never receive such harsh sentences.<sup>22</sup> In reaction, the President requested for the American Ambassador to be recalled, and during a television interview stated:<sup>23</sup>

The Ambassador has insulted our collective wisdom as Zambians. I think a retraction or apology can do but I don't know how far this issue will go because already the US is tying this issue to Aid. If that is how you are going to bring your Aid then I am afraid the West can leave us alone in our poverty, and we shall continue scrounging and struggling on our own and get ourselves going. No amount of money will change Zambia's views on homosexuality.

The two incidents outstandingly bring out the narrative of heterosexual nationalism in Zambia. Hoad has commented on such instances stating that homophobic strands in African nationalism represent a displaced resistance to perceived and real encroachments on neo-colonial national

21 *Lusakatimes* (n 2).

22 'US press statement on the severe LGBTI sentencing in Zambia' issued on 29 November 2019 (n 2).

23 The Presidents interview and statements can be accessed on 'Zambia's president says "no to homosexuality"' *Sky News* 2 December 2019 <https://www.youtube.com/watch?v=DyNQGrtw7Ig&app=desktop> (accessed 30 November 2020).

sovereignty by economic and cultural globalisation.<sup>24</sup> Heterosexual nationalism manifests in three forms in Zambia: religious (Christian), cultural and moral.

### 3.2 Religious/Christian heterosexual nationalism

Religious heterosexual nationalism identifies itself with a particular religion and contests sexual diversity based on the teachings of that religion on human sexuality. In Zambia, religious nationalism is based on the political and constitutional declaration that ‘the Republic is a Christian nation’.<sup>25</sup> The declaration was first made by then President Fredrick Chiluba in 1991.<sup>26</sup> Chiluba, himself a Pentecostal Christian, was supported by Pentecostal leaders who had gained prominence by criticising the socialist style of the previous government under the United National Independence Party (UNIP) which they termed as ‘evil’.<sup>27</sup> Cheyeka observes that after the speech, ‘no other politician would dare go back on this declaration as political mobilisation was centered around Pentecostal affiliation’.<sup>28</sup> To this end, sexual and gender minorities have been made a symbol of evil following the story of Sodom and Gomorrah, and thus their persecution and the retention of the anti-sodomy laws is interpreted as living up to the theo-political aspiration of Zambia. To affirm this aspiration, the declaration was later enshrined in the first line

- 24 N Hoad *African intimacies: Race, homosexuality and globalization* (2007) xii. While the encroachment on African states sovereignty is – in many instances a perception – it is also real in others and this sends African leaders on the defence. The victims are usually sexual and gender minorities who suffer the backlash of this neocolonial sovereignty battle between Africa and the West. M Epprecht *Sexuality and social justice in Africa: Rethinking homophobia and forging resistance* (2013) has cautioned that while Western commentary on the rights of sexual and gender minorities is important, it can lead to unprecedented back class for sexual minorities in Africa as they become the victims of political defiance of the state. In this regard he suggests that mobilisation against homophobia would be more progressive if predominantly done by local civil society organisations and human rights activists.
- 25 CJ Kaunda ‘From fools for Christ to fools for politicians: A critique of Zambian Pentecostal Theo-political imagination’ (2017) 41 *International Bulletin of Mission Research* 296 <https://journals.sagepub.com/doi/pdf/10.1177/2396939317730694> (accessed 1 December 2020), see also I Phiri ‘President Fredrick Chiluba of Zambia: The Christian nation and democracy’ (2003) 33 *Journal of Religion in Africa* 401.
- 26 As above. The speech and the events were captured in a propaganda documentary sponsored by local and international evangelicals. See ‘Miracle in Zambia: Prayers of the First President – A TeamZambia Films Production’ <https://m.youtube.com/watch?v=gIZDvJF5-D8> (accessed 2 December 2020).
- 27 Kaunda (n 25) 1-3.
- 28 AM Cheyeka ‘Zambia, a “Christian nation” in the post Movement for Multiparty Democracy (MMD) era, 2011-2016’ (2016) 6 *International Journal of Humanities and Social Sciences* 167.

of the Preamble of the Constitution. The Preamble does not have legal force but its contents express the spirit of the Constitution and as such the basis on which the Constitution, laws (such as the anti-sodomy laws as seen below) and policies are interpreted in Zambia.<sup>29</sup> As such Christian retentionists of the anti-sodomy laws in Zambia base their argument on the supremacy of the Constitution by stating that in a democracy, the constitutionally expressed will of the people should be reflected in the law.<sup>30</sup> This rhetoric of Christian nationalism is predominantly driven by Pentecostal Christian churches who perhaps have the most influence in the discourse on sexuality in Zambia. As observed by Van Klinken

[i]n Zambia this is even more apparent because it is the only country on the continent where Pentecostal Christianity has shaped a popular, constitutionally embedded sense of national identity ... the constitutional and political configuration of Zambia as a Christian nation clearly shapes and defines the debates and politics concerning homosexuality and LGBTI rights.<sup>31</sup>

The influence of Pentecostalism on legal and political discourses in Zambia reveals a strong relationship between church and state. Notably while in other countries religious based heterosexual nationalism is influenced or even driven by Western far-right Christian movements,<sup>32</sup> in Zambia such influence is present and the discourse is driven by local Pentecostal churches.<sup>33</sup>

### 3.3 Cultural heterosexual nationalism

Like Christian heterosexual nationalism, cultural heterosexual nationalism is also a strong basis for the retention of anti-sodomy laws in Zambia. Cultural heterosexual nationalism is broadly grounded on the narrative that Africa is organically heterosexual; that pre-colonial African societies did not have diverse forms of human sexuality and therefore that 'homosexuality is unAfrican'.<sup>34</sup> In this regard cultural nationalists argue

29 A Chanda *Constitutional law in Zambia: Cases and materials* (2011) 11-17. See also art 388, Constitution of Zambia, Act 2 of 2016.

30 Kaunda (n 25) 13.

31 A Van Klinken 'Gay rights, the devil and the end times: Public religion and the enchantment of the homosexuality debate in Zambia' (2013) 23 *Religion* 519.

32 See K Kaoma 'The paradox and tension or moral claims: Evangelical Christianity, the politicisation and globalisation of sexual politics in sub-Saharan Africa (2014) 2 *Critical Research on Religion* 227.

33 Van Klinken (n 12) 254.

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

that 'homosexuality is exported from the West into Africa to disrupt African cultural values'.<sup>35</sup> An extended arm of cultural heterosexual nationalism is that African civil society organisations that use rights talk to further the rights of sexual and gender minorities in Africa are sponsored by the West.<sup>36</sup> In essence cultural heterosexual nationalism in Africa generally, as an offspring of African cultural nationalism, is a contestation of what is perceived as western value systems and a rejection of what is deemed as 'unAfrican' and 'bad for' Africa.<sup>37</sup>

Cultural heterosexual nationalism takes two basic forms in Zambia and perhaps in other heterosexual nationalist states in Africa. These are political and religious. Religious based cultural heterosexual nationalism is driven by religious and traditional leaders who link African religious morality and value systems to Christian moral ethics on sexuality. Van Klinken observes that both

in popular discourse and in the rhetoric of political and religious leaders, Christianity and Zambian culture are strangely deployed as almost interchangeable canons for arguing against homosexuality, which is considered un-Christian, un-Zambian and un-African.<sup>38</sup>

The interchangeable use of religion and culture in highly Pentecostalised countries like Zambia is strange and surprising because 'Pentecostalism generally presents the rhetoric of breaking with the past and is not interested in authentic Africaness' which it associates with witchcraft.<sup>39</sup>

Political-based cultural nationalism is driven by political leaders who view non-heteronormative sexualities as impositions from Western governments. To a large extent, political based cultural heterosexual nationalism rejects the minority rights thesis using cultural relativism and human rights exceptionalism as opposed to the universality of human rights. In this context culture is 'used' as a legitimate basis to politicise sexuality with expected favourable outcomes. Gloppen and Rakner define politicisation as the process by which a social phenomenon (in this case sexuality) becomes the basis of mobilisation by societal and political actors, who turn it into an issue of major political significance, as a subject

35 As above.

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

37 Epprecht (n 36). See also M Epprecht *Heterosexual Africa? The history of an age of exploration the age of AIDS* (2008).

38 Van Klinken (n 12) 24.

39 As above.

of heated public arguments, mobilisation and conflict.<sup>40</sup> The critical nature of politically charged cultural heterosexual nationalism was best illustrated in the events that led to the American Ambassador's recalling from Zambia, discussed above.

### 3.4 Moral heterosexual nationalism

Moral heterosexual nationalism holds that homosexuality is immoral and sponsors heterosexuality as the decent, respectable and natural form of sexual citizenship. It is premised on deviance theory arguing that homosexuality is a choice and represents a deviation from what are perceived as organic heteronormative societies like Zambia.<sup>41</sup> To ensure a decent society, moral heterosexual nationalism therefore, postulates that one of the functions of law is to enforce morals, for example through the anti-sodomy laws.<sup>42</sup> Thus, most anti-sodomy laws are termed laws against 'morality and the order of nature'. This view, founded in natural law theory, contests the postulation that the realm of law is to prevent public harm and not to delve in the private lives of citizens, such as consensual same-sex relations.<sup>43</sup> In essence moral nationalism holds that sexual citizenship, public or private falls under the purview of the law.

Continuing the above legacy, morality was added as a constitutional value and basis for interpretation in the 2016 constitutional amendment. Article 8 was introduced in the 2016 amendment to make certain that Zambia does not lose its history of upholding morality as the basis for law, policy and governance. Moral arguments to sustain the anti-sodomy laws are thus partly made based on article 8 of the Constitution, which states that morality and ethics should guide the interpretation of the law. In this regard it can be argued that Zambia took a natural law point of view by relating law with morality. With respect to sexual and gender minorities, Delvin's view is taken that the law should be a tool to combat the immorality of homosexuality.<sup>44</sup> Opposed to this view is the positive school of thought which argues in favour of the separation thesis – that

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

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

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

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

44 Delvin (n 42) 151.

law and morality should be separated.<sup>45</sup> While the meaning of article 8 in terms of what constitutes morality has not yet been a subject of litigation in the judicature of Zambia, its use has been mainly in lawfare against sexual and gender minority rights by political and religious leaders.

#### **4 The impact of heterosexual nationalism and the mischaracterisation and misapplication of the anti-sodomy laws in Zambia**

The anti-sodomy laws of Zambia more than being a product of colonialism, represent coloniality, in that they are mainly a sustained commodity of heterosexual nationalism. Once retained at independence the laws took a life of their own in the post democratisation era but retaining aspects of the colonial governmentality on which they were first conceived. As stated in the introductory note, these laws, retained, nurtured, and mobilised through heterosexual nationalism, are mischaracterised, and misapplied as anti-homosexual orientation and identity laws. The mischaracterisation and misapplication have adverse effects on the rights of sexual and gender minorities in breach of Zambia's human rights legal obligations.<sup>46</sup> This consequent breach, seen through the eyes of heterosexual nationalism, is often perceived as legitimate or ignored as insignificant, because the victims (sexual and gender minorities) are labelled as deviants and constituting a criminal population.

As stated earlier, pure criminal law analysis of the provisions reveals that it is not an ingredient of the offence to prove that a person is a homosexual, for that person to be convicted. In the same light, it is not a defence for a person to argue that they are not homosexual to be acquitted. However, the provisions are misunderstood to be anti-homosexuality laws and therefore applied exclusively against sexual and gender minorities in Zambia.<sup>47</sup> Homosexuality, itself is misunderstood to mean anal sex and all sexual and gender minorities, including intersex persons are categorised as homosexual.<sup>48</sup> The net result is that society and the drivers of heterosexual nationalism have converted sodomy into a term synonymous to homosexuality. To this 'end, a homosexual is seen as synonymous to a sodomite and a sodomite synonymous to homosexual'.<sup>49</sup> In essence sexual

45 HLE Hart *Liberty and morality* (1963) 11.

46 For a full discussion see Panos Institute of Southern Africa *Towards non-discrimination on the basis of sexual orientation and gender identity in Zambia* (2013) 3-11.

47 Pierre (n 10) 31-33.

48 As above.

49 CR Leslie 'Creating criminals: The injuries inflicted by "unenforced" sodomy laws' (2000) 35 *Harvard Civil Rights-Civil Liberties Law Review* 103 at 110.

and gender minorities in Zambia, suffer the label of deviant criminals without actually committing any crime, or having any criminal record. Leslie puts this point as follows:<sup>50</sup>

Sodomy laws do not merely express societal disapproval, they go much further by creating a criminal class. The contours of criminal class are not defined by conduct, but by sexual orientation regardless of whether one's desires are ever manifested in conduct. Sodomy laws do not merely define the fluid boundaries of a social class, rather they achieve indirectly what the states cannot do directly; criminalise homosexuality.

In the landmark decision of *National Coalition for Gay and Lesbian Equality v Minister of Justice*, the South African Constitutional Court explained this as follows:<sup>51</sup>

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

The mischaracterisation has macro and micro effects. The macro effect is that it has created a legal and social environment where discrimination, marginalisation and violent homophobic attacks are seen as legitimate and therefore perpetrated against sexual and gender minorities in Zambia.<sup>52</sup> In this sense sexual and gender minorities are not seen as holders of human rights but rather as social deviants who deserve the attacks and other forms of human rights violations that are perpetuated on them.

Based on their mischaracterisation as laws against homosexual orientation, the anti-sodomy laws are misapplied to give effect to heteronormativity against sexual and gender minorities. Seen as legitimate, the misapplication of anti-sodomy laws in Zambia is at two levels: societal (public) and institutional. Nurtured by heterosexual nationalism, at

50 As above.

51 (1998) ZACC 15.

52 Panos Institute (n 46) 11-17.

societal (public) level, the anti-sodomy laws are among the few laws where society or the public deems it justifiable to take matters into their own hands regarding their enforcement.<sup>53</sup> In this regard ‘mob-justice’ energised by heterosexual nationalism is usually carried out against sexual and gender minorities under the guise of citizens’ responsibility to maintain public morality and the declaration of Zambia as a Christian nation.<sup>54</sup> These violations occur with the full awareness of the state who turn a blind eye to them. It is worth probing the social psychology behind the mob misapplication of law in the context of sexual and gender minorities. Rich explains that heterosexual socialisation breeds subconscious hatred for sexual and gender minorities, translating to violence in ‘conducive’ environments such as heterosexual nationalism.<sup>55</sup>

At an institutional level, the anti-sodomy provisions are misapplied by both state and non-state actors. Among state actors are the police, healthcare institutions and the media, both public and private. A report by the Transbantu Association of Zambia (TBZ) supported by the United States Agency for International Development (USAID) documented disturbing violations of human rights against sexual and gender minorities by Zambian police (ZP) officials in the form of rape, assault, extortion, unlawful detention and torture.<sup>56</sup> For instance 32 per cent of the ‘female’ transgender participants that were interviewed in the TBZ survey, alleged that they were raped and assaulted by police.<sup>57</sup> A similar statistic was recorded in a USAID/Family Health International (FHI360) ‘Open Doors Project Report’.<sup>58</sup> The report indicates that sexual and gender minorities are abused by both the police and the public but that these cases of abuse are never officially recorded as sexual minorities fear further victimisation.<sup>59</sup> In most instances sexual minorities are ‘outed’ by arrest and this leads to a whole range of suffering which includes media harassment, loss of family support, loss of employment and generally a

53 R Rich *The sociology of criminal law: Evaluation of the deviance of the Anglo-American society* (1979) 7.

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

55 Rich (n 53) 27.

56 TBZ (n 54) 3-13.

57 TBZ (n 54) 46.

58 USAID/FHI360 ‘Understanding the legal barriers to accessing HIV/AIDS services by key populations: Key findings from expert panel meetings’ (2019) 11-12 <https://www.fhi360.org/resource/understanding-legal-barriers-accessing-hiv-aids-services-key-populations-findings-expert> (accessed 20 December 2021).

59 As above.

normal way of life. The depth of the problem is highlighted in a study on wellbeing of sexual and gender minorities in Zambia which captures the experience of violence as follows:<sup>60</sup>

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

Non-state actors misapply the anti-sodomy laws in much the same way as state actors. For instance, between September and November 2017 one of the leading private newspapers run a series of reports against sexual minorities and called for enforcement of the law through homophobia.<sup>61</sup> The report series led to the closure of the 'Key populations' clinic which was run privately by FHI-360 but did not lead to any arrests.<sup>62</sup>

## **5 LGBT lawfare in response to heterosexual nationalism and the impact of the anti-sodomy laws**

### **5.1 The genesis**

LGBT lawfare in response to heterosexual nationalism and the impact of the anti-sodomy laws started in the early 1990s following the end of one-party rule. Arguably, LGBT rights talk and pushback against the anti-sodomy law was one of the immediate consequences of the

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

61 'Homosexuality business shocker' *The Daily Nation* 9 November 2017; 'Homosexuality is not Zambian' *The Daily Nation* 8 January 2018. All these stories were published as the main front page stories. In 2016 during the Constitution making process the paper had carried a series of stories inciting members of the public to rise against 'inclusion of gay rights in the constitution'. The United States Government through their embassy in Zambia reacted to this stating that the paper had misrepresented facts <http://www.lusakatimes.com> (accessed 26 December 2020).

62 'Secret gay indaba' *The Daily Nation* 7 November 2017.

democratisation phase in post-colonial Zambia. After the return to multi party politics in 1990, the MMD, as the main opposition political party stood on the ticket of democracy, the rule of law and the state's respect for human rights and freedoms which the citizens had lost during the one-party dictatorial rule of UNIP. Once in power the MMD adopted neo-liberal policies, which required a more open society and respect for human rights. However, the MMD government's declaration of Zambia as a Christian nation at the dawn of democracy is the main basis for anti-sexual and gender-minority rights mobilisation in Zambia and thus set the scene was for LGBT lawfare.

## 5.2 Organisational mobilisation

Sexual and gender minority rights mobilisation against the anti-sodomy laws became a public issue for the first time in Zambia in 1998, when Francis Chishambisha, a college student, publicly came out announcing that he was gay and also shared his lived experiences of constant human rights violations and helplessness.<sup>63</sup> He therefore announced that he and his friends intended to form an organisation called the Lesbian, Gay, Bisexual and Transgender Association (LEGATRA) to advocate for the rights of sexual and gender minorities.<sup>64</sup> The story was covered as a three-page article in *The Post*, a private-owned newspaper. The background to the article is that Chishambisha walked to the *Post* newspaper offices, told the reporters that he was gay and asked if they could interview him and cover his life story. According to Long & Cooper, the reporters leapt at this chance to report on homosexuality for the first time in Zambia and covered the story.<sup>65</sup> What followed was unprecedented public anger and backlash against sexual and gender minorities from all sections of society.

Despite the constitutional guarantees of freedom of association and the promise by the MMD government to respect human rights, LEGATRA was never registered despite several attempts. The state took a human rights exceptionalism stance with the Registrar of Societies stating that it was an 'illegal organisation because homosexuality is a criminal offence in Zambia' and adding that he could 'not register LEGATRA any more than he could a satanic organisation'.<sup>66</sup> As a department under the Ministry of Home Affairs, the Office of the Registrar of Societies (ORS) could, arguably, not have made a contrary decision because the Minister

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

64 As above.

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

66 Long & Cooper (n 65) 69.

of Home Affairs had earlier stated that the anti-sodomy laws of Zambia meant that ‘anyone who tried to register an organisation promoting homosexuality would be arrested’.<sup>67</sup> This mischaracterisation of the anti-sodomy laws was repeated by the Zambia Police spokesperson and validated by the Minister of Justice who issued that ‘registration of such an association [supporting sexual and gender minority rights] is in itself a crime’.<sup>68</sup> Uncharacteristic for the National Human Rights Institution (NHRI) the Zambia Human Rights Commission (ZHRC) took a human rights exceptionalism and relativism position, stating the following:<sup>69</sup>

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

Permeating through and influencing the discourse was religious and cultural nationalism. For example, two days after the article was published, a prominent clergy, Archbishop John Mambo, issued a press statement saying that ‘homosexuality cannot be an issue of human rights because it is against the teaching of the [B]ible’.<sup>70</sup> Several religious leaders weighed in and gave similar statements urging the government to maintain Zambia as a Christian nation and enforce its laws against ‘homosexuality’. Cultural nationalism was expressed through the government’s Spokesperson who when asked to give the official government position on the registration stated that ‘homosexuality is un-African and an abomination to society which would cause social decay’ and as such ‘government would not tolerate gay rights’.<sup>71</sup> Arguably LEGATRA registration set the tone for LGBT lawfare and future discourses on sexual diversity in Zambia. In many respects it also marked the start of heterosexual nationalism as the basis for mobilisation against sexual and gender minority rights in Zambia. The main actors, political, religious and traditional leaders have remained the leading voices. The sexual and gender minority rights movement did not employ litigation as a strategy to challenge the decision in court. If one considers the incremental approach and the factors that aid successful strategic litigation, the time was perhaps not right.<sup>72</sup> Instead, they were

67 ‘Zambia issues warning on gay associations’ *The Herald* 5 September 1998.

68 As above.

69 Press statement of The Zambia Human Rights Commission on the registration of gay rights organisation (1998).

70 ‘Mambo attacks Zulu for defending homosexuals’ *The Post* 16 July 1998.

71 ‘Gay grouping thrown out’ *Zambia Daily Mail* 3 September 1998.

72 For a full discussion on the effective use of strategic litigation in LGBT lawfare see

driven underground and compared to other movements in the region such as Botswana, the movement in Zambia has since not shown significant ability to mobilise and engage in effective lawfare following the failure of LEGATRA.

The failure of LEGATRA's registration was however not the end of the sexual and gender minority rights movement in Zambia. Human rights organisations like Friends of Rainka (FoR), Trans-Bantu Zambia (TBZ) and Lotus Identity Zambia (LIZ) have a focus on sexual and gender minority rights. They have not taken on cases in court or engaged in public advocacy but their existence is in itself part of LGBT lawfare.

### 5.3 Strategic litigation

Strategic litigation, as a tool in lawfare, has not yet been employed by the sexual and gender minority rights movement in Zambia. The closest use of the judicial arena for lawfare was in an appeal against the conviction of a trans woman in *Hatch-Brill v The People*.<sup>73</sup> On the material night, Hatch, a transwoman got into a taxi going home from a night club. On the way home, the cab driver forced himself on her, overpowered her, and raped her. After this incident the taxi driver took Hatch to the police reporting that 'he had sex with a man who pretended to be a woman and only realised this after the fact'.<sup>74</sup> At the police Hatch was stripped naked and when it was found that her gender marker was 'male' she was arrested, charged and detained under the anti-sodomy laws. The basis of the charge was that as a transwoman, she was the one who must have initiated the anal sex and that the taxi driver would not have reasonably initiated or solicited anal sex. Hatch's statement that she was raped was thrown out. Convicted to 15 years in prison Hatch appealed making it the first case ever to go to a higher court with respect to anti-sodomy laws. Notably, during the criminal prosecution at the magistrate's court, Hatch was not represented by a lawyer as she could not afford one, a factor that the court should have considered. It was during the appeal that the legal team, funded by the Southern Africa Litigation Centre (SALC) came on board,<sup>75</sup> and raised several human rights issues, including the unfairness

A Jjuuko *Strategic litigation and the struggle for gay, lesbian and bisexual equality in Africa* (2020).

73 (2017) CAZ/09/03/2016.

74 As above.

75 The team was constituted through the intervention of the Southern African Litigation Centre, an international NGO focusing on strategic litigation that became aware of the case through TBZ, a local organisation focusing on sexual and reproductive health rights. It was telling of the fact that local organisations have no capacity to mobilise resources to mount a defence.

of the anti-sodomy laws, the violation of Hatch's rights as a trans person such as mandatory HIV testing which is illegal in Zambia.<sup>76</sup> The team relied on several local and international human rights law jurisprudence.<sup>77</sup> However, the court dismissed the arguments stating that 'this is a criminal law case where the accused person pretended to be a woman' adding that 'arguments that he is a transgender and that the anti-sodomy laws are unconstitutional or violate his rights are hollow and we shall not even spend time entertaining them'.<sup>78</sup> The Courts' refusal to entertain the human rights arguments, arguably highlights their lack of knowledge on sexual and gender minorities which can be attributed to their training and socialisation in a heteronormative society.

The case reveals that the anti-sodomy laws will always be disproportionality applied against sexual and gender minorities. Arguably a level of fairness would have been achieved if both the accused and the complainant were charged since each of them had a different version of events of the material night. However, due to the mischaracterisation of the anti-sodomy laws as laws against queer identity and expression, the gender identity and expression of the accused was the criminalising factor which led to the exclusive application of the law on her, thereby endorsing the view that it was the person and not the action that was the target of the law.

Ideally the lessons learnt from the case should have been used to create strategies for proactive litigation in LGBT lawfare. However, rather than energise the sexual and gender minority rights movement to engage in proactive lawfare, it – like the LEGATRA saga two decades before – only drove the movement further underground. At a post litigation meeting, it was suggested that the movement should use litigation incrementally as a tool in the lawfare. But due to the fear of imprisonment and public harassment, litigation was seen as unsafe and dangerous to the welfare of sexual and gender minorities.<sup>79</sup> This is in sharp contrast to other countries

76 Mandatory HIV testing was declared illegal in Zambia in *Kingaipe & Chookole v The Attorney General* (2010) HL/86.

77 The defence argued that the arrest and treatment of Hatch amounted to discrimination based on gender identity and relied on jurisprudence from different justifications such as *Thuto Rammage & 20 Others v Attorney General* (2014) CA 128, *Toonen v Australia* (1992) CCPR/C/50/488 and *Lawrence v Texas* (2003) US 558. The defence team used the principle of human dignity relying on the Universal Declaration of human rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and Yogyakarta Principles. The Court however, rejected arguments on the protection from discrimination based on gender identity.

78 As above.

79 As part of the legal team that represented Hatch on appeal, I took part in several

with similar hostile environments like Botswana where despite initial court disappointments, the movement took the positive aspect of the lost cases to build on future cases until eventually the anti-sodomy laws in that country were decriminalised. A notable fact is that in Botswana, during the hearing of cases, the movement showed solidarity outside the court grounds with their banners calling for equal protection before the law. In Zambia, the movement was silent, invisible and steered away from the case.

The reaction to the *Hatch-Brill* case and several other cases<sup>80</sup> where sexual and gender minorities have been convicted under the anti-sodomy laws demonstrates that Zambia is many steps behind countries like Botswana in using strategic litigation in LGBT lawfare. While it can be understood that the legal, political and social environment is hostile and presents several barriers for strategic litigation, it can also be argued – learning from other states within the region – that it is such hostile environments that make strategic litigation a potent tool. While the sexual and gender minority rights movement has not used litigation to protect their rights, the state has effectively used it not only to prosecute them but also for political reasons to mobilise public support and gain political advantage. Even in such events, the local sexual and gender minority rights movement does not show solidarity or the ability to mobilise resources to mount a legal defence. Defence lawyers are often externally funded which reinforces the heterosexual nationalism narrative that sexual and gender minority rights are a foreign agenda which must be contested. However, it is noted that strategic litigation in a hostile environment as Zambia should be approached with caution by ensuring that all the elements are in place.<sup>81</sup>

meetings where the team highlighted the importance of proactive strategic litigation and its long-term nature before results can be gained. However, the concern was that witnesses would out themselves during litigation and this would cause a backlash with more arrests and convictions since anti-sodomy laws are seen as laws against identity and not conduct. As such, safety was seen as the primary strategy and concern which affected any prospects for litigation.

80 Most of the cases where sexual and gender minorities have been prosecuted under the anti-sodomy laws were conducted in the Magistrates' Courts and hence are not reported. For example, *The People v Mwale* and *The People v Mubiana* are just but examples of such cases. The sexual and gender minority rights movement though aware of these cases has not taken strategic advantage of them by using them to challenge their constitutionality as did the movement in Botswana with similar cases such as *Letsweletse v Attorney General* (2019) MAHGB 16, which finally decriminalised same-sex sexual conduct in Botswana.

81 For a full discussion on the elements that make LGBT strategic litigation in Africa successful, see A. Jjuuko *Strategic litigation and the struggle for lesbian, gay, and bisexual equality in Africa* (2020).

The nature of LGBT lawfare in Zambia is also exemplified in *The People v Kasonkomona*.<sup>82</sup> Kasonkomona a sexual and reproductive health rights activist, appeared on a live television programme where he was advocating for, among others, the state to respect the rights of sexual and gender minorities in Zambia. His aim was to create awareness and help shift the negative narrative in Zambia. During the programme he highlighted the impact of the anti-sodomy laws in Zambia, the fact that they violate Zambia's human rights obligations and therefore called for their repeal. He was immediately arrested after the programme by police who were waiting for him outside the studio. Initially he was charged under section 155 (sex against the order of nature) but it was soon realised that the charge would not stand and so it was amended to 'soliciting in the public for immoral purposes'.<sup>83</sup> The rationale for the charge was that

by asking for non-discrimination of sexual and gender minorities and calling for decriminalisation of the anti-sodomy laws, Kasonkomona was promoting homosexuality which is illegal and immoral in Zambia as a Christian nation.<sup>84</sup>

During trial, the state called six witnesses among them the Director of the Evangelical Fellowship of Zambia (EFZ) who was the main witness. He testified on the sinfulness and immorality of homosexuality as his testimony was meant to establish that the statement of the accused amounted to soliciting for immoral purposes.<sup>85</sup> This approach highlights the fact that the case was constructed in terms of religious and moral nationalism as justification for the anti-sodomy laws in Zambia. However, the testimony was discredited on an evidential point of law because it turned out that the witness had not even watched the programme himself. His testimony was in fact based on the

collective view that he and his colleagues in the church leadership held, that Zambia being a Christian nation, the statement made by the accused amounted to a criminal offence which the state ought to prosecute.<sup>86</sup>

The testimony not only illustrates how the state [through agency of the police] understands the anti-sodomy provisions but also how they are used/enforced in conjunction with other laws to unfairly prosecute sexual

82 *The People v Paul Kasonkomona* (2014) HPA/54.

83 Section 178 of the Penal Code of Zambia.

84 Zambia Police Indictment form of Paul Kasonkomona, 8 April 2013.

85 See *The Kasonkomona case* (n 82).

86 As above.

and gender minorities or activists. Notably in their submissions the state argued:<sup>87</sup>

The respondent [the accused] was not merely discussing homosexuality but was actually advocating for the rights of people practicing homosexuality to be protected. And it is illegal to practice homosexuality ... It is further submitted that in light of the provision under which the respondent was charged, it would be discerned that the test for the offence of soliciting for immoral purposes in relation to homosexuality is not actual harm but potential harm to public morality. Thus, any attempt to promote or to fund or in any way supporting homosexuality and related practices is an offence.

From the submission it is also clear that the prosecution's (state's) understanding of 'homosexuality as a practice' and not as a diverse form of human sexual orientation informed or rather misinformed their argument. The defence put up a strong argument, submitting that *Kasonkomona* not only had his freedom of expression guaranteed in the Constitution when he made the statement but also that calling for non-discrimination and decriminalisation did not amount to soliciting for immoral purposes. The Magistrates' Court agreed with this submission by the defence and after protracted hearings, *Kasonkomona* was acquitted.

The *Kasonkomona* case brings out an important point factor to consider regarding the potential in direct litigation challenging the anti-sodomy laws. This is because the litigants who are members of the anti-sodomy laws, or witnesses would one themselves up to arrest and prosecution.

#### 5.4 Rights talk

With the hostility of the political and social environment, as well as the non-registration of sexual and gender minority rights organisations, some general human rights civil society organisations have employed 'rights talk' to counter heterosexual nationalism and the anti-sodomy laws. For example, as early as 1998 following the refusal to register LEGATRA, the Zambia Independent Monitoring Team (ZIMT), a local human rights organisation that focused on elections, issued a statement that: 'Gay people just like lesbians, are normal people and are entitled to fundamental human rights and should not be discriminated against'.<sup>88</sup> The ZIMT leader Alfred Zulu and other employees were mocked and received death threats of arrest political and traditional leaders.<sup>89</sup> ZIMT which sought to carry

87 States submissions in the *Kasonkomona* case (n 82).

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

89 'Zambia: Arrest ZIMT Officials' *The Times of Zambia* 22 October 1998 <https://allafrica.com>.

LEGATRA under its wings became the subject of a funding inquiry by the Zambian government.<sup>90</sup> As Long & Cooper note, ‘eventually – and perhaps most dangerously – the controversy became one of how civil society in Zambia was funded’.<sup>91</sup> This led to a near diplomatic incident when the Norwegian Ambassador to Zambia was summoned and questioned by the Minister of Foreign Affairs regarding Norway’s funding of ZIMT. For unexplained reasons, a year later in 2000, ZIMT was deregistered by the executive and ceased to exist.<sup>92</sup>

Rights talk was the strategy used by Dette Resources Zambia (DRZ), a local human rights organisation whose main focus was Land rights. DRZ, publicly spoke out in support of sexual and gender minorities using explicitly Christian rationale considering the strength of religious heterosexual nationalism in Zambia.<sup>93</sup> However marginal, their voice represented a rare counter narrative towards sexual and gender minority rights in Zambia. DRZ had first conducted a survey to understand the lived experiences of sexual and gender minorities in Zambia with the aim of using the information for advocacy.<sup>94</sup> The announcement of the survey attracted attacks from the usual actors; political and religious leaders, with the Ministry of Home Affairs launching a criminal investigation on their source of funding. Despite these attacks DRZ issued several statements calling for the respect and protection of the rights of sexual and gender minorities in Zambia. Basing its understanding of human rights on biblical doctrine of Imago Dei and then applying it to sexual and gender minority rights, DRZ sought to root its defence of human rights for sexual and gender minorities in a religious language and theological narrative that most Zambians would understand.<sup>95</sup> However, despite DRZ’s good intentions, its rights talk and advocacy, as was the case with the statements of Ban Ki-moon discussed above, was diluted in the huge volume of attacks from political, religious, traditional leaders as well as

com/stories/199810220043.html; and ‘Gays out’ *The Mail & Guardian* 11 September 1998 <https://mg.co.za/article/1998-09-11-zambian-gays-out/> (both accessed on 9 May 2022). The situation with ZMIT also highlights the danger in engaging in litigation at this point.

90 As above.

91 Long & Cooper (n 65) 46.

92 As above.

93 Van Klinken ‘Christianity, human rights and LGBTI advocacy: The case of Detta Resources Foundation Zambia’ in Van Klinken & E Chitando (eds) *Public religion and the politics of homosexuality in Africa* (2016) 229.

94 ‘Zambian LGBT Organisation facing government prob’ *The London Evening Post* 29 July 2013.

95 As above.

members of the general public who took to social media condemning the organisation.<sup>96</sup>

As seen, rights talk in support of sexual and gender minority rights by originations in Zambia is consistently gaslighted by the executive in inquiries about funding and motivation. In this regard Long & Cooper note that ‘the discourse on sexual minority rights in Zambia eventually and perhaps most dangerously becomes about how and who funds civil society organisations that support homosexuality’.<sup>97</sup> Van Klinken corroborates and notes that the government’s consistent reference to organisations ‘falling for donor funding to support gay rights’ and labelling them as agents of western neo-colonial imperialism has isolated and weakened the local sexual and gender minority rights movement in Zambia.<sup>98</sup> Long after DRZ’s statements the executive remained under pressure from religious, traditional and opposition political party leaders, to deal with such organisations and their agenda strongly. Yielding to this pressure, and in a somewhat political gesturing move, with elections around the corner the then government urged members of the public to ‘report homosexuals to the police’ stressing that:

[A]s Zambians, we have declared that we are a christian nation and there is no way we can allow this un-Zambian culture. I want to urge all Zambians to rise and denounce this vice and report all homosexuals to the Police. Why should someone or some institutions want to import this homosexuality and try to influence others to practice it? We can’t allow it; I’m calling on all citizens to stand firm and reject it.<sup>99</sup>

Rights talk has also been employed by individual activists. Most prominently the background facts to the *Kasonkomana* case discussed above is an example of rights talk by an individual. Kasonkomona, a sexual and reproductive health rights activist, appeared on a live television

96 See comments on ‘Ban Ki-Moon calls for respect of homosexuals and lesbians’ *The Lusaka Times* 25 February 2012 <https://www.lusakatimes.com/2012/02/25/ban-ki-moon-calls-respect-homosexuals-lesbians/> (accessed 1 August 2022).

97 Long & Cooper (n 65) 46.

98 Van Klinken (n 93) 229.

99 ‘Kabimba urge Zambians reject and denounce people and institutions championing homosexuality’ *Lusaka Times* 22 April 2013 <https://www.lusakatimes.com/2013/04/22/kabimba-urge-zambians-reject-and-denounce-people-and-institutions-championing-homosexuality/> (accessed 7 July 2020) (emphasis added).

programme where he was advocating for, among others, the state to respect the rights of sexual and gender minorities in Zambia.

## 5.5 Shifting the narrative: Strategies for engaging in effective LGBT lawfare in Zambia

### 5.5.1 *Media training*

The media is an active participant in LGBT lawfare in Zambia and is as responsible for the flag of heterosexual nationalism as the other actors. Aware of the power of the media to shift the narrative in lawfare, Lotus Identity, a local organisation focusing on health rights of sexual and gender minorities, working in collaboration with the National HIV/AIDS Council (NAC) embarked on nationwide trainings of media personnel.<sup>100</sup> To avoid controversy the trainings were framed in a public health context with major content focusing on the impact of the anti-sodomy laws on the right to health for ‘key populations’ [including sexual and gender minorities] and the role of the media in shifting the negative narrative regarding sexual diversity in Zambia. To capture the media’s construction of sexual and gender minorities, a word association exercise was conducted where 150 journalists across the provinces were asked to associate different words which included ‘sex-worker’, ‘homosexuality’ and ‘gay person.’ One hundred and thirty-eight (138) participants out of 140 associated homosexuality and gay persons with negative and de-humanising words. The words recorded were ‘sinner’, ‘demon possessed’, ‘mentally disturbed’, ‘abnormal’, ‘animal’, ‘uncultured’, ‘criminal’, ‘evil’ and ‘lover of man’.<sup>101</sup> Typically, sexual and gender minorities are viewed through one of the lenses of heterosexual nationalism where they are either medicalised, de-humanised, de-spiritualised, stereotyped or in some way given the label of deviance. While the impact of the trainings has yet to be evaluated, the first but sadly only story covered by one of the trained participants showed the potential of positive change. What makes the story even more significant is the fact that it was covered by a public newspaper under the headline ‘Key populations have suffered propositional stigmatisation’.<sup>102</sup> While the headline used the public health

100 The trainings were conducted between 2017-2020. With Elections in 2021, it was strategised that the training be suspended to avoid brining attention to sexual and gender minority rights as in previous elections the subject became the cite of political mobilisation against sexual and gender minorities in Zambia. Further, NAC being a public institution could not be allowed to embark on the programme to avoid the state being ‘misunderstood to support homosexuality in Zambia’ one officer stated.

101 NAC Internal Report on Media Training (2021).

102 *Times of Zambia*, 6 November 2020.

frame of sexual and gender minorities, its content took a more human rights approach stating for instance that:

Sexual and gender minorities in Zambia have been subjected to some of the worst human rights violations in Zambia. Lack of information, poor enforcement of the law and distorted reporting by the media is part of the reason for these human rights violations.<sup>103</sup>

This piece shows that the potential to change the narrative is there. However, change can only occur over time with consistent engagement with the media as one of the actors in Zambian LGBT lawfare.

### ***5.5.2 Using the public health approach as a master narrative***

While NAC is not directly engaged in LGBT lawfare in Zambia, as an ally it has taken agency of the public health approach on sexual and gender minority rights in Zambia, much like other like institutions in the region. Guided by Sustainable Development Goal (SDG) number 15<sup>104</sup> to ensure universal health coverage and to 'leave no one behind' NAC, as a public funded institution under the Ministry of Health, lobbied for and adopted the National HIV/AIDS Strategic Framework (NASF), which is the only official government policy that speaks to the promotion and protection of sexual and gender minorities as 'key populations' in the National response to HIV.<sup>105</sup> In this regard, NAC works with local and international sexual and gender minority rights organisations. The media trainings discussed above would not have been possible without the agency of NAC and would have received backlash if NAC was not a public institution working in the context of the sustainable development goals. Further, the executive and other branches of government are careful not to criticise this approach as that would create the narrative that Zambia is opposed to the SDGs. Programming under the NASF, as with general health programming in Zambia, is largely dependent on donor funding.<sup>106</sup> While this may impact

103 As above.

104 See UN sustainable Development Goals 'Goal 3: Ensure healthy lives and promote well-being for all at all ages' <https://www.un.org/sustainabledevelopment/health/> (accessed 13 April 2022).

105 See NAC 'National AIDS strategic framework 2017-2021' <https://www.nac.org.zm/?q=content/national-aids-strategic-framework-nasf-2017-2021> (accessed 17 February 2022).

106 There are two sides to international donor funding in relation to sexual and gender minority rights. One side is that such funding can be used to advance sexual and gender minority rights. In support of this view, EM Lubaale 'Beyond the rhetoric of international human rights standards in the struggle to decriminalise homosexual conduct in Uganda' (2021) 30 *Afrika Fokus* 254, argues that international donor agencies should tie aid to particular policies and programmes that further tolerance for sexual

the overall efficacy of the policy, its long-term impact on LGBT lawfare has potential to be positive. The laxity of government notwithstanding, the HIV and the public health framing of sexual and gender minority rights represents the best opportunity in Zambia. Incrementally, the discourse, programming and activism can have a more 'standalone' but not divorced voice from the HIV and public health master frame. One way that local civil society and its supporting partners can gain traction using the HIV and public health master frame is through the NASF. As government official policy the NASF recognises as follows:

HIV however, continues to contribute the highest mortality rates, burdening households and straining national health systems. With this understanding, the Revised Zambia National AIDS Strategic Framework (RNASF) 2020-2023 exemplifies the governments to deliver better health for all with a focus on socially inclusive interventions to prevent and manage HIV and AIDS ... *It emphasises an equitable HIV response that ensures no one is left behind.* This is a priority for Zambia to achieve her goals. It targets *key and priority populations* while ensuring that all Zambians are reached and stigma and discrimination are reduced for improved health outcomes.<sup>107</sup>

While government budgeting arguably makes the above policy statement sound rhetorical and gesturing, local civil society and supporting partners can take advantage of this 'commitment' to create thematic programmes for sexual and gender minorities around it. The public health approach has also been adopted by other organisations such as FHI 360 on the 'Open doors' project which focuses on the health rights of sexual and gender minorities among other key populations. In one of its reports under the

and gender minorities. In this way, Lubaale argues, donor funding will have a positive impact on the overall protection of sexual and gender minorities. The other side argues that tying aid to the promotion of sexual and gender minority rights will have a backlash as it will only reinforce the narrative that western countries have an agenda to promote homosexuality in African. In this regard M Epprecht *Sexuality and social justice in Africa: Rethinking homophobia and forging resistance* (2013) 12, cautions against aid conditionalities in Africa as it has only reinforced nationalism. In the Zambia context, I argue that while the sexual and gender minority rights movement and indeed organisations like NAC will be unable to effectively engage in LGBT lawfare with external funding, such funding should be given in a manner that does not tie aid to the promotion of sexual and gender minority rights. This view is informed by the backlash the organisations like ZIMT and DRZ faced. Further, in 2020, the President of Zambia – when asking for the recall of the American ambassador – expressly stated that 'if our friends want to tie aid to homosexuality then they stay with their aid, and we shall find other ways of funding our programme's. Our collective wisdom and sovereignty cannot be sacrificed so that we receive donor money' see n 3 & 23.

107 NAC (n 105) (emphasis added).

project, FHI 360 highlights the lived experiences of sexual and gender minorities.<sup>108</sup>

Taking lessons from the lawfare in Botswana, the movement in Zambia can also effectively use the public health framing of sexual and gender minority rights as its 'master frame'. In order for any minority group to be successful in its struggle for recognition, emancipation and equality, its activists should argue their cause from general and less controversial human rights discourses within the context of that society. De Vos describes this as the 'master narrative' or 'master frame' arguing that in countries where progress has been made, 'sexual and gender minority rights organisations framed their activism within the broader human rights discourse and struggle'.<sup>109</sup> In Botswana for example, the master frame/narrative was the public health model in the context of the national response to HIV. As such the lawfare and particularly the litigation strategy highlighted the lived experiences of sexual and gender minorities in the context of how the anti-sodomy laws prevented them from accessing general, but most specifically, HIV related healthcare services. This made a huge difference when in *Letswelestse Mosthidiemang v Attorney General*, the case through which the anti-sodomy laws were decriminalised, the court acknowledged the following:<sup>110</sup>

A number of studies and research papers, all authorised by the Botswana Government, confirmed the negative effect of the impugned criminal sections had on gay men in Botswana as an HIV/AIDS vulnerable, and that they were often reluctant to, owing to the stigma, and fear of prosecution, to come forward for testing and treatment, or as complainants when they suffered blackmail or assault owing to their orientation. This had an adverse effect on their mental well-being owing to the stress of constant fear of discovery or arrest if they engaged in what for them was normal sexual conduct as an expression of their love for their partners. This sometimes led to depression, suicidal behaviour, alcoholism, or substance abuse, and at a level far higher than of heterosexuals.

In this light the public health approach and the evidence-based reports developed by NAC, FHI-360 and other organisation present a potent tool for future use towards effective LGBT lawfare in Zambia. What presently lacks is a strong sexual and gender minority rights movement.

108 TBZ (n 54) 46-47.

109 P de Vos 'On the legal construction of gay and lesbian identity and South Africa's transitional constitution' (1996) 12 *South Africa Journal on Human Rights* 274.

110 (2019) MAHGB-00591-16.

## 5.6 Strengthening the capacity of local sexual and gender minority organisations to engage in lawfare

After LEGATRA and subsequent events some of which have been discussed above, the sexual and gender minority rights movement has avoided visibility and confrontation with the drivers of heterosexual nationalism. In this sense, it is debatable whether the movement is actively engaged in lawfare. It can be argued that the movement, although not at the same active level as others in South Africa, is not where it is post the LEGATRA registration failure. The movement has managed to build from within, which can be taken as responses to heterosexual nationalism.

Administratively, organisations that focus on sexual and gender minority rights have registered as general human rights promotion organisations. This has helped to avoid the state's strict scrutiny of their activities. This strategy has worked in hostile environments like Zambia and has avoided the need for litigation as a strategy to 'force' the state to allow registration. As such organisations have been able to operate as general human rights institutions. Currier and Cruz note that this strategy is effective in hostile environments but however, caution that while this approach is tactically effective in the African context, 'it has produced situations where activists endlessly defer initiating LGBT rights campaigns and activities'.<sup>111</sup> They argue that 'some organisations took years to decide to open decriminalisation campaigns and in the end those plans died with the organisations'.<sup>112</sup>

A significant and notable step has been capacity building. Organisations like Friends of Rainka, Lotus Identity and TBZ have managed to conduct paralegal trainings of their members with a specific focus on sexual and gender minority rights. The trained paralegals are always on standby to respond to situations where sexual or gender minorities are arrested by the police or face any challenges that may bring public attention and risk their safety. The trainings have occurred over time and are ongoing. While this step deserves commendation, they are designed for safety and are reactive to rather than taking a proactive step in lawfare. Notwithstanding, an initiative to mobilise some trained lawyers is currently on going. Perhaps this can evolve into a strategy to start taking steps towards visible and proactive lawfare. TBZ has also gone a step further by documenting some

111 A Currier & J Cruz 'Civil society and sexual struggles in Africa' in E Obadare (ed) *Handbook of civil society in Africa* (2014) 10.

112 As above.

human rights violations which hopefully and potentially could be used for more effective/proactive lawfare.<sup>113</sup>

Another praiseworthy step is the collaboration between organisations that have focused on sexual and gender minority rights with others such as NAC and FHI-360. This has enabled the voice and lived experiences of LGBT persons to inform the programming of these organisations although limited to the public health context. However, as argued above, this can be used as a steppingstone towards more effective lawfare.

## 6 Conclusion

LGBT lawfare in Zambia is fought on the grounds of heterosexual nationalism with the state using the anti-sodomy laws as its most potent weapon. It has weakened the sexual and gender minority rights movement making it unable to respond effectively or visibly. Lessons learnt from other jurisdictions in Africa point to the fact that a strong civil society movement is crucial to any lawfare. As such if LGBT lawfare in Zambia is to yield positive results, the sexual and gender minority rights movement has to strengthen and be visible in its efforts. Several factors and conditions need to be met to reach this height.<sup>114</sup> This chapter has shown that the movement is currently not engaged in effective proactive lawfare, and has taken an invisible and safety approach in the face of heterosexual nationalism. However, the chapter has also shown that the movement is not where it used to be since it first showed visibility in 1998. As earlier stated, the movement fortunately has a lot of lessons to learn from countries within the region such as Botswana, South Africa and Mozambique which have greater success in decriminalisation of their anti-sodomy laws. Other countries that have not decriminalised like Uganda and Kenya also provide pertinent examples as their movements are relatively stronger, advanced, and more visible with incremental success scored. An emerging concern for Zambia is the diminishing foreign funding in the wake of the COVID-19 pandemic will further weaken activism. It is however certain that the situation in Zambia will not change by chance.

113 TBZ (n 53).

114 See F Viljoen 'Botswana court ruling is a ray of hope for LGBT people across Africa' *The Conversation* 12 June 2019 <https://theconversation.com/botswana-court-ruling-is-a-ray-of-hope-for-lgbt-people-across-africa-118713> (accessed 4 December 2021).

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