

A SURVEY OF LAWS IMPACTING THE HUMAN RIGHTS OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER PERSONS IN SELECTED SOUTHERN AFRICAN COUNTRIES

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I. EXECUTIVE SUMMARY

This report seeks to outline the current state of legal protection for the human rights of lesbian, gay, bisexual and transgender (“LGBT”) persons in southern Africa by examining relevant current legislation in each of South Africa, Malawi, Namibia, Zambia and Zimbabwe and surveying the enforcement activities with regard to said legislation and communal attitudes toward LGBT individuals. By combining the individual case studies and providing a like-for-like comparison, this report seeks to identify how the neighboring states have influenced each other, both legislatively and with regard to popular attitudes, and to ascertain specific areas in which any individual country has made particularly progressive strides, thereby isolating the factors which have precipitated such progress.

This report consists of the following sections: (i) an executive summary, (ii) case studies for each of South Africa, Malawi, Namibia, Zambia and Zimbabwe, (iii) a brief analysis of the international and regional treaties and protocols that may impact the human rights of LGBT persons to which any of the above countries is a party and (iv) a conclusion summarizing the results of the preceding analysis. Each case study is composed of a brief background section, a discussion of constitutional anti-discrimination provisions and a summary of national legislation impacting LGBT persons vis-à-vis the human rights to (i) privacy, (ii) establishing a family, (iii) adoption, (iv) access to employment, healthcare and housing, (v) treatment for and non-discrimination due to HIV/AIDS, (vi) expression and assembly, (vii) immigration and (viii) military service.

II. CASE STUDIES

A. South Africa

1. Background

The South African constitution provides one of the most comprehensive sets of protective measures of individual rights not only in southern Africa but in the world. A ban on discrimination on the basis of sexual orientation has been enshrined in the South African constitution for twenty years. This is particularly notable given that consensual adult same-sex sexual acts are subject to criminal penalties in many of the country’s neighboring states. In addition, same sex marriage is a national right. As further evidence of its commitment to protecting LGBT rights, South Africa recently voted in favor of the Resolution on Human Rights, Sexual Orientation and Gender Identity adopted by the 27th Session of the Human Rights Council in September 2014, which has been hailed as a significant step forward in the fight against violence and discrimination based on sexual orientation and gender identity.¹

¹ “Op-Ed: South Africa must not separate human rights from LGBTI rights.” Shehnilla Mohamed, Daily Maverick. October 9, 2014. Available at <http://www.dailymaverick.co.za/article/2014-10-09-op-ed-south-africa-must-not-separate-human-rights-from-lgbti-rights/#.Vug3RIWLRQI>

However, evidence suggests that South African cultural attitudes lag behind the country's liberal post-apartheid constitution. Violence against South Africa's LGBT population appears to be rampant, with a number of well-publicized cases documenting the rape and murder of openly gay and transgender men and women. Indeed, the case study of South Africa demonstrates that, in spite of an arsenal of statutory and jurisprudential protections, the guarantee of legal rights alone is not sufficient to ensure that people can exercise and enjoy such rights: the state must proactively ensure the rights through protective and transformative measures.

According to a report by Human Rights Watch and the International Gay and Lesbian Human Rights Commission, “[m]ost of the population is still shut off from accessing [South Africa's promises of equality]—or from experiencing the freedoms described on paper—by deep economic inequality, social isolation, and cultural exclusion.”² However, prohibiting discrimination on the basis of sexual orientation is certainly a critical step in the right direction for countries seeking to combat LGBT discrimination and homophobia, and South Africa's constitution and anti-discriminatory statutes provide a clear path forward for any country undertaking legal reform.

2. Constitutional Anti-Discrimination

South Africa's post-apartheid constitution, adopted in 1994, was the first in the world to outlaw discrimination on the basis of sexual orientation. Section 9(3) of the South African Constitution disallows government discrimination on the grounds of race, gender and *sexual orientation*, among other things, and Section 9(4) prohibits discrimination on the same grounds by private parties.³ The Constitutional Court has stated that this section also prohibits discrimination against transgender people.⁴

The Promotion of Equality and Prevention of Unfair Discrimination Act (“PEPUDA”) was passed in 2000 to give effect to Section 9 of South Africa's Constitution in order to “prevent and prohibit unfair discrimination and harassment; to promote equality and eliminate unfair discrimination; to prevent and prohibit hate speech; and to provide for matters connected therewith.”⁵ PEPUDA includes a general prohibition on unfair discrimination against any person, by the state or an individual,⁶ and further prohibits hate speech based on any of the above-mentioned constitutionally prohibited grounds, including sexual orientation.⁷

PEPUDA also prohibits harassment and discrimination in the areas of public accommodations and services, and establishes a judicial means of redress in cases of discrimination. Chapter 4 of PEPUDA establishes “equality courts” as a forum in which proceedings may be instituted under PEPUDA, the first step of which is for the equality court to “determine whether unfair discrimination, hate speech or harassment, as the case may be, has taken place, as alleged.”⁸ PEPUDA also requires the state to develop action plans to address unfair discrimination,⁹ and government ministers to implement measures to eliminate any form of unfair discrimination.¹⁰

² “More than a Name: State-Sponsored Homophobia and its Consequences in Southern Africa,” Human Rights Watch and the International Gay and Lesbian Human Rights Commission, 2003, available at <https://www.hrw.org/report/2003/05/13/more->

name/state-sponsored-homophobia-and-its-consequences-southern-africa

³ Section 9, “Equality,” of Bill of Rights to South African Constitution (1996), *available at*

<http://www.gov.za/documents/constitution-republic-south-africa-1996> By its text, South Africa’s Bill of Rights also “affirms the democratic values of human dignity, equality and freedom” (Section 7(1)) and states that “[e]veryone is equal before the law and has the right to equal protection and benefit of the law” (Section 9(1)) and “[e]veryone has inherent dignity and the right to have their dignity respected and protected.” Section 10, *id.*

⁴ In *National Coalition for Gay and Lesbian Equality v Minister of Justice*, the Constitutional Court stated that the concept of “sexual orientation” as used in Section 9(3) of the Constitution “must be given a generous interpretation” and thus applies equally to transgendered individuals. (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998), *available at*

<http://www.saflii.org/za/cases/ZACC/1998/15.html>

⁵ Preamble to Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, *available at*

<http://www.justice.gov.za/legislation/acts/2000-004.pdf>

⁶ Chapter 2, “Prevention, Prohibition and Elimination of Unfair Discrimination, Hate Speech and Harassment,” Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, *available at* <http://www.justice.gov.za/legislation/acts/2000-004.pdf>

⁷ *Id.* Hate speech, as defined in section 10 of PEPUDA, constitutes words “that could reasonably be construed to demonstrate a clear intention to (a) Be hurtful; (b) Be harmful or to incite harm; (c) Promote or propagate hatred.”

⁸ See Section 21(1) under “Powers and Functions of Equality Court” in Chapter 4, “Equality Courts,” Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, *available at* <http://www.justice.gov.za/legislation/acts/2000-004.pdf>

⁹ See Section 25(1) under “Duty of State to Promote Equality” in Chapter 5, “Promotion of Equality,” Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, *available at* <http://www.justice.gov.za/legislation/acts/2000-004.pdf>

¹⁰ *Id.* at Section 25(4).

However, it is arguable that PEPUDA distinguishes discrimination on the grounds of race, gender and disability from discrimination on the basis of sexual orientation and other “prohibited grounds” in some respects. For example, Chapter 2 of PEPUDA (“Prevention, Prohibition and Elimination of Unfair Discrimination, Hate Speech and Harassment”) leads off with a broad prohibition of unfair discrimination, generally stating that “[n]either the State nor any person may unfairly discriminate against any person.” Chapter 2, however, then proceeds to provide additional, more specific prohibitions on discrimination on the grounds of race, gender and disability.¹¹ Similar prohibitions focused on discrimination based on sexual orientation and gender identity are notably absent in this context. Other provisions of PEPUDA similarly task the South African Human Rights Commission to assess the extent to which unfair discrimination on the grounds of *race*, *gender* and *disability* persists in the country¹² and mandate that “the State, institutions performing public functions and all persons” “eliminate discrimination on the grounds of race, gender and disability” and “promote equality in respect of race, gender and disability.”¹³ In addition, only discrimination on the grounds of race, gender or disability may be regarded as an aggravating factor for purposes of sentencing in respect of violations of PEPUDA.¹⁴ Given the omission of the categories of sexual orientation and gender identity in the foregoing contexts, the extent as to which LGBT individuals are able to invoke PEPUDA protections in certain contexts is not clear.

3. Legislation

Privacy

The South African Constitution affirms the universal right to privacy¹⁵ and sexual conduct, including same-sex sexual conduct, is legal when both partners are above the age of 16.

In 1997, the Cape High Court ruled in the case of S v. Kampher that the common law crime of sodomy was incompatible with the constitutional rights to equality and privacy, and that sodomy had ceased to exist as an offense when the post-apartheid constitution came into force in 1994.¹⁶ The following year, the Johannesburg High Court ruled in National Coalition for Gay and Lesbian Equality v. Minister of Justice that the common law crimes of sodomy and “commission of an unnatural sexual act,” as well as Section 20A of the Sexual Offences Act (known as the “men at a party clause,” which criminalized sexual acts between men that occurred in the presence of a third person), were unconstitutional.¹⁷

In 1994, the age of consent was set at 19 for all same-sex conduct, while the age of consent for heterosexual acts was 16. This discrepancy was reformed by the 2007 Criminal Law (Sexual Offences and Related Matters) Amendment Act, which set the age of consent at 16 for both heterosexual and homosexual conduct.¹⁸ Of more significance, this statute also codified sexual offense laws in gender and sexual orientation-neutral terms.

Same-Sex Marriage

¹¹ *Id.*

¹² *Id.* at Section 28(2) under “Special Measures to Promote Equality with regard to Race, Gender and Disability”.

¹³ *Id.* at Section 28(3).

¹⁴ *Id.* at Section 28(1).

¹⁵ Section 14, “Privacy,” of Bill of Rights to South African Constitution (1996), *available at* <http://www.gov.za/documents/constitution-republic-south-africa-1996>

¹⁶ *S v Kampher* 1997 (9) BCLR 1283 (C), 1997 (4) SA 460 (C) (4 August 1997), Cape Provincial Division.

¹⁷ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998), *available at* <http://www.saflii.org/za/cases/ZACC/1998/15.html>

¹⁸ No. 32 of 2007: Criminal Law (Sexual *Offences* and Related Matters) Amendment Act, 1997, *available at* https://www.issafrika.org/crimehub/uploads/sexual_offences_act32_2007_eng.pdf

Same-sex marriage is legal in South Africa. South Africa was the fifth country in the world (and the first in Africa) to legalize same-sex marriage. In the 2005 case of Minister of Home Affairs v. Fourie, the Constitutional Court ruled that it was unconstitutional to prevent same-sex marriage and gave the South African Parliament one year to pass legislation codifying same-sex unions.¹⁹ In 2006, the Parliament passed the Civil Union Act, which permits same-sex civil marriage as well as civil unions for both unmarried same-sex and opposite sex couples.²⁰ Rights extended by the statute include the right to family responsibility leave and protections against domestic violence.²¹ Courts have also recognized the duty of support between partners²², immigration benefits²³, employment and pension benefits²⁴, joint adoption²⁵, parental rights to children conceived through artificial insemination²⁶, intestate inheritance²⁷ and claims for loss of support when a partner is negligently killed.²⁸

Adoption

In 2002, the Constitutional Court legalized adoption by same-sex parents, ruling in Du Toit v. Minister of Welfare and Population Development that same-sex partners are entitled to the same adoption rights as different-sex married spouses – i.e., same-sex couples may adopt children jointly or one partner may adopt the other partner’s children.²⁹ This right was codified in the 2005 Children’s Act, which allows adoption by spouses and by “partners in a permanent domestic life-partnership,” regardless of sexual orientation.³⁰

In 1997, artificial insemination, previously limited under the Human Tissue Act of 1983 to married women (whose husbands provided written consent) became legally available to unmarried women (including lesbians).³¹ In 2003, the Constitutional Court ruled in J v. Director General, Department of Home Affairs that a child born by artificial insemination to a lesbian couple was to be regarded as legitimate, and the partner who was not the biological parent was to be regarded as a natural parent and recorded on the child’s birth certificate.³²

Access to Employment, Healthcare and Housing

A number of South African statutes provide protection from discrimination in areas such as employment, healthcare and housing. The Labour Relations Act of 1995 bars unfair labor dismissals, including those based on sexual orientation.³³ The Employment Equity Act, passed in 1998, contains wide-ranging protections for gays and lesbians in the workplace, prohibiting discrimination “in any employment policy or practice,” including with respect to benefits such as pensions and insurance, on the basis of sexual orientation as well as “family responsibility” and “HIV status,” among other categories.³⁴ Although the Employment Equity Act provides no explicit protections against discrimination based on gender identity, recent amendments in January 2014 added the catch-all provision to protect against discrimination based on “any other arbitrary ground.”³⁵

¹⁹ *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (1 December 2005), available at <http://www.saflii.org/za/cases/ZACC/2005/19.html>

²⁰ No. 17 of 2006: Civil Union Act, 2006, available at <http://www.justice.gov.za/legislation/acts/1998-116.pdf>

²¹ See Domestic Violence Act, 1998, available at <http://www.info.gov.za/view/DownloadFileAction?id=70651> Of note is that the definition of “domestic relationship” includes a complainant and respondent “(whether they are of the same or of the opposite sex) [who] live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to

be married to each other.”

²² *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC), available at <http://www.saflii.org/za/cases/ZACC/2005/2.html>

²³ Immigration Act 13 of 2002, section 1, available at http://www.saflii.org/za/legis/consol_act/ia2002138/

²⁴ *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC), available at

<http://www.saflii.org/za/cases/ZACC/2005/2.html>

²⁵ *Du Toit and Another v Minister for Welfare and Population Development and Others* 2002 (10) BCLR 1006 (CC), available at

<http://www.saflii.org/za/cases/ZACC/2002/20.html>

²⁶ *J and Another v Director-General, Department of Home Affairs and Others* 2003 (5) BCLR 463 (CC), available at

<http://www.saflii.org/za/cases/ZACC/2003/3.html>

²⁷ *Gory v Kolver NO and Others (Starke and Others intervening)* 2007 (3) BCLR 249 (CC), available at

<http://www.saflii.org/za/cases/ZACC/2006/20.html>

²⁸ See “Adoption,” “Access to Employment, Healthcare and Housing” and “Immigration” sub-sections below for discussions of these rights in context. Also see Wendy Isaack, “Equal in Word of Law: The Rights of Lesbian and Gay People in South Africa,” American Bar Association, Summer 2003, available at

http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol30_2003/summer2003/hr_summer03_southafrica.html, for a discussion of many of the cases that precipitated the codification of these rights.

²⁹ *Du Toit and Another v Minister of Welfare and Population Development and Others* (CCT40/01) [2002] ZACC 20; 2002 (10) BCLR 1006; 2003 (2) SA 198 (CC) (10 September 2002), available at <http://www.saflii.org/za/cases/ZACC/2002/20.html> See also “Lesbians, Gays Can Adopt Children,” News 24 Archives, September 10, 2002, available at

<http://www.news24.com/World/News/Lesbians-gays-can-adopt-children-20020910>

³⁰ No. 38 of 2005: Children’s Act, 2005, available at <http://www.justice.gov.za/legislation/acts/2005-038%20childrensact.pdf>

³¹ See Wendy Isaack, “Equal in Word of Law: The Rights of Lesbian and Gay People in South Africa,” American Bar Association, Summer 2003, available at

http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol30_2003/summer2003/hr_summer03_southafrica.html

³² *J and Another v Director-General, Department of Home Affairs and Others* (2003) AHRLR 263 (SACC 2003), available at

<http://www.saflii.org/za/cases/ZACC/2003/3.html>

³³ No. 66 of 1995: Labour Relations Act, 1995, available at

<http://www.labour.gov.za/DOL/legislation/acts/labour-relations/labour-relations-act>. Note, however, that while gender and sexual orientation are explicitly protected from unfair dismissal under the Labour Relations Act, dismissal due to gender identity (defined as a person’s private sense and subjective experience of their own gender) is not specifically prohibited. However, the South African Constitution allows for protection of rights on analogous grounds and gender identity would necessarily meet the criteria for protection. In *Atkins v Datacentrix (Pty) Ltd* [2010] 4 BLLR 351 (LC), for example, the court awarded compensation to the transgender plaintiff specifically with the aim of deterring future employers from discriminating against those who wish to undergo gender reassignment surgeries. The court also ordered the employer to take steps to prevent unfair discrimination or similar practices, and to report back to the court within three months on such practices, indicating a proactive approach in eliminating discrimination against transgender individuals. See also *Ehlers v Bohler Uddeholm Africa (Pty) Ltd* [2010] JOL 26216 (LC), in which the court found that the dismissal of an applicant was due to the fact that she was a transsexual person, and strongly condemned the attitude of the respondent to the person’s gender reassignment.

³⁴ No. 55 of 1998: Employment Equity Act, 1998, available at

<http://www.labour.gov.za/DOL/legislation/acts/employment-equity/employment-equity-act>

³⁵ “Government Gazette.” Vol. 583, No. 37238. January 16, 2014. Available at

https://www.greengazette.co.za/documents/national-gazette-37238-of-16-january-2014-vol-583_20140116-GGN-37238.pdf

The South African Constitution also provides for the universal right to healthcare.³⁶ The Medical Schemes Act of 1998 defines “dependent” to include same-sex partners as well as unmarried heterosexual partners for purposes of medical benefits.³⁷ The Alteration of Sex Description and Sex Status Act of 2004 allows transsexual people who have undergone medical orientation or surgical treatment to apply to change their listed sex in the population registry and to receive a passport and other identity documents reflecting their preferred sex.³⁸ However, application is limited to post-operative transsexual and transgendered individuals only, thereby ignoring pre-operative individuals or others who choose to forego invasive sex change operations.³⁹

With respect to housing, Section 25 of the Constitution enshrines the right to property ownership, stating that “[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property,” and requires the state to “take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.”⁴⁰ In addition, Section 26 of the Constitution addresses housing specifically, stating that “[e]veryone has the right to have access to adequate housing.”⁴¹ The Rental Housing Act, passed in 1999, focuses on rental housing, and bans discrimination on the basis of sexual orientation in the context of the landlord/tenant relationship.⁴² Specifically, the Rental Housing Act prohibits landlords from unfairly discriminating against tenants, prospective tenants, members of tenants’ households and tenants’ visitors in advertising, lease negotiations and during the term of the lease.⁴³ The Rental Housing Act also establishes Rental Housing Tribunals to hear disputes and conduct investigations relating to “unfair practices” in the rental housing market,⁴⁴ which includes unfair discrimination on the basis of sexual orientation. There are no specific protections against discrimination based on gender identity.

HIV/AIDS

According to a 2013 UNAIDS report, approximately 6.1 million South Africans were living with HIV or AIDS in 2012, equivalent to about 12% of the country’s population of 51 million, constituting the largest HIV epidemic in the world.⁴⁵ Total deaths (from all causes) increased 87% between 1997 and 2005, with 40% of deaths believed to be attributable to HIV.⁴⁶ The Constitution of South Africa requires the government to devise and implement within its available resources “a comprehensive and coordinated programme to realize progressively the rights of pregnant women and their newborn children to have access to health services to combat mother-to-child transmission of HIV,” including counseling and testing of pregnant women for HIV, counseling HIV-positive pregnant women on ways to reduce the risk of parent-to-child transmission, and providing appropriate treatment.⁴⁷ PEPUDA also lists HIV/AIDS status as a basis on which people may not be “unfairly disadvantage[d],” including being unfairly and unreasonably refused insurance services,⁴⁸ and the Employment Equity Act prohibits discrimination in employment policies and practices on the basis of HIV status,⁴⁹ as discussed above.

³⁶ Section 27, “Health Care, Food, Water and Social Security” to Bill of Rights to South African Constitution (1996), *available at* <http://www.gov.za/documents/constitution-republic-south-africa-1996>

³⁷ No. 131 of 1998, Medical Schemes Act, 1998, *available at* <http://www.info.gov.za/view/DownloadFileAction?id=70667>

³⁸ No. 49 of 2003: Alteration of Sex Description and Sex Status Act, 2003, *available at*
http://www.saflii.org/za/legis/consol_act/aosdassa2003466/

³⁹ Commentators have argued that this legal framework is based on prevailing gender stereotypes and constructs that conflate the notions of sex, gender and sexual orientation, and ignores the valid reasons of individuals not choosing to undergo invasive “sex change” operations. See, e.g., Visser, Cornelius, and Elizabeth Picarra. “Victor, Victoria or V? A constitutional perspective on transsexuality and transgenderism.” *South African Journal on Human Rights* 28.3 (2012): 506-531. Visser and Picarra further argue, however, that it is not likely that any future laws will meet these individuals’ needs unless there is a clearer understanding of the concepts of sex, gender and sexual orientation and their interaction with each other.

⁴⁰ Section 25, “Property,” of Bill of Rights to South African Constitution (1996), *available at*
<http://www.gov.za/documents/constitution-republic-south-africa-1996>

⁴¹ *Id.* at Section 26, “Housing.”

⁴² No. 50 of 1999: Rental Housing Act, 1999, *available at*

http://www.saflii.org/za/legis/hist_act/rha50o1999190/rha50o1999a1a2000310.pdf

⁴³ *See id.* at Chapter 3, “Relations between Tenants and Landlords.”

⁴⁴ *See id.* at Chapter 4, “Rental Housing Tribunal.”

⁴⁵ “Annex: Epidemiology,” Annex to “UNAIDS Report on the Global AIDS Epidemic 2013”, UNAIDS, *available at*

http://www.unaids.org/sites/default/files/media_asset/UNAIDS_Global_Report_2013_en_1.pdf

⁴⁶ “2008 Report on the Global AIDS Epidemic”, UNAIDS, *available for download at*

http://data.unaids.org/pub/GlobalReport/2008/jc1510_2008globalreport_en.pdf (page 47).

⁴⁷ Lance Gable et al., “Legal Aspects of HIV/AIDS: A Guide for Policy and Law Reform,” The World Bank, Washington, D.C., 2007, *available at* <http://elibrary.worldbank.org/doi/abs/10.1596/978-0-8213-7105-3> (page 8). This is as per the Constitutional Court decision of *Minster of Health and Others v Treatment Action Campaign and Others* (1) 2002 (10) BCLR 1033 (CC).

⁴⁸ *See* Schedule 5(c) to Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, *available at*

<http://www.justice.gov.za/legislation/acts/2000-004.pdf>.

⁴⁹ No. 55 of 1998: Employment Equity Act, 1998, *available at*

<http://www.labour.gov.za/DOL/legislation/acts/employment-equity/employment-equity-act>.

The South African government has also established the South African National AIDS Council (“SANAC”), an association of institutions with the objective of “build[ing] consensus across government, civil society and all other stakeholders to drive an enhanced country response to the scourges of HIV, tuberculosis and sexually transmitted infections.”⁵⁰ Of note is that SANAC has established an “LGBTI sector” consisting of service providers with experience in lesbian, gay, bisexual, transgender and intersex (“LGBTI”) research, advocacy, treatment and care for the LGBTI community. This sector is involved in, among other things, building government relationships and advocacy within the National Department of Health.⁵¹

Expression and Assembly

There are no legal prohibitions against the freedoms of expression and assembly of LGBT individuals in South Africa. The South African Constitution grants universal rights to freedom of expression, assembly and association⁵² and PEPUDA specifically prohibits harassment related to sexual orientation.⁵³ Several gay rights organizations were formed in the late 1970s in opposition to the strengthening of the national sodomy law in 1976, and many such organizations are active today.⁵⁴ There are gay nightclubs in all of South Africa’s major cities, and Johannesburg and Cape Town each host annual Gay Pride events.⁵⁵ South Africa attracts thousands of LGBT tourists annually as a result of its reputation as Africa’s most gay-friendly destination.⁵⁶ Out Now Business Class, which specializes in the lesbian, gay, bisexual and transgender travel market, named Cape Town one of the top 20 gay travel destinations in 2013.⁵⁷ Prominent religious leaders Archbishop Desmond Tutu and Dr. Allan Boesak are vocal supporters of gay rights in South Africa.⁵⁸

However, as noted earlier, homophobia and transphobia remains widespread in South Africa and are more prevalent in rural, tradition-bound townships than in modern, progressive cities. Speaking at a public ceremony in 2012, King Goodwill Zwelithini, monarch of the Zulu nation, pronounced people engaged in same-sex relationships to be “rotten,” their behavior “wrong” and “not acceptable,” and claimed that historically same-sex relationships did not exist.⁵⁹ In a demonstration of the crossroads at which South Africa finds itself with respect to reconciling conservative attitudes with progressive laws, Jacob Zuma, South Africa’s President since 2009, at a public celebration in 2006, condemned same-sex marriage as “a disgrace to the nation and to God.”⁶⁰ However, taking the stage after King Zwelithini six years later, President Zuma was quoted as saying that South Africa faces the “challenges of reconciliation and of building a nation that does not discriminate against other people because of their colour or sexual orientation.”⁶¹

⁵⁰ The South African National Aids Council, “About Us,” *available at* <http://sanac.org.za/about-sanac/>

⁵¹ *Id.* at “The LGBT Sector,” *available at* <http://sanac.org.za/2013/07/01/the-lgbti-sector/>. The “LGBT Sector” page also notes the dearth of knowledge regarding HIV prevalence among lesbian women and transgender and intersex individuals and the lack of government funding for programs in the LGBT community.

⁵² See Section 16, “Freedom of Expression,” Section 17, “Assembly, Demonstration, Picket and Petition” and Section 18, “Freedom of Association,” of Bill of Rights to South African Constitution (1996), *available at* <http://www.gov.za/documents/constitution/chapter-2-bill-rights>

⁵³ See definition of “harassment” in Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, *available at* <http://www.justice.gov.za/legislation/acts/2000-004.pdf> Chapter 2 of PEPUDA states, “No person may subject any person to harassment.”

⁵⁴ A predecessor to the Triangle Project was established in 1981 and began providing counseling and medical services and a telephone

hotline the following year. See The Triangle Project, “History,” available at <http://triangle.org.za/about/>. Among other long-standing gay rights organizations, OUT was formed nearly twenty years ago (<http://www.out.org.za/>) and the Inner Circle, a Cape Town-based organization that “help[s] Muslims who are queer to reconcile Islam with their sexuality,” was formed in 1996 (<http://theinnercircle.org.za/>). Other active organizations in South Africa include the Durban Lesbian & Gay Community & Health Centre (<http://www.gaycentre.org.za/about.asp>) and the I Am Gay Group (<http://iamgay.co.za>), among many others. SANAC’s “LGBTI Sector” page, available at <http://sanac.org.za/2013/07/01/the-lgbti-sector/>, lists a number of organizations that provide HIV-related services to the LGBT community.

⁵⁵ For example, Mamba Online’s list of gay clubs and other gay venues throughout South Africa, available at http://www.mambaonline.com/i_hotspots.asp.

⁵⁶ See, for example, information regarding South Africa’s “Pink Route,” a collection of “gay-owned, gay-friendly and exclusively gay South African lodges, hotels and guest houses” available at <http://www.southafrica.info/travel/cities/pink-route.htm#.VubMVluLROI>

⁵⁷ “Gay Cape Town” available at <http://www.southafrica.net/za/en/articles/entry/article-gay-cape-town>.

⁵⁸ Desmond Tutu, former Archbishop of Cape Town and Nobel Peace Prize winner, has called homophobia a “crime against humanity” and “every bit as unjust” as apartheid, stating: “A parent who teaches a child that there is only one sexual orientation and that anything else is evil denies our humanity and their own too.” “Desmond Tutu: ‘Homophobia Equals Apartheid,’” Afrol News, July 7, 2004, available at <http://www.afrol.com/articles/13584>.

⁵⁹ Cnaan Mdletshe, “Gays are Rotten, Says Zulu King,” South Africa Times Live, January 23, 2012, available at <http://www.timeslive.co.za/local/2012/01/23/gays-are-rotten-says-zulu-king>.

⁶⁰ Lebogang Seale, “Zuma’s Anti-gay Comments Lead to Backlash,” IOL News, September 27, 2006, available at <http://www.iol.co.za/news/politics/zuma-s-anti-gay-comments-lead-to-backlash-1.295249>.

⁶¹ Cnaan Mdletshe, “Gays are Rotten, Says Zulu King.” Available at <http://www.timeslive.co.za/local/2012/01/23/gays-are-rotten-says-zulu-king>.

In spite of constitutional and jurisprudential protections, social acceptance of homosexuality does not appear to be widespread. According to a 2008 survey, 84% of South Africans believe that homosexuality is always wrong.⁶² 61% of respondents in a 2013 survey said that society should not accept homosexuality.⁶³ Such attitudes have engendered a culture of violence against LGBT individuals, particularly outside of South Africa's large cities, which are often home to thriving gay sub-cultures and offer a striking contrast to the outlying conservative, often religious townships. There have been a number of highly publicized cases in which non-gender conforming women have been the victims of murder, beating or rape. Such rape cases have been characterized as "corrective," as male rapists have sought to "cure" victims suspected of being lesbian of their sexual orientation.⁶⁴ Openly gay men have also been the victim of homophobia-fueled violence.⁶⁵ However, in a significant ruling in 2012, a judge sentenced four men, convicted of killing an openly gay woman, to 18 years in prison, identifying the murder as a hate crime and sending a message that such violence would be severely punished.⁶⁶ This was a noteworthy development given that the provisions of the South African Constitution allowing for the freedom of expression do not extend to "advocacy of hatred that is based on race, ethnicity, gender or religion," but advocacy of hatred on other non-specified grounds, such as sexual orientation,⁶⁷ is arguably protected on a strict reading of the Constitution. It should be noted, however, that PEPUDA explicitly prohibits hate speech on the grounds of sexual orientation, as discussed above.

In March 2011, the Department of Justice and Constitutional Development established the National Task Team ("NTT") on Gender and Sexual Orientation-Based Violence with the aim of addressing human rights concerns and violations against LGBTI persons.⁶⁸ In 2014, an LGBTI program was launched to address the increasing violence against LGBTI persons and in March 2015, provincial task teams were put in place to assist the NTT in addressing hate crimes against LGBTI individuals.⁶⁹

Immigration

As a result of South Africa's comparative tolerance of, and legal protections afforded to, persons regardless of their sexual orientation and, to a lesser extent, gender identity, South Africa is a favored immigration destination for LGBT individuals seeking to escape from abuse and the lack of legal rights in neighboring southern African countries. Historically, the Aliens Control Act, passed in 1991, granted the non-South African spouses of South African citizens the right to an immigration permit,⁷⁰ implicitly denying this right to same-sex couples who at the time were not legally allowed to marry. In 2000, the Constitutional Court found this provision of the Aliens Control Act to be unconstitutional,⁷¹ and the non-South African partners of South African citizens are now permitted to apply for permanent residence.⁷²

The Refugees Act of 1988 also provides for the right of refugees and asylum seekers who enter South Africa to avoid persecution on the basis of their sexual orientation to apply for refugee status.⁷³ Protection under the Refugees Act further extends to members of a "social group," which term includes, among other things, a group of persons of a particular gender. Although the courts have not specifically addressed the issue, it is likely that such category would encompass persecution based on gender identity.⁷⁴

⁶² Tom W. Smith, “Cross-national Differences in Attitudes towards Homosexuality,” NORC/University of Chicago, GSS Cross-national Report No. 31, *available at* <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Smith-CrossNational-NORC-May-2011.pdf>.

⁶³ Pew Research Center, “The Global Divide on Homosexuality: Greater Acceptance in More Secular and Affluent Countries,” June 4, 2013, *available at* <http://www.pewglobal.org/files/2014/05/Pew-Global-Attitudes-Homosexuality-Report-REVISED-MAY-27-2014.pdf>.

⁶⁴ *See, e.g.*, Hannah Osborne, “Johannesburg: Lesbian Duduzile Zozo Murdered with Toilet Brush in ‘Corrective Rape’ Hate Crime,” *International Business Times*, July 9, 2013, *available at* <http://www.ibtimes.co.uk/johannesburg-lesbian-duduzile-zozo-murdered-toilet-brush-488060>; Donna Bryson, “South Africa Lesbians Targeted in Rapes, Murders,” *Huffington Post*, May 11, 2011, *available at* http://www.huffingtonpost.com/2011/05/11/south-africa-lesbians-tar_n_860437.html; “Thirteen-year-old the latest victim of ‘corrective rape,’” *City Press*, May 7, 2011, *available at* <http://www.news24.com/Archives/City-Press/Thirteen-year-old-the-latest-victim-of-corrective-rape-20150429>; “Rape New Weapon Against South African Lesbians,” *Reuters*, June 28, 2004, *available at* http://web.archive.org/web/20071126075109/http://www.sodomylaws.org/world/south_africa/sanews008.htm.

⁶⁵ *See, e.g.*, “Thapelo Makutle, South African Gay and Transgender Beauty Pageant Winner, Killed in Alleged Hate Crime,” *Huffington Post*, June 13, 2012, *available at* http://www.huffingtonpost.com/2012/06/13/thapelo-makutle-south-african-gay-transgender-pageant-winner-death_n_1593972.html, reporting the murder of a young man who identified as gay and transgender and was killed

after getting into an argument over his sexuality. The victim had recently won the Miss Gay pageant in the small South African town of Kuruman and worked as a volunteer for a local gay advocacy group. LGBT activist Junior Mayema of People Against Suffering Oppression and Poverty, a Cape Town-based non-governmental organization, observed in an interview at the time: “Hate crime is widespread in the townships and beyond. It is inflamed by religious groups and ignorance about South Africa’s constitution. In addition, the police have little or no training on hate crime which leads to many cases being either not investigated or ignored.” Dan Littauer, “Trans Gay Activist Believed to Have Been Brutally Murdered in South Africa,” *Pink News*, June 13, 2012, *available at* <http://www.pinknews.co.uk/2012/06/13/trans-gay-activist-believed-to-have-been-brutally-murdered-in-south-africa/>.

⁶⁶ “Lesbian Killers in South Africa Get 18-Year Jail Terms,” *BBC News Africa*, February 1, 2012, *available at* <http://www.bbc.co.uk/news/world-africa-16835653>; South Africa Lesbian Zoliswa Nkonyana’s Killers Sentenced,” *Huffington Post*, February 1, 2012, *available at* http://www.huffingtonpost.com/2012/02/01/south-africa-zoliswa-nkonyana-lesbian-killed-sentencing_n_1247320.html. It should be noted, however, that the South African legislature has yet to pass comprehensive legislation to address hate crimes. *See also*, Williams, Kerry. “‘Dip me in Chocolate and Throw me to the Lesbians’: Homophobic hate crimes, the state and civil society.” *South African Crime Quarterly* 42 (2014): 39-46, which article demonstrates some of the frustrations experienced in the prosecution of hate crimes in South Africa by focusing on the prosecution for the assault of a young, black, gay man in 2007. In this case there was a delay of two years between the commission of the crime and the commencement of the trial and the trial itself took three years to reach a conclusion and for the accused to be convicted of assault with intent to do grievous bodily harm. Evidence was presented in the case to demonstrate the detrimental effects of the hate crime on the victim, and the effects of homophobic hate crimes on the gay and lesbian community and South African society as a whole, with the purpose to influence the way in which the magistrate sentenced the perpetrators and set a precedent for the future sentencing of perpetrators of hate crimes. Despite evidence, and legal argument, the magistrate did not impose a harsher sentence on the perpetrators, instead opting to impose a more lenient one, thereby failing to treat the homophobic aspect of the crime as an aggravating factor in sentencing the perpetrators. This case demonstrates that the South African state may be struggling with how to prosecute homophobic hate crimes, however, the Williams article suggests that the state may not have a particular interest in protecting minority groups. The prosecutor relied on an NGO to make a case in aggravation of the sentence and did not call any witnesses of her own.

⁶⁷ Section 16, “Freedom of Expression,” to Bill of Rights to South African Constitution (1996), *available at* <http://www.gov.za/documents/constitution/chapter-2-bill-rights>

⁶⁸ *See* <http://www.nationallgbttaskteam.co.za/>

⁶⁹ *See* <http://www.saflii.org/za/journals/DEREBUS/2014/105.pdf>

⁷⁰ Aliens Control Act 96 of 1991, *available at* http://www.saflii.org/za/legis/num_act/aca1995245/.

⁷¹ *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* (CCT10/99) [1999] ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39 (2 December 1999), *available at* <http://www.saflii.org/za/cases/ZACC/1999/17.html>

⁷² Wendy Isaack, “Equal in Word of Law: The Rights of Lesbian and Gay People in South Africa,” *American Bar Association*, Summer 2003, *available at* http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol30_2003/summer2003/hr_summer03_southafrica.html

⁷³ *Id.*

⁷⁴ *Id.* According to Isaack, the Refugees Act recognizes persecution for sexual orientation as a basis for applying for refugee status by virtue of the fact that refugees may apply on the basis of “membership of a particular social group,” defining “social group” as a “group of persons of particular gender, sexual orientation, disability, class or caste.”

Military Service

Gays and lesbians are allowed to serve openly in the South African National Defence Force (the “SANDF”). The government’s *White Paper on National Defence*, adopted in 1996, prohibited the SANDF from discriminating against its members on the basis of sexual orientation.⁷⁵ In 1998, the Department of Defence adopted its *Policy on Equal Opportunity and Affirmative Action*, which prohibits the questioning of recruits’ sexual orientation and explicitly states that the SANDF takes no official interest in the lawful sexual behavior of its members.⁷⁶ In 2002, the SANDF began extending spousal medical and pension benefits to the permanent life partners of its members.⁷⁷ There are no special protections for transgender persons who have not changed the gender marker in identity documents, making rights protection for transgender persons dependent on invasive medical procedures.

B. Malawi

1. Background

The protection of LGBT rights is a highly sensitive issue in Malawi and has been the subject of increased attention over the past few years. Consistent with certain of its neighboring countries, Malawi criminalizes “unnatural offences” with the maximum penalty for such conduct being 14 years imprisonment, with or without corporal punishment.⁷⁸ Despite the provisions of its penal code, however, Malawi can be viewed as being in the crossroads of change and potentially embarking on a route that would eliminate the prosecution of individuals perceived to be gay or lesbian based on their assumed sexual activities (although members of the LGBT community may still find themselves the victims of cultural discrimination).

In 2012, the Malawi government suspended all laws that criminalized homosexuality and the Attorney General and Minister of Justice allegedly ordered the police not to arrest LGBT individuals solely based on their sexual orientation pending a review of the laws by the National Assembly⁷⁹ (although, shortly thereafter, the Minister of Justice denied making such statement).⁸⁰ In addition, the previous President of Malawi, Joyce Banda, indicated her intention to decriminalize homosexuality in her state of the nation address in May 2012 “as a matter of urgency”⁸¹; however, in September 2012 she reversed this position in an interview with the associated press.⁸² More recently, in December 2015, charges were dropped against a same-sex couple charged with sodomy earlier in the month.⁸³ The justice minister said that the Malawian government will no longer arrest or prosecute gay citizens while the High Court is reviewing the constitutionality of existing anti-gay laws.⁸⁴ Additionally, President Mutharika announced that he “wants gay rights protected” through his press secretary on a local radio station.⁸⁵

As a result of these public official communications it appears that LGBT rights have become a point of discussion within Malawi which could result in significant changes in the future (although there is still significant cultural and religious pressure to maintain the status quo).

2. Constitutional Anti-Discrimination

⁷⁵ Government of South Africa, “White Paper on National Defence for the Republic of South Africa: Defence in a Democracy,” May 1996, available at <http://www.dod.mil.za/documents/WhitePaperonDef/whitepaper%20on%20defence1996.pdf>

⁷⁶ Aaron Belkin and Margot Canaday, “Assessing the Integration of Gays and Lesbians into the South African National Defence Force,” *Scientia Militaria, South African Journal of Military Studies*, Vol. 38, No. 2, 2010, available at <http://www.ajol.info/index.php/smsajms/article/view/70501/59105>

⁷⁷ *Id.*

⁷⁸ See Penal Code 7:01 Laws of Malawi, available at: <http://www.malawilii.org/mw/legislation/consolidated-act/7-01>. Section 153 of the Penal Code, which criminalizes unnatural offenses, provides that anyone found guilty shall be liable for imprisonment for 14 years, with or without corporal punishment. Sections 156 (Indecent practices between males) and 137A (Indecent practices between females) provide a 5 year maximum penalty for those found guilty of such practices.

⁷⁹ Malawi: Courageous Move to Suspend Anti-Gay Laws, Human Rights Watch, November 6, 2012, available at <http://www.hrw.org/news/2012/11/06/malawi-courageous-move-suspend-anti-gay-laws>.

⁸⁰ “Malawi Suspends anti-gay laws”, Reuters, November 5, 2012, available at <http://www.reuters.com/article/2012/11/05/us-malawi-gays-idUSBRE8A40F420121105>; see also “Making Love a Crime: Criminalization of Same-Sex Conduct in Sub-Saharan Africa.” Amnesty International, available at <http://www.amnestyusa.org/research/reports/making-love-a-crime-criminalization-of-same-sex-conduct-in-sub-saharan-africa>.

⁸¹ “Malawi to overturn homosexual ban, Joyce Banda says”, BBC (18 May 2012), available at www.bbc.co.uk/news/world-africa-18118350.

⁸² “Malawi Suspends Sodomy Laws”, available at <https://www.outrightinternational.org/content/malawi-suspends-sodomy-laws>

⁸³ “Despite Laws, Malawi Won’t Arrest Or Persecute Gays, Minister Claims”, available at http://www.huffingtonpost.com/entry/malawi-gay-rights-arrests_us_5679aa80e4b014efe0d71b91.

⁸⁴ *Id.*

⁸⁵ “Stronger voices for LGBT rights in Malawi”, available at <http://76crimes.com/2016/01/16/stronger-voices-for-lgbt-rights-in-malawi/>

The Malawi Constitution, adopted in 1994, is progressive and prohibits discrimination on grounds of race, color, sex, language, religion, political or different opinion, nationality, ethnic or social origin, disability, property, birth or *other status*.⁸⁶ To facilitate the implementation of this provision, the Malawi Constitution provides that “legislation may be passed addressing inequalities in society and prohibiting discriminatory practices and the propagation of such practices and may render such practices criminally punishable by the courts.”⁸⁷ Section 4 of the Constitution of Malawi also provides that the Constitution shall bind all executive, legislative and judicial organs of the State at all levels of Government and all the peoples of Malawi are entitled to the equal protection of the Constitution and laws made under it.⁸⁸

Discrimination based on sexual orientation or gender identity is arguably included in “other status.” This argument is particularly compelling since Malawi is a party to the International Covenant on Civil and Political Rights (the “ICCPR”) and the International Covenant on Economic, Social and Cultural Rights (the “ICESCR”). In May 2007 the Malawi Supreme Court of Appeal (“MSCA”) in Malawi Telecommunications Limited v. Makande & Omar (Civil Appeal No.2 of 2006 (unreported)) overturned an earlier ruling in Chihana v. the Republic (Malawi Supreme Court of Appeal Criminal Appeal No.9 of 1992) and held that all treaties ratified before the 1994 Constitution took effect were binding on domestic courts in Malawi even if no local legislation was enacted to translate them into municipal law. As a result, in attempting to combat discriminatory provisions in both the Malawi penal code and other legislation it is possible to look to these international treaties and the interpretations of those treaties by international bodies.

For instance, in 2009, the Committee on Economic, Social and Cultural Rights (“CESCR”)⁸⁹ confirmed that the non-discrimination guarantee of the ICESCR includes sexual orientation. The CESCR explained that states should ensure that a person’s sexual orientation is not a barrier to realizing ICESCR rights.⁹⁰ Furthermore, in 2012, the UN Office of High Commissioner for Human Rights (the “OHCHR”) explained that while the non-discrimination guarantees listed in the ICESCR do not explicitly include sexual orientation, it does include the words “other status”. The OHCHR explained that the inclusion of the words “other status” affirms that the lists of discriminations were intentionally left open to include future grounds for discrimination, such as sexual orientation and gender identity, which were not considered when the documents were first written.⁹¹ In addition, in Banda v. Lekha, Malawi’s Industrial Relations Court stated:

⁸⁶ See Constitution of Malawi, Section 20, available at http://www.wipo.int/wipolex/en/text.jsp?file_id=218796.

⁸⁷ *Id.*

⁸⁸ *Id.* In particular, see Section 44(1) of the Constitution of Malawi, but note, in terms of Section 45 certain rights may be derogated from during a time of emergency. See also, Section 19, Section 20, Section 33, Sections 32-38 and Section 44(2) (addressing protection of enumerated human rights).

⁸⁹ The CESCR is the international body of independent experts that was established to monitor the implementation of the ICESCR. It was established under ECOSOC Resolution 1985/17 on May 28, 1985.

⁹⁰ *Id.*

⁹¹ See “Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity,” Report of the United Nations High Commissioner for Human Rights, November 17, 2011, available at:

http://www2.ohchr.org/english/bodies/hrcouncil/docs/19session/A.HRC.19.41_English.pdf; See also “High Commissioner’s statement on Malawi”, May 21, 2010, available at: <http://arc-international.net/global-advocacy/ohchr/hc-statement-malawi>; General Comment No. 14, 15 and 20 of the Committee on Economic, Social and Cultural Rights

“Section 20 of the Constitution prohibits unfair discrimination of persons in any form. Although the section does not specifically cite discrimination on the basis of one’s (sic) HIV status, it is to be implied that it is covered under the general statement of anti discrimination in any form... The position on anti discrimination enunciated in the Hoffmann case fits squarely with the situation in Malawi. Malawi ratified the African Charter which came into force on 21 October 1986 and it also ratified Convention 111 on 22 March 1965 both of which place a constitutional duty on the State to pass protective legislation and formulate national policy that give effect to fundamental rights entrenched in the Charter and the Convention. Malawi has formulated the National AIDS policy, which among other things is aimed at ensuring that all people affected or infected with HIV are equally protected under the law.”⁹²

The Malawi Constitution also provides that no person over the age of 18 shall be prevented from entering into marriage,⁹³ which can arguably be read as prohibiting discrimination against individuals seeking same-sex marriages. Recently, the United Nations Human Rights Committee (the “UNHRC”) on the protection and promotion of civil and political rights published a set of concerns and recommendations for Malawi. Included in that report was the UNHRC’s concern that the Malawi Human Rights Commission (the “Malawi HRC”) does not function fully independently and is not yet adequately funded. The UNHRC further noted that the reluctance of the Malawi HRC to engage on issues related to the rights of LGBTI persons is also a source of concern, along with the absence of adequate mechanisms in place for the effective consideration of the Malawi HRC’s recommendations. The UNHRC recommended, *inter alia*, that the Malawi HRC amend the Malawi Human Rights Commission Act to ensure that it enjoys full independence and fully comply with its mandate by engaging on all human rights issues, including those related to the rights of LGBTI persons.⁹⁴ The UNHRC also expressed its concern that consensual same-sex sexual activity among consenting adults is still criminalized. The UNHRC recommended the Malawi government should “review its legislation to explicitly include sexual orientation and gender identity among the prohibited grounds of discrimination and repeal the provisions that criminalises homosexuality and other consensual sexual activities among adults (arts. 137 (A), 153, 154 and 156 of the Penal Code).”

3. Legislation

Privacy

⁹² See Banda v Lekha, [2005] MWIRCC 44, pp 2-3 available at: <http://www.malawilii.org/mw/judgment/industrial-relations-court/2005/44>. In Banda, the court cited Hoffman v. South African Airways where the Constitutional Court of South Africa challenged the refusal of South African Airways to hire the plaintiff based on his HIV status. The Court in that case held that the refusal to hire Hoffman because of his HIV status violated his right to equality as guaranteed by the constitution. See Hoffmann v South African Airways 2000 (2) SA 628; 2001 (10) BHRCC 571; (2000) 3 CHRLD 146, available at <http://www.saflii.org/za/cases/ZACC/2000/17.html>.

⁹³ See Sec. 22 of the Malawi Constitution, available at [https://www.icrc.org/ihl-nat.nsf/0/4953f2286ef1f7c2c1257129003696f4/\\$FILE/Constitution%20Malawi%20-%20EN.pdf](https://www.icrc.org/ihl-nat.nsf/0/4953f2286ef1f7c2c1257129003696f4/$FILE/Constitution%20Malawi%20-%20EN.pdf).

⁹⁴ See Human Rights Committee “Concluding observations on the initial periodic report of Malawi” July 23, 2014, available at

https://view.officeapps.live.com/op/view.aspx?src=http%3A%2F%2Freproductiverights.org%2Fsites%2Frr.civactions.net%2Ffiles%2Fdocuments%2FHRC_Malaw_ConcludingObservations2014.doc

Section 21 of the Malawi constitution provides that every person shall have the right to personal privacy, which shall include the right not to be subject to (a) searches of his or her person, home or property, (b) the seizure of private possessions or (c) interference with private communications, including mail and all forms of telecommunications.⁹⁵ However, Sections 137A, 153, 154 and 156 of the Malawi Penal Code criminalize same sex activities, even if such activities are conducted in the privacy of an individual's home.⁹⁶ For instance, Section 137A explicitly states that “[a]ny female person who, whether in public *or private*, commits any act of gross indecency with another female person, or procures another female person to commit any act of gross indecency with her, or attempts to procure the commission of any such act by any female person with herself or with another female person, whether in public or private, shall be guilty of an offence and shall be liable to imprisonment for five years.”⁹⁷ Section 156 prohibits the same conduct for males (and subjects them to the same penalty, with or without corporal punishment).⁹⁸

In addition, Section 35 of the Police Act allows police to conduct a search without a warrant.⁹⁹ This provision may only be invoked where, among other things, there are reasonable grounds for the belief that anything necessary for purposes of an investigation into any offence may be found in the place under search. Although we were unable to uncover specific instances of its use to harass LGBTI individuals, such a provision has great potential for abuse as a tool to discriminate against LGBTI individuals.

Same-Sex Marriage

The Marriage, Divorce and Family Relations Bill¹⁰⁰ (the “Bill”) came into force in Malawi on April 17, 2015. The background to the Bill explicitly states that the scheme of law in Malawi presupposes heterosexual union and that, for purposes of marriage, sex is regarded as that determined at birth, in order to avoid potential problems caused by transsexuals or persons who have undergone sex-changing surgery later in life from marrying a person who, prior to that sex-changing surgery, was of the same sex as them.

Section 14 of the Bill sets out the essential elements of marriage as being between “two persons of the opposite sex,” thereby disregarding the possibility of a union between people of the same sex. Further, Section 55 states that “A person who knowingly and wilfully celebrates or purports to celebrate a marriage when he or she is not competent under this Act to do so commits an offence and is liable on conviction to a fine of K100,000 and to imprisonment for five years,” creating the potential for abuse if such Section is enforced against same sex couples who attempt to celebrate their relationship in a manner that is similar to marriage.¹⁰¹

Section 64 of the Bill states that “[i]n deciding whether or not a marriage has irretrievably broken down, the court may accept any one or more of the following facts as evidence that the marriage has irretrievably broken down,” and then lists as (b) “the respondent has been convicted of the offence of rape or of an offence under section 153 of the Penal Code.”

⁹⁵ See Constitution of Malawi, available at: http://www.wipo.int/wipolex/en/text.jsp?file_id=218796

⁹⁶ See Penal Code 7:01 Laws of Malawi, available at http://www.malawilii.org/files/mw/legislation/consolidated-act/7:01/penal_code_pdf_14611.pdf

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ See Section 35 of the Police Act (Jun. 26, 2009), available at http://hacri.org/attachments/article/43/Police_Bill_2009.pdf.

¹⁰⁰ See <http://malawi24.com/wp-content/uploads/2015/02/Malawi-Marriage-Divorce-and-Family-Relations-bill-2015.pdf> and <http://landwise.resourceequity.org/record/2702>.

¹⁰¹ *Id.*

Malawi's Penal Code¹⁰² lists "unnatural offences" under section 153. These include any person who: (1) has carnal knowledge of any person against the order of nature; or (2) has carnal knowledge of an animal; or (3) permits a male person to have carnal knowledge of him or her against the order of nature. Homosexual acts are punishable in Malawi under section 153 of the Penal Code.

Adoption

In Malawi, both married and single persons are permitted to adopt; however, an adoption order shall not be made where the sole applicant is male and the child is female unless the court is satisfied there are special circumstances which justify the exception.¹⁰³ There is no guidance or regulation regarding adoption by LGBTI individuals and/or adoption by same-sex couples.¹⁰⁴

Access to Employment, Healthcare and Housing

While there is no legislation specifically discriminating against LGBTI individuals in either housing, employment or the provision of healthcare, the cultural attitude towards individuals perceived to be gay, lesbian, or bisexual (including transgender persons) exposes many to discrimination. According to a 2008 study done by the Centre for the Development of the People, approximately 34% of gay men in Malawi had been blackmailed or denied services such as housing or healthcare due to their sexual orientation.¹⁰⁵ In its recent report, the UNHRC highlighted its concern around reports of cases of violence against LGBTI persons and that, due to the stigma, LGBTI persons do not enjoy effective access to health services. The UNHRC recommended the Malawi government should:

- (a) Introduce a mechanism to monitor cases of violence against LGBTI and undertake all necessary measures to prevent those cases, prosecute the perpetrators and compensate the victims;
- (b) Ensure that public officials refrain from using language that may encourage violence and raise awareness to eliminate stereotyping and discrimination; and
- (c) Guarantee effective access to health services, including HIV/AIDS treatment, for LGBTI persons.¹⁰⁶

HIV/AIDS

Like many of its neighboring countries, the HIV/AIDS epidemic in Malawi has had a significant impact on the country's social and economic infrastructure. Those living with HIV continue to face discrimination as a result of their status. However, as discussed above, the Malawi Industrial Relations Court has found that discrimination based on HIV status violates Malawi's constitutional right to be free from discrimination. In addition, a Bill on HIV and AIDS is under consideration which will address some of the discrimination experienced by persons living with HIV and AIDS (as well as discrimination against people perceived to be HIV positive).¹⁰⁷

¹⁰² See <http://www.icla.up.ac.za/images/un/use-of-force/africa/Malawi/Penal%20Code%20Malawi%201930.pdf>

¹⁰³ Intercountry Adoption, Bureau of Consular Affairs, U.S. Department of State, *available at* <https://travel.state.gov/content/adoptionsabroad/en/country-information/learn-about-a-country/malawi.html>

¹⁰⁴ See Human Rights Committee “Concluding observations on the initial periodic report of Malawi” August 19, 2014, *available at* http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fMWI%2fCO%2f1%2fAdd.1&Lang=en

¹⁰⁵ Survey mentioned in “Alternative Report for the Review of Republic of Malawi by the Human Rights Committee” dated January 11, 2011. The research further revealed that 8 percent of those surveyed had been beaten by police due to their sexual orientation but they did not report for fear of arrest. *See id.*

¹⁰⁶ See Human Rights Committee “Concluding observations on the initial periodic report of Malawi” August 19, 2014, *available at* http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fMWI%2fCO%2f1%2fAdd.1&Lang=en

¹⁰⁷ See Malawi HIV and Aids Extended National Action Framework (NAF), 2010-2012, *available at* <http://siteresources.worldbank.org/INTHIVAIDS/Resources/375798-1151090631807/2693180-1151090665111/2693181-1155742859198/CCMMalawiNSA20102012FINALDRAFT.pdf>

Condoms are not allowed in prisons in Malawi, despite the general understanding that sexual intercourse among prisoners does occur.¹⁰⁸ The official position is that “condoms would encourage homosexuality which [is] illegal.”¹⁰⁹ “Homosexual activity and sexual abuse is known to occur in Malawi prisons and might be the main method of transmission of sexually transmitted infections and HIV.”¹¹⁰ However, Malawi may have started to adopt a more progressive stance in favor of condom provision, both in prisons and outside, in its efforts to control the spread of HIV. It has been reported that Malawi prison authorities were cooperative in discussing the issue of sexually transmitted infections, homosexual activity and the provision of condoms, although such provision remains a legal problem.¹¹¹ There has also been discussion in the Malawi parliament relating to the provision of condoms in prisons.¹¹² One encouraging sign that the provision of condoms to prisoners may be able to overcome the argument that such provision should be disallowed based on the illegality of homosexual activity is the example of sex work—although sex work is illegal in Malawi, sex workers and their clients are encouraged to use condoms, with the national policy being one that allows the distribution of condoms.¹¹³

Expression and Assembly

The Malawi Constitution provides a number of protections respecting the freedoms of expression and assembly.¹¹⁴ However, despite these protections, a number of laws continue to be used for purposes of intimidation and harassment, as well as to prevent peaceful assembly and protest. For instance, in 2011, five human rights defenders were charged with holding an illegal demonstration under the Police Act in connection with a peaceful protest against the government.¹¹⁵ An activist was also arrested in 2011 for breach of peace for publicly placing posters in support of gay rights (and received a community service sentence)¹¹⁶ and, in July of that same year, two leading LGBT activists allegedly went into hiding to escape potential treason charges.¹¹⁷

Despite a recent history that does not comport with the protections afforded by the Malawi Constitution, Joyce Banda’s administration did appear to be taking steps to address some of the aforementioned discriminatory behavior. For instance, under the previous administration, Section 46 of the Malawi penal code was added to allow the Minister of Information arbitrary exercise of power to prohibit a publication “if the minister has reasonable grounds to believe that the publication or importation of any publication would be contrary to the public interest.”¹¹⁸ This Section was recently repealed by former President Banda, however, which may encourage increased respect for fundamental rights under the new administration.¹¹⁹

Immigration

¹⁰⁸ See Muula, A.S., *Condom and Sexual Abstinence Talk in the Malawi National Assembly*, 6(1) AFR. HEALTH SCI. 21, 23 (Mar. 2006), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1831960/>

¹⁰⁹ Tembo, A., *Call for Free Condoms, to Combat Spread of HIV in Malawi Prisons*, NYASA TIMES (Jul. 25, 2013), available at <http://www.nyasatimes.com/2013/07/25/call-for-free-condoms-to-combat-spread-of-hiv-in-malawi-prisons/> See also Zachariah, R. et al., *Sexually Transmitted Infections among Prison Inmates in a Rural District of Malawi*, 96 TRANSACTIONS OF THE ROY. SOC. OF TROP. MED. AND HYGIENE 617, 617 (2002), available at <http://msf.openrepository.com/msf/bitstream/10144/18254/1/trans%20reid%20harries%20malawi.pdf>

¹¹⁰ See also Zachariah et al., *supra* note 91 (citing a 1998 study by the National AIDS Control Program in Malawi). For a more detailed

discussion of homosexual activity in prison, see also Tembo, *supra* note 91.

¹¹¹ See *id.* at 619.

¹¹² Muula, *supra* note 90 at 22 (quoting an unnamed member of parliament stating that “there is a lot of homosexuality happening in prisons. Are those people given condoms in order not to transmit the diseases. Those people are part of us. They are citizens of Malawi and they need to be protected. If we keep quiet, it will not help us”). Another MP is quoted by Muula as stating that “these condoms should be distributed freely in prisons as a way of trying to control the spread of HIV/AIDS.” *Id.* at 24. It should be noted that Muula also cites numerous quotes by MPs opposing the position that condoms should be distributed in prisons.

¹¹³ See Zachariah et al., *supra* note 91 at 619.

¹¹⁴ For instance: Section 32 provides that every person shall have the right to freedom of association, which shall include the freedom to form associations; Section 33 provides that every person has the right to freedom of conscience, religion, belief and thought, and to academic freedom; Section 34 provides that every person shall have the right to freedom of opinion, including the right to hold opinions without interference to hold, receive and impart opinions; Section 35 provides that every person shall have the right to freedom of expression; Section 38 provides that every person shall have the right to assemble and demonstrate with others peacefully and unarmed; and Section 40 provides that, subject to the Constitution, every person shall have the right to (a) form, to join, to participate in the activities of, and to recruit members for, a political party, (b) to campaign for a political party of cause; (c) to participate in peaceful political activity intended to influence the composition and policies of the Government and (d) to freely make political choices.

¹¹⁵ ‘M’angisa fails to testify for state in activists’ case’, (17 April, 2012), available at

<http://www.nyasatimes.com/2012/04/17/mmangisa-fails-to-testify-for-state-in-activists-case/>

¹¹⁶ International Bar Association’s Human Rights Institute, ‘Rule of Law in Malawi: The Road to Recovery’, available at <http://www.ibanet.org/Document/Default.aspx?DocumentUid=C9872074-1DF6-47E7-B2AA-728144009382>

¹¹⁷ Canning, ‘LGBT rights activists in Malawi threatened with arrest for “treason”’, SDGLN, (Jul. 26, 2011), available at <http://sdgln.com/news/2011/07/26/lgbt-rights-activists-malawi-threatened-arrest-treason#sthash.6t1zXcp7.dpbs>

¹¹⁸ See Penal Code 7.01 Section 46, available at <http://www.malawilii.org/mw/legislation/consolidated-act/7-01>

¹¹⁹ “Opening remarks by UN Deputy High Commissioner for Human Rights Kyung-wha Kang at a press conference during her mission to Malawi”. United Nations Human Rights. Retrieved January 11, 2013.

No literature was specifically found on whether LGBT individuals or same-sex couples are overtly discriminated against in the context of immigration. However, given the general historical record in Malawi of discrimination and violence towards persons based on their real or perceived sexual orientation or gender identity, it is likely that Malawi's current immigration policy favors the exclusion of individuals and couples perceived to be LGBT persons. If that is, in fact, the case, then explicit, permissive legislation will need to be passed providing for the right of LGBT individuals and same-sex couples to immigrate to Malawi and to apply for permanent residence, in order to bring about change in this area.

Military Service

Similar to immigration, no literature was specifically found on whether LGBT individuals are permitted to openly serve in the Malawi military. However, the current criminalization and religious and political condemnation of LGBT individuals within Malawi makes it unlikely that LGBT individuals are permitted to openly serve in the military. Here again, it is likely that explicit policies will need to be adopted by the Malawi government, prohibiting discrimination in the military on the basis of sexual orientation and gender identity, in order to bring about change in this area.

C. Namibia

1. Background

Namibia attained its independence from neighboring South Africa in 1990. Although Namibia shares a legal history and background with South Africa, with regards to the right to non-discrimination on the basis of sexual orientation and gender identity, Namibian law has not progressed at the same pace as its larger neighbor. Common law in Namibia still holds that "sodomy" is a crime, and Section 299 of the Criminal Procedure Act 2004 lists "[s]odomy" under the statutory offenses of committing a sexual act or of unlawful carnal intercourse.¹²⁰ There is no law, however, against same-sex sexual relations between women. Additionally, the political tone in Namibia had a significant and vociferous anti-gay rights tone in the early 2000s, with several prominent politicians, including then President Sam Nujoma, releasing statements attacking homosexual behavior. In 2002, President Nujoma was quoted as stating that "[t]he Republic of Namibia does not allow homosexuality" and that "[p]olice are ordered to arrest you, and deport you and imprison you too."¹²¹ In light of such legal and political history, there is significant progress yet to be made in Namibia in reducing discrimination on the basis of sexual orientation and protecting the rights of LGBT individuals. Notwithstanding the fact that there have been no recent reports of public statements by senior government officials against LGBT individuals, there remain political forces in the country which actively campaign on anti-homosexual platforms, namely the newly created Namibia Economic Freedom Fighters party ("NEFF").¹²²

¹²⁰ Namibia Criminal Procedure Act 2004, Section 299, available at http://www.wipo.int/wipolex/en/text.jsp?file_id=223230

¹²¹ *Namibian President Announces Purges Against Gays*, AFROL NEWS, available at http://www.afrol.com/News2001/nam008_gay_purges.htm See also *Namibia: African NGOs Respond to Statement* by

Namibian Deputy Minister on Gays and Lesbians "Betraying the Fight for Freedom", INT'L GAY & LESBIAN HUM. RTS. COMM'N, Sept. 13, 2005, available at www.iglhrc.org/content/namibia-african-ngos-respond-statement-namibian-deputy-minister-gays-and-lesbians-betraying (citing the Deputy Minister of Home Affairs as stating that gays and lesbians were, among other things, "responsible for the HIV/AIDS pandemic"); *Lesbian and Gay Backlash Ignited in Namibia*, FEM. MAJ., Oct. 5, 2000, available at www.feminist.org/news/newsbyte/uswirestory.asp?id=5213 (quoting Home Affairs Minister Jerry Ekandjo as "urging police officers to 'eliminate gays and lesbians from the face of Namibia.'").

¹²² See Immanuel, Shinovene, *Malema's EFF fever hits Namibia*, THE NAMIBIAN, Jun. 25, 2014, available at http://www.namibian.com.na/indexx.php?id=14514&page_type=story_detail (discussing stance of Namibia Economic Freedom Fighters as "against foreign exploitation of the country's natural resources, homosexuality and ...").

The NEFF styles itself as a sister party to Economic Freedom Fighters (“EFF”) in South Africa and has similar economic and political goals, although such connections have been disclaimed by the South African party.¹²³ Unlike the NEFF, the EFF is publicly “against the oppression of anyone based on their gender, gender expression, or sexual orientation.”¹²⁴ Given NEFF’s similar economic ideology to EFF and the disconnect on sexual orientation and gender identity issues, it can be argued that the principal ideas of such political group are rooted in economic rather than social concepts; regardless of the underlying motives, however, such attacks and statements politicize the space and increase the vulnerability of LGBT individuals in Namibia, regardless of whether the NEFF are using homosexuality merely as a tool in populist rhetoric against foreign influence or are actively discriminating against LGBT individuals as a core policy.

2. Constitutional Anti-Discrimination

The Namibian Constitution contains an anti-discrimination provision, although there is no explicit mention of sexual orientation or gender identity as protected classes. Specifically, Article 10 of the Constitution provides that “[a]ll persons shall be equal before the law” and “[n]o persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.” Article 21 further protects fundamental freedoms, and provides that all persons shall have the right to “freedom of speech and expression”, “freedom of thought, conscience and belief”, “assemble peaceably and without arms” and “freedom of association.”¹²⁵

The omission of sexual orientation and gender identity as a protected class under Article 10 is the source of the current justification for disparate treatment of LGBT individuals. While the provision that all persons “shall be equal before the law”¹²⁶ can arguably be interpreted as allowing for a challenge to the disparate treatment of LGBT individuals, Article 10 of the Namibian Constitution has yet to be used as a tool to bring equality of treatment to members of the LGBT community, as it has not historically been interpreted to protect the rights of individuals on the basis of sexual orientation and/or gender identity. In fact, the Supreme Court of Namibia held in 2001 that the Namibian Constitution “was never contemplated or intended to place a homosexual relationship on an equal basis with a heterosexual marriage.”¹²⁷ Furthermore, no single case of discrimination on the basis of sexual preference or orientation, or gender identity or expression, has been brought before the Namibia courts since 1990, when Namibia became an independent nation, with the result that there is no judicial precedent on the topic of interpreting Article 10 to protect the rights of individuals who are known or thought to be LGBT.¹²⁸

¹²³ Haufiku, Mathias, *EFF dismisses NEFF link*, New Era, Jun. 27, 2014, available at <http://www.newera.com.na/2014/06/27/eff-dismisses-neff-link/>

¹²⁴ Modisane, Cameron, *EFF Condemns Anti-Homosexuality Bill*, Economic Freedom Fighters website, Dec. 26, 2013, available at <http://www.economicfreedomfighters.org/eff-condemns-anti-homosexuality-bill/>. Compare *id.* with Shinovene, *supra* n. 104 (citing Epafraas Mukwiilongo, the leader of the NEFF, as stating that Namibia “can take care of itself” and blaming the West for influencing governments). Mukwiilongo is quoted as saying that “the imperialists are manipulating/influencing [Namibia] through homosexual practices.”

¹²⁵ NAM. CONST. ART. 10 AND ART 21, available at http://www.gov.na/documents/10181/14134/Namibia_Constitution.pdf/37b70b76-c15c-45d4-9095-b25d8b8aa0fb.

¹²⁶ *Id.*

¹²⁷ See *In re Frank*, SA 8/99 (Sup. Ct. Nam. 2001) (Mar. 5, 2001), available at <http://www.saflii.org/na/cases/NASC/2001/1.html>

¹²⁸ United Nations General Assembly, Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Namibia* ¶ 21 (Mar. 24, 2011), available at <http://www.refworld.org/publisher,UNHRC,,NAM,50f3e57a2,0.html>

In light of the foregoing interpretive issues, LGBT individuals in Namibia have increasingly looked to international treaties as a possible source of help in the fight against discriminatory practices based on sexual orientation. Namibia, as a signatory to the International Covenant on Civil and Political Rights (the “ICCPR”), is required to conform its national laws to its international obligations.¹²⁹ Indeed, via Article 144 of the Namibian Constitution, Namibia directly implements its international treaty obligations.¹³⁰ The UN Human Rights Committee, which oversees the ICCPR, has previously requested that Namibia enact anti-discrimination legislation to protect persons based on sexual orientation.¹³¹ However, Namibia has yet to enact any such legislation in response to such request. In 2011, Namibia also rejected a UN General Assembly recommendation, brought by Spain, that Namibia’s laws be amended to prohibit “discrimination on the basis of sexual orientation or on gender identity,” suggesting a political unwillingness at this point in time to codify the equal treatment of LGBT individuals.¹³²

3. Legislation

Privacy

Paragraph 1 of Article 13 of the Namibia Constitution provides for the protection of privacy for individuals in Namibia, stating that “[n]o persons shall be subject to interference with the privacy of their homes, correspondence or communications save as in accordance with law and as is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or for the protection of the rights or freedoms of others.”¹³³

The UN Periodic Report recently noted that Namibians “were not prosecuted for practising same-sex activities in private, although this practice was not condoned...”¹³⁴ However, Namibia has made no attempts to move towards decriminalizing consensual adult same-sex sexual acts¹³⁵, creating a potential conflict between its criminal statutes and the constitutional protection of privacy in the home. Portugal, France and Spain have each recommended in the UN General Assembly that Namibia revoke criminalization of consensual homosexual conduct between adults; however, each time, Namibia has rejected such request.¹³⁶ During the 2016 Universal Periodic Review, Namibia was again presented with questions regarding the legalization of same-sex relationships¹³⁷, indicating that few, if any, improvements have been made in this area of law.

Same-Sex Marriage

¹²⁹ See International Covenant on Civil and Political Rights Art. 3, available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (“The States parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.”). The ICCPR also provides a central mechanism by which signatory states must report to the Human Rights Committee on the measures adopted to effect the protected rights under the ICCPR, as well as for reporting violations by other signatory states. See *id.*, Arts. 40–42.

¹³⁰ “Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.” NAM. CONST. ART. CXLIV, available at http://www.gov.na/documents/10180/30001/Namibia_Constitution.pdf/a6050315-315a-4f65-8a0b-a7fe10a93258.

¹³¹ Human Rights Committee, *General Comment* ¶ 74(22) A/59/40 vol. I (2004), available at <http://www.ccprcentre.org/wp->

content/uploads/2012/11/A_59_40_Vol.I_E.pdf (noting that laws criminalizing consensual homosexual conduct violates articles 2, 17 and 26 of the ICCPR). It should be noted that the recommendation encompassed only sexual orientation and did not explicitly mention protection of gender identity.

¹³² *Report of the Working Group on the Universal Periodic Review: Namibia* at ¶ 99.3 (Mar. 24, 2011), available at <http://www.refworld.org/docid/50f3e57a2.html>

¹³³ NAM. CONST. ART. XIII, available at

http://www.gov.na/documents/10181/14134/Namibia_Constitution.pdf/37b70b76-c15c-45d4-9095-b25d8b8aa0fb

¹³⁴ United Nations General Assembly, Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Namibia* ¶ 21 (Mar. 24, 2011), available at <http://www.refworld.org/publisher,UNHRC,,NAM,50f3e57a2,0.html>

¹³⁵ United Nations General Assembly, Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Namibia* ¶ 6 (Nov. 6, 2015), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/266/26/PDF/G1526626.pdf?OpenElement>

¹³⁶ United Nations General Assembly, Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Namibia* ¶ 99 (Mar. 24, 2011), available at

http://lib.ohchr.org/HRBodies/UPR/Documents/Session24/NA/Advance_questions_to_Namibia_first_batch.docx.

¹³⁷ United Nations General Assembly, *Advance Questions to Namibia*, available at

<http://www.refworld.org/publisher,UNHRC,,NAM,50f3e57a2,0.html>

Article 14 of the Namibian Constitution states that all adult men and women shall have the “right to marry and to found a marriage” and denies any limitation of this right.¹³⁸ However, same-sex marriage is not currently legal in Namibia. Notwithstanding that fact, same-sex marriage is one area in which Namibian legal precedent exists to provide interpretive guidance on the rights of individuals in same-sex relationships. In the case of The Chairperson of the Immigration Selection Board v. Frank & Another, cited earlier in this report, same-sex rights initially enjoyed a major triumph (although the decision was later overturned by the Namibian Supreme Court). The case concerned a German woman in the 1990s who was in a relationship with a Namibian woman, and who elected to challenge an administrative ruling denying her permanent residence in the country, citing her relationship with the Namibian citizen as a positive factor in her application. The Namibian High Court held that a long-term lesbian relationship should be recognized and taken into account when determining a petition for permanent residency.¹³⁹ As a result, the court found that the same benefits must be conferred on a long-term same-sex relationship as those on a “universal partnership” between a man and a woman due, in part, to the court’s interpretation of Article 10 of the Constitution as denying any unequal treatment between the two types of relationships.

The Supreme Court of Namibia, however, eventually held on appeal that same-sex relationships are not recognized under Namibian law, and should not be considered in an administrative decision, overturning the previous High Court ruling. The Supreme Court held, in its opinion, that the Namibian Constitution “was never contemplated or intended to place a homosexual relationship on an equal basis with a heterosexual marriage.”¹⁴⁰ While the Supreme Court ruling only invalidated the High Court’s decision on the issuance of permanent residence, the implication that same-sex relationships do not enjoy the same benefits in administrative decisions as heterosexual relationships, and that Article 10 of the Constitution should not be interpreted to require such equal treatment, put an immediate stop to efforts to utilize the High Court ruling to further the cause of equal rights for individuals in other areas of law, regardless of their sexual orientation.

Adoption

Historically, the Children’s Act 33 of 1960, a holdover from South African law at the time of Namibia’s independence, governed the law of adoption and provided that only the following persons may adopt a Namibian child: (1) a husband and wife jointly, (2) widowed, unmarried or divorced persons, (3) married persons whose spouse has been for a continuous period of at least seven years mentally disordered or defective, or (4) a married person who is judicially separated from his or her spouse. However, the Children’s Act of 1960 was recently replaced by Section 170 of the Children Care and Protection Act of 2015¹⁴¹, which could be interpreted to permit adoption by same-sex couples: “A child may be adopted by the partners in a marriage, jointly; the spouse of a parent of the child; or a widower, widow, divorced or unmarried person, including the foster parent, kinship care-giver or primary caretaker of the child.”¹⁴²

¹³⁸ NAM. CONST. ART. 14 (1), *available at* http://www.gov.na/documents/10181/14134/Namibia_Constitution.pdf/37b70b76-c15c-45d4-9095-b25d8b8aa0fb The text of Section (1) of Article 14 states that “[m]en and women of full age, without any limitation due to race, colour,

ethnic origin, nationality, religion, creed or social or economic status shall have the right to marry and to found a family. They shall be entitled to equal rights as to marriage, during marriage and at its dissolution.”

¹³⁹ See *In re Frank*, 1999 NR 257 (HC Nam. 1999) (Jun. 25, 1999) (overruled by *In re Frank*, SA 8/99 (Sup. Ct. Nam. 2001) (Mar. 5, 2001), available at <http://nam-elaws.com.na/displaylrpage.php?id=4700&dsp=2>

¹⁴⁰ *In re Frank*, SA 8/99 (Sup. Ct. Nam. 2001) (Mar. 5, 2001), available at

<http://www.saflii.org/na/cases/NASC/2001/1.html>

¹⁴¹ See <http://www.lac.org.na/laws/2015/5744.pdf>

¹⁴² See <http://www.lac.org.na/projects/grap/grapccpa.html>.

Adoption is another area where the intersection of Article 10 of the Namibian Constitution and legal precedent could be read to provide an opportunity for advancing the rights of same-sex couples and LGBT individuals generally. The Namibian High Court has previously held that a blanket rule preventing foreigners from adopting children in Namibia is unconstitutional.¹⁴³ If the court's ruling is based at all on Article 10 of the Constitution (i.e., that all persons are equal and may not be treated differently under the law), then, arguably, a blanket rule preventing LGBT individuals or same-sex couples from adopting children could also be found to violate the Constitution.

Access to Employment, Healthcare and Housing

The employment act in Namibia once provided the most explicit and direct protection for the rights of individuals irrespective of their sexual orientation, by including “sex or sexual orientation” as a protected class in prohibiting workplace discrimination.¹⁴⁴ Unfortunately, however, the former employment act was repealed by the Labour Act 11 of 2007, which does not contain the “sexual orientation” provision.¹⁴⁵ While it is not clear from the record that the removal of such language was an explicit goal of the legislators, the fact that the sexual orientation provision was removed is clearly a step in the wrong direction. Although workplace discrimination is still prohibited generally, the fact that sexual orientation is no longer an explicit protected class in this area appears to permit employers to discriminate against individuals based on their real or perceived sexual orientation in employment and workplace issues without facing the full weight of the law. The fact that sexual orientation was once part of a protected class for employment purposes but has since been removed also creates the potential for a decision similar to that in the Frank case, where the fact that “sexual orientation” is not specifically listed as one of the protected classes for purposes of Article 10 of the Constitution led the Namibian Supreme Court to find that the drafters had never intended to place same-sex rights on an equal footing with the other protected classes, and that discrimination based on sexual orientation was, therefore, not prohibited under the Constitution. The protection of the right to non-discrimination based on gender identity remains elusive.

LGBT individuals continue to suffer from harassment when it comes to employment in Namibia. In 2012, OutRight Namibia recorded 15 cases of employment discrimination, violence, harassment, threats or verbal abuse during the year against persons based on their real or perceived sexual orientation or gender identity.¹⁴⁶ While harassment itself contributes to an unsafe environment, the lack of action by the authorities in response thereto arguably creates an even more dangerous problem, because it encourages the instigators of violence to act with impunity without the threat of the law or its repercussions. Notwithstanding the foregoing, however, OutRight Namibia recently noted that, since 2011, “the Office of the Ombudsman and the Minister of Health and Social Services [have] strengthened their relations with the LGBT community.”¹⁴⁷ This development may signal a recognition by government authorities that they need to take steps to curb violence against LGBT individuals in the work environment.

¹⁴³ See *Detmold v. Minister of Health and Social Services and Others*, 2004 NR 174 (HC Nam. Nov. 10, 2004), available at <http://nam-elaws.com.na/displaylrpage.php?id=4018&dsp=2>

¹⁴⁴ See NAM. LAB. ACT 1992 (Mar. 13, 1992), Part XIII, Sect. 107, available at <http://www.ilo.org/dyn/natlex/docs/WEBTEXT/29328/64850/E92NAM01.htm> (prohibiting discrimination against employees on the basis of sexual orientation). See also Hubbard, D., *Gender and Law Reform in Namibia*, Leg. Assistance Cent. Nam. (Sept.

1999), available at <http://www.lac.org.na/projects/grap/Pdf/lawreform.pdf> (noting the progressive nature of Namibia's Labour Act passed in 1992).

¹⁴⁵ See Labour Act 11 of 2007, Ch. 2, Sect. 5(2) (Act No. 11 of 2007), promulgated in Govt. Gazette of the Rep. of Namibia, No. 3971, (Dec. 31, 2007), available at

http://www.parliament.gov.na/index.php?option=com_phocadownload&view=category&download=6216:3971&id=120:government-gazettes-of-2007&Itemid=1269&start=200

¹⁴⁶ Country Reports on Human Rights Practices for 2012, *Namibia 2012 Human Rights Report* at 29, U.S. DEPT. OF STATE BUR. OF DEM., HUM. RTS. AND LAB., available at <http://www.state.gov/documents/organization/204361.pdf>

¹⁴⁷ U.S. Dept. of State, *Namibia: Human Rights Reports* (Apr. 19, 2013), available at

<http://allafrica.com/stories/201304231168.html?viewall=1>

With regard to housing and land ownership, Namibia has faced some serious problems historically in terms of providing affordable housing to all of its citizens.¹⁴⁸ Therefore, while access to housing remains a major socio-economic problem in Namibia, there is little indication that such limited access is exacerbated for LGBT individuals. On its face, there is no direct interaction between housing and land ownership law in Namibia and discrimination based on real or perceived sexual orientation or gender identity. For instance, there is no mention of sexual orientation or references to LGBT individuals being categorized as a vulnerable group (as in the country's HIV policy) or discriminated against in the Namibia National Housing Policy, and the country's housing finance programs do not contain explicit discriminatory provisions.¹⁴⁹ Essentially, while Namibia's housing issues are significant and troubling, the existing literature indicates that this is an across-the-board poverty and expense issue, and not one based on explicit discrimination against one or more specific groups of individuals.

In contrast to the aforementioned housing problem, individuals do appear to be singled out for discrimination based on real or perceived sexual orientation or gender identity in the area of access to healthcare in Namibia. Because of the stigma of same-sex activity, a 2010 study reported that 8.3% of men (based on the sample group) have reported being denied health care services, and 21.3% have reported being blackmailed, because of their sexual orientation.¹⁵⁰ OutRight Namibia has also previously indicated that "LGBT people face challenges in accessing healthcare services when they disclose their sexual orientation to healthcare personnel."¹⁵¹ While such discrimination is not a direct result of state activity, societal attitudes that favor discrimination against individuals based on real or perceived sexual orientation or gender identity appear to be supported through existing legislation and public statements by politicians.

HIV/AIDS

Like most of its neighboring countries, Namibia has a comprehensive national policy, the Namibian National HIV/AIDS Policy of 2007 (the "Policy"), to deal with the pervasive issue of HIV in the country.¹⁵² The Policy explicitly provides that individuals in same-sex relations are a vulnerable group, which would be expected to contribute toward raising awareness for the plight of such persons.¹⁵³ Unfortunately, however, when it comes to LGBT individuals, the Policy only includes that single reference to individuals in same-sex relations, and none to transgender persons at all. Although the Policy focuses some attention on the lack of diagnosis and testing for HIV,¹⁵⁴ the failure by omission to focus on individuals in same-sex relationships and on transgender individuals is likely to contribute to the continued neglect of an at-risk group that is less likely to seek diagnosis and medication than other groups. In fact, a recent study identified a clear connection between the experience of discrimination on the basis of sexual orientation and gender identity and fear of health care services.¹⁵⁵

¹⁴⁸ "Namibia is currently one of the most expensive countries in the world when it comes to the delivery of serviceable land." *Namibia: Housing Provision Needs a Rethink*, New Era (Aug. 2, 2013), available at <http://allafrica.com/stories/201308090831.html>. Despite the fact that sixteen percent of the country live in shacks, see Brandt, E., *Namibia: Housing Crisis Confirmed*, New Era (Mar. 28, 2013), available at <http://allafrica.com/stories/201303280726.html>, only 0.3% of national expenditure in Namibia is allocated to housing. See Sweeney-Bindels, E., *Housing Policy and Delivery in Namibia*, Inst. For Pub. Pol. R. (funded by the Neth. Emb. In Pretoria) (Oct. 24, 2011), available at <http://www.az.com.na/fileadmin/pdf/2011/az/Housing-Policy-10-24-11.pdf> (contrasting this low expenditure with a far higher percentage of expenditure in South Africa of 2%). For more information on Namibia's historical difficulties in providing affordable housing to its citizens, see also id.; Namibia National Housing Policy of 2009, available at http://209.88.21.36/opencms/export/sites/default/grnnet/MRLGH/Documents/National_Housing_Policy.pdf

¹⁴⁹ See Namibia National Housing Policy of 2009; *Housing Finance in Africa: A Review of Some of Africa's Housing Finance Markets*, CENT. FOR AFFORDABLE HOUS. FIN. IN AFR., YEARBOOK 2013 (Sept. 2013), available at http://www.housingfinanceafrica.org/wp-content/uploads/2013/09/CAHF_smallpdf.pdf (discussing access to affordable housing finance in Africa). While the Africa Housing Finance Yearbook is by no means a comprehensive summary of all of Namibia's housing finance legislation or avenues for housing finance, it provides a detailed summary of the overall picture of Namibian citizens' access to finance and mortgages, and makes no mention of any discrimination against any individuals.

¹⁵⁰ Fay, H. et al., *Stigma, Health Care Access, and HIV Knowledge among Men who have Sex with men in Malawi, Namibia, and Botswana*, 5–6 (Dec. 10, 2010), available at <http://link.springer.com/article/10.1007%2Fs10461-010-9861-2#page-1>.

¹⁵¹ *Namibia: Treatment of Sexual Minorities by Society and Government Authorities; Recourse and Protection Available to Sexual Minorities who have been Subject to Ill-Treatment*, Imm. and Ref. Board of Canada (Aug. 2, 2012), available at <http://www.refworld.org/docid/5034fea82.html>

¹⁵² In 2007, the United Nations reported that approximately 200,000 Namibians were HIV-positive. See REPUBLIC OF NAMIBIA, UNITED NATIONS GENERAL ASSEMBLY SPECIAL SESSION COUNTRY REPORT 29 (2007), available at http://data.unaids.org/pub/Report/2008/namibia_2008_country_progress_report_en.pdf

¹⁵³ See Cecilia Strand, *State-Sanctioned Discrimination and Silent Media – a Case Study on Homophobic Politics and a Quiet Media in Namibia* (2009) (stating that same sex relationships are completely omitted, despite such relationships being included in the original text). For the full policy, see Republic of Namibia, *National Policy on HIV/AIDS* (Mar. 14, 2007), available at

http://www.na.undp.org/content/dam/namibia/docs/HIVAIDS/undp_na_hivaidns_NamNatPolHIVAIDS.pdf?download

¹⁵⁴ See Republic of Namibia, *National Policy on HIV/AIDS* at 24 (Mar. 14, 2007), available at http://www.na.undp.org/content/dam/namibia/docs/HIVAIDS/undp_na_hivaidns_NamNatPolHIVAIDS.pdf?download (discussing urgency of diagnosis and notification, and noting that “stigma and discrimination is a deterrent to people finding out and disclosing their HIV status”). Fay et al. also noted the inverse correlation between the proportion of men seeking and utilizing HIV and STI services and the proportion of men screening positive for HIV. See Fay, H. et al., *supra* note 127 at 6.

¹⁵⁵ See Fay, H. et al., *supra* note 127 at 6 (“[T]here was a strong association between ever experiencing discrimination, including denial of health care services and blackmail based on sexuality, and fear of health care services.”)

It is difficult to discuss HIV/AIDS policy in the context of non-discrimination based on real or perceived sexual orientation or gender identity without also discussing the impact of prisons and the prison environment on the transmission of HIV through same-sex sexual relations in prison.¹⁵⁶ Unlike the Policy, commentators note that “a comprehensive and standardized approach to controlling HIV in the prison system is lacking.”¹⁵⁷ Despite the stated policy to combat HIV,¹⁵⁸ the Namibian government also uses the rationale of sodomy being a criminal activity to justify a refusal to provide condoms to prisoners.¹⁵⁹ In using this argument, Namibia’s government turns a blind eye to the spread of HIV in prisons, a problem that is severely afflicting the country.

Expression and Assembly

As discussed above, the early 2000s saw a spate of public statements released by Namibian political figures disparaging gay and lesbian activity and rights. Such statements caused concern that verbal attacks by political leaders would lead to persecution, violence and public vilification, which would in turn lead to police harassment of those seeking to push the norms of sexual conduct and gender expression.¹⁶⁰

Article 21 of the Namibian Constitution protects fundamental freedoms, and provides that all persons shall have the right to “freedom of speech and expression”, “freedom of thought, conscience and belief”, “assemble peaceably and without arms” and “freedom of association.”¹⁶¹ Unfortunately, however, although the fundamental freedoms set forth in Article 21 apply broadly to “all persons,” there is evidence that the application of these rights by LGBT individuals often results in a cultural backlash and outright hostility from other groups within Namibia.¹⁶² For example, OutRight Namibia has reported numerous incidents of civilian violence against individuals based on real or perceived sexual orientation or gender identity.¹⁶³ To compound matters, the prevailing view amongst LGBT persons within Namibia is that the police generally do not take complaints of violence against the LGBT community seriously.¹⁶⁴ There are signs, however, that the exercise of freedoms of expression and assembly by the LGBT community may slowly be gaining greater acceptance and engendering greater tolerance from both the government and society at large. For example, in 2009, Keetsmanshoop, a southern Namibian city, hosted the first gay pride march in the country.¹⁶⁵

Immigration

The current statute in place governing immigration, the Immigration Control Act 7 of 1993, does not contain any language expressly or directly discriminating against the rights of persons based on real or perceived sexual orientation or gender identity.¹⁶⁶ As discussed above, the *In re Frank* case raised hopes among the LGBT community in Namibia of a great victory for non-discrimination based on sexual orientation, as, had the High Court ruling not been overturned by the Supreme Court, same-sex couples would have been entitled to enjoy the same rights under Article 10 of the Constitution as heterosexual couples, including with respect to immigration and the right to petition for permanent residency. Following the resolution of the *Frank* case, however, there have been very few developments with regard to legal precedent on immigration in Namibia.

¹⁵⁶ The issue of homosexual activity is tangential to the impact of governmental discrimination against LGBT individuals, as sexual orientation is not necessarily the underlying reason for sexual relations in prison. See LEG. ASST. CENT. AIDS L. UNIT & UNIV. WYOM. C. L., *Struggle to Survive: A Report on HIV/AIDS and Prisoners' Rights in Namibia* 5 (2008), available at <http://www.lac.org.na/projects/alu/Pdf/struggletosurvive.pdf> (noting that sex in prisons generally occurs via one of three different ways: (1) consensual sex, (2) coercive sex in return for benefits, and (3) rape).

¹⁵⁷ See *id.*

¹⁵⁸ See *Condoms in Prison Debate Rages*, NAMIBIAN SUN (Feb. 28, 2012), available at <http://sun.com.na/content/national-news/condoms-in-prison-debate-rages>. The “equivalency” policy dictates that “rights of access to health care enjoyed by the public must apply to all citizens, including those incarcerated in the Namibian prison system.” *Id.*

¹⁵⁹ See *id.* (“The Government’s refusal to distribute condoms in prisons appears to be related to the anti-sodomy law”).

¹⁶⁰ Human Rights Watch, *More than a Name: State-Sponsored Homophobia and its Consequences in Southern Africa* at 2 (2003), available at <http://www.ighrc.org/sites/default/files/160-1.pdf>

¹⁶¹ NAM. CONST. ART. 21, available at http://www.gov.na/documents/10180/30001/Namibia_Constitution.pdf/a6050315-315a-4f65-8a0b-a7fe10a93258

¹⁶² See *Sister Namibia’s Office Guttled in Suspected Anti-Gay Attack*, GAY NAMIBIA NEWS & REPORTS (Jul. 11, 2000), available at <http://archive.globalgayz.com/africa/namibia/gay-namibia-news-and-reports/#article1> (“Maybe we are being targeted because we are a human rights organization [dealing with gay issues.]”).

¹⁶³ *2011 Country Reports on Human Rights Practices – Namibia*, U.S. Dept. of State (May 24, 2012), available at <http://www.refworld.org/docid/4fc75a7a2.html> (noting that OutRight Namibia has reported incidents in 2011 of a stoning of a transgender woman and the stabbing to death of a lesbian for the reason that “she was having a conversation with another woman”).

¹⁶⁴ *Id.* (“OutRight Namibia ridiculed LGBT persons when they reported cases of abuse, and this secondary victimization often dissuaded victims from reporting abuses”).

¹⁶⁵ See, e.g., Johnson, R., *Keetsmans, Namibia to Hold First Gay Pride March*, available at <http://gaylife.about.com/b/2009/09/03/keetsmans-namibia-to-hold-first-gay-pride-march.htm>; Bolcer, J., *Namibia City to Hold First Gay Pride*, Advocate.com (Sept. 4, 2009), available at <http://www.advocate.com/news/daily-news/2009/09/04/namibia-city-hold-first-gay-pride>

¹⁶⁶ See Immigration Control Act 7 of 1993 (Jul. 29, 1994), available at <http://www.refworld.org/docid/3ae6b4fb0.html> (evidencing absence of any discriminatory language against LGBT individuals).

In 2014, however, following the passage of laws in Nigeria and Uganda criminalizing same sex relations, immigration and asylum as it related to gay and lesbian rights returned to the forefront of the Namibian political consciousness. Namibia's Commissioner for Refugees, Nkrumah Mushelenga, publicly stated that Namibia would refuse to accept gay Uganda refugees, stating that they "will not qualify to become refugees on the basis of their sexuality."¹⁶⁷

Military Service

Similar to immigration, there is very little literature on whether LGBT individuals are permitted to openly serve in the Namibian military. The Namibian Defence Act of 2002, which contains the Military Discipline Code, is silent with regard to homosexuality and gender identity,¹⁶⁸ which implies that LGBT individuals are not currently prohibited from serving in the Namibian military.

However, in spite of the lack of any express or direct discriminatory provisions against the LGBT community in the Defence Act, the current criminalization of sodomy and other discriminatory provisions of Namibian law indicate that LGBT individuals are probably not able to openly serve their country in the military. Here again, it is likely that explicit policies will need to be adopted by the Namibian government, prohibiting discrimination in the military on the basis of sexual orientation or gender identity, in order to bring about change in this area.

D. Zambia

1. Background

Despite making progress toward establishing many core democratic and human rights principles, Zambia continues to face challenges when it comes to advancing and protecting the rights of the LGBT community. On March 19, 2013, the Delegation of the EU to the Republic of Zambia issued its 2012-2013 guidelines for grant applicants under the European Instrument for Democracy and Human Rights for the Country-Based Support Scheme for Zambia offering grants of 100,000 to 200,000 euros to fund initiatives that protect the rights of prisoners and lesbian, gay, bisexual, transgender and intersex people.¹⁶⁹ Like many other African nations, state-sponsored homophobia and transphobia continues to plague the legal and political atmosphere of Zambia. In response to the EU delegation's call for proposals, the then Minister of Home Affairs Edgar Lungu said that "those who want to use money to champion same sex marriages in Zambia are just wasting their time because the practice is un-Zambian. It is not in our culture and as [a] Government we are not ready for that."¹⁷⁰

¹⁶⁷ Becker, John M., *Namibia Refuses to Accept Gay Ugandan Refugees*, Bilerico, available at http://www.bilerico.com/2014/04/namibia_refuses_to_accept_gay_ugandan_refugees.php

¹⁶⁸ GOVT. GAZETTE OF THE REP. OF NAMIBIA, No. 2749 (Jun. 7, 2002), available at [http://www.icrc.org/applic/ihl/ihl-nat.nsf/0/17d111aa6dc7154cc12576ce0050a33a/\\$FILE/Defence_Act_2002.pdf](http://www.icrc.org/applic/ihl/ihl-nat.nsf/0/17d111aa6dc7154cc12576ce0050a33a/$FILE/Defence_Act_2002.pdf)

¹⁶⁹ "Country Based Support Scheme (CBSS) in Zambia - Supporting Civil Society to Protect the Rights of Prisoners and of LGBT People" Available at: <https://www.devex.com/projects/grants/country-based-support-scheme-cbss-in-zambia-supporting-civil-society-to-protect-the-rights-of-prisoners-and-of-lgbti-people/281>

¹⁷⁰ "Edgar Lungu tells off EU over gay rights advert in Zambia" *Zambian Watchdog Mail*, March 25, 2013. <http://www.zambiawatchdog.com/edgar-lungu-tells-off-eu-over-gay-rights/>

Since then Minister Lungu's comments in March 2013, the number of homophobic statements made by politicians and religious leaders has been on the rise and this anti-gay sentiment peaked in early April 2013 when Philip Mubiana and James Mwape were arrested and charged with four counts of sodomy.¹⁷¹ The decline of respect for the right to non-discrimination based on real or perceived sexual orientation or gender identity in Zambia has not gone unnoticed. Richard Lee from the Open Society Initiative for Southern Africa acknowledged the growing anti-gay climate stating that "[i]t is a shocking turn of events – but sadly not surprising. Zambia's record on human rights has taken a hammering in recent months as the government of President Michael Sata has cracked down relentlessly on opposition politicians and civil society activists." There is much less public attention to discrimination based on gender identity and the plight of transgender individuals.

The recent resurgence of anti-gay sentiment in Zambia unfortunately coincides with its drafting of a new Constitution. On November 16, 2011, former President Michael Sata, pursuant to his executive powers under the 1991 Zambian Constitution, appointed a technical committee (the "Technical Committee") that was tasked with drafting a new Zambian Constitution.¹⁷² The Technical Committee has been in session since December 21, 2011 and released a first draft of the Constitution on April 30, 2012 (the "First Draft Constitution").¹⁷³ A final draft of the Constitution was released on October 23, 2014 (the "Final Draft Constitution").¹⁷⁴

In the process, the Technical Committee's drafts were reviewed, and commented upon, by the Zambia Human Rights Commission, which limited its review to the Bill of Rights, i.e. Part V of the First Draft Constitution and Part VI of the Final Draft Constitution.¹⁷⁵

The constitutional process resumed in 2015 under the new President, Edgar Lungu, and culminated in the adoption of the Constitution of Zambia (Amendment) Act, 2016, dated January 5, 2016 (the "New Constitution").¹⁷⁶ It is important to note that the New Constitution, which largely resembles the Final Draft Constitution, fails to include Part VI of the Final Draft Constitution (i.e. the Bill of Rights), which will be the subject of a separate referendum likely to be held in October 2016.¹⁷⁷

The following discussion references the Bill of Rights as included in Part VI of the Final Draft Constitution. However, there is no assurance that the referendum to include Part VI will be passed and, if so, that the language as discussed below will mirror that which is ultimately included in the New Constitution.

2. Constitutional Anti-Discrimination

Like most African nations' constitutions, Part VI of the Final Draft Constitution contains an anti-discrimination provision (Article 39), which states that:

Every person has the right not to be discriminated against, directly or indirectly, on any grounds, including race, sex, pregnancy, health, marital, ethnic, tribe, social or economic status, origin, colour, age, disability, religion, conscience, belief, culture, language or birth.¹⁷⁸

¹⁷¹ Obert Simwanza, “Zambia’s Gay Rights Cases Raise Concerns over Nation’s Growing Intolerance” Huffington Post , June 4, 2013. Available at: http://www.huffingtonpost.com/2013/06/05/zambia-gay-rights-cases-_n_3385441.html

¹⁷² Zambia Daily Mail; *available at*: <https://www.daily-mail.co.zm/?p=8886>

¹⁷³ First Draft Constitution *available at*

<http://www.mibs.gov.zm/sites/default/files/First%20Draft%20Constitution%20-%202012.pdf>

¹⁷⁴ Final Draft Constitution, *available at*: http://www.zambia.co.zm/downloads/draft_constitution.pdf

¹⁷⁵ Zambia Human Rights Commission “HRC submits its comments on first draft Constitution” *available at*

http://www.hrc.org.zm/index.php/latest-news/64-hrc-submits-its-comments-on-first-draft-constitution_
Zambia Human Rights Commission “The First Draft Constitution: The Human Rights Commission’s Submission to the Technical Committee On Drafting the Zambian Constitution” *available at* <http://www.hrc.org.zm/index.php/publications/general-publications/file/37-hrc-submission-to-technical-committee-on-drafting-zambian-constitution>

¹⁷⁶ *Available at*

http://www.parliament.gov.zm/sites/default/files/documents/amendment_act/Constitution%20of%20Zambia%20%20%28Amendment%29%2C%202016-Act%20No.%202_0.pdf

¹⁷⁷ Lusaka Times; *available at* <https://www.lusakatimes.com/2016/02/02/grand-coalition-demands-government-clarity-on-referendum-for-adoption-of-expanded-bill-of-rights/>

¹⁷⁸ Article 39, Final Draft Constitution, *available at*: http://www.zambia.co.zm/downloads/draft_constitution.pdf

This provision is quite progressive in its inclusion of conscience, pregnancy and health, however, it notably omits sexual orientation and gender identity. While speaking in Lusaka during a discussion on the First Draft Constitution, the Chairperson of the Technical Committee, Annel Silungwe, said that it would be up to Zambians to make submissions on whether or not to include “gay rights” in the constitution. However, in June 2014, Zambia’s foreign affairs minister confirmed that the government would not recognize gay citizens’ rights in the Constitution.¹⁷⁹

In response to the Technical Committee’s request for public participation and feedback in the constitution drafting process, the Zambia Human Rights Commission submitted comments and proposed changes to the First Draft Constitution. In reviewing the above mentioned Article, the Zambia Human Rights Commission focused exclusively on ensuring that the Article not be interpreted to include the LGBT community. The Zambia Human Rights Commission argued that while “human rights are universal... their enjoyment is not absolute”, explaining that human rights should be ensured for all, subject to the “cultural, moral, religious, legal, economic and social context of the community/country in which they apply”.¹⁸⁰ Therefore, they argue that it is permissible for LGBT individuals to be excluded for “the protection of the greater good of society”.¹⁸¹ The Zambia Human Rights Commission went on to recommend that the provision be interpreted as exhaustive rather than inclusive and proposed the removal of terms such as “conscience” and “belief” because there is a “danger that [LGBT] groups could have these rights recognized on these bases”.¹⁸² The Zambia Human Rights Commission’s position with respect to non-discrimination based on real or perceived sexual orientation or gender identity arguably conflicts with Article 38 of the Final Draft Constitution, which states that “Every person is equal before the law and has the right to equal protection and benefit of the law.”

It is important to note that every right afforded to individuals under the Final Draft Constitution can be limited under Article 82. This article allows any right or freedom to be limited by a law of general application if the limitation is “reasonable and justifiable in an open and democratic society” and is “reasonably required” in the interest of, *inter alia*, public morality.¹⁸³ Ultimately, therefore, all legal challenges to the discriminatory nature of laws and policies applicable to LGBT individuals will require, and be subject to, an interpretation of the applicable law and/or policy by the Zambian Constitutional Courts. In this regard, it is possible that certain articles of the Constitution will be interpreted to permit continuing discriminatory policies in Zambia even after they have been challenged.

Furthermore, Article 9 of the New Constitution provides that national values and principles shall be applied in the enactment or interpretation of the Constitution and other laws and state policy decisions.¹⁸⁴ The historical cultural and institutional belief that “homosexuality is not a Zambian value” is, therefore, likely to remain a significant obstacle for years to come in the fight to advance the rights of everyone in Zambia.

3. Legislation

Privacy

¹⁷⁹ “Zambian minister Confirms Government Won’t Recognize Gay Citizen’s Rights.” Advocate.com., June 9, 2014. Available at

180 <http://www.advocate.com/world/2014/06/09/zambian-minister-confirms-government-wont-recognize-gay-citizens-rights>
Zambia Human Rights Commission “The First Draft Constitution: The Human Rights Commission’s Submission to the Technical Committee On Drafting the Zambian Constitution” *available at*
<http://www.hrc.org.zm/index.php/publications/general-publications/file/37-hrc-submission-to-technical-committee-on-drafting-zambian-constitution>

181 *Id.*

182 *Id.*

183 Article 82, Final Draft Constitution, *available at*:
http://www.zambia.co.zm/downloads/draft_constitution.pdf

184 Article 9, New Constitution, *available at*
http://www.parliament.gov.zm/sites/default/files/documents/amendment_act/Constitution%20of%20Zambia%20%20%28Amendment%29%2C%202016-Act%20No.%202_0.pdf

In response to the arrest of Messrs Mubiana and Mwape, Amnesty International's Zambia researcher, Simeon Mawanza explained that "the arrest of the two men solely for their real or perceived sexual orientation amounts to discrimination and it is in violation of their rights to freedom of conscience, expression, and privacy."¹⁸⁵ Article 50 of Part VI of the Final Draft Constitution provides that "all persons have the right to privacy, which includes the right not to have . . . information relating to their family, health status or private affairs unlawfully required or revealed."¹⁸⁶ The inclusion of the term "family" and "private affairs" could potentially be used as a basis for arguing against the criminalization of private same-sex sexual acts between consenting adults. Currently, Section 158 of the Zambian Penal Code states that "Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony and is liable to imprisonment for five years."¹⁸⁷ Therefore, Article 50 of Section VI of the Final Draft Constitution could be interpreted to make Section 158 of the Zambian Penal Code unconstitutional to the extent it is applied to prosecute people for engaging in consensual homosexual acts in the privacy of their homes.

Same-Sex Marriage

On April 3, 2013, various news outlets reported that four gay couples in Zambia attempted to register their marriages but were rejected by authorities.¹⁸⁸ Shortly thereafter, Chief Madzimawe, the traditional leader of the Ngoni people in the eastern province of Zambia, was quoted as saying that "it is not the culture of Zambians, Africans, and Ngonis to practice homosexuality and gay people should be caged."¹⁸⁹ This supposed bias against homosexual behavior is articulated by Section 155 of the Penal Code—inherited from British colonial law—which provides that "Any person who- (a) has carnal knowledge of any person against the order of nature; or (b) has carnal knowledge of an animal; or (c) permits a male person to have carnal knowledge of him or her against the order of nature; is guilty of a felony and is liable to imprisonment for fourteen years."¹⁹⁰ Although the foregoing prohibition on sodomy applies equally to both homosexual and heterosexual acts, in practice it is only enforced against persons for reportedly engaging in a homosexual act than for engaging in a heterosexual act.

The political rejection of homosexual behavior has been built into the Final Draft Constitution. For example, Article 44(1) of Section VI of the Final Draft Constitution, if approved in the October 2016 referendum, provides that "the Republic recognizes the family as the natural and fundamental unit of society and the necessary basis of the social order."¹⁹¹ Article 44(3)(a) then implicitly narrows the scope of what can constitute a family by limiting the legal concept of spouse to a person of the opposite sex.¹⁹² By defining only marriages between a man and a woman as being protected under the Constitution, the Zambian Bill of Rights, if adopted in its current form, would make it exceedingly difficult for same-sex marriages to be recognized in Zambia.

Adoption

¹⁸⁵ *Zambia Urged to Release Two Men Charged with Same-sex Sexual Conduct*, Amnesty Int'l (May 8, 2013), available at <http://www.amnestyusa.org/news/news-item/zambia-urged-to-release-two-men-charged-with-same-sex-sexual-conduct> According to Amnesty International, sources had indicated that the two men were arrested after a neighbor reported them to the police, and that they were subjected to anal examinations by the authorities without their consent and were forced to confess to speed up their trial. Regarding the incident, Simon Mawanza was quoted saying that “[a]nal examinations conducted to ‘prove’ same-sex conduct are scientifically invalid, and furthermore, if they were conducted without the men’s consent, contravene the absolute prohibition of torture and other cruel, inhuman and degrading treatment or punishment under international law.”

¹⁸⁶ Art. 50, Final Draft Constitution, available at https://zambia.co.zm/downloads/draft_constitution.pdf

¹⁸⁷ Penal Code Act of 1995, Chapter 87 of the Laws of Zambia available at <http://www.parliament.gov.zm/sites/default/files/documents/acts/Penal%20Code%20Act.pdf>

¹⁸⁸ “Easter saga: 4 gay marriages involving Zambian men and foreigners stopped in Lusaka” *Zambian Eye*, available at <http://zambianeye.com/archives/7144>

¹⁸⁹ David Smith “Zambian Gay Rights Activist Arrested” *The Guardian*, April 9, 2013, available at <http://www.theguardian.com/world/2013/apr/09/zambian-gay-rights-activist-arrested>

¹⁹⁰ Penal Code Act of 1995, Chapter 87 of the Laws of Zambia available at <http://www.parliament.gov.zm/sites/default/files/documents/acts/Penal%20Code%20Act.pdf>

¹⁹¹ Article 44 (1), Final Draft Constitution, available at: http://www.zambia.co.zm/downloads/draft_constitution.pdf

¹⁹² Article 44(3) (a) of the Final Draft Constitution provides that “[Every adult] has the right to freely choose a spouse of the opposite sex and marry.”

Zambian law currently makes no provision for LGBT individuals or same-sex couples residing in Zambia to adopt children. The U.S. State Department has also stated that “[a]doption by gay, lesbian, transgendered or same-sex persons or couples is not permitted under Zambian law.”¹⁹³ Similarly, neither single males nor same-sex couples from outside of Zambia are currently permitted to adopt Zambian children.¹⁹⁴

Access to Employment, Healthcare and Housing

Originally, Article 60(c)¹⁹⁵ of the First Draft Constitution explicitly addressed employment issues by affirming that the state is required to put in place affirmative action programs designed to ensure that minority and marginalized groups are provided special opportunities for access to employment. “Marginalized group” is defined in the First Draft Constitution, *inter alia*, as “a community that, because of . . . any [other] reason, has been unable to fully participate in the integrated social and economic life of Zambia as a whole”. On its face, the LGBT community would appear to fall within this definition.

Nonetheless, in response to this definition, the Zambia Human Rights Commission commented that it is “vague and too long winded.”¹⁹⁶ The Zambia Human Rights Commission argued that the intention of the provision is to provide protections for “all groups that may have historically been discriminated against by the state or political, economic and social structures,” and specified that it believes the Article should be narrowly tailored to only cover “women, children, persons with disabilities, and older persons”.¹⁹⁷ The Zambia Human Rights Commission has also stated that the Article “need not be included in the Constitution as all other possible minority or previously disadvantaged groups have been catered [to],” thereby explicitly ignoring the existence of the LGBT community as a legitimate group in need of protection under the law.¹⁹⁸

As a result, Part VI of the Final Draft Constitution does not contain a specific provision addressing marginalized groups’ and minorities’ access to employment. In fact, Article 33 of the Final Draft Constitution, includes only a general duty of the State to promote rights and freedoms included in the Bill of Rights, including measures designed to benefit minorities and marginalized communities.¹⁹⁹

Nonetheless, it is worth noting that, although Article 65 of Part VI of the Final Draft Constitution does not specifically address marginalized communities or minorities, it broadly protects the right of all Zambian citizens to fair labor practices. Similarly, Articles 66, 67, 68, 69 and 70 of the Final Draft Constitution appear to broadly protect, respectively, the right of all Zambians to (a) social security, (b) health care services and reproductive health care; (c) education; (d) accessible and adequate shelter and housing; and (e) be free from hunger, have access to adequate food of acceptable quality and to clean and safe water in adequate quantities.²⁰⁰ However, while the foregoing rights are drafted broadly and do not, on their face, appear to discriminate against LGBT individuals, it is difficult to envision a LGBT person being able to successfully sue or take other action to enforce these rights within the current political and social climate in Zambia.

¹⁹³ The U.S. Department of State, “Inter-country Adoption,” Bureau of Consular Affairs, *available at* <https://travel.state.gov/content/adoptionsabroad/en/country-information/learn-about-a-country/zambia.html>

See also Adoption (Amendment) Act, Cap 54, *available at* <http://www.zambialii.org/zm/legislation/consolidated-act/54> (indicating by omission that there is no direct prohibition of LGBT individuals becoming adoptive parents in the plain text of the statute)

¹⁹⁴ The Children’s Bridge, “International Adoption Consultants”, *available at* <http://www.childrensbridge.com/pages/zambia.html>

¹⁹⁵ Article 60(c) of the First Draft Constitution , *available at* <http://www.mibs.gov.zm/sites/default/files/First%20Draft%20Constitution%20-%202012.pdf>

¹⁹⁶ Human Rights Commission “The First Draft Constitution: The Human Rights Commission’s Submission to the Technical Committee On Drafting the Zambian Constitution” at 21.

¹⁹⁷ *Id.* at 24.

¹⁹⁸ The following Articles address specific groups: Article 51 (Equality of Both Genders), Article 52 (Further Rights for Women), Article 53 (Older Members of Society), Article 55 (Children), Article 56 (Youth), Article 57 (Protection of Young Person), Article 58 (Persons with Disabilities), Article 59 (Special Measures for Persons with Disabilities).

¹⁹⁹ Article 33, Final Draft Constitution, *available at* https://zambia.co.zm/downloads/draft_constitution.pdf

²⁰⁰ *See* Articles 65, 66, 67, 68, 69 and 70 of the Final Draft Constitution *available at* https://zambia.co.zm/downloads/draft_constitution.pdf grants individuals “the right to employment and to fair labour practices”.

HIV/AIDS

In 2009 the National AIDS Council acknowledged the “urgent need” to include homosexual men in national AIDS strategies. Then, a year later, the chairman of the Council, Bishop J.H.K. Banda, criticized donor countries for speaking out on behalf of the Zambian LGBT population. Banda characterized the donor countries' efforts as being “against the traditional values of the country.”²⁰¹

The National HIV and AIDS Strategic Framework (the “Framework”) does not include LGBT individuals.²⁰² However, it is noteworthy that prisoners are afforded an ample level of attention and that the Framework acknowledges the need for policy changes in order to ensure that condom distribution takes place in prisons. The 2014 U.S. State Department Human Rights Report on Zambia, however, reports that since the law criminalizes sodomy, authorities continue to deny prisoners access to condoms and as a result the prevalence of HIV/AIDS among prisoners in 2014 was 27.4 percent, as compared with 14.3 percent in the general population.²⁰³ Along the same lines, the Framework calls for a guarantee of a human rights-based approach to promote prevention, education and services to all Zambians, including marginalized groups, but “within the confines of existing law.”²⁰⁴ Therefore, as long as sodomy is criminalized in Zambia, the LGBT community, generally, is likely to continue to be excluded from the Framework.

Expression and Assembly

When LGBT organizers first appeared in Zambian newspapers to announce their wishes to register an organization, government officials warned that any attempt to register the group or hold public meetings would be met with arrests. The Home Affairs Minister at the time, Peter Machungwa, ordered police to arrest anyone who attempted to register a group advocating for “homosexual rights.” Registrar of Societies, Herbert Nyendwa, who is responsible for processing requests for legal recognition of civic groups, swore he personally would never register an LGBT group.²⁰⁵ In a recent landmark decision, human rights activist Paul Kasonkomona was acquitted after being arrested for appearing on live television in April 2013 and calling for homosexuality to be decriminalized under Section 178(g) of the Zambian Penal Code, which criminalizes any public solicitation for immoral purposes.²⁰⁶

This recent court ruling appears to be in line with Articles 52 and 56 of the Final Draft Constitution which provide, respectively, a right to freedom of expression, which includes *inter alia* the freedom to hold an opinion and to impart ideas, and a right to freedom of association.

According to the U.S State Department’s 2014 Human Rights Report on Zambia, current legislation requires that all organizations must formally apply with the Registrar of Societies in the Ministry of Home Affairs.²⁰⁷ The U.S. State Department considers the registration requirement to be a high barrier to the exercise of the right to association and has criticized the Registrar for retaining considerable discretion in this area.²⁰⁸ Although new legislation may be enacted, it is clear that even if the Registrar was afforded less discretion, the fact that homosexual behavior continues to be a crime in Zambia makes it highly likely that the current or any future Registrar would refuse to register an LGBT organization.

201 Human Rights Watch “Zambia: Intolerance Threatens Health, Rights,” May 21, 2010, *available at*
202 <http://www.hrw.org/news/2010/05/21/zambia-intolerance-threatens-health-rights>
203 National HIV/AIDS Council “National HIV and AIDS Strategic Framework: 2011-2015”, 2011, *available at*
204 <https://www.k4health.org/sites/default/files/Zambia%20NASF%202011%20-2015.pdf>
205 United States Department of State, Bureau of Democracy, Human Rights and Labor, “Zambia 2014 Human Rights Report” Country
206 Reports on Human Rights Practices for 2014, *available at* <http://www.state.gov/documents/organization/236632.pdf>
207 *See* National HIV/AIDS Council, *available at*
208 http://www.safaid.net/files/Zambia%20National%20Strategic%20Framework_2006-2010.pdf
Global Rights, “Violations of the Rights of LGBT Persons in Zambia” July 2007.
209 *See, e.g.*, David Smith “Zambian gay rights activist arrested” The Guardian, April 9, 2013, *available at*
210 <http://www.theguardian.com/world/2013/apr/09/zambian-gay-rights-activist-arrested> ; Colin Stewart,
“Zambia Court: Is it a Crime to Speak against Anti-Gay Law,” June 5, 2013, *available at*
211 <http://76crimes.com/2013/06/05/zambia-court-is-it-a-crime-to-speak-against-anti-gay-law/> Paul
Kasonkomona ; “Zambia Gay Rights Activist Paul Kasonkomona acquitted”, BBC News Africa, February 25, 2014, *available at*
212 <http://www.bbc.com/news/world-africa-26342543>
213 United States Department of State, Bureau of Democracy, Human Rights and Labor, “Zambia 2014 Human Rights Report” Country
214 Reports on Human Rights Practices for 2014 at 18, *available at*
215 <http://www.state.gov/documents/organization/236632.pdf>
216 United States Department of State, Bureau of Democracy, Human Rights and Labor, “Zambia 2014 Human Rights Report” Country
217 Reports on Human Rights Practices for 2012, *available at*
218 <http://www.state.gov/documents/organization/204393.pdf>

Immigration

No literature was specifically found on whether LGBT individuals or same-sex couples are overtly discriminated against in the context of immigration. However, given the general historical record in Zambia of discrimination and violence towards persons based on their real or perceived sexual orientation or gender identity, it is likely that Zambia's current immigration policy favors the exclusion of individuals and couples thought to be LGBT. Furthermore, the language of the Zambian Immigration and Deportation Act suggests the potential for discrimination, given that it contains prohibitions against immigration by certain broad categories of individuals, which categories could be open to abuse if read broadly in order to discriminate against LGBT individuals.²⁰⁹ Accordingly, explicit, permissive legislation would likely be needed in order to ensure the rights of LGBT individuals and same-sex couples to immigrate to Zambia and to apply for permanent residence.

Military Service

Similar to immigration, no literature was specifically found on whether LGBT individuals are permitted to openly serve in the Zambian military, and the Zambian Defense Act does not contain any express or direct discriminatory provisions against LGBT individuals. However, the current criminalization and religious and political condemnation of LGBT individuals within Zambia makes it unlikely that LGBT individuals are permitted to openly serve in the military, and the Zambian Defense Act does contain certain statutory sections with nebulous definitions within which exists the potential for abuse of LGBT individuals in the military.²¹⁰ Similar to the immigration area, it is likely that explicit policies are required to ensure that LGBT individuals that openly express their sexual orientation or gender identity do not suffer discrimination or repercussions as a result of their service in the military.

E. Zimbabwe

1. Background

Homosexuality and transgenderism are highly sensitive issues in Zimbabwe where homosexuality is politicized and publicly criticized by both religious leaders and government authorities and homosexual acts between men, including hand holding, hugging and kissing, are criminal offenses.²¹¹ As a result of the harsh laws and public denunciation, particularly by President Robert Mugabe, members of the LGBT community are routinely stigmatized, discriminated against, denied access to services and benefits and subjected to assault and harassment. President Mugabe has even gone so far as to threaten to behead gay citizens, denouncing tolerance for homosexuality as “unnatural” and criticizing LGBT individuals as “worse than pigs, goats and birds.”²¹²

2. Constitutional Anti-Discrimination

After nearly four years of drafting, Zimbabwe's new Constitution became fully operational following the swearing-in ceremony of President Mugabe on August 22, 2013.²¹³

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- ²⁰⁹ Immigration and Deportation Act, 2010, Section 35(1), *available at* <http://www.refworld.org/docid/3ae6b4d64.html> (“Any person who belongs to a class set out in the Second Schedule shall be a prohibited immigrant in relation to Zambia”). The cross-referenced Second Schedule makes no explicit reference to LGBT individuals, but has a broad range of categories of individuals, and the potential exists for a broad interpretation of any of the less clearly defined categories to include LGBT individuals. *See id.* at Second Schedule.
- ²¹⁰ *See, e.g.*, Defence Act, Cap. 106, Section 69, *available at* <http://www.parliament.gov.zm/sites/default/files/documents/acts/Defence%20Act.pdf> (imposing criminal liability by court-martial and imprisonment of up to two years for “disgraceful conduct of a cruel, indecent or unnatural kind”). Without express definition of such “disgraceful conduct”, it is possible for a military court to make any interpretation as to what behavior falls under this category.
- ²¹¹ LGBTQNation, “Mugabe says China aid doesn’t require Zimbabwe to embrace ‘homosexuality.’” September 3, 2014. *Available at* <http://www.lgbtqnation.com/2014/09/mugabe-says-china-aid-doesnt-require-zimbabwe-to-embrace-homosexuality/>. *See also* the Criminal Law (Codification and Reform) Act [Chapter 9:23] Section 73, which prohibits “anal sexual intercourse” and “physical contact” between men. Although the law does not explicitly extend to homosexual women, in practice lesbians are subjected to the same victimization, censure and police harassment as gay men.
- ²¹² Breanna Goodman, “Condemn Zimbabwean President’s Threat to Behead Gay Citizens.” *Available at* <http://forcechange.com/70676/condemn-zimbabwean-presidents-threat-to-behead-gay-citizens/>
- ²¹³ “New Constitution Fully Operation After Swearing-in of Mugabe.” August 24, 2013. *Available at* http://www.zimbabwesituation.com/news/jb_new-constitution-fully-operational-after-swearing-in-of-mugabe/

The new Constitution, which replaced the Lancaster House Constitution crafted in 1979, contains a general equality and non-discrimination clause, which provides that “[e]very person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race, colour, tribe, place of birth, ethnic or social origin, language, class, religious belief, political affiliation, opinion, custom, culture, sex, gender, marital status, age, pregnancy, disability or economic or social status, or whether they were born in or out of wedlock.”²¹⁴ Sexual orientation and gender identity, however, were intentionally omitted from the final draft of the anti-discrimination provision.²¹⁵ According to Dr. Alex Magaisa, an expert adviser to the Parliamentary Select Committee that was responsible for drafting the Constitution, similar phrases such as “natural difference, “circumstance of birth” and “any other status” were likewise removed at the insistence of the anti-gay rights lobby, which felt that any such phrases were “back-door” attempts to bring “gay rights” into the new Constitution.²¹⁶ As such, the new Constitution does not affirmatively protect the right to non-discrimination based on real or perceived sexual orientation or gender identity in Zimbabwe. Furthermore, the Constitution expressly states that “Persons of the same sex are prohibited from marrying each other.”²¹⁷

3. Legislation

Privacy

Although the Zimbabwe Constitution provides for a right to privacy,²¹⁸ which has been interpreted in the United States and elsewhere to protect sexual acts between consenting adults of the same sex from interference by the state, Section 73 of the Criminal Law Act specifically prohibits any male person from knowingly performing anal sexual intercourse with another male person, “or any other act involving physical contact other than anal sexual intercourse that would be regarded by a reasonable person to be an indecent act.”²¹⁹ Prior to the codification of the Criminal Law in 2006, common law and customary laws similarly prevented gay men, and to some extent lesbians, from expressing their sexual orientation and engaging in consensual same-sex conduct.²²⁰

The Criminal Procedure and Evidence Act, which was enacted in order to consolidate and amend the law relating to procedure and evidence in criminal cases, similarly contains a provision that expands upon the charges for which a person charged with sodomy or assault with intent to commit sodomy may be found guilty, including indecent assault, assault, committing an unnatural offence, or contravening sections 3, 4, 8 or 15 of the Sexual Offences Act.²²¹ Likewise, the Magistrates Court Act was amended in 2001 in order to include “sodomy” in the definition of a “sexual offence.” Under this Act, a magistrate is empowered to enact a punishment for a sexual offence of imprisonment for a period not to exceed twenty years or a significant fine.²²²

Same-Sex Marriage

²¹⁴ Zimbabwe Constitution. Section 56: Equality and non-discrimination, *available at* https://www.constituteproject.org/constitution/Zimbabwe_2013.pdf

²¹⁵ “All you need to know about final draft constitution.” Zimbabwe Daily. July 23, 2012. *Available at* <http://www.thezimbabwedaily.com/opinion/12659-all-you-need-to-know-about-final-draft-constitution.html>

²¹⁶ *Id.*

²¹⁷ Zimbabwe Constitution. Section 4.78.

²¹⁸ Zimbabwe Constitution. Section 57. Right to privacy.

²¹⁹ Criminal Law Act, Section 73. Sodomy. Available at

https://www.unodc.org/res/cld/document/zwe/2006/criminal_law_codification_and_reform_act_html/criminal_law_codification_and_reform_act.pdf

²²⁰ Zimbabwe 2012 Human Rights Report. Available at <https://www.hrw.org/world-report/2012/country-chapters/zimbabwe>

²²¹ Criminal Procedure and Evidence Act. Section 211 Charge of Rape and Other Sexual Offences and Assaults, available at

<http://www.wipo.int/edocs/lexdocs/laws/en/zw/zw039en.pdf> See also Sexual Offences Act, available at

http://www.parlzim.gov.zw/attachments/article/95/SEXUAL_OFFENCES_ACT_9_21.pdf

²²² Magistrates Court Act. Part III, Section 51 Special jurisdiction as to punishment.

Available at <http://archive.kubatana.net/docs/legisl/sexoff010817.pdf>

Following President Mugabe's public declarations against homosexuality, a constitutional ban on same-sex marriage was officially implemented in Zimbabwe in 2013 with the inclusion of Section 4.78 of the constitution, which reads: "[P]ersons of the same sex are prohibited from marrying each other."²²³ Zimbabwe's Marriage Act likewise does not provide for the recognition of same-sex marriages in other countries.²²⁴

Adoption

Prospective adoptive parents who are citizens or legal residents of Zimbabwe must be married and over the age of 25 in order to adopt in Zimbabwe. Single woman over 25 may also adopt if approved by the Minister of Labor and Social Welfare. Single men may only adopt family members and must also be approved by the Minister.²²⁵ Although not explicitly stated, the strict eligibility requirements for adoptive parents indicate that same-sex couples and LGBT individuals would not be permitted to adopt children in Zimbabwe. Furthermore, the United States Bureau of Consular Affairs Intercountry Adoption Agency has confirmed that the Zimbabwe government will not permit the adoption of Zimbabwean children by American gay, lesbian, or same-sex couples.²²⁶

Access to Employment, Healthcare and Housing

The new Constitution provides that: "[t]he State and all institutions and agencies of government at every level must endeavor to secure (a) full employment [and] (b) the removal of restrictions that unnecessarily inhibit or prevent people from working and otherwise engaging in gainful economic activities."²²⁷ However, similar to the general anti-discrimination clause of the new Constitution, national labor and employment legislation fails to specifically prohibit discrimination in the workplace on the basis of sexual orientation or gender identity. Section 5 of the Labour Act reads: "[n]o employer shall discriminate against any employee or prospective employee on grounds of race, tribe, place of origin, political opinion, colour, creed, gender, pregnancy, HIV/AIDS status or, subject to the Disabled Persons Act, any disability referred to in the definition of 'disabled person.'"²²⁸ Sexual orientation and gender identity are, however, noticeably absent from this list. Further, the stigma surrounding homosexuality and transgenderism has created de facto barriers to employment for members of the LGBT community.²²⁹

Similarly, Section 29(2) of the new Constitution provides that: "[t]he State must take appropriate, fair and reasonable measures to ensure that no person is refused emergency medical treatment at any health institution."²³⁰ However, in practice, state services are often not made available to members of the LGBT community.²³¹ Furthermore, consistent with the general public's perception of homosexuality and transgenderism, many healthcare providers in Zimbabwe are homophobic or transphobic and fail to understand sexual orientation and the needs and concerns of LGBT individuals.²³² As a result, even if they are not explicitly denied access to medical services, persons who identify as LGBT often fail to seek medical care for sexually transmitted diseases or other health issues out of fear of being shunned and persecuted.²³³

²²³ Zimbabwe Constitution. Section 4.78. See also "Zimbabwe's new constitution makes gay marriage a 'crime'." Gay Star News,

January 31, 2013. Available at <http://www.gaystarnews.com/article/zimbabwe%E2%80%99s-new-constitution-makes-gay-marriage-crime310113>

²²⁴ Zimbabwe Marriage Act. Available at <http://cyber.law.harvard.edu/population/zimbabwe/marriage.htm>

²²⁵ Intercountry Adoption: Zimbabwe. Available at

http://www.passportsusa.com/family/adoption/country/country_351.html

²²⁶ "Intercountry Adoption: Zimbabwe." Bureau of Consular Affairs, U.S. Department of State. Available at

<https://travel.state.gov/content/adoptionsabroad/en/country-information/learn-about-a-country/zimbabwe.html>

²²⁷ Zimbabwe Constitution. Section 24. Work and labour relations.

²²⁸ Labour Act. Part II, Section 5. Protection of employees against discrimination, available at

<http://www.refworld.org/docid/4c47019f2.html>

²²⁹ "Report on Discrimination against Women in Zimbabwe based on Sexual Orientation and Gender Identity." UN Convention on the Elimination of All Forms of Discrimination against Women, available at <http://www.iglhrc.org/sites/default/files/559-1.pdf>

²³⁰ Zimbabwe Constitution. Section 29. Health services.

²³¹ Vincent Mabvurira, Petronila Dadirai Motsi, Tawanda Masuka and Etiya Edith Chigondo, "The 'politics' of sexual identities in Zimbabwe: A Social Work perspective?" INTERNATIONAL JOURNAL OF HUMANITIES AND SOCIAL SCIENCE, Vol. 2, No. 13. July

2012. Available at <http://digilib.buse.ac.zw/xmlui/handle/11196/265>

²³² Human Rights Watch Country Summary: Zimbabwe. January 2013.

²³³ *Id.*

With respect to housing, while there is no explicit legislation that directly promotes, or alternatively infringes upon, the rights of LGBT individuals when it comes to access to housing, it is likely that LGBT individuals open about their sexual orientation or gender identity would be at risk of being discriminated against due to the prevailing prejudices within Zimbabwean society.

HIV/AIDS

The Zimbabwe government established a National AIDS Council in 1999 that has since issued various plans, including, most recently, the Zimbabwe National HIV and AIDS Strategic Plan, to address the precarious HIV and AIDS situation in the country, where, according to 2014 estimates, approximately 1.6 million Zimbabweans were living with HIV or AIDS, equivalent to about 16.7% of the country's adults aged 15 to 49.²³⁴ More recently, the Zimbabwean government has, in connection with the Zimbabwe HIV and AIDS Activities Union Community Trust, helped to launch an HIV community monitoring initiative, a program led by people living with HIV with the intention of monitoring access to and availability of AIDS services in the country's health care centers.²³⁵ Likewise, Dr. Owen Mugurungi, the HIV and tuberculosis director at the Zimbabwean Ministry of Health, for the first time recently stated that gay men should be included in HIV and AIDS strategies, particularly men engaging in gay sex in prisons.²³⁶

However, while the intention behind the Plan and the Community Trust is to combat discrimination and drastically reduce new infections and AIDS-related deaths, other national legislation, such as the Sexual Offences Act, directly discriminates against LGBT individuals that are living with HIV or AIDS. For example, Section 16 of the Sexual Offences Act provides that “[w]here a person is convicted of...sodomy ...and it is proved that, at the time of the offence, the convicted person was infected with HIV, whether or not he was aware of his infection, he shall be sentenced to imprisonment for a period not exceeding twenty years.”²³⁷

Expression and Assembly

The new Constitution specifically provides for freedom of expression, freedom of assembly and freedom to demonstrate and petition.²³⁸ However, government authorities continue to utilize repressive legislation to restrict these freedoms, particularly as they relate to members of the LGBT community or anyone speaking out against non-discrimination based on real or perceived sexual orientation or gender identity. Specifically, government leaders have used the Public Order and Security Act (“POSA”), the Criminal Law Act, the Private Voluntary Organization (“PVO”) Act and the Access to Information and Protection of Privacy Act to search private offices and dwellings without a warrant, ban lawful public meetings and gatherings, revoke operating licenses and deregister organizations.²³⁹ For example, it was only after a lengthy court trial that the Harare Magistrates Court in February 2015 found Martha Tholanah, chairperson of the Gays and Lesbians of Zimbabwe (“GALZ”), a non-governmental organization, not guilty of the charge of running an “unregistered” organization in contravention of Article 6 of the PVO Act, which requires that all private voluntary organizations register with the PVO board.²⁴⁰ Similarly, in March 2015, police arrested two GALZ officials on charges of organizing a media training workshop without police clearance, in violation of POSA.²⁴¹

²³⁴ UNAIDS: Zimbabwe. Available at <http://www.unaids.org/en/regionscountries/countries/zimbabwe>

²³⁵ “Zimbabwe: Patients to Monitor Aids Services At Hospital”, available at

<http://allafrica.com/stories/201503010273.html>

²³⁶ “Zimbabwe: Health minister calls for better healthcare for men having sex in prison” available at

<http://www.pinknews.co.uk/2015/01/09/zimbabwe-health-minister-calls-for-better-healthcare-for-men-having-sex-in-prison/>

²³⁷ Sexual Offences Act. Part V, Section 16. Sentence for certain offences where offender is infected with HIV.

²³⁸ See Zimbabwe Constitution. Section 58. Freedom of assembly and association, Section 59. Freedom to demonstrate and petition and Section 61. Freedom of expression and freedom of media.

²³⁹ “The Access to Information and Protection of Privacy Act: Two Years On.” Media Institute of Southern Africa, available at <http://www.article19.org/data/files/pdfs/publications/zimbabwe-aippa-report.pdf>

²⁴⁰ Human Rights Watch World Report 2015: Zimbabwe. Available at <https://www.hrw.org/world-report/2015/country-chapters/zimbabwe>

²⁴¹ *Id.*

Similarly, Chapter 10:04 of the Censorship and Entertainments Control Act prohibits the importation, keeping and distribution of publications that are undesirable (defined as “indecent or obscene or is offensive or harmful to public morals”). By extension, possession of most homosexual activity-related material would likely fall into this category.²⁴²

Immigration

Enacted for the purpose of regulating the entry and departure of persons into and out of the country, the Citizenship of Zimbabwe Act specifically discriminates against and provides for the prohibition and removal of individuals who are, or are perceived to be, lesbian or gay from the country. Section 14 of the Act states that, among others, the following persons are “prohibited persons” for purposes of the Act: “(a) any person or class of persons deemed by the Minister, on economic grounds or on account of standards or habits of life, to be undesirable inhabitants or to be unsuited to the requirements of Zimbabwe” and “(f) any person who (i) is a prostitute or homosexual; or (ii) lives or has lived on, or knowingly receives or has received any part of the earnings of prostitution or homosexuality; or (iii) has procured persons for immoral purposes.”²⁴³

Military Service

No literature was specifically found on whether LGBT people are permitted to openly serve in the Zimbabwe military, and the Zimbabwe Defence Act does not include any explicit prohibitions against LGBT individuals serving in the military.²⁴⁴ However, LGBT individuals who choose to be open about their sexual orientation or gender identity while serving in the military would likely be subject to discrimination and prejudice given the prevailing societal attitude, and such persons could leave themselves open to criminal charges. Moreover, the public criticism of homosexuality (and to a lesser extent transgenderism) by government leaders such as President Mugabe further compounds the problem and creates a more hostile environment for LGBT individuals who may choose to serve in the military.

III. LEGAL CHALLENGE: INTERNATIONAL AND REGIONAL TREATY ANALYSIS

²⁴² Censorship and Entertainments Control Act [Chapter 10:04], available at <http://www.refworld.org/pdfid/4c46e6ec2.pdf>

²⁴³ Citizenship of Zimbabwe Act. Part III, Section 14. Prohibited persons, available at <http://cyber.law.harvard.edu/population/zimbabwe/citizenship.htm>

²⁴⁴ See Defence Act. Available at http://www.zimlil.org/zw/legislation/consolidated-act/11%3A02/DEFENCE_ACT_11_02.pdf

The continued criminalization of consensual same-sex conduct and discrimination against LGBT individuals in the above mentioned African countries (with the exception of South Africa) violates a wide range of international and regional human rights norms and treaties to which many of these countries are a party. International treaties enumerating such fundamental rights as the right to non-discrimination and equality before the law, the right to life and the right to privacy include the Universal Declaration of Human Rights (the “Universal Declaration”), the International Covenant on Civil and Political Rights (the “ICCPR”), the International Covenant on Economic, Social and Cultural Rights (the “ICESCR”), the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Discrimination (Employment and Occupation) Convention, the Convention Concerning Termination of Employment and the Convention on the Rights of Persons with Disabilities. Various regional treaties further expand upon these rights, including the African Charter on Human and Peoples’ Rights (the “Charter”), the Protocol on the Rights of Women and the Southern African Development Community Treaty and related Protocols. The following discussion highlights some of the rights encompassed in the above mentioned treaties and protocols of which members of the LGBT community are most often deprived in southern Africa.

A. International Treaties and Declarations

1. Universal Declaration of Human Rights

Article 3 of the Universal Declaration provides that everyone has the right to life, liberty and security of person. In addition, Article 5 (and Article 7 of the ICCPR discussed below) provides that no one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.²⁴⁵ Article 12 (and Article 17 of the ICCPR discussed below) prohibits arbitrary interference with privacy, family, home or correspondence and Articles 9 of both the Universal Declaration and the ICCPR protect individuals from arbitrary arrest and detention.²⁴⁶ The general right to be free from discrimination is ingrained in Article 2 of each of the Universal Declaration, the ICCPR and the ICESCR.²⁴⁷ In addition, Articles 19 and 20 of the Universal Declaration (and Articles 19, 21 and 22 of the ICCPR) protect freedom of expression, association and peaceful assembly.²⁴⁸

2. International Covenant on Civil and Political Rights

²⁴⁵ Universal Declaration of Human Rights, available at <http://www.un.org/en/documents/udhr/>. See also International Covenant on Civil and Political Rights, available at <http://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf>.

²⁴⁶ *Id.*

²⁴⁷ *Id.* See also International Covenant on Economic, Social and Cultural Rights, available at <http://www.un-documents.net/icescr.htm>

²⁴⁸ Universal Declaration of Human Rights, available at <http://www.un.org/en/documents/udhr/> See also International Covenant on Civil and Political Rights, available at <http://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf>

In addition to the rights discussed above, Article 17 of the ICCPR ensures the right to privacy and the enjoyment of that right free from arbitrary interference.²⁴⁹ Although the ICCPR does not specifically refer to sexual orientation or gender identity, the UNHRC has previously found that “reference to ‘sex’ in Articles 2(1) and 26 [of the ICCPR] is to be taken as including sexual orientation.”²⁵⁰ In Toonen v. Australia, the UNHRC considered the interpretation of Article 17 of the ICCPR in the case of a Tasmanian law prohibiting all private male same-sex activity and found the law to violate the right to the privacy provision encapsulated in the ICCPR, holding that adult consensual sexual activity in private is covered by the concept of privacy and that Mr. Toonen was therefore negatively affected by the continued existence of the provisions of a criminal code that prohibits such activity.²⁵¹ Since Toonen, the UNHRC has held that laws used to criminalize private, adult, consensual same-sex sexual relations violate rights to privacy and non-discrimination.²⁵² The UNHRC has further rejected the argument that criminalization may be justified as “reasonable” on grounds of protection of public health or morals, noting that the use of criminal law in such circumstances is neither necessary nor proportionate. Finally, the UNHRC held that distinctions made between same sex couples and opposite sex couples in relation to veterans entitlements were discriminatory in violation of Article 26 of the ICCPR.²⁵³

As noted by the Law Council of Australia, gender identity is likely protected by the ICCPR under its “other status” distinction.²⁵⁴ For example, the UNHRC has emphasized the need to protect transgender communities from violence and harassment and to recognize the right of transgender people to change their gender through the issuance of a new birth certificate.²⁵⁵

Each of South Africa, Malawi, Namibia, Zambia and Zimbabwe is party to the ICCPR.²⁵⁶

3. International Covenant on Economic, Social and Cultural Rights

Article 2 of the ICESCR guarantees protection against discrimination on any grounds.²⁵⁷ In 2009, the Committee on Economic, Social and Cultural Rights (the “CESCR”) confirmed that the non-discrimination guarantee of the ICESCR includes sexual orientation, noting that states should ensure that a person’s sexual orientation is not a barrier to realizing ICESCR rights.²⁵⁸ In addition, the CESCR affirmed the principle of non-discrimination in the context of sexual orientation in its “general comments on the rights to work, water, social security and the highest attainable standard of health.”²⁵⁹ The CESCR also interpreted that both sexual orientation and gender identity should be included as prohibited grounds for discrimination under the ICESCR.²⁶⁰ Further, in 2011, the UN Office of High Commissioner for Human Rights (the “OHCHR”) explained that while the non-discrimination guarantee contained in the ICESCR does not explicitly include sexual orientation, it does include the words “other status.”²⁶¹ As such, the OHCHR concluded that the inclusion of the words “other status” affirms that the list of grounds for discrimination was intentionally left open to include future grounds, such as sexual orientation and gender identity, which were not considered when the documents were written.²⁶² Each of South Africa, Malawi, Namibia, Zambia and Zimbabwe is party to the ICESCR.²⁶³

4. Convention on the Elimination of All Forms of Discrimination Against Women

²⁴⁹ International Covenant on Civil and Political Rights, *available at*

250 <http://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf>
Human Rights Violations of Lesbian, Gay, Bisexual & Transgender People in Chile, presented to the 18th Sess. Of the Int'l Covenant
on Civ. and P. Rts., UN Hum. Rts. Comm. (Jul. 2013), *available at*
[https://www.outrightinternational.org/content/human-rights-violations-lesbian-gay-bisexual-and-](https://www.outrightinternational.org/content/human-rights-violations-lesbian-gay-bisexual-and-transgender-lgbt-people-chile)
251 [transgender-lgbt-people-chile](https://www.outrightinternational.org/content/human-rights-violations-lesbian-gay-bisexual-and-transgender-lgbt-people-chile)
Toonen v. Australia, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994), *available at*
<http://iilj.org/courses/documents/Toonenv.Australia.pdf>
252 Selected Decisions of the Human Rights Committee under the Optional Protocol, Office of the United Nations High Commissioner
for Human Rights, *available at* <http://www.ohchr.org/Documents/Publications/SDecisionsVol5en.pdf>
253 *Young v. Australia*, Communication No. 941/2000, UN Doc CCPR/C/78/D/941/2000 (2003). Manfred Nowak, *UN Covenant on Civil*
and Political Rights: CCPR Commentary (2005), p 623.
254 Law Council of Australia, Comment 132. See also Michael O'Flaherty and John Fisher, 'Sexual Orientation, Gender Identity and
International Human Rights Law: Contextualizing the Yogyakarta Principles' (2008) 8(2) *Human Rights Law Review* 207.
255 *See, e.g.*, Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant:*
Concluding Observations of the Human Rights Committee, Russian Federation, 24 November 2009, UN Doc CCPR/C/RUS/CO/6;
Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding*
Observations of the Human Rights Committee, Colombia, 4 August 2010, UN Doc CCPR/C/CO/6 and *Consideration of Reports*
Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee, Ireland, 30
July 2008, UN Doc CCPR/C/IRL/CO/3.
256 *See* United Nations website, Treaty Collection, International Covenant on Civil and Political Rights, Ratifications, Accessions and
Successions, *available at* [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&lang=en)
4&chapter=4&lang=en (indicating that each of the countries has ratified the ICCPR).
257 International Covenant on Economic, Social and Cultural Rights, *available at* <http://www.un-documents.net/icescr.htm>
258 *See* "Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity,"
Report of the United Nations High Commissioner for Human Rights, November 17, 2011, *available at*
http://www2.ohchr.org/english/bodies/hrcouncil/docs/19session/A.HRC.19.41_English.pdf. *See also* "High
Commissioner's statement on Malawi", May 21, 2010, *available at* [http://arc-international.net/global-](http://arc-international.net/global-advocacy/ohchr/hc-statement-malawi)
advocacy/ohchr/hc-statement-malawi; General Comment No. 14, 15 and 20 of the Committee on Economic, Social and
Cultural Rights.
259 United Nations Gen. Assem., Hum. Rts. Council Nineteenth Sess., *Discriminatory Laws and Practices and Acts of Violence against*
Individuals Based on their Sexual Orientation and Gender Identity at 7, (Nov. 17, 2011), *available at*
http://www.ohchr.org/Documents/Issues/Discrimination/A.HRC.19.41_English.pdf (citing general comments
No. 18 (E/C.12/GC/18) (right to work, para. 12 (b)(i); No. 15 (E/C.12/2002/11) (right to water), para. 13; No. 19 (E/C.12/GC/19)
(right to social security), para.29; and No. 14 (E/C.12/2000/4) (right to the highest attainable standard of health, para. 18).
260 *See id.*
261 *See* United Nations Gen. Assem., Hum. Rts. Council Nineteenth Sess., *Discriminatory Laws and Practices and Acts of Violence*
against Individuals Based on their Sexual Orientation and Gender Identity at 4, (Nov. 17, 2011), *available at*
http://www.ohchr.org/Documents/Issues/Discrimination/A.HRC.19.41_English.pdf
262 *See id.*
263 *See* United Nations website, Treaty Collection, International Covenant on Economic, Social and Cultural Rights, Ratifications,
Accessions, and Successions, *available at* [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&lang=en)
4&chapter=4&lang=en (indicating that South Africa is a signatory and each of the other four countries has ratified the ICCPR).

CEDAW is limited to specific grounds of discrimination against women and does not explicitly address discrimination based on real or perceived sexual orientation or gender identity.²⁶⁴ However, discrimination on the grounds of sexual orientation and gender identity is governed by CEDAW if such discrimination arises together with sex discrimination. Each of South Africa, Malawi, Namibia, Zambia and Zimbabwe is party to CEDAW.²⁶⁵

5. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

According to the Committee Against Torture, states are obligated to protect all persons from torture and ill-treatment, regardless of sexual orientation or gender identity.²⁶⁶ LGBT individuals are frequently subjected to torture and other cruel, inhuman or degrading treatment or punishment by justice officials and other state agents. Examples include when anal exams are performed on men accused of homosexuality in an attempt to obtain proof of same-sex conduct, or when lesbian women are subjected to “corrective rape” and forced marriages to encourage heterosexual conduct.²⁶⁷ South Africa, Malawi, Namibia and Zambia are each party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.²⁶⁸ Although Zimbabwe is not currently a party to the Convention, there have been indications that members of the government support formal ratification in the near future.²⁶⁹

6. Additional International Treaties

There are additional international treaties that provide for basic human rights which could potentially be used to challenge discriminatory treatment of LGBT individuals. The Discrimination (Employment and Occupation) Convention,²⁷⁰ to which each of South Africa, Malawi, Namibia, Zambia and Zimbabwe is party,²⁷¹ is a 1958 international treaty under the ambit of the International Labour Organization (the “ILO”), which seeks to prohibit discrimination and exclusion on any basis with regards to employment of individuals. The Convention Concerning Termination of Employment,²⁷² to which each of Malawi, Namibia and Zambia is party,²⁷³ went into force in 1985 and was also adopted under the umbrella of the ILO. The aim of the Convention Concerning Termination of Employment is to prevent arbitrary dismissals at the initiative of employers on the basis of, among other things, “race, colour, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.”²⁷⁴ The Convention on the Rights of Persons with Disabilities,²⁷⁵ to which each of South Africa, Malawi, Namibia, Zambia and Zimbabwe is party,²⁷⁶ aims to “promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.”²⁷⁷ While these treaties are only tangentially related to the right to non-discrimination based on real or perceived sexual orientation or gender identity, they provide additional avenues by which the international community may be able to pursue the removal of discrimination against LGBT individuals.

B. Regional Treaties and Protocols

1. African Charter on Human and Peoples’ Rights

²⁶⁴

Convention on the Elimination of All Forms of Discrimination against Women, *available at*

265 <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>
See United Nations website, Treaty Collection, Convention on the Elimination of All Forms of Discrimination against Women, Ratifications, Accessions, and Successions, *available at*
http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en (indicating that South Africa and Zambia are signatories and each of the other three countries has ratified the ICCPR).

266 *See* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *available at*
<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>

267 Zimbabwe 2014 Human Rights Report, *available at* <http://www.state.gov/documents/organization/236634.pdf>
268 United Nations website, Treaty Collection, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Ratifications, Accessions, and Successions, *available at*
https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&lang=en (listing South Africa as a signatory, and each of Malawi, Namibia and Zambia as ratifiers).

269 *See, e.g.,* Kawadza, S., *Zimbabwe: Govt Pushes to Ratify UN Convention against Torture*, THE HERALD (Feb. 20, 2012), *available at* <http://allafrica.com/stories/201202200115.html>; Gonda, V., *Zimbabwe Minister says Harare will Ratify UN Convention Against Torture*, VOICE OF AM. (Feb. 20, 2012), *available at*
<http://www.voazimbabwe.com/content/zimbabwe-moves-to-ratify--139735773/1468229.html>

270 *See* Discrimination (Employment and Occupation) Convention, *available at*
http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C111.

271 International Labour Organization website, Ratifications of C111, *available at*
http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312256
(indicating that the Convention is in force in each of the five listed countries).

272 *See* Termination of Employment Convention, *available at*
http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C158.

273 *See* International Labour Organization website, Ratifications of C158, *available at*
http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312303 (indicating that each of Malawi, Namibia and Zambia have ratified the Convention).

274 Termination of Employment Convention Art. 5(d), *available at*
http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C158.

275 *See* Convention on the Rights of Persons with Disabilities, *available at*
<http://www.un.org/disabilities/convention/conventionfull.shtml>.

276 United Nations website, Treaty Collection, Convention on the Rights of Persons with Disabilities, Ratifications, Accessions and Successions, *available at*
http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en (showing that South Africa, Malawi, Namibia and Zambia are all signatories to the Convention and that Zimbabwe newly ratified the treaty in September 2013).

277 Convention on the Rights of Persons with Disabilities Art. 1, *available at*
<http://www.un.org/disabilities/convention/conventionfull.shtml>.

Article 5 of the African Charter on Human and Peoples' Rights mandates respect for human dignity.²⁷⁸ Pursuant to Article 2, the rights provided by the Charter are guaranteed to every individual with distinction of any kind, such as race, ethnic group, color, sex, language, religion, political or any other opinion, national or social origin, fortune, birth or "other status."²⁷⁹ In addition, the Charter protects freedom of assembly and precludes discrimination and government oppression designed to circumvent "political or any other opinion."²⁸⁰ While there is limited interpretation of Article 2, in Zimbabwe Human Rights NGO Forum v. Zimbabwe, the African Commission stated that the "aim of this principal is to ensure equality of treatment for individuals irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age or sexual orientation."²⁸¹ Furthermore, in interpreting the Charter, the African Commission is required pursuant to Articles 60 and 61 of the Charter to consider other international human rights instruments, including the ICCPR and interpretations by UN committees.²⁸²

In a landmark resolution adopted during its 55th Ordinary Session held from April 28 to May 12, 2014 ("Resolution 275"), the African Commission condemned acts of violence, discrimination and other human rights violations against persons on the basis of sexual orientation and/or gender identity, confirming that such acts violate State obligations under the Charter.²⁸³ Most notably, Resolution 275 is the strongest document to date evidencing the African Commission's recognition of the human rights of LGBT individuals.²⁸⁴

Each of South Africa, Malawi, Namibia, Zambia and Zimbabwe is party to the Charter.²⁸⁵

2. Protocol on the Rights of Women

The Protocol on the Rights of Women in Africa (the "Maputo Protocol"), guarantees a wide range of rights for women, including the right to take part in the political process, the right to equality with men, the right to control reproductive health and the right to end female genital mutilation.²⁸⁶ The Maputo Protocol has been ratified by each of South Africa, Malawi, Namibia and Zimbabwe.²⁸⁷ While the Maputo Protocol does not deal directly with discrimination on the basis of sexual orientation or gender identity, it is a regional African treaty which seeks to promote amongst its signatories principles of equality, a mechanism by which legislation amongst member states may be adopted in order to reduce discrimination and infringement of human rights.

3. Southern African Development Community Treaty

The Southern African Development Community Treaty is the founding document for the establishment of the Southern African Development Community ("SADC"), an intergovernmental organization designed to further socioeconomic and political cooperation among the southern African state members. Each of South Africa, Malawi, Namibia, Zambia and Zimbabwe is party to the SADC Treaty.²⁸⁸

4. Protocol on Gender and Development

²⁷⁸ See African Charter on Human and Peoples' Rights, Art. 5, available at

279 <http://www1.umn.edu/humanrts/instree/z1afchar.htm>.
280 *Id.* at Art. 2.
281 *Id.*
282 Zimbabwe Human Rights NGO v. Zimbabwe, para.169. African Commission on Human and Peoples' Rights, *available at*
283 http://www.achpr.org/files/sessions/39th/comunications/245.02/achpr39_245_02_eng.pdf.
284 *See* African Charter on Human and Peoples' Rights, *supra* note 245, at Art. 60–61.
285 *See* ACommHPR, Res. 275: Protection Against Violence and other Human Rights Violations Against Persons
286 on the Basis of their Real or Imputed Sexual Orientation or Gender Identity, 55thSession, 28 April-12 May 2014.
287 African Men for Sexual Health and Rights, "African Civil Society Organisations Commend the African Commission's Resolution."
288 May 23, 2014.
See African Union, African Charter on Human and Peoples' Rights, List of Countries which have Signed, Ratified/Acceded, *available*
at <http://www.refworld.org/cgi-bin/tehis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=514aea652>.
See Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Arts. 5, 8, 9, 14, *available at*
http://www.achpr.org/files/instruments/women-protocol/achpr_instr_proto_women_eng.pdf (enumerating
rights that the protocol seeks to enforce for all women).
Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, *available at*
http://www.achpr.org/files/instruments/women-protocol/achpr_instr_proto_women_eng.pdf.
Southern African Development Community, *available at* <http://www.sadc.int/about-sadc/>.

The Protocol on Gender and Development seeks to provide for the empowerment of women, the elimination of discrimination and the achievement of gender equality through the implementation of gender responsive legislation and policies, and to harmonize the implementation of the various instruments to which the SADC member states have subscribed.²⁸⁹

5. Protocol on Health

The Protocol on Health advocates for the coordination of regional efforts to prevent, control and eradicate communicable and non-communicable diseases and seeks to address the health needs of women, children and other vulnerable groups.²⁹⁰

IV. CONCLUSION

In contrast to the South Africa case study, which highlights the significant strides taken by that country in recent years, through constitutional amendments and enacting and enforcing anti-discriminatory legislation, to protect the rights of LGBT individuals, the case studies of Malawi, Namibia, Zambia and Zimbabwe demonstrate the tremendous challenges that LGBT individuals continue to face throughout southern Africa with respect to discriminatory legislation and behavior, including violence, targeted towards persons based on their sexual orientation or gender identity.

The descriptions of the various international and regional treaties, declarations and protocols to which most, if not all, of the five countries that are the subject of this report are a party also highlight the tension between the international obligations and the domestic laws of these nations (other than South Africa) in that they have promised on the international stage to uphold certain fundamental rights and ideals, including with respect to LGBT persons, while, at the same time, taking steps to deny those same rights to LGBT individuals within their borders. It is hoped that the case studies described herein will prove to be valuable to the Cyrus R. Vance Center for International Justice and the OutRight Action International (formerly known as the International Gay and Lesbian Human Rights Commission) as they work to advance and promote LGBT rights in southern Africa.

²⁸⁹ See Protocol on Gender and Development (2008). Southern African Development Community, *available at* <http://www.sadc.int/documents-publications/show/803>.

²⁹⁰ Protocol on Health (1999). Southern African Development Community, *available at* http://www.sadc.int/files/7413/5292/8365/Protocol_on_Health1999.pdf.

**Constitutional Provisions, Statutes and Case Law
LGBT Rights in Southern Africa**

South Africa

Discrimination	<p>Constitution Sections 9(3) and (4): disallows discrimination by the government or private parties on the grounds of race, gender and sexual orientation, among other things. http://www.gov.za/documents/constitution-republic-south-africa-1996</p> <p>Promotion of Equality and Prevention of Unfair Discrimination Act: prohibits unfair discrimination against any person, by the state or an individual, and hate speech based on any of the constitutionally prohibited grounds, including sexual orientation. http://www.justice.gov.za/legislation/acts/2000-004.pdf</p> <p>Case law:</p> <ul style="list-style-type: none"> - The Constitutional Court stated in <i>National Coalition for Gay and Lesbian Equality v Minister of Justice</i> that Section 9(3) also prohibits discrimination against transgender people. (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998). http://www.saflii.org/za/cases/ZACC/1998/15.html
Privacy	<p>Constitution Section 14: affirms the universal right to privacy. http://www.gov.za/documents/constitution-republic-south-africa-1996</p> <p>Criminal Law (Sexual Offences and Related Matters) Amendment Act: codifies sexual offense laws in gender and sexual orientation-neutral terms and sets the age of consent at 16 for both heterosexual and homosexual conduct. https://www.issafrika.org/crimehub/uploads/sexual_offences_act32_2007_eng.pdf</p> <p>Case Law:</p> <ul style="list-style-type: none"> - The Johannesburg High Court ruled in <i>National Coalition for Gay and Lesbian Equality v. Minister of Justice</i> that the common law crimes of sodomy and “commission of an unnatural sexual act,” as well as Section 20A of the Sexual Offences Act (which criminalized sexual acts between men that occurred in the presence of a third person), were unconstitutional. CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998). http://www.saflii.org/za/cases/ZACC/1998/15.html

<p>Same-Sex Marriage</p>	<p>Civil Union Act: permits same-sex civil marriage as well as civil unions for both unmarried same-sex and opposite sex couples. Rights include the right to family responsibility leave and protections against domestic violence. http://www.justice.gov.za/legislation/acts/1998-116.pdf</p> <p>Case Law:</p> <ul style="list-style-type: none"> - Courts have also recognized the duty of support between partners, immigration benefits, employment and pension benefits, joint adoption, parental rights to children conceived through artificial insemination, intestate inheritance and claims for loss of support when a partner is negligently killed. <i>Volks NO v Robinson and Others</i> 2005 (5) BCLR 446 (CC) http://www.saflii.org/za/cases/ZACC/2005/2.html; <i>Du Toit and Another v Minister for Welfare and Population Development and Others</i> 2002 (10) BCLR 1006 (CC), http://www.saflii.org/za/cases/ZACC/2002/20.html; <i>J and Another v Director-General, Department of Home Affairs and Others</i> 2003 (5) BCLR 463 (CC), http://www.saflii.org/za/cases/ZACC/2003/3.html; and <i>Gory v Kolver NO and Others (Starke and Others intervening)</i> 2007 (3) BCLR 249 (CC), http://www.saflii.org/za/cases/ZACC/2006/20.html.
<p>Adoption</p>	<p>2005 Children’s Act: allows adoption by spouses and “partners in a permanent domestic life-partnership” regardless of sexual orientation. http://www.justice.gov.za/legislation/acts/2005-038%20childrensact.pdf</p> <p>Case Law:</p> <ul style="list-style-type: none"> - In 2002, the Constitutional Court legalized adoption by same-sex parents in <i>Du Toit v. Minister of Welfare and Population Development and Others</i>. http://www.saflii.org/za/cases/ZACC/2002/20.html - In 2003, the Constitutional Court ruled in <i>J v. Director General, Department of Home Affairs</i> that a child born by artificial insemination to a lesbian couple was to be regarded as legitimate, and the partner who was not the biological parent was to be regarded as a natural parent and recorded on the child’s birth certificate. http://www.saflii.org/za/cases/ZACC/2003/3.html

<p>Access to Employment, Healthcare and Housing</p>	<p>Constitution Section 27: provides for the universal right to healthcare. http://www.gov.za/documents/constitution-republic-south-africa-1996</p> <p>Constitution Section 26: states that “[e]veryone has the right to have access to adequate housing.” http://www.gov.za/documents/constitution-republic-south-africa-1996</p> <p>Labour Relations Act: bars unfair labor dismissals, including those based on sexual orientation. http://www.labour.gov.za/DOL/legislation/acts/labour-relations/labour-relations-act</p> <p>Employment Equity Act: contains wide-ranging protections for gays and lesbians in the workplace, prohibiting discrimination “in any employment policy or practice,” including with respect to benefits such as pensions and insurance, on the basis of sexual orientation as well as “family responsibility” and “HIV status,” among other categories. http://www.labour.gov.za/DOL/legislation/acts/employment-equity/employment-equity-act</p> <p>Medical Schemes Act: defines “dependent” to include same-sex partners as well as unmarried heterosexual partners for purposes of medical benefits. http://www.info.gov.za/view/DownloadFileAction?id=70667</p> <p>Alteration of Sex Description and Sex Status Act: allows transsexual people who have undergone medical orientation or surgical treatment to apply to change their listed sex in the population registry and to receive a passport and other identity documents reflecting their preferred sex. http://www.saflii.org/za/legis/consol_act/aosdassa2003466/</p> <p>Rental Housing Act: prohibits landlords from unfairly discriminating against tenants, prospective tenants, members of tenants’ households and tenants’ visitors on the basis of sexual orientation in the context of the landlord/tenant relationship. http://www.saflii.org/za/legis/hist_act/rha50o1999190/rha50o1999a1a2000310.pdf</p>
<p>HIV/AIDS</p>	<p>PEPUDA: lists HIV/AIDS status as a basis on which people may not be “unfairly disadvantage[d],” including being unfairly and unreasonably refused insurance services. http://www.justice.gov.za/legislation/acts/2000-004.pdf</p> <p>Employment Equity Act: prohibits discrimination in employment policies and practices on the basis of HIV status. http://www.labour.gov.za/DOL/legislation/acts/employment-equity/employment-equity-act</p>
<p>Expression and Assembly</p>	<p>Constitution Sections 16, 17 and 18: grants universal rights to freedom of expression, assembly and association. http://www.gov.za/documents/constitution/chapter-2-bill-rights</p>

Immigration	<p>Refugees Act: provides for the right of refugees and asylum seekers who enter South Africa to avoid persecution on the basis of their sexual orientation to apply for refugee status. http://www.gov.za/sites/www.gov.za/files/a130-98_0.pdf</p> <p>Case Law:</p> <ul style="list-style-type: none"> - In 2000, the Constitutional Court found a provision of the Aliens Control Act of 1991 to be unconstitutional and the non-South African partners of South African citizens are now permitted to apply for permanent residence – the Aliens Control Act granted the non-South African spouses of South African citizens the right to an immigration permit, implicitly denying this right to same-sex couples who at the time were not legally allowed to marry. <i>National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others</i> (CCT10/99) [1999] ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39 (2 December 1999). http://www.saflii.org/za/cases/ZACC/1999/17.html
Military Service	<p>Government’s 1996 White Paper on National Defence: prohibits the South African National Defence Force from discriminating against its members on the basis of sexual orientation. http://www.dod.mil.za/documents/WhitePaperonDef/whitepaper%20on%20defence1996.pdf</p>

Malawi

<p>Discrimination</p>	<p>Constitution Section 20: prohibits discrimination on grounds of race, color, sex, language, religion, political or different opinion, nationality, ethnic or social origin, disability, property, birth or other status and provides that legislation may be passed addressing inequalities in society and prohibiting discriminatory practices and the propagation of such practices and may render such practices criminally punishable by the courts.</p> <p>Constitution Section 4: provides that the Constitution shall bind all executive, legislative and judicial organs of the State at all levels of Government and all the peoples of Malawi are entitled to the equal protection of the Constitution and laws made under it.</p> <p>Constitution Section 22: provides that no person over the age of 18 shall be prevented from entering into marriage.</p> <p>http://www.wipo.int/wipolex/en/text.jsp?file_id=218796.</p> <p>Penal Code Articles 137 (A), 153, 154 and 156: criminalizes homosexuality and other consensual sexual activities among adults.</p> <p>http://www.malawilii.org/mw/legislation/consolidated-act/7-01</p> <p>Case Law:</p> <ul style="list-style-type: none"> - The Malawi Supreme Court of Appeal in <i>Malawi Telecommunications Limited v. Makande & Omar</i> (Civil Appeal No.2 of 2006 (unreported)) held that all treaties ratified before the 1994 Constitution and took effect were binding on domestic courts in Malawi even if no local legislation was enacted to translate them into municipal law. http://compendium.itcilo.org/en/compendium-decisions/malawi-supreme-court-of-appeal-blantyre-malawi-telecommunications-ltd-v.-makande-and-another-7-may-2007/at_download/attachedfile. - The Industrial Relations Court <i>Banda v Lekha</i> (IRC 277 of 2004) held that Section 20 of the Constitution prohibits unfair discrimination of persons in any form and that it is to be implied that HIV status is covered under the general statement of anti-discrimination in any form. http://www.malawilii.org/mw/judgment/industrial-relations-court/2005/44
<p>Privacy</p>	<p>Constitution Section 21: provides that every person shall have the right to personal privacy, which shall include the right not to be subject to (a) searches of his or her person, home or property, (b) the seizure of private possessions or (c) interference with private communications, including mail and all forms of telecommunications. http://www.wipo.int/wipolex/en/text.jsp?file_id=218796.</p> <p>Penal Code Articles 137 (A), 153, 154 and 156: criminalizes homosexuality and other consensual sexual activities among adults, whether in public or in the privacy of someone's home. http://www.malawilii.org/mw/legislation/consolidated-act/7-01</p> <p>Police Act Section 35: provides that the police may conduct a search without a warrant. http://hacri.org/attachments/article/43/Police_Bill_2009.pdf.</p>

<p>Same-Sex Marriage</p>	<p>The Marriage, Divorce and Family Relations Bill Section 4: describes the essential elements of marriage as being between “two persons of the opposite sex”.</p> <p>The Marriage, Divorce and Family Relations Bill Section 55: states that “a person who knowingly and wilfully celebrates or purports to celebrate a marriage when he or she is not competent under this Act to do so commits an offence and is liable on conviction to a fine of K100,000 and to imprisonment for five years”.</p> <p>The Marriage, Divorce and Family Relations Bill Section 64: states that “in deciding whether or not a marriage has irretrievably broken down, the court may accept any one or more of the following facts as evidence that the marriage has irretrievably broken down” and lists as (b) “the respondent has been convicted of the offence of rape or of an offence under section 153 of the Penal Code”.</p> <p>http://landwise.resourceequity.org/record/2702.</p> <p>Penal Code Articles 153: list “unnatural offences”, including any person who: (1) has carnal of any person against the order of nature; or (2) has carnal knowledge of an animal; or (3) permits a male person to have carnal knowledge of him or her against the order of nature.</p> <p>http://www.malawilii.org/mw/legislation/consolidated-act/7-01</p>
<p>Adoption</p>	<p>No relevant constitutional provision, statute or case law.</p>
<p>Access to Employment, Healthcare and Housing</p>	<p>No relevant constitutional provision, statute or case law.</p>
<p>HIV/AIDS</p>	<p>Case Law:</p> <ul style="list-style-type: none"> - The Industrial Relations Court in <i>Banda v Lekha</i> (IRC 277 of 2004) held that Section 20 of the Constitution prohibits unfair discrimination of persons in any form and it is to be implied that HIV status is covered under the general statement of anti-discrimination in any form. http://www.malawilii.org/mw/judgment/industrial-relations-court/2005/44

<p>Expression and Assembly</p>	<p>Constitution Section 32: provides that every person shall have the right to freedom of association, which shall include the freedom to form associations.</p> <p>Constitution Section 33: provides that every person has the right to freedom of conscience, religion, belief and thought, and to academic freedom.</p> <p>Constitution Section 34: provides that every person shall have the right to freedom of opinion, including the right to hold opinions without interference to hold, receive and impart opinions.</p> <p>Constitution Section 35: provides that every person shall have the right to freedom of expression.</p> <p>Constitution Section 38: provides that every person shall have the right to assemble and demonstrate with others peacefully and unarmed.</p> <p>Constitution Section 40: provides that, subject to the Constitution, every person shall have the right to (a) form, to join, to participate in the activities of, and to recruit members for, a political party; (b) to campaign for a political party of cause; (c) to participate in peaceful political activity intended to influence the composition and policies of the Government and (d) to freely make political choices.</p> <p>http://www.wipo.int/wipolex/en/text.jsp?file_id=218796.</p>
<p>Immigration</p>	<p>No relevant constitutional provision, statute or case law.</p>
<p>Military Service</p>	<p>No relevant constitutional provision, statute or case law.</p>
<p>Namibia</p>	
<p>Discrimination</p>	<p>Constitution Article 10: provides that “[a]ll persons shall be equal before the law” and “[n]o persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.” http://www.gov.na/documents/10181/14134/Namibia_Constitution.pdf/37b70b76-c15c-45d4-9095-b25d8b8aa0fb</p> <p>Criminal Procedure Act: under Section 299 sodomy is a statutory offense of committing a sexual act or of unlawful carnal intercourse. http://www.wipo.int/wipolex/en/text.jsp?file_id=223230</p> <p>Case law: the Supreme Court held that the Namibian Constitution “was never contemplated or intended to place a homosexual relationship on an equal basis with a heterosexual marriage.” http://www.saflii.org/na/cases/NASC/2001/1.html</p>
<p>Privacy</p>	<p>Constitution Article 13, Paragraph 1: provides that “[n]o persons shall be subject to interference with the privacy of their homes, correspondence or communications save as in accordance with law and as is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or for the protection of the rights or freedoms of others.” http://www.gov.na/documents/10181/14134/Namibia_Constitution.pdf/37b70b76-c15c-45d4-9095-b25d8b8aa0fb</p>

Same-Sex Marriage	<p>Constitution Article 14: provides that all adult men and women shall have the “right to marry and to found a marriage” and denies any limitation of this right. http://www.gov.na/documents/10180/30001/Namibia_Constitution.pdf/a6050315-315a-4f65-8a0b-a7fe10a93258</p> <p>Case law:</p> <ul style="list-style-type: none"> - The High Court has held that the same benefits must be conferred on a long-term same sex relationship as those on a “universal partnership” between a man and a woman, interpreting Article 10 of the Constitution as denying any unequal treatment of the two. http://nam-elaws.com.na/displaylrpage.php?id=4700&dsp=2 - The Supreme Court held that same-sex relationships are not recognized under Namibian law. http://www.saflii.org/na/cases/NASC/2001/1.html
Adoption	<p>Child Care and Protection Act: governs the law of adoption and indicates who can adopt a Namibian child. http://www.lac.org.na/laws/2015/5744.pdf.</p> <p>Case Law:</p> <ul style="list-style-type: none"> - The High Court ruled that a blanket rule preventing foreigners from adopting children in Namibia is unconstitutional. http://nam-elaws.com.na/displaylrpage.php?id=4018&dsp=2.
Access to Employment, Healthcare and Housing	No relevant constitutional provision, statute or case law.
HIV/AIDS	<p>Namibian National HIV/AIDS Policy: expressly refers to individuals in same-sex relations as a vulnerable group, but does not include transgender persons. http://data.unaids.org/pub/Report/2008/namibia_2008_country_progress_report_en.pdf</p>
Expression and Assembly	<p>Constitution Article 21: provides that all persons shall have the right to “freedom of speech and expression”, “freedom of thought, conscience and belief”, “assemble peaceably and without arms” and “freedom of association.”</p> <p>http://www.gov.na/documents/10181/14134/Namibia_Constitution.pdf/37b70b76-c15c-45d4-9095-b25d8b8aa0fb</p>
Immigration	<p>Immigration Control Act 7 of 1993: is silent with regard to discrimination against the rights of persons based on real or perceived sexual orientation or gender identity. http://www.refworld.org/docid/3ae6b4fb0.html</p>
Military Service	<p>Namibian Defence Act of 2002: is silent with regard to homosexuality. http://www.icrc.org/applic/ihl/ihl-nat.nsf/0/17d111aa6dc7154cc12576ce0050a33a/\$FILE/Defence_Act_2002.pdf</p>
Zambia	

Discrimination	<p>Constitution Article 266: provides that “discrimination” means “directly or indirectly treating a person differently on the basis of that person’s birth, race, sex, origin, colour, age, disability, religion, conscience, belief, culture, language, tribe, pregnancy, health, or marital, ethnic, social or economic status;” http://www.parliament.gov.zm/sites/default/files/documents/acts/Constitution%20of%20Zambia%20%20(Amendment),%202016-Act%20No.%202.pdf</p> <p>Final Draft Constitution Article 39 (Protection from Discrimination)*: “Every person has the right not to be discriminated against, directly or indirectly, on any grounds, including race, sex, pregnancy, health, marital, ethnic, tribe, social or economic status, origin, colour, age, disability, religion, conscience, belief, culture, language or birth.” https://zambia.co.zm/downloads/draft_constitution.pdf</p>
Privacy	<p>Final Draft Constitution Article 50 (Privacy)*: “All persons have the right to privacy, which includes the right not to have - (a) their person, home or their property searched; (b) their possessions seized; (c) information relating to their family or private affairs unnecessarily required or revealed; or (d) the privacy of their communications infringed.” https://zambia.co.zm/downloads/draft_constitution.pdf</p> <p>Zambian Penal Code Section 155 (Unnatural Offences): “Any person who- (a) has carnal knowledge of any person against the order of nature; or (b) has carnal knowledge of an animal; or (c) permits a male person to have carnal knowledge of him or her against the order of nature; is guilty of a felony and is liable to imprisonment for fourteen years.” http://www.parliament.gov.zm/sites/default/files/documents/acts/Penal%20Code%20Act.pdf</p> <p>Zambian Penal Code Section 158 (Indecent Practices Between Males): “Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony and is liable to imprisonment for five years.” http://www.parliament.gov.zm/sites/default/files/documents/acts/Penal%20Code%20Act.pdf</p>
Same-Sex Marriage	<p>Final Draft Constitution Article 44(3)(a) (Family)*: “Every adult – (a) has the right to freely choose a spouse of the opposite sex and enter into marriage; [...]” https://zambia.co.zm/downloads/draft_constitution.pdf</p>
Adoption	<p>No relevant constitutional provision, statute or case law.</p>
Access to Employment, Healthcare and Housing	<p>Part VI of the Final Draft Constitution*: does not contain a specific provision addressing employment issues. In fact, Article 33 only states a general duty of the State to promote rights and freedoms included in the Bill of Rights, including measures designed to benefit minorities and marginalized communities.</p>

HIV/AIDS	<p>National Aids Strategic Framework 2011-2015: does not include LGBT individuals.</p> <p>https://www.k4health.org/sites/default/files/Zambia%20NASF%202011%20-2015.pdf</p>
Expression and Assembly	<p>Final Draft Constitution Article 52 (Freedom of Expression)*: “(1) Every person has the right to freedom of expression, which includes - (a) freedom of the press and other media; (b) freedom to receive or impart information or ideas; (c) freedom of artistic creativity; and (d) academic freedom and freedom of scientific research. (2) The right referred to in clause (1), does not extend to - (a) propaganda for war; (b) incitement to violence; or (c) advocacy of hatred that - (i) constitutes vilification of and disparaging others or incitement to cause harm; or (ii) is based on any prohibited ground of discrimination provided for under Article 39.”</p> <p>https://zambia.co.zm/downloads/draft_constitution.pdf</p> <p>Final Draft Constitution Article 56 (Freedom of Association)*: “(1) Every person has the right to freedom of association. (2) Freedom of association applies to the formation, operation and continued existence of organizations. (3) A person shall not be compelled to join an association of any kind.” https://zambia.co.zm/downloads/draft_constitution.pdf</p> <p>Final Draft Constitution Article 56 (Assembly, demonstration, picketing and petition)*: Every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities.”</p> <p>https://zambia.co.zm/downloads/draft_constitution.pdf</p> <p>Zambian Penal Code Section 178(g) (Idle and Disorderly Persons): “[...](g) every person who in any public place solicits for immoral purposes; are deemed idle and disorderly persons, and are liable to imprisonment for one month or to a fine not exceeding sixty penalty units or to both.” http://www.parliament.gov.zm/sites/default/files/documents/acts/Penal%20Code%20Act.pdf</p>
Immigration	No relevant constitutional provision, statute or case law.
Military Service	No relevant constitutional provision, statute or case law.
*	*Please note that Part VI of the Final Draft Constitution - i.e. the Bill of Rights - has not yet been incorporated in Part III of the new Constitution of Zambia as it will be the subject of a referendum to be held, most likely, simultaneously with the general elections in August 2016. Therefore, please bear in mind that the provisions marked with an asterisk might not be fully incorporated in the final version of the Bill of Rights.
Zimbabwe	
Discrimination	<p>Constitution Section 56: provides that “[e]very person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race, colour, tribe, place of birth, ethnic or social origin, language, class, religious belief, political affiliation, opinion, custom, culture, sex, gender, marital status, age, pregnancy, disability or economic or social status, or whether they were born in or out of wedlock.</p> <p>http://www.parliament.am/library/sahmanadrutyunner/zimbabwe.pdf</p>

Privacy	<p>Constitution Section 57: provides for the universal right to privacy. http://www.parliament.am/library/sahmanadrutyunner/zimbabve.pdf</p> <p>Criminal Law Act: prohibits males from engaging in anal sex with another male. https://www.unodc.org/res/cld/document/zwe/2006/criminal_law_codification_and_reform_act_html/criminal_law_codification_and_reform_act.pdf.</p> <p>Criminal Procedure and Evidence Act: expands upon the charges for a person charged with sodomy or assault with intent to commit sodomy. http://www.wipo.int/edocs/lexdocs/laws/en/zw/zw039en.pdf</p> <p>Magistrates Court Act: includes sodomy in the definition of sexual offence. http://archive.kubatana.net/docs/legisl/sexoff010817.pdf.</p>
Same-Sex Marriage	<p>Constitution Section 4.78: persons of the same sex are prohibited from marrying each other. http://www.parliament.am/library/sahmanadrutyunner/zimbabve.pdf</p>
Adoption	<p>No relevant constitutional provision, statute or case law.</p>
Access to Employment, Healthcare and Housing	<p>Constitution Section 24: states that the State must endeavor to secure employment and remove restrictions inhibiting people from working. http://www.parliament.am/library/sahmanadrutyunner/zimbabve.pdf</p> <p>Constitution Section 29(2): states that the State must take reasonable measures to ensure no person is refused emergency medical treatment. http://www.parliament.am/library/sahmanadrutyunner/zimbabve.pdf</p> <p>Labour Act: no employer shall discriminate against any employee or prospective employee on grounds of race, tribe, place of origin, political opinion, colour, creed, gender, pregnancy, HIV/AIDS status or, subject to the Disabled Persons Act, any disability referred to in the definition of ‘disabled person’. http://www.refworld.org/docid/4c47019f2.html</p>
HIV/AIDS	<p>Sexual Offences Act: a person convicted of sodomy who has HIV shall be sentenced to imprisonment for no more than 20 years. http://archive.kubatana.net/docs/legisl/sexoff010817.pdf</p>

<p>Expression and Assembly</p>	<p>Constitution Section 59: provides for the freedom of expression, assembly and to demonstrate and petition. http://www.parliament.am/library/sahmanadrutyunner/zimbabve.pdf</p> <p>Public Order and Security Act: used to search private offices and dwellings without a warrant, ban lawful public meetings and gatherings, revoke operating licenses and deregister organizations. http://www1.umn.edu/humanrts/research/zimbabwe-POSA.pdf</p> <p>Criminal Law Act: used to search private offices and dwellings without a warrant, ban lawful public meetings and gatherings, revoke operating licenses and deregister organizations. https://www.unodc.org/res/cld/document/zwe/2006/criminal_law_codification_and_reform_act_html/criminal_law_codification_and_reform_act.pdf.</p> <p>Private Voluntary Organization Act: used to deregister organizations. http://www.iccsl.org/pubs/Zimbabwe_Private_Voluntary_Organisations_Act_2002.pdf</p> <p>Access to Information and Protection of Privacy Act: used to search private offices and dwellings without a warrant, ban lawful public meetings and gatherings, revoke operating licenses and deregister organizations. http://archive.kubatana.net/docs/legisl/aippa_amd_act_080111.pdf</p> <p>Censorship and Entertainments Control Act: prohibits keeping of undesirable publications (including, by extension, homosexual pornography). http://www.refworld.org/docid/4c46e6ec2.html</p>
<p>Immigration</p>	<p>Citizenship of Zimbabwe Act: specifically discriminates against and provides for the prohibition and removal of individuals who are, or are perceived to be, lesbian or gay from the country. http://cyber.law.harvard.edu/population/zimbabwe/citizenship.htm</p>
<p>Military Service</p>	<p>Zimbabwe Defence Act: does not explicitly exclude LGBT individuals from serving in the military. http://www.zimlil.org/zw/legislation/consolidated-act/11%3A02/DEFENCE_ACT_11_02.pdf</p>

**International Treaties
LGBT Rights in Southern Africa**

	South Africa	Malawi	Namibia	Zambia	Zimbabwe
Universal Declaration of Human Rights	X	X	X	X	X
International Covenant on Civil and Political Rights	X	X	X	X	X
International Covenant on Economic, Social and Cultural Rights	X	X	X	X	X
Convention on the Elimination of All Forms of Discrimination Against Women	X	X	X	X	X
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	X	X	X	X	
Discrimination (Employment and Occupation) Convention	X	X	X	X	X
Convention Concerning Termination of Employment		X	X	X	
Convention on the Rights of Persons with Disabilities	X	X	X	X	

**Regional Treaties
LGBT Rights in Southern Africa**

	South Africa	Malawi	Namibia	Zambia	Zimbabwe
African Charter on Human and Peoples' Rights	X	X	X	X	X
Protocol on the Rights of Women	X	X	X		X
Southern African Development Community Treaty	X	X	X	X	X
Protocol on Gender and Development	X	X	X		
Protocol on Health	X	X	X		
Code on HIV/AIDs and Employment		X	X		