MORE THAN A NAME

State-Sponsored Homophobia and Its Consequences in Southern Africa

I wanted to speak to my president face to face one day and tell him, I am here. I wanted to say to him: I am not a word, I am not those things you call me. I wanted to say to him: I am more than a name.

—Francis Yabe Chisambisha, Zambian activist, interviewed in 2001.

Human Rights Watch and
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HUMAN RIGHTS WATCH

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We investigate and expose human rights violations and hold abusers accountable.

We challenge governments and those who hold power to end abusive practices and respect international human rights law.

We enlist the public and the international community to support the cause of human rights for all.

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Human Rights Watch began in 1978 with the founding of its Europe and Central Asia division (then known as Helsinki Watch). Today, it also includes divisions covering Africa, the Americas, Asia, and the Middle East. In addition, it includes three thematic divisions on arms, children's rights, and women's rights. It maintains offices in New York, Washington, Los Angeles, London, Brussels, Moscow, Tashkent, Tblisi, and Bangkok. Human Rights Watch is an independent, nongovernmental organization, supported by contributions from private individuals and foundations worldwide. It accepts no government funds, directly or indirectly.

THE INTERNATIONAL GAY AND LESBIAN HUMAN RIGHTS COMMISSION

The mission of the International Gay and Lesbian Human Rights Commission (IGLHRC) is to secure the full enjoyment of the human rights of all people and communities subject to discrimination or abuse on the basis of sexual orientation or expression, gender identity or expression, and/or HIV status. A US-based non-profit, non-governmental organization (NGO), IGLHRC effects this mission through advocacy, documentation, coalition building, public education, and technical assistance.

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This report was written by Scott Long, consultant to Human Rights Watch and former program director of the International Gay and Lesbian Human Rights Commission. A. Widney Brown, deputy program director of Human Rights Watch, and Gail Cooper, consultant to Human Rights Watch, contributed substantial portions to the text. For Human Rights Watch, the report was edited by Ian Gorvin, program consultant; Bronwen Manby, deputy director of the Africa Division; and Dinah PoKempner, general counsel. For IGLHRC, it was reviewed by Sydney Levy, former director of communications.

The report is based on research conducted between 1998 and 2002. Scott Long carried out a mission to Botswana, Namibia, South Africa, Zambia, and Zimbabwe for five weeks in November-December, 1998 and conducted thirty-one interviews which laid the groundwork for future documentation. Scott Long and Widney Brown returned to South Africa in October-November 1999 for two weeks, for a regional workshop for LGBT activists, during which they helped formulate the conceptual outlines of this report in cooperation with activists. Scott Long returned to Zambia and Zimbabwe for five weeks in July-August 2000, and conducted nineteen interviews in Zambia and thirty-nine interviews in Zimbabwe, as well as an additional five interviews in South Africa. Scott Long returned to South Africa for two weeks in November 2001 and conducted nineteen interviews in Johannesburg and Soweto. Kagendo, Africa/Southwest Asia program officer for IGLHRC, visited Botswana, Namibia, and South Africa in November-December 2001, and in five weeks conducted eight interviews.

For Human Rights Watch, Widney Brown and Gail Cooper conducted a mission to South Africa and Namibia in July-August 2001. In South Africa, Widney Brown interviewed thirty-one people, mostly in Gauteng and Eastern Cape provinces. Gail Cooper interviewed an additional forty people in South Africa, mostly in Gauteng, KwaZulu-Natal, and Western Cape provinces. Widney Brown continued to Namibia, and conducted thirteen interviews in Windhoek and surrounding townships.

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powerful advocate on their behalf; her voice, with a calm confidence which confuted others' anger, had carried the urgency of their needs to an international audience. Carlos, who died in 2002, lived the disappointment, the hope, and the loneliness of youth with rapid intensity; his death did not extinguish his will to accomplish change, but seemed to seal and preserve it, an inheritance for others. We dedicate this report to them: and to those who will inherit.

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GLOSSARY OF KEY TERMS

Biological sex: the biological classification of bodies as male or female, based on factors including external sex organs, internal sexual and reproductive organs, hormones, and chromosomes.

Bisexual: a person who is attracted to both sexes.

Gay: a synonym for homosexual. Sometimes used to describe only males who are attracted primarily to other males.

Gender: the social and cultural codes used to distinguish between what a society considers "masculine" or "feminine" conduct.

Gender expression: the external characteristics and behaviors which societies define as "masculine" or "feminine"—including such attributes as dress, appearance, mannerisms, speech patterns, and social behavior and interactions.

Gender identity: a person's internal, deeply felt sense of being male or female, or something other than or in between male and female.

Heterosexual: a person attracted primarily to people of the opposite sex.

Homosexual: a person attracted primarily to people of the same sex.

Lesbian: a female attracted primarily to other females.

LGBT: lesbian, gay, bisexual or transgender; an inclusive term for groups and identities sometimes also associated together as "sexual minorities."

Queer: Often used as a slur in English to refer to lesbian, gay, bisexual, and transgender persons, the term "queer" has been reclaimed by many people in the US and other countries as an expression of pride in one's sexual orientation and gender identity.

Sexual orientation: the way in which a person's sexual and emotional desires are directed. The term categorizes according to the sex of the object of desire—that is, it describes whether a person is attracted primarily toward people of the same or opposite sex, or to both.

Transgender: One whose inner gender identity differs from the physical characteristics of their body at birth. Female-to-male (FTM) transgender people were born with female bodies but have a predominantly male gender identity; male-to-female (MTF) transgender people were born with male bodies but have a predominantly female gender identity.

Transsexual: One who has undergone sex reassignment surgery so that his/her physical sex corresponds to his/her internal gender identity.

I. INTRODUCTION

A. Summary

In the mid-1990s, South Africa emerged from decades of oppression, during which equality had been both a rallying cry and a remote dream, and wrestled with the question of how to turn the slogan into a reality for its peoples.

At the same time, politicians elsewhere in southern Africa—facing shrinking public support and the threat of electoral defeat—began exploring how to make inequality a powerful slogan in itself. One leader discovered a potential target and a vituperative language that struck a responsive chord among his people. Others followed suit. They have echoed and reinforced one another across borders and over time—scapegoating one group of people for their countries' difficulties, and explicitly excluding "homosexuals" from constitutional protections granted to their other citizens.

Southern Africa is burdened by poverty and political uncertainty, and devastated by higher rates of HIV/AIDS (human immunodeficieny virus/acquired immunodeficiency syndrome) infection than any other region in the world. Yet in some countries, politicians, instead of directly addressing those issues, have made calls to persecute and cast out homosexuals (or "gays and lesbians," "sodomists," or "sexual perverts") commonplace. Robert Mugabe, president of Zimbabwe, popularized those calls through widely publicized statements, reiterated regularly since 1995. "We don't believe they [gay men and lesbians] have any rights at all," he said, "It cannot be right for human rights groups to dehumanize us to the status of beasts." Mugabe justifies his intolerance with the claim that homosexuality is "un-African," describing it as a disease "coming from so-called developed nations."

Sam Nujoma, president of Namibia, took up the cry almost immediately. According to an official statement by Nujoma's party,

> Most of ardent supporters of this perverts [sic] are Europeans who imagine themselves to be the bulwark of civilization and enlightenment... we made sacrifices for the liberation of this country and we are not going to allow individuals with alien practices such as homosexuality to destroy the social fabric of our society.
>
> We are convinced that homosexuality is not a natural and objective form of moral history but a hideous deviation of decrepit and inhuman sordid behavior.... Homosexuality deserves a severe contempt and disdain from the Namibian people and should be uprooted totally as a practice.

Politicians in Zambia in 1998 outdid one another in condemning the only homosexual man in the entire country who had dared to “come out” to the press. Botswana not only clung to its colonial-era criminalization of male homosexual acts, but in 1998 broadened it to punish women having sex with women. The leaders of other countries have joined the chorus, with President Yoweri Museveni of Uganda declaring in 1999 that “I have told the CID [Criminal Investigations Department] to look for homosexuals, lock them up and charge them.”

In this report, Human Rights Watch and the International Gay and Lesbian Human Rights Commission (IGLHRC) document and analyze the impact of state-sponsored homophobia in Zimbabwe, Namibia, Zambia, and Botswana. The report shows how these attacks attempt to create an atmosphere of intolerance in which governments can erode the basic principles of human rights, and individuals can abuse others with impunity. It contrasts these to the different situation in South Africa, where the constitution has promised an end to discrimination based on sexual orientation—but where a lack of will as well as foresight has kept these promises short of fulfillment.

As this report documents, the verbal attacks by political leaders have often led to persecution and violence. In Zimbabwe and Namibia, in particular, public vilification has set off police harassment of those who break norms for sexual conduct and gender expression. Official crackdowns have frequently followed politicians’ statements. People have been detained and tortured by police, or abused by prison guards.

Throughout the region, neighbors, strangers, and families have also joined in the violence. In the communities where they live, men and women accused of homosexuality have been assaulted and often driven underground. Some have been expelled from schools or jobs, or chased from hospitals or homes. Some have been driven into exile. Some have committed suicide.

In Botswana, Namibia, Zambia, and Zimbabwe, laws criminalizing consensual homosexual conduct—so-called “sodomy laws”—enable many of these abuses. Such laws violate international protections of the right to privacy, and protections against discrimination. Yet basic freedoms of association, assembly, and expression are also under threat. In all four countries, civil-society organizations have been denied legal status or threatened with closure because they defended homosexuals. Publications have been censored; peaceful gatherings have been harassed or denied protection.

In many countries, however, civil society has remained silent about these violations—including organizations dedicated to the defense of human rights. Namibia and Botswana have revealed exceptions; there, feminist activists and human rights defenders, as well as leaders of some Christian churches, have spoken out against intolerance. In many places, however, tenuous organizations of gays and lesbians, identifying by the names that politicians use against them, have been left to defend themselves as best they can.

South Africa presents a different example. The principle of equality and non-discrimination embodied in the country's 1996 constitution sees a source of strength in the diversity of a country with eleven official languages, innumerable religious institutions, and uncounted and often contradictory cultural traditions. The constitution vows in its preamble to "heal the divisions of the past" and to "lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law." It creates institutions as well as protections toward this goal, striving to accommodate difference while defusing violence.

Profound economic inequalities transect South Africa; racial, ideological, and sexual violence persists; the few who can obtain AIDS drugs live, while millions prepare to die. While steps taken by the government to address these divisions have been important, they remain inadequate. In this report, we show the persistence of community prejudice and violence. We document how, in the absence of clear state action to implement it, the constitution's Equality Clause remains inaccessible and unfulfilled for lesbians and gay men living in townships and rural areas. We examine the foot-dragging of political leaders in changing laws, and in creating mechanisms for enforcement and remedy. Silence and inaction endanger the constitution's promise.

Yet other states still refuse even to make such a promise.

B. Contexts: HIV/AIDS, Inequality, Identity

A number of contexts need to be understood as a background to the spread of state-sponsored homophobia in the region.

The *first* is the intersection of sexuality with the massive, overwhelming, and mounting HIV/AIDS pandemic. The disease has already claimed over 21 million lives in sub-Saharan Africa, and the southern African countries in which this research was conducted are the global epicenter of the crisis. The epidemic is so widespread in the region—about one in four adults is infected in most of these countries, in Botswana more than one in three—that every sexually active person may be considered a member of a high-risk group. The proximity of death is a fact of life in every country discussed here. Many people interviewed in this report have already died of AIDS.

As the Appendix to this report shows, social prejudice and criminal penalties against certain kinds of sexual conduct long antedate the appearance of AIDS. Yet the pandemic and the attendant atmosphere of fear give states and societies additional incentives to control and punish non-conforming sexualities—while making that repression doubly destructive.

Although the predominant means of HIV transmission in southern Africa is heterosexual sexual activity, many segments of society still associate AIDS with "homosexuals." This can compound the marginalization of many people living with HIV/AIDS, who face additional stigma through the presumption that they have practiced prohibited sex. Meanwhile, those who endure discrimination for engaging in homosexual activity may find they are presumed as well to be both victims of AIDS and its "carriers." Men who have sex with men, and women who have sex with women, often fear the social and legal consequences of seeking testing or treatment.

On a larger scale, the burgeoning epidemic has arguably hardened opposition to repealing sodomy laws, though this is difficult to document when both HIV/AIDS and same-sex conduct are so shrouded in silence and stigma. The social devastation which AIDS brings—the collapse of family and community structures—is sometimes blamed on a "homosexuality" encroaching from beyond national borders. Fears enveloping HIV have certainly contributed to repressing discussion of, and education about, sexual health and sexual rights.

The history of responses to the AIDS pandemic shows that any national HIV/AIDS prevention effort hoping for success should work respectfully with communities made vulnerable by their sexual conduct or orientation, and should protect their human rights as a priority. Unless they can openly and safely seek and gain access to HIV/AIDS prevention services and information, men who have sex with men and women who have sex with women are at particular risk in the epidemic. The rhetoric of discrimination documented in this report is an acute threat to the anti-AIDS efforts these countries have mounted.

A *second* context is the uneasy course of democratization in the region.

The struggle against colonialism and white minority rule lasted longer in southern Africa than almost anywhere else in the continent. Though Zambia and Botswana achieved independence from Britain in 1964 and 1966 respectively, and Portugal relinquished Angola and Mozambique in 1975, Zimbabwe held its first all-race elections only in 1980, Namibia in 1990, and South Africa in 1994. Progress has been made toward establishing democratic processes and institutions in all these countries, but it has been uneven and uncertain. The accomplishment of South Africa—not only in holding free elections, but in undertaking a wholesale transformation of the repressive apparatus of the colonial state—remains virtually unique.

In Zimbabwe in particular, President Mugabe presides over a dissolving economy and a deep popular demand for democracy. Gays and lesbians have served him as a scapegoat for the first and a sideshow from the second. Mugabe speaks of his country's gays and lesbians as both servants and symbol of forces outside Zimbabwe, and outside Africa, threatening the cultural integrity and welfare of his country. He sees them as vanguard of, and metaphor for, a neo-colonial invasion.

Sexuality and gender are loaded questions in every country and culture, involving as they do the ways in which societies define and reproduce themselves. That cultural weight can also make them convenient issues for states to exploit, in the effort to impose some semblance of political unity on fractious populations—and for politicians to employ, in the quest to preserve power.

Zimbabwe's economic unraveling, the collapse of its public health system, and its political instability are real disasters. In translating them into the terms of a culture war, however, Mugabe's only success is in changing the subject. In a characteristic speech in 2000, he attacked the United Kingdom (U.K.), which had condemned his policy of land seizures, accusing it of opposing Zimbabwe because he personally opposed homosexuality. "We are against this homosexuality," he said, "and we as chiefs in Zimbabwe should fight against such Western practices and respect our culture." And he concluded: "These economic woes will come and go. So let us unite against the enemy."

When Mugabe's attacks on homosexuals began, the human rights community in Zimbabwe—with a few exceptions—failed to respond. Some voiced fear that defending a marginal group in a hostile environment would devastate their work; others refused to see the attacks as relevant to their work as rights activists.

Yet the techniques Mugabe explored in vilifying lesbians and gays—depicting them as a group outside the scope of rights, stoking public fear and loathing, and eroding the rule of law—have since found new victims. Mugabe has attacked peaceful political opposition both through trumped-up legal charges and extralegal violence. He has supported the extrajudicial seizure of land, and has incited and defended violence against both the white farm owners and their African employees. He has undermined the independence of the judiciary; he has conducted, and triumphed in, an election in which intimidation was rampant. Increasingly, state policy in Zimbabwe has been voiced in demagogic speeches, not in democratic law, and carried out not by delegated agents but by armed gangs.

President Nujoma of Namibia has described gays and lesbians in terms as violent as any Mugabe used. Yet, by contrast to Zimbabwe, civil society stood up to President Nujoma from the start. Human rights organizations in Namibia immediately analyzed and answered attacks on gays and lesbians as a challenge to the principles of rights. The National Society for Human Rights in Windhoek described Nujoma's rhetoric as an indication of emerging authoritarianism in Namibia. "The move appears to be a tip of an insidious, much wider and protracted strategy spearheaded by and or run from State House and such campaigns are apparently aimed at stemming the tide of a rapidly growing civil society in Namibia," the organization said.

The official vilification of groups within Namibian society has also progressed beyond homosexuals. Nujoma has attacked independent media, political opposition leaders, women's rights activists, and foreigners. The small but vigorous human rights organizations within Namibia, however, continue to condemn both Nujoma's outbursts and the social divisions they incite.

Zambia—where a coalition of trade unions, intellectuals, and activists displaced the almost three decades-old Kaunda government, only to find that its successor showed the same authoritarian tendencies—provides another illustration. The administration of Frederick Chiluba (1991-2001), implementing deeply unpopular economic policies, found the Mugabe model an attractive prescription for boosting its flagging support. Demonizing homosexuals—to which it devoted several months in 1998—provided a useful distraction, and a convenient way of gaining political credit with both Christian churches and rural traditionalists. Yet it confirmed an indifference to rights protections that steadily characterized how the government answeredother challenges to its political control.

These examples are telling. They reiterate that an assault launched against one group may signal an erosion of the rights of others. Yet they also suggest that the stigma attached to sexual nonconformity can be a test of democratic process—a measure of the latitude it offers political as well as personal dissent. The condition of the most vulnerable people and the most marginalized identities in a society should serve as a barometer of its openness and civic maturity.

For Zimbabwe's government, verbal fusillades against homosexuals proved the opening shots in a violent campaign against all independent social movements and any organized opposition. Meanwhile, for Namibia's NGOs, defending homosexuals was not a "private" issue but a crux and condition for defending civil society itself. That government and those organizations grasped the same insight. Affirming the equality of lesbian, gay, bisexual, and transgender people means negating the state's claim to ironclad control over the person, as well as over what can appear or be expressed in the public sphere. It is a step toward developing African democracy.

A *third* context for this report involves the question of identity—of where terms such as "gay" and "lesbian" come from, and what, in an African context, they may mean.

Unable to protect their populations against the public health disaster generated by HIV/AIDS, as well as political and economic crisis, southern African governments have fallen back on the language of protecting "cultural authenticity." Ironically, the quest for such "authenticity" often takes up the tools of colonial oppression. Politicians in Zimbabwe, Zambia, Botswana, and Namibia all defend archaic sodomy laws as bulwarks of integrity against Western incursions.

Yet the laws themselves are alien to any "African culture." They are colonial importations—brought in by British and Dutch settlers, modeled on European codes, but enforced with particular intensity against "native" sexual conduct which colonials, always both prurient and puritanical, saw as exotically unrestrained.

And arguably, it is the Mugabes and Nujomas of southern Africa, purveyors of the idea that homosexuality is "un-African," who have helped create the identity of the "homosexual" in the region.

Terminologies for sexual conduct and experience are multifarious. (A glossary of some key terms as we employ them can be found at the beginning of this report.) Many common terms are of surprisingly recent coinage. And clearly many such labels would neither be recognized nor accepted by all the people they are intended to describe—or by all the people who face discrimination because of the description. Many men who have sex with men, in Africa or elsewhere, might not even know the terms "homosexual" or "gay." A biological woman in Zambia who regularly wears men's clothing may consider herself a "hermaphrodite" or a man—and might reject the term "transgender" with incomprehension.

This is more than a matter of translation. The concept of "sexual orientation"—as a way for people to cement a public identity built around the sex of the person for whom they feel desire—is unfamiliar to many cultures. In some situations, including many studied in this report, women may think of themselves instead in terms of how they correspond or not to "feminine" codes of conduct or appearance. In some situations, including many studied in this report, men may similarly see their looks or dress or mannerisms as defining them more than their desires—or may see the sexual role they play (as penetrator or penetrated partner in a sex act) as more significant than the sex of their desired object.

It is clear that homosexual *conduct*—desire for, and erotic acts or emotional relationships between, people of the same sex—has always existed throughout Africa, as everywhere in the world. Yet homosexual *identity*, and the concept of "sexual orientation," have not. Those concepts (as Michel Foucault affirmed, and historians have detailed) developed in particular, Western contexts—as ways of interpreting the fact of homosexual conduct, and attaching individual as well as social meaning to it.

This does not mean that people who adopt the label "homosexual" in non-Western cultural settings are somehow "inauthentic." No one receives an identity—social or familial, as "son" or "chief," for instance—in pristine and undiluted form from society or tradition; it always takes on personal and internal meanings, as well as shadings from the social surroundings and the historical moment. Similarly, people who identify as "homosexual" or "gay" or "lesbian" in a cultural situation where the term is new do not merely adopt an unbroken set of imported associations. They creatively adapt the term and its meaning to their own conditions and their cultural inheritance.

The rhetoric of a Mugabe or a Nujoma has given many men and women experiencing same-sex desire in Zimbabwe or Namibia a name for themselves. They do not take the terms "homosexual" or "lesbian" or "gay" from a foreign cadre of cultural corrupters; they take it from the words of their political leaders. In this sense, Mugabe and Nujoma are indeed "promoters" of "homosexuality" in their societies.

Yet the people who assume this identity and name use them for purposes rooted in their own place and time. In particular, in interviews with numerous men and women throughout southern Africa, it became evident that many defined their sexual and emotional desires, and the intricacy of identity based on those desires, not as a matter of "sexual orientation," but rather as one of gender. They experienced themselves as defined not so much by whom they desired, as by how they appeared and acted.

Men attracted to men, and women attracted to women, built their identities less around that erotic need itself than around their crossing of culturally stipulated boundaries between masculinity and femininity. Their self-images derived from defying convention and asserting uniqueness by flouting, in their everyday dress and conduct, expectations of what a "man" or "woman" should be. They deployed terms such as "gay" or "lesbian" strategically, as ways of becoming recognizable and visible to one another (and, sometimes, to the international community) and creating a subculture where people could turn for safety and self-defense. Yet many believed that they faced discrimination and hatred not because people imagined, and loathed, what they did sexually—but because people looked at them and saw a man refusing to be a "man," or a woman refusing to be a "woman."

That the identity means something different does not make the discrimination less real. As IGLHRC has elsewhere written,

> Any group identity is subject to contest and continual redefinition; yet arguments, whether external or internal to the group, about the meanings of key terms in no way mitigate the reality of hatred or the ubiquity of unequal treatment. Racism is no less dangerous because the meaning of "race" has been questioned or reconfigured by scientific or political discourses. Anti-Semitism does not abate because Jews and anti-Semites alike may argue the definition of a Jew…. The fluidity of identity neither constrains prejudice, nor palliates it.

In fostering hatred toward people called "gays" and "lesbians," Mugabe and Nujoma also further a suffusive suspicion in which families, neighbors, co-workers, and police are all alert for the tell-tale signs of non-conformity that they equate with guilt. Gestures become giveaways. Girls and boys and men and women who fail to adhere to rigid norms dictating how they must walk, talk, dress, and act, find a name waiting for them, an interpretation ready for their idiosyncrasies, and an identity poised to be imposed—one they may or may not wish to claim. In effect, they are condemned as much for their self-expression as for their presumed "sexual orientation."

Where comparable violations of the freedom of expression happen in other contexts, human rights activists respond. When repressive governments discriminate against women by imposing and enforcing dress codes, we recognize that the freedom of expression is at issue, threatened by unwarranted control of personal choice in how the body is presented and seen. Yet many human rights activists find their sympathy exhausted when the acts of expression being punished fall outside a gendered norm—when females dress or act in a way which defies general definitions of "femininity," or when males flout a socially imposed codification of manhood. When employers fire them, when the police arrest them, when their communities reject them, the victims themselves are often blamed for wanting to dress and express themselves outside those rigid norms.

This silence leaves the field of public life to the voices of political leaders who incite hatred in order to institutionalize intolerance. The silence and the ensuing violence must end.

C. Brief Recommendations

The campaign of hate in southern Africa raises basic questions. Those committed to the defence of rights must decide whether the promises in treaties, and the commitments made by civil societies, are in fact universal—or whether marginalization, moral particularism, and stigma can exclude unpopular individuals and groups from their scope.

Amid armed conflict, the HIV/AIDS pandemic, the collapse of health care and educational systems, and inequalities within countries and among continents that defy every principle of social justice, the consequences of political leaders vilifying marginalized groups may seem small. They are not. These attacks serve as a political distraction from urgent social and economic needs. They divert debate away from reaching solutions, toward seeking scapegoats. They strike at communities' capacity to accommodate diversity and accept change.

Finally, left unchallenged, they subtly but inexorably reduce rights protections back to the level of a popularity contest. Preaching that dignity is denied those whom a consensus deems despised, they make freedoms depend not on the sense of a shared humanity but on opinion polls. Discrimination is by definition not directed at those whom a society wholeheartedly embraces and respects. It is aimed at those reviled and rejected, made vulnerable by stigma. And official intolerance is most dangerous when the contempt for its objects is most generally shared. State rhetoric then helps make hatred appear an ordinary, accepted, expected part of public life. Tolerating those first attacks creates a climate in which attacks on human rights escalate and spread. Politically motivated intolerance toward minorities is often just the initial salvo in an assault on the fundamental principle of equality and respect for the inherent dignity of all human beings.

Southern African leaders must reverse the trend toward division, discrimination, and abuse. Human Rights Watch and IGLHRC call on states and state officials to:

- refrain from statements promoting intolerance and from inciting discrimination and abuse;

- repeal laws, including "sodomy laws," which violate human rights, including the rights to privacy and freedom of expression;

- change or repeal other laws which discriminate on the basis of sexual orientation or gender identity, including laws on rape and domestic violence, or laws which deny access to marriage and related benefits to same-sex couples; and

- enact positive protections against discrimination, including discrimination based on sexual orientation and gender identity.

It is not enough for states to *recognize* rights. They must be *realized.* Paper protections must be made understandable and accessible even to the most disempowered populations. States, including South Africa, must turn existing constitutional promises into law, policy, and practice. State officials themselves must be trained to implement protections fully and fairly. Human Rights Watch and IGLHRC call on states to:

- publicize and promote awareness of rights protections and how to use them;

- create and allocate adequate resources to accessible forms of remedy for human rights violations, with mechanisms empowered and informed to address the specific needs of vulnerable populations;

- ensure that legal representation and legal remedy are economically and practically accessible to everyone; and

- train state officials, particularly throughout the criminal justice system, in human rights and non-discrimination, and in sensitivity to gender and to minorities and vulnerable groups.

Finally, civil society has responsibilities as well. The examples of Botswana, Namibia, and South Africa show how human rights activists willing to defend the most marginalized members of society also safeguard the basic institutions of democracy. The decay of those institutions in Zimbabwe shows the dangers of inaction when intolerance first appears. Human Rights Watch and IGLHRC call on civil society actors, and particularly human rights movements to:

- speak out whenever state officials incite or practice discrimination or abuse; and

- seek out marginalized and stigmatized groups, and work to bring their concerns into the mainstream of human rights and other social movements.

Detailed recommendations can be found at the end of this report.

II. THE SPREAD OF HOMOPHOBIC RHETORIC IN SOUTHERN AFRICA

This chapter identifies the leaders who helped, and some who hindered, the spread of homophobia in southern Africa—and records the words they used to do it. The rest of this report explores the consequences.

A. Zimbabwe: From Book Fair to Book Burning

It started with a celebration. On August 1, 1995, the Zimbabwe International Book Fair (ZIBF) opened in Harare. In the twelve years of its existence, the event had become a centerpiece of African intellectual life, an opportunity for writers, critics, and publishers across the continent to converse. The theme of the 1995 fair was "Human rights and justice."

More was inaugurated than the fair itself. A campaign of intolerance began which has continued for over seven years.

On July 24, the fair's organizers—an independent trust—had received a letter from a government official condemning the decision to allot a booth to a small human rights organization called Gays and Lesbians of Zimbabwe (GALZ). "The Government strongly objects to the presence of the GALZ stand at the Book Fair which has the effect of giving acceptance and legitimacy to GALZ," the letter read. "Whilst acknowledging the dynamic nature of culture, the fact still remains that both Zimbabwean society and government do not accept the public display of homosexual literature and material…. In the interest of continued cooperation with the Government, please, withdraw the participation of GALZ at this public event."[1]

The panicked trustees asked GALZ to remove itself voluntarily from the book fair; the organization refused. Founded in 1989, GALZ had served to network and support a small, closeted community of self-identified gays and lesbians. Initially most of its membership was white; now it was trying to reach out to a broader community. This meant raising its public profile. GALZ had hoped the fair would be a chance to do so safely, by distributing information about its own work, about homosexuality, and about human rights.

As the fair trustees later explained, they "were faced with a very difficult and painful decision … we had to face not only withdrawal of state participation and support but also the very real possibility of further state action or disruption

[1] Letter from the Ministry of Information, Posts, and Telecommunications' director of information, Bornwell Chakaodza, to Mrs. Trish Mbanga, executive director of the Zimbabwe International Book Fair, July 24, 1995.

of the fair itself. With great reluctance and acting under severe constraint, we withdraw acceptance of GALZ's participation."[2]

Zimbabwe's president, Robert Mugabe, opened the book fair on August 1. The censorship had already drawn outrage from some prominent participants. Nonetheless, Mugabe made it the major theme of his speech. He painted homosexuals as people who flaunted their sexual conduct shamelessly; he effectively identified the book fair stand as a public sexual act. "Human Rights and Justice," said Mugabe, was an issue which

> has occupied the attention of the governments and people throughout the world in increasing measure over the past decade … My government is committed to the respect of human rights, and striking a practical balance among the rights of the majority versus those of minorities and the individual….
>
> Freedom, however, is not a selfish, one way street….. The greater the freedom one enjoys, the greater the responsibility one owes the community which bestows that freedom….
>
> Let me give an obvious example of a taboo here, but one which is universally recognized. While, between a married couple, sexual relations are not only permissible but expected, such relations should, however, never be seen to occur in public, for example in streets or public parks. No married couple could be heard to argue that because they have a legal right to practice sex, they can do so anywhere. This is because we all accept that the intimate nature of such relations demands privacy.
>
> Supposing those persons who believe that the denial of their alleged rights to have sex in public is a violation of their human rights formed an association in defence and protection of it and proceeded to write booklets and other forms of literature on the subject of their rights. Is any sane government which is a protector of society's moral values expected to countenance their accessions?
>
> I find it extremely outrageous and repugnant to my human conscience that such immoral and repulsive organisations, like those of homosexuals who offend both against the law of nature and the

[2] Statement to all Zimbabwe International Book Fair participants, July 31, 1995.

> morals of religious beliefs espoused by our society, should have any advocates in our midst and even elsewhere in the world.
>
> If we accept homosexuality as a right, as is being argued by the association of sodomists and sexual perverts, what moral fibre shall our society ever have to deny organised drug addicts, or even those given to bestiality, the rights they might claim and allege they possess under the rubric of individual freedom and human rights, including the freedom of the Press to write, publish and publicise their literature on them?[3]

Official homophobia was not new in Zimbabwe. Arrests had long happened, and GALZ members' apartments had been raided in recent years. Indeed, the state-sponsored press had, throughout 1994 and 1995, carried an increasing number of sensational articles about homosexuals; in one, the minister of home affairs stated, "We are going to arrest them. It is illegal in this country."[4] Mugabe had already condemned homosexuality as "abominable and destructive" in a speech in early 1995.[5]

Mugabe, first elected in 1980 when Zimbabwe held its first all-race elections, was facing growing opposition by the late 1990s. To deflect criticism, he turned to the issue of land redistribution.[6] He also increasingly blamed the country's affluent white minority for Zimbabwe's ills. Homosexuality, which the president had discovered galvanized press and public alike, became an additional tool for discrediting Zimbabwe's whites. (GALZ at the time was still a largely white organization, itself significantly hampered by internal racism. It became almost exclusively black in the following years, partly as a result of Mugabe's vilification—as gays and lesbians from high-density areas sought out

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[3] Quoted in Chris Dunton and Mai Palmberg, "Human Rights and Homosexuality in Southern Africa," *Current African Issues* 19, Nordiska Afrikainstitutet, 1996, pp. 9-10.

[4] Minister of Home Affairs Dumiso Dabengwa to the *Daily Gazette,* quoted in Josephine Masimba, "Zimbabwe: Police vow to keep gays in the closet," Inter Press Service, February 3, 1994.

[5] Quoted in "Comment" (Editorial) in *The Chronicle,* Bulawayo, February 3, 1995. See *Human Rights Violations Against Sexual Minorities in Zimbabwe,* Submission from Gays and Lesbians of Zimbabwe (GALZ) to the World Conference Against Racism (WCAR), 2001, pp. 9-10.

[6] See "Fast Track Land Reform in Zimbabwe," Human Rights Watch Short Report (New York: Human Rights Watch, February 2002).

the organization for support amid mounting community and family pressures, and as many whites left in fear of a government crackdown.) [7]

In a stream of pronouncements Mugabe returned obsessively to the question of "homosexuals," "sodomists," and "perverts." "I don't believe they have any rights at all," he told reporters after his book fair speech.[8] Less than two weeks later, speaking on a national holiday, he said that homosexuality "degrades human dignity. It's unnatural and there is no question ever of allowing these people to behave worse than dogs and pigs." He told his listeners, "What we are being persuaded to accept is sub-animal behaviour and we will never allow it here. If you see people parading themselves as lesbians and gays, arrest them and hand them over to the police."[9] And when a group of U.S. members of Congress sent Mugabe a letter of protest, he told supporters of his ruling party ZANU-PF, "Let the Americans keep their sodomy, bestiality, stupid and foolish ways to themselves, out of Zimbabwe…. Let them be gay in the US, Europe and elsewhere…. They shall be sad people here." [10]

Several notes Mugabe struck would be repeated again and again, by his supporters and by other politicians, in Zimbabwe and elsewhere. There was the notion that rights have limits, that some people by definition cannot enjoy them—that the idea of a common human dignity is incompatible with preserving national or local particularity. If humanity could not be universal, though, the nation must be uniform: there was the question of cultural authenticity, the defense of an apparently cohesive and consensus-founded identity, either country- or continent-wide, against external invasion or internal differentiation. And there was the very question of terminology: who exactly were the enemies

[7] Human Rights Violations Against Sexual Minorities in Zimbabwe, Submission from Gays and Lesbians of Zimbabwe (GALZ) to the World Conference Against Racism (WCAR), 2001, p. 8.; IGLHRC interview by Scott Long with Keith Goddard, GALZ, Harare, Zimbabwe, December 8, 1998. Peter Joaneti, a long-time GALZ member, told IGLHRC that after the book fair controversies, "Most whites withdrew their membership. We were too many blacks for them, and there were too many police. I don't know what was worse for them. Keith was the only one who stuck it out. But a lot of blacks felt we had nothing left to lose." IGLHRC interview by Scott Long with Peter Joaneti, Harare, Zimbabwe, August 9, 2000.

[8] South African News Agency SAPA, *BBC Summary of World Broadcasts,* August 3, 1995.

[9] Quoted in Dunton and Palmberg, "Human Rights and Homosexuality in Southern Africa," p. 13.

[10] Quoted in Dunton and Palmberg, "Human Rights and Homosexuality in Southern Africa," p. 13. The letter, dated August 3, 1995, had been organized by U.S. Representatives Barney Frank and Maxine Waters.

Mugabe combatted? Were they "gays and lesbians"; "homosexuals"; or, more archaically, "sodomists" or even practitioners of bestiality?

One Zimbabwean parliamentarian resorted to a—seemingly non-standard—dictionary in a subsequent debate:

> I looked up a number of authorities and the sum total of all these definitions is this one. These homosexuals are people given to social pleasures. This is one definition. The second definition says these are people given to inordinate pleasure. The third definition describes them as licentious and this means morally rotten and promiscuous. The fourth definition describes them as lecherous, this means lewd, unchaste, base, and given to debauchery….
>
> What is at issue in cultural terms is a conflict of interest between the whole body, which is the Zimbabwean community and part of that body represented by individuals or groups of individuals.—The whole body is more important than any single dispensable part. When your finger starts festering and becomes a danger to the body you cut it off. —The homosexuals are the festering finger.[11]

Controversies over GALZ's participation threatened to become a regular feature of the book fair. In 1996, GALZ again applied for a stand. The fair trustees promised to resist government pressure; the government promised not to apply it. A week before the fair began, however, the Ministry of Information announced a government order barring GALZ from appearing—"to protect and guarantee the cultural health of the country from possible erosion."[12] The banning order did not actually appear in writing. GALZ therefore continued to plan on participating. However—anticipating how the Mugabe regime would deal with other political opponents in future—shadowy threats of mob action surfaced. A leader of a "student group" was quoted in the government press as saying,

> We are ready to raze down the stands and go to jail. Our actions will be for a noble cause. We want to protect the values of our culture. The essence of the fair should be exhibiting what the country has

[11] M.P. Chigwedere, Zimbabwe parliamentary debate, September 28, 1995; quoted in Dunton and Palmberg, "Human Rights and Homosexuality in Southern Africa," p. 14.

[12] Statement by Bornwell Chakaodza , quoted in "GALZ banned from Book Fair … and won't be allowed at any future exhibition," *Herald,* July 24, 1996.

> achieved and can offer in literal arts, and absolutely not homosexuality.[13]

At a preliminary conference on national book policy, noisy demonstrators protested the book fair's trustees.[14] Finally, the day before the fair opened, the chairman of the Board of Censors issued a hastily written order to the trustees, prohibiting GALZ from appearing, "based on 17(1) of the Censorship and Entertainment Control Act"—a provision allowing the state to ban any exhibition or entertainment which is "undesirable" or likely to cause "breaches of the peace, disorderly or immoral behavior." The order indicated that the trustees as well as GALZ members could be jailed if GALZ appeared.

The book fair trustees stated they would comply. However, GALZ rapidly sued the government, saying it was standing up "not just for gay rights but for the holistic principle of freedom of speech, which applies to all individuals and communities in this country."[15] On the second day of the fair, the Harare High Court set aside the government's ban. The judge held that the government could not censor material without examining it first.[16] GALZ had taken its stand in court. Now it took over its stand at the fair.

However, hostile crowds menaced the exhibition. According to a GALZ statement,

> On the second public day …GALZ was forcibly prevented from taking up its position at the Fair because a violent mob, led by Public Prosecutor Herbert Ushewokunze, descended on the GALZ stand. The Public Prosecutor stated that he and his followers represented "the People's Court" and that they "did not care about High Court Rulings." This provided concrete evidence of a direct link between government and the violence against GALZ.[17]

GALZ left its stand symbolically empty until the last day of the fair, when they took up a position at the margins of the exhibition ground—so as to be able to escape if violence recurred. It did: at mid-day, reports came that a mob was approaching the fair. GALZ members left; a small book burning followed.

[13] "We'll raze down GALZ stand at the Book Fair," *Herald*, July 23, 1996.
[14] Vivian Maravanyika, "Scuffles break out at demo against GALZ," *Sunday Mail*, Harare, July 28, 1996.
[15] "Censors board bans GALZ from Fair: End of the road …" *Herald*, July 30, 1996.
[16] "GALZ ban from Fair void," *Herald*, August 1, 1996.
[17] Statement by Gays and Lesbians of Zimbabwe, September 5, 1996.

According to the organization, "The mob trashed the stand and tried to burn remnants of the literature around the stand."[18]

Other nongovernmental organizations (NGOs) were mixed in their responses to the GALZ controversies. When, in 1997, a Zimbabwean politician launched a campaign to have homosexuals whipped and castrated, a leader of the Catholic Commission for Justice and Peace, a human rights group, spoke out against him.[19] Others were more tepid.[20] Indeed, the government adeptly used

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[18] Statement by Gays and Lesbians of Zimbabwe, September 5, 1996. In subsequent years, GALZ was able to participate in the Fair by placing its materials on a stand owned by the fair itself and shared for free by a number of human rights organization. However, the state-controlled press continued to attack the organization's presence: in 1998, for instance, the *Herald* warned that "Gays and Lesbians of Zimbabwe are exhibiting at the Zimbabwe International Book Fair this year at a Human Rights Collective Stand but are distributing their pamphlets to children under 18 in defiance of conditions set by the fair organizers." "GALZ at Book Fair," *Herald,* August 8, 1998. GALZ responded by observing that its information "is entirely factual in nature and would not look out of place in any general encyclopedia—some of it is of a religious nature! A folded pamphlet describes the basic services of GALZ…. Although children have the basic right to information principally so they can protect themselves, GALZ realizes that, in a climate of intense homophobia, disseminating information to minors will be construed as recruiting children. For this reason, the Book Fair and GALZ have tried to ensure that GALZ literature is given only to adults. However, the graphic descriptions of homosexual acts which appear daily in the state newspapers and which are accessible to any child who can read, are a great deal more graphic than anything that is produced by GALZ." Statement from Gays and Lesbians of Zimbabwe, August 7, 1998. Gradually GALZ's quiet presence came to be, if not entirely accepted, relatively unnoticed. An IGLHRC representative was present at the 2000 book fair on the day President Mugabe visited the grounds. His entourage mistakenly guided him toward the area where NGOs—many of them opponents of his regime—had their booths, the human rights stand among them. The GALZ representative there had time to cover up the organization's materials, and turn over his lapel to hide the rainbow flag he was wearing, before a confused Mugabe, trying to leave, barged toward the stand. He shook the GALZ representative's hand before hurrying out of the area.

[19] "We must do something to curb rape, child abuse, and bestiality, but this is a different class": Mike Auret, director of the Catholic Commission for Justice and Peace, quoted in "Castrate gays, Zimbabwe campaigner says," Reuters, March 5, 1997.

[20] Only in the late 1990s, when questions of constitutional and land reform—and the emergence of a credible opposition party—galvanized the country, did civil society in Zimbabwe begin actively challenging state policy. One observer writes, "For most of the post-colonial period [in Zimbabwe], NGOs have maintained a cautious ambivalence towards the state, finding ways to accommodate the development discourse of the state and avoiding frontal, policy-lobbying confrontations with the government…. Within this

the issue to divide civil society. In 1997, GALZ joined the "Sixteen Days of Activism" campaign, a coalition of organizations drawing attention to rights violations against women. The state-controlled Zimbabwe Broadcasting Corporation withdrew prime-time radio and T.V. programming it had offered the coalition, accusing it of being "a front for GALZ." Other members of the campaign distanced themselves from GALZ, saying the group "should first resolve its difficulties with government before involving itself in coalition business." GALZ eventually withdrew from the campaign.[21]

Many of Zimbabwe's churches joined in denouncing homosexuals. In 1996, campaigning for re-election—and for the votes of church members—Mugabe had specifically appealed to pastors to stand with him in condemning homosexuality.[22]

In 1998, the eighth general assembly of the World Council of Churches (WCC) was due to be held in Harare, a much-anticipated publicity opportunity for the regime. The assembly would include a "Padare" or public space for discussions and exhibitions by accredited groups and NGOs. GALZ applied to participate. Even two years before the assembly began, however, local churches made it clear they would oppose GALZ's presence. At a 1996 press conference announcing the upcoming assembly, Anglican Bishop Jonathan Siyachitema, president of the Zimbabwe Council of Churches (ZCC)—the hosting organization—used the occasion to denounce homosexuality: "We are not going to allow, as a Christian body, gays in our council and destroy that which we

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context, McFadden (1999) [author of an unpublished study on Zimbabwean feminism] has criticised women's organisations who have tended to 'shy away from making more radical demands of the state, preferring instead to work with and in the state, more often than not as an expression of the personal/class interests which the dominant leadership bring into the movement structure.'" Brian Raftopoulos, "The State, NGOs, and Democratisation," in Sam Moyo, John Makumbe, and Brian Raftopoulos, eds., *NGOs, the State and Politics in Zimbabwe (*Harare: SAPES Books, 2000), p. 45. GALZ (and particularly its programmes manager, Keith Goddard) —excluded from the start from the state's "development discourse," and with little or no opportunity to "work with" government institutions—may be credited with pioneering a new NGO style of using rights discourse to mount conspicuous public challenges to state policy. It has found imitators in civil society as the situation in Zimbabwe deteriorates. Yet although it is far more closely embedded in civil society networks than anyone would have thought possible seven years earlier—partly due to its compelling rhetoric and example—it still has comparatively few open allies.

[21] "16 days of deactivating?" *GALZ Quarterly,* January 1998, pp. 2-3.

[22] "Zimbabwe's Mugabe attacks homosexuals again," *Reuters*, February 28, 1996.

cherish: our culture," he said.[23] He added, "if people want to masquerade as homosexuals" at the assembly, "we declare that the law must take its course."[24]

Not all church members agreed. Ecumenical Support Services, a progressive lay body within the Anglican church, sponsored GALZ's application, and on that basis the WCC initially approved it.[25] As word that GALZ might actually appear at the Padare spread, however, local churches mobilized against it. A group called Concerned Christians began circulating a petition to bar GALZ.[26] Bishop Siyachitema again took to newspaper columns, stressing the opposition of the ZCC: "We feel that Zimbabweans should not be coerced into a practice that is alien to them."[27] The Evangelical Fellowship of Zimbabwe said, "the WCC is putting us to shame, when our politicians are the ones who have to preach to the church that homosexuality is wrong."[28] By July, over twenty Protestant churches had stated their objections. The press whipped up outrage. One writer declared, "Christianity the world over has been slowly accepting such evils like homosexuals in their denominations because Christian denominations are dividing themselves endlessly…. We expected their representatives to stand for justice, that is to represent the views of the majority of this country."[29] A state newspaper editorialized that "the majority on a daily basis silently looks away to accommodate these sexual perverts as they go about their pastime. But for them to want to propagate their 'faith' at conferences is stretching people's patience a bit too far."[30]

The WCC itself faced internal rifts on the issue of homosexuality. Some members, particularly in Europe and the United States, pressed for an open discussion of sexual diversity; many of these wished to move the assembly to another country, in response to Mugabe's rhetoric and human rights record. Other member churches, particularly Eastern Orthodox ones, were determined to exclude homosexuality from the assembly's agenda, threatening a boycott if the

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[23] "ZCC condemn homosexuality," *Sunday Mail,* June 16, 1996.

[24] "Churches against homosexuals at world congress," *Herald,* June 15, 1996.

[25] IGLHRC interview by Scott Long with Keith Goddard, Harare, Zimbabwe, December 8, 1998. See also Weston Kwete, "WCC Confirms GALZ's participation at forthcoming Harare conference," *Sunday Mail,* April 26, 1998. The Catholic Commission for Justice and Peace, a human rights group, also spoke out on behalf of GALZ from the time of the book fair; like Ecumenical Support Services, it faced intense criticism as a result.

[26] "Opposition mounts against gays, lesbians," *Herald,* May 28, 1998.

[27] "ZCC condemns homosexuality," *Herald,* May 2, 1998.

[28] "Opposition mounts against gays, lesbians," *Herald,* May 28, 1998.

[29] Sure Mataramvura, "Homosexuality has no place in Christianity," *Sunday Mail,*

[30] "Comment: Why this subject?" *Sunday Mail,* April 19, 1998.

debate took place.[31] The WCC was clearly unwilling to defend an embattled gay group, and in the end moved to eliminate GALZ's potentially divisive presence, which it knew would spur such a debate through publicity alone.[32] It told GALZ that an endorsement from a lay institution was insufficient. To participate, it needed the support of a *bona fide* church.

No church in Zimbabwe, and none in neighboring South Africa, was willing to take up GALZ, in the face of the militant opposition of politicians and the ZCC. The organization was finally denied accreditation, though it was able to bring some members into the Padare under the auspices of a sympathetic human rights NGO.

"Animals in the jungle are better than these people because at least they know that this is a man or a woman," President Mugabe said in a 1998 speech.[33] In the same speech Mugabe criticized the independent media: "In Britain you will never find a paper that speaks bad about that country; why then in

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[31] Concern about Orthodox threats is reflected in internal WCC documents: see World Council of Churches Executive Committee, Document Number 7, "Orthodox Participation in the WCC: The Current Situation: Issues and Ways Forward," document dated September 15-18, 1998.

[32] A sign of the WCC's exceptional caution in responding to rights violations in Zimbabwe—and to the issue of homosexuality—can be found in a 1994 letter from Konrad Reiser, General Secretary of the WCC, to a minister who had expressed concern over reports of arrests in Zimbabwe. The general assembly had already been scheduled for Harare in four years' time; Reiser, visiting Zimbabwe in preparation, had been asked to raise the arrests with the minister of home affairs. He responded by citing the imputation, invoked by Zimbabwean officials, that homosexuality and pedophilia were linked: "I have no information about the alleged detention of seven members of the Association of Gays and Lesbians in Zimbabwe and obviously have not been able to speak to the minister about these cases which have not been known to me. What has been pointed out to me is the fact that there have been cases where particularly young boys have been drawn into homosexual activities against their will and without the consent of their parents. Both church and government authorities have expressed concern about these developments and indicated that they would do whatever was necessary to prevent a continuation of such practices. Lacking any further detail, you will understand that I see no possibility for the WCC to take a public position. The government representatives in Zimbabwe with whom we have been in contact have been very cooperative and I would need to be convinced that we are faced with a situation of obvious injustice and harassment." Letter from Konrad Reiser to the Rev. Kittredge Cherry, September 6, 1994, on file with IGLHRC.

[33] "Zimbabwe's Mugabe lashes out at homosexuals," Reuters, April 23, 1998; see also "Chikerema to be buried at Kutama cemetery on Saturday," *The Herald,* April 23, 1998.

Zimbabwe do we not adopt a common ideology?"[34] Mugabe grew more and more dependent on his own stable of state-controlled media, and increasingly the work of harassing GALZ was left to them. The *Herald* and its sister paper, the *Sunday Mail,* both state-controlled, steadily tried to embarrass the NGO.

In May 1998, for example, the *Sunday Mail* published a front-page article accusing GALZ of running a brothel from its office, as well as showing pornographic videos. (At the time, GALZ was able to rent premises in a low-density area of Harare. There, it offered counselling services for people dealing with issues of sexuality and of HIV, along with a resource library and a social gathering-place.) The reporter, who claimed to have inside knowledge of GALZ's dealings, said the organization provided sex to foreigners, noting that "After one party I saw some tourists leaving the centre, accompanied by more than one teenager."[35] According to Keith Goddard, GALZ's programmes manager, the reporter had earlier joined the organization undercover, with the mission of finding or fabricating a scandal to discredit GALZ.[36]

GALZ demanded, but never received, a retraction. Both the *Herald* and the *Sunday Mail* continued to amass accusations against the organization. One week later, the *Sunday Mail* alleged that GALZ members had made death threats against its reporters.[37] Two weeks after that, it charged the "controversial organization" of holding "rowdy parties" featuring "public indecency."[38] Other headlines proclaimed "Opposition mounts against gays, lesbians"[39] and "Homosexuality is morally bankrupt."[40]

The allegations began at the same time Goddard was arrested on blatantly false charges of "sodomy" (described in Chapter III below)—and helped build animosity toward him and his work in the public mind. They also came as Canaan Banana, the former president of Zimbabwe and Mugabe's revolutionary comrade-in-arms, faced trial for "sodomy" as well, in a well-publicized scandal. (See Appendix, "Before the Law.") Goddard's arrest and the campaign against GALZ may have drawn attention away from the embarassing proximity of a "sodomite" to the present president

[34] "Zimbabwe President renews attack on homosexuals," Ecumenical News International, April 29, 1998.

[35] "Gays pick-up point exposed," *The Sunday Mail,* May 24, 1998.

[36] IGLHRC interview by Scott Long with Keith Goddard, Harare, Zimbabwe, December 6, 1998.

[37] "Reporters receive death threats over GALZ story," *Sunday Mail,* May 31, 1998.

[38] "Neighbors up in arms against gay 'gigs,'" *Sunday Mail,* June 24, 1998.

[39] *Herald,* May 28, 1998.

[40] "Sunday mailbag" letter to the editor, *Sunday Mail,* June 7, 1998.

While the press continues to pursue GALZ, Mugabe has taken up grander themes. His concern has moved from the presence of homosexuals within Zimbabwe to visions of external coalitions against the country. Internationally isolated, he sees constellations of conspiratorial homosexuals opposing him.. These visions have multiplied since, in October 1999, Mugabe was subjected to a citizen's arrest by a British gay activist while shopping in London. Press and government whipped up outrage against Britain: at a Commonwealth meeting, Mugabe accused "gangster gays" of working for the British "gangster regime."[41] He told a meeting of traditional leaders in Zimbabwe that Britain sought to promote homosexuality in Zimbabwe: "We are against this homosexuality and we as chiefs in Zimbabwe should fight against such Western practices and respect our culture…. Let us fight against the enemy." [42] He repeatedly accused U.K. Prime Minister Tony Blair's government of being controlled by homosexuals.

At campaign rallies for the 2002 presidential election, Mugabe emphasized that he had "real men" around him. He called on Tony Blair to "expose" his cabinet, saying, "I have people who are married in my cabinet. He has homosexuals and they make John marry Joseph and let Mary get married to Rosemary…. We can form clubs, but we will never have homosexual clubs. In fact, we will punish them."[43]

In April 2002 the head of one of the main mouthpieces of Mugabe's many denunciations, the Zimbabwe Broadcasting Corporation, Alum Mpofu, was forced to resign. He had allegedly been caught having sex with a man in a Harare nightclub.[44] In June 2002, an opposition legislator testified in a court case that he had heard rumors of an affair between Mpofu and Mugabe's powerful minister of information, Jonathan Moyo.[45] With homosexuality threatening to intrude in the highest echelons of Zimbabwe's government, Mugabe reportedly ordered a "witch hunt" against any homosexuals in his administration. One South African newspaper asserted that Mugabe asked his Central Intelligence Organisation, responsible for state security and the

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[41] "Mbeki puts Mugabe in firing line," *Sunday Times,* South Africa, November 14, 1999; and "President Repeats 'Gay Gangster' Accusation," *Herald,* November 13, 1999.
[42] "British promoting gays, says Mugabe," *Herald,* March 13, 2000.
[43] "Mugabe attacks Britain, gays at campaign rally," Agence-France Presse, February 2, 2002.
[44] Chris McGreal, "Gay claims force out Mugabe's TV chief," *Guardian,* London, April 4, 2002.
[45] "Court Hears of Alleged Moyo-Mpofu Gay Affair," *Daily News,* Harare, June 4, 2002.

president's protection, to assemble lists of gays in official service.[46] A source told a Zimbabwean reporter that "The president made it clear that the world would see him as a hypocrite if he attacked … Tony Blair for having a cabinet full of gays when these very same people are said to be in his administration."[47]

Rita Makarau, then a member of Parliament from Mugabe's ZANU-PF party, and a politician often presented as a liberal face of the regime, told us in 2000 that

> I believe lesbians and gays were indeed always part of our society. There was not tolerance as such; but a spirit that if they only kept to themselves we would not interfere. The problem, you know, is that there is not a culture of human rights in Zimbabwe. I try to look to the future, to rights that can be interpreted or gained through jurisprudence. I try to say to people, "give us five years!"[48]

B. Namibia: Obsession and Opportunism

Mugabe's statements drew international condemnation, but also international imitation. In neighboring Namibia Gwen Lister, publisher of the *Namibian,* the country's main independent press organ, remembers how startled she was when homosexuality became a political question there, in the months after Mugabe exploited it.

> Many people were a bit confused at the time: it's years after independence, we've never heard a word about these things, why suddenly is this becoming an issue? If I'm asked the question, I think it's really opportunistic, I think at times it's a question of finding a scapegoat when things go wrong.… Don't forget, to a very large degree, the people they are speaking to are in the rural areas, are not illiterate but peasant folk that they are talking to about these things, and making it seem as though all these whites from all over the world are coming here to Namibia to turn black Namibians into gays and lesbians…. If there's been a huge scandal of corruption then suddenly they'll shout the odds about gays and lesbians…. It's something that seems to happen in waves. You'll find right at this

[46] Basildon Peta, "Zim leader sets his spies on a gay witchhunt," *Star,* South Africa, July 3, 2002.
[47] Walter Marwizi, "Mugabe to Root Out Gays," *Daily Standard,* Harare, July 2, 2002.
[48] IGLHRC interview by Scott Long with Rita Makarau, Harare, Zimbabwe, August 16, 2000.

> time [November 2001] that the gay and lesbian issue isn't on the national agenda at all. But who's to say that come December when something else happens, it's not suddenly going to be put right in people's faces once again? [49]

The first wave started among lower officials—but, as Lister says, "the trend began with the president. There's absolutely no question about that…. In order to please the president, other figures who are not as high on the political spectrum as he join in by making these noises from time to time."

In October 1995, only months after the Harare Book Fair controversy, Namibia's deputy minister for lands, resettlement, and rehabilitation told a reporter that "Homosexuality is like cancer or AIDS and everything should be done to stop its spread in Namibia." He urged that gays and lesbians be "operated on to remove unnatural hormones," and tied the struggle against external perversion to the liberation struggle: according to the reporter, he "said he did not take up arms to fight for an immoral society, neither does he want his children to live in such a corrupt state."[50] Soon after, Namibia's finance minister, Helmut Angula, wrote a long article arguing that "homosexuality is an unnatural behavioural disorder which is alien to African culture … [and] a product of industrialised society, where there is plenty of boredom and unbridled materialism, as well as liberalism bordering on anarchy."[51]

Another wave came in 1998. Late that year, Minister of Home Affairs Jerry Ekandjo stated in the National Assembly that he planned to introduce new legislation against homosexual acts. "It is my considered opinion," he said, "that the so-called gay rights can never qualify as human rights. They are wrongly claimed because it is inimical to true Namibian culture, African culture and religion. They should be classified as human wrongs which must rank as sin against society and God."[52]

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[49] IGLHRC interview by Kagendo with Gwen Lister, Windhoek, Namibia, November 19, 2001.

[50] Fred Mwilima, "Homosexuality is like cancer or the AIDS scourge. Hishongwa blasts gays," *New Era,* October 5-11, 1995.

[51] Helmut Angula, "Homosexuality Is a Mental Disorder Which Can be Cured," three-part article, *Namibian,* November 10, 17, 24, 1995; a similar article appeared in *New Era,* December 21-27, 1995.

[52] Christof Maletsky, "Govt planning to criminalise gays," *Namibian,* November 9, 1998. In a report which caused widespread fear, an Afrikaans newspaper indicated that Ekandjo's proposed legislation included compulsory castration for homosexual men: "Jerry: gays is nie mense nie," *Die Republikein,* November 9, 1998.

No such legislation was ever introduced. Two years later, however, the minister returned to the subject. Speaking to a group of newly graduated police officers in October 2000, he urged them to "eliminate" gays and lesbians "from the face of Namibia," saying that the "Constitution does not guarantee rights for gays and lesbians," and that police must take measures to combat all such "unnatural acts, including murder."[53] An opposition MP demanded clarification from the minister on the floor of the National Assembly. Ekandjo answered that "elimination does not only mean to kill. According to the dictionary meaning, elimination may also mean to ignore, put aside, and [get] rid of." However, he insisted, "We never had *moffies* [a derogatory term for gay or effeminate men widely used in the region] in mind when SWAPO drafted the Namibian Constitution ten years ago."[54]

Most conspicuously, however, President Nujoma has periodically weighed in in statements closely echoing Mugabe's, with sometimes vague, sometimes ominously specific threats. In December 1996, Nujoma declared that "all necessary steps must be taken to combat influences that are influencing us and our children in a negative way. Homosexuals must be condemned and rejected in our society." [55] In the ensuing controversy—with the feminist organization Sister Namibia strongly criticizing the president's remarks—the ruling South West Africa People's Organization (SWAPO) party swung strongly behind its leader, effectively making homophobia a political platform in Namibia. In what observers called an "unprecedented" move, the party issued a statement supporting the president, threatening his opponents, and vowing to "uproot" homosexuality:

> It should be noted that most of ardent supporters of this perverts [sic] are Europeans who imagine themselves to be the bulwark of civilization and enlightenment …
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> If there is a matter which must be dealt with utmost urgency, it is the need to revitalise our inherent culture and its moral values which we

[53] "Jerry in new anti-gay rant," *Namibian,* October 2, 2000.

[54] Max Hamata, "Minister elaborates on anti-gay stance," *Namibian,* November 3, 2000.

[55] Erhard Gunzel, "Nujoma blasts gays," *Windhoek Advertiser,* December 12, 1996. The quotation was released to the press by an anonymous woman present. Although the speech was filmed by the Namibian Broadcasting Corporation (NBC), exactly what the president said cannot be reconstructed. Less than a week later, NBC told print reporters that the tape had been destroyed. "NBC says tape of President's speech 'erased,'" *Windhoek Advertiser,* December 18, 1996.

> have identified with foreign immoral values. Promotion of homosexuality in our society scorns many sets of our values…
>
> The moral values of our nation, as defended by the President, incorporate the fundamental principles of nature and should not be equated to the vile practices of homosexuals which has a backlash. Homosexuality deserves a severe contempt and disdain from the Namibian people and should be uprooted totally as a practice.[56]

Nujoma has repeated his threats regularly. Later in 1997, he warned the SWAPO Youth League that homosexuals "should not impose on the human rights of others. The youth should be vigilant and guard against foreigners who claim to know development and democracy better than us…. Where were they when we sacrificed our lives during the liberation struggle?"[57] In 2000, attending a cultural gathering where a chief spoke in condemnation of homosexuality, Nujoma urged parents and traditional leaders "to whip" those who refused to follow cultural norms, "because culture is the fundamental source of respect and wisdom of any given nation."[58]

A rapid-fire series of statements from Nujoma came early in the next year. In March 2001, the president told university students that "The Republic of Namibia does not allow homosexuality, lesbianism here. Police are ordered to arrest you, and deport you and imprison you too."[59] In April 2001, he voiced horror at recent weddings of same-sex couples in the Netherlands. He warned homosexuals would be barred from entering Namibia: "If they arrive at the Hosea Kutako Airport, we'll send them back with the same aircraft—if they are couples or found to be homosexuals." And he added, "The constitution is being misinterpreted by colonialists who are confused. They are using the constitution to protect homosexuals and lesbians in an irresponsible way."[60] In the same

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[56] Alpheus !Naruseb, Department of Information and Publicity, SWAPO, in a press release by SWAPO, January 28, 1997. See "Alpheus comes out on gay issue," *Namibian,* January 29, 1997; and "Mr !Naruseb and the seeds of hate…" *Windhoek Advertiser,* January 31, 1997.

[57] Erhard Gunzel, "President wants gays shut behind closed doors," *Windhoek Advertiser,* April 28, 1997.

[58] "Authorities repeat threats against Namibian homosexuals," October 24, 2000, www.afrol.com/News/nam012_homophobia2/nam012_homophobia.2/htm, retrieved August 16, 2002.

[59] "Gays 'fearful' in Namibia," BBC News, March 20, 2001.

[60] Christof Maletsky, "Homosexuals 'to be barred from entering Namibia,'" *Namibian,* April 6, 2001.

month, he urged traditional leaders and local officials to "see to it that there are no criminals, gays and lesbians in your villages and regions."[61] Later that month he elaborated on the theme at a SWAPO rally, criticizing the forces of "imperialism" and saying that "The enemy is still trying to come back with sinister manoeuvres and tricks called lesbians and homosexuality and globalisation. These are all madness and they claim to be Christians…. They colonised us and now they claim human rights when we condemn and reject them. In Namibia there will be no lesbian and homosexual [sic] left."[62]

Also in early 2001, Nujoma told an interviewer that

> Each nation, each people on earth have their own cultures, way of life. But I detest the way human rights [are] being put that they [homosexuals] should parade in the streets behaving like animals…. God created a man and a woman separately. Now we have women marrying each other and men marrying each other. What is this madness? You must remain with your cultures in Europe. Don't bring it to Namibia because we are not going to impose our cultures on you.

When the interviewer, a German-born Namibian citizen, asked how such comments corresponded to the constitution, Nujoma grew agitated:

> That is a constitution that was made by SWAPO, we are the ones who fought for the liberation of this country for you to talk about a constitution. What do you know about [a] constitution? You sided with the enemy here!… Keep away your system of corruption, anti-God and animal behaviour from the Republic of Namibia.

The interviewer asked again about "gay and lesbianism" and Nujoma replied:

> Keep away from our country, please. Don't repeat those words. They are unacceptable here. If you want us to work with you,

[61] The same speech reportedly warned Namibians against marrying foreigners, and urged a revival of traditional—customary, often polygynous—marriage as a response to HIV/AIDS: Oswald Shivute, "Round up gays, urges Nujoma," *Namibian,* April 2, 2001.
[62] Christof Maletsky, "Madness 'on the loose,' says Nujoma," *Namibian,* April 23, 2001.

> respect our laws and respect our rights. Those words you are mentioning are un-Namibian.[63]

The government was prepared to punish civil society actors for using the "un-Namibian" words. Little more than a year before the interview quoted above, Nujoma's administration had tried to discredit the country's largest women's rights organization, for including a reference to gay and lesbian rights in an advocacy document. Sister Namibia, a feminist NGO, had organized other civil society actors to collaborate on a document called the Namibian Women's Manifesto: the goal was to support and publicize the government's National Gender Policy, turning its generalizations into specific recommendations relevant to everyday life. The twenty-five-page document contained only two references to lesbians—one including them in a list of women to be protected from discrimination; another asking political parties to state their stances on gay and lesbian rights. Five days before the manifesto's release in 1999, the SWAPO Women's Council condemned it, saying that it differed from the state policy in that "they included homosexuality issues in their so-called manifesto…. They have to find another platform to address homosexuality and not within the context of gender issues."[64] The head of the national Department of Women's Affairs said the manifesto "has no other message than asking women in Namibia to promote homosexuality." State agencies distanced themselves from NGOS associated with the manifesto; unsubtle pressures were applied to divide civil society and isolate Sister Namibia.[65]

The controversy over the Women's Manifesto pitted the ruling party's women's league against independent feminist organizers from civil society. Sister Namibia is headed by an open lesbian, Elizabeth Khaxas; the accusations of "promoting homosexuality" were in part aimed at her work. In 1996, when Nujoma launched his first comments against homosexuality, he chose a meeting of the SWAPO Women's Council to do so. Even then, some feminists took this as a message: that respectable women worked within the state and party, while deviants pursued activism outside.

Civil society has in fact responded to SWAPO's attacks. From the beginning, in 1995, Sister Namibia had criticized official homophobia, stating

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[63] The interview was conducted for the BBC but apparently not broadcast. See Tangeni Amupadhi, "Nujoma 'ready' for fourth term," *Namibian,* April 10, 2001. The full text of the interview can be found at www.namibian.com.na.

[64] Francis Zoagub, "SWC unleashes salvo at Women's Manifesto," *Namibian,* June 10, 1999.

[65] For a full account of the controversy, see IGLHRC's report *Written Out: How Sexuality Is Used to Attack Women's Organizing,* 2000, pp. 119-133.

publicly that "We believe that gays and lesbians should have the same rights as heterosexuals in all spheres of life."[66] The next year, it boldly condemned the utterances of the president himself, declaring, "We must stand up now together and speak out against this or any other kind of hate speech and oppression against any member of our communities."[67] When Minister Ekandjo threatened anti-gay legislation in 1998, other NGOs opposed him. The National Society for Human Rights (NSHR) had produced gay-friendly educational materials[68]; its president, Phil ya Nangoloh, told us that year, "We do not tolerate discrimination on any grounds. We think government has run out of issues, and wants to whip up emotion by talking about gayness. It is behaving ridiculously, like an elephant chasing a squirrel."[69]

In 1997, Sister Namibia provided space and helped gay men and lesbians found their own network for support and advocacy, called The Rainbow Project (TRP). In 2001, when Nujoma threatened lesbians and gays with arrest and deportation, TRP was able to build a coalition in response. The National Society for Human Rights issued press releases and an open letter to the president condemning the threats. TRP called for a march to affirm the freedom and safety of lesbians, gays, bisexuals, and transgender people. As word of the march spread, the organizers began hearing of threats, including a statement by SWAPO Youth League that the "march will never take place."[70] Human rights activists in Windhoek supported the original organizers and turned the rally into a "march for the human rights of all." More than one thousand people rallied at the event; all the major human rights groups were involved.[71] Some NGOs expressed private support for the march but declined to participate because they were dependent on SWAPO for funding.[72] After the march, President Nujoma asked, "How dare they march in a country we liberated?"[73]

Still, Ian Swartz, TRP's coordinator, says that fear has impeded the group's efforts to provide counselling and support services to people abused or

[66] "Sister collective defends gays," *New Era,* November 2-8, 1995.
[67] "Sister Namibia wants President to apologise," *Namibian,* January 17, 1997.
[68] See, for instance, the booklet, *My Rights and the Rights of Others,* published by NSHR in 1998, which included images of gay men among other groups facing discrimination.
[69] IGLHRC interview by Scott Long with Phil ya Nangoloh, National Society for Human Rights, Windoek, Namibia, December 16, 1998.
[70] Ibid.
[71] Ibid.
[72] Human Rights Watch interview with one of the organizers (anonymous), Windhoek, Namibia, July 18, 2001.
[73] Cited in Human Rights Watch interview with Ian Swartz, The Rainbow Project, Windhoek, Namibia, July 16, 2001.

discriminated against for their sexual orientation or gender identity. According to Swartz, most lesbians and gay men are so frightened of being identified that they will not come to TRP's quarters in Windhoek. The group provides almost all their services through a telephone hotline.[74]

Staff at NSHR have also noted an increase in attacks on their work, Phil ya Nangoloh told Human Rights Watch in 2001. "Those of us who work at the society have been attacked as traitors, as spies, and for being un-African. We've also been attacked for promoting homosexuality because we are critical of the attacks by the president and the minister of home affairs and by the SFF [Special Field Forces]. We are not promoting homosexuality, we are promoting human rights." Ya Nangoloh added, "Gays and lesbians have been in Africa for a long time—we have words in our local language for gay people. They are not a threat to the president. But we can't ignore what he's said because it is becoming very dangerous." [75]

Norman Tjombe of the Legal Action Center (LAC) believes that SWAPO is trying to distract its constituencies from its failure to address mass unemployment, land reform issues, and a growing HIV epidemic. "Perverse sex" is a perfect diversion. "In our culture we have strong ideas regarding men and women. Men are strong—women are submissive. No other expression of sexuality is permitted. Nujoma knows that most Namibians are intolerant of homosexuality, so he attacks gays and lesbians. The government is making attacks on homosexuality a central part of its outlook. But it will not end with homosexuality—it is to create a culture of intolerance—a culture that will grow. Either we change this culture and become more tolerant or it will get worse."[76]

Swartz also expressed concern about the culture of intolerance the state promotes. "First it was attacks on homosexuals. Then it became rhetoric about 'purifying' Namibia, which meant attacks on whites, Afrikaans-speaking Namibians, and then all foreigners and women who marry foreigners. Also, just like Mugabe, Nujoma is attacking landowners and the independent media."[77]

Ya Nangoloh notes the attacks are often personal. Independent judges have been vilified for deciding against the government: "Individuals have been

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[74] Ibid.

[75] Human Rights Watch interview with Phil ya Nangoloh, NSHR, Windhoek, Namibia, July 17, 2001.

[76] Human Rights Watch interview with Norman Tjombe, Legal Action Center, Windhoek, Namibia, July 19, 2001.

[77] Human Rights Watch interview with Ian Swartz, The Rainbow Project, Windhoek, Namibia, July 16, 2001.

attacked as traitors, as foreigners, racists, reactionaries, and imperialists."[78] Ya Nangoloh himself has been called, in a government press release, a traitor who "DESERTED the national liberation struggle" and "vilifies the SWAPO government" to "receive his daily bread from his sponsors." [79]

Gwen Lister of the *Namibian* also observes that the attacks on homosexuals are often "personally directed."[80] Another activist says, "It is a small country and they know who to target. You mustn't think that they are talking about a group in general. They know who they mean."[81]

For example, Elizabeth Khaxas and her German-born partner, Liz Frank, fought a years-long legal battle to have their relationship recognized for immigration purposes. Although they had lived together and raised a son, the Ministry of Home Affairs fought to deny Frank a residency permit, threatening her with deportation. Indeed, in 2000, Home Affairs Minister Ekandjo specifically commented in Parliament on Frank's and Khaxas' case—saying mockingly that he would remain opposed to recognizing their status as a couple "until it is scientifically tested that they can produce a baby."[82] The case reached the country's Supreme Court in 2001; in a split decision in March of that year, it found that a same-sex relationship could not be recognized by Namibian law, and could not count in favor of the application.[83] President Nujoma's threat to

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[78] Human Rights Watch interview with Phil ya Nangoloh, NSHR, Windhoek, Namibia, July 19, 2001.

[79] "Press Release: The Ministry of Justice's Response to Attacks by the National Society For Human Rights in Namibia against Mr. Utoni Nujoma, Chairman of the law Reform and Development Commission and Government Coordinator for Human Rights," July 30, 2001, on file with IGLHRC.

[80] IGLHRC interview by Kagendo with Gwen Lister, Windhoek, Namibia, November 19, 2001.

[81] IGLHRC telephone interview by Scott Long with anonymous Namibian activist, March 23, 2000.

[82] Max Hamata, "Minister elaborates on anti-gay stance," *Namibian,* November 3, 2000.

[83] Werner Menges, "Gay rights dealt blow," *Namibian,* March 6, 2001. The Supreme Court decision was the result of a government appeal against an earlier High Court decision in Frank's favor—and was particularly painful because the High Court had in fact made a progressive finding in favor of sexual-orientation rights. Justice A. J. Levy, in the High Court decision, had held that Frank's and Khaxas' relationship could be construed as a "Universal Partnership" resembling what might elsewhere be called a common-law partnership, "as between a man and a woman living together as husband and wife but who have not been married by a marriage offer"—a status with some recognition in Namibian (Roman-Dutch) common law. It also found that the Namibian Constitution's prohibition, in article 10.2, of discrimination based on sex should require that a relationship between two women also qualify for recognition as a Universal

"deport" lesbians and gays came shortly after the Supreme Court decision. It was evidently in part meant to menace Frank and Khaxas.[84]

Henning Melber, director of the Namibian Economic Research Policy Unit (NEPRU), told us in 1998:

> One must look on Namibia as a traumatized place, perhaps a schizophrenic place. There is an unresolved history in this country, a history of authoritarian personality structures. The country has been through trauma, a terrible period of repression and a war. This produces a typical phenomenon of very dependent individual personalities, the result of a long history of colonialism and brutality and fear. Such personalities can easily be mobilized against a minority. And sexuality is very much bound up with fear.
>
> Then, though, there is a split in public awareness and political awareness. Repression co-exists with liberalism. One part of the government will say it wants to eradicate the enemy. Another part hurries in to say that it wants to give everyone rights.
>
> And the fear of the internal enemy is tied to fears of external enemies. Homophobic sentiments are mixed with xenophobic sentiments. It is terrible. And it is depressing.[85]

As Gwen Lister had predicted, another "wave" of violent rhetoric may have begun. In August 2002 President Nujoma again mixed homophobia with

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Partnership. In so doing, the ruling had created a space for same-sex partnerships to be acknowledged in Namibian law. That decision—similar to an emerging pattern of jurisprudence in South Africa—had raised hopes that the courts could interpret equality protections in the Constitution in inclusive ways. (The constitution of Namibia, much more narrowly than that of South Africa, bars discrimination only on the basis of "sex, race, colour, ethnic origin, religion, creed or social or economic status.") High Court of Namibia, *Frank and Khaxas v. Chairperson of the Immigration Selection Board,* case no. A 56/99.

[84] Frank's petition for residency was finally granted later that year, when the Ministry of Home Affairs relented. However, the concession came only after the government had won on its point of principle. The highest court cited Nujoma's and Ekandjo's own remarks as evidence that Namibian norms and values opposed equality protections based on sexual orientation: it concluded that constitutional anti-discrimination provisions did not mandate recognition of same-sex relationships.

[85] IGLHRC interview by Scott Long with Henning Melber, NEPRU, Windhoek, Namibia, December 16, 1998.

fear of the outside. Speaking to the Namibia Public Workers Union Congress, he denounced what he called "British imperialism" and its anti-Mugabe stance: "Today it is Zimbabwe, tomorrow it is Namibia or any other country. We must unite and support Zimbabwe. We cannot allow imperialism to take over our continent again." And he criticized wealthy countries for tying development aid to human rights, which he linked with promoting homosexuality.

> In Namibia we will not allow these lesbians and gays. We fought the liberation struggle without that. We do not need it in our country . . . We have whites who are Namibian, but they must remember they have no right to force their culture on anyone. If they are lesbian, they can do it at home, but not show it in public… I warn you as workers not to allow homosexuality. Africa will be destroyed.[86]

C. Zambia: "Wanting to Help Others Was the Worst Crime of All"

Zambia, in a few months in 1998 experienced something akin to the hysterical rhetoric about homosexuality which Mugabe and Nujoma had inflicted on their countries over several years. A newspaper article describing a single, isolated gay man's experiences provoked a vast national controversy. Church leaders, NGO officials, students and professors, and professional politicians all stepped forward to voice their horror of homosexuality. The vice-president and ultimately the president of the country joined the condemnations. By the time the furor died down, homosexuals had been driven even more deeply underground, or beyond the country's borders altogether. And human rights organizations, and civil society agents in general, had been stigmatized as being agents of a foreign agenda.

In July 1998, a young man named Francis Yabe Chisambisha went to the offices of Zambia's largest independent newspaper, told them he was homosexual, and asked if they would like an interview. Reporters leapt at the chance. Chisambisha's self-revelation, his "coming out," was, as he explained to our researcher later, born of wanting not to continue in concealment. The *Post* published Chisambisha's interview, and photograph, on its first page. The story, which used his full name, spread over three pages; it concentrated on his sexual experiences. "I'm 25, gay, with 33 sex partners," said the front headline; an interior header added, "I am gay and enjoying it …" Buried in the article was a more moving message. Chisambisha explained why he went public:

[86] Maggi Barnard, "Nujoma targets imperialism, gays," *Namibian,* August 19, 2002.

> Firstly, what I want is to tell society that this gay thing has been there even before our generation. I want society to be aware that it is happening in Zambia and there are people who want to be respected for their choice. It's just that in our African culture, it's believed to be taboo and hence people do it in hiding," he said. "But the fact that I am doing it, shows that this practice is there and will continue to be there as long as man is there. Our friends in South Africa and Zimbabwe and elsewhere have spoken out that they want their feelings to be respected and be allowed to enjoy their sexual preferences. That is what I want to do here in Zambia. It makes me feel bad to be criticized that what you are doing is wrong when I am not causing harm to the person I am doing it with.
>
> Secondly, Francis said he wants to form an association so that Zambian gays can fight for their rights. [87]

Chisambisha told us later, "I was alone and I wanted not to be, and I wanted to help others not to be. I found out that being alone was legal. Wanting not to be alone was criminal. Wanting to help others was the worst crime of all."[88]

Chisambisha's confession sparked a mammoth scandal. The response was instant. The day after Chisambisha's confession, the *Post* was already receiving hand-delivered indignant letters. "There is totally nothing good in being gay that one should feel that it is an achievement to come out in the open," one read.[89] The rest of the press scrambled to rival the scoop; when, weeks later, a headline screamed "Another gay surfaces," it seemed like relief for desperate reporters.[90] Homosexuality had almost never been publicly discussed in Zambia; now, for months, most newspapers carried several stories a week about it. Virtually all condemned it. The independent *Post* was willing at least occasionally to convey Chisambisha's and other sympathetic perspectives; the state-sponsored press was uniformly negative.[91]

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[87] Goodson Machona, "I'm 25, gay with 33 sex partners," *Post,* July 14, 1998.

[88] IGLHRC interview by Scott Long with Francis Chisambisha, Lusaka, Zambia, December 3, 1998.

[89] "Zulu defends homosexual," *Post,* July 15, 1998.

[90] Dickson Jere, "Another gay surfaces," *Post,* August 24, 1998.

[91] IGLHRC interviews by Scott Long with Gershom Musonda, Zambia Independent Monitoring Team (ZIMT), and Francis Chisambisha, Lusaka, Zambia, December 2 and 3, 1998.

A women's columnist headlined an account of the controversy, "Homosexuality not new but can be stopped here," and pictured advocacy for sexual rights as deleterious to development:

> In advanced societies, where people have attained so much that they have nothing much to do in life, they tend to turn to such unnatural practices as a pastime. In the first world, people have achieved so much in life. They have three meals a day, all the fruits and drinks of any imaginable luxury at their disposal. Since some of them may not have much work to do any more, they search for hobbies and some, unfortunately, end up in homosexuality. But in third world countries, particularly in Sub Saharan Africa, we have so much work to do, we cannot even afford to think of homosexuality…. The energies being channeled toward unproductive ventures like forming gay associations could be used for more meaningful projects like poverty alleviation … The relevant authorities should be prompted to act against people purporting to enhance their human rights by engaging in unacceptable practices.[92]

Reporters conducted "man-in-the-street" interviews, gauging the indignation they helped to foster. One writer asked Lusakans about the proposal to let gays form an NGO:

> A cross-section of the public interviewed during a random survey seem to be in unison that such a move is unacceptable and should not be encouraged in any way as it would merely be perpetuating a vice. The outraged people noted that although homosexual and lesbian organizations might be in existence elsewhere, it was totally alien in Zambian society and everything should be done to ensure it did not take off.[93]

Another cited the Zimbabwean situation, saying many Zambians

> vehemently oppose the wholesale importation of Western culture including negative and retrogressive values like homosexuality,

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[92] Pauline Banda, "Gender Focus: Homosexuality not new but can be stopped here," *Zambia Daily Mail,* September 17, 1998.

[93] Vincent Zulu and Victor Chitafu, "Homo Party? Not here!" *Sunday Times of Zambia,* September 6, 1998.

> which some say is an insult to the conscience of the human being for even the low animals, some people interviewed say, know better. President Robert Mugabe of Zimbabwe who not long ago put up a strong fight against gays in his country drew a similar analogue and said homosexuals are worse than animals.[94]

"Homos, lesbians, go to hell!" one piece was headlined:

> When the bad news fouled my ears to the effect that homosexuals, lesbians, I mean the gays, have started walking the streets with their heads upright, my soul was shaken to its very foundation….
>
> These homosexuals, and these lesbians, wonders will never end! Are you telling me they have the courage to waste the taxpayer's stationery, I mean my stationery, by registering an association with the Registrar of Societies?
>
> Registrar of Societies, I don't expect it to happen, but if a lesbian gathers enough courage and exhibits her ugly face in the confines of your beautiful office for the sinful, shameful purpose of registering what will sinfully and shamefully be known as the Lesbians Union of Zambia, give her the boot, particularly on her rump steak, you know what I mean by her rump steak, don't you? What I mean is, give her marching orders thus: *By the left, quick match! Left, right, left, right, On the double!*…
>
> Homosexuals, lesbians, gays, you homosexuals, go home, who needs you? Did I say go home? It was a slip of the tongue. I meant go to Hell. Look, homosexuals, lesbians, gays and the likes of you, no home is fit for you. . . .
>
> All of you need to be sent to a special institution to undergo special and thorough examination. Something is certainly the matter with you.[95]

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[94] Clive Kawana, "Cry our beloved Zambia: Homosexuality is an evil act," *National Mirror,* November 1-7, 1998.
[95] Wam Kwaleyla, "Just chatting: Homos, lesbians, go to hell," *Zambia Daily Mail,* September 19, 1998.

Few dared raise dissenting voices. Former president Kenneth Kaunda initially urged Zambians to "cool down and think about" the question of "how to handle these brothers and sisters."[96] A furious response from press and politicians ensued; one writer sneered, "It took just one ill-timed, ill-conceived, ill-advised statement uttered in probably less than one minute to invalidate… Kaunda's claim to 74.5 years of wisdom."[97] Kaunda soon retracted his sympathy, explaining that "They are sick, in my opinion, and they should be helped to come back to normalcy."[98]

Francis Chisambisha found one lone defender. On the day after his interview was published, the *Post's* front page announced that Alfred Zulu, head of the Zambia Independent Monitoring Team (ZIMT), wanted to support Chisambisha. "Gay people," said Zulu, "just like lesbians, are normal people and are entitled to fundamental human rights and should not be discriminated against."[99]

Zulu's organization had previously worked principally on election monitoring and on the rights of traditional chiefs. He quickly, however, became the country's main spokesperson on the issue of sexual orientation. In part because of provocative assertions by Zulu about homosexuals' prevalence in Zambia, he was mocked as well as vilified.[100] That a self-proclaimed heterosexual man should defend homosexuals particularly outraged many. At one raucous public meeting, a pastor pleaded with him to admit that he was gay, so that "society will know how to deal with you."

A forum on the issue organized by journalism students at a local college erupted into violence, with Zulu as the target. One press account said that Zulu and a fellow staffer "narrowly escaped lynching" when the audience grew outraged at their "advocating homosexuality." Students switched off lights in

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[96] Goodson Machona, "KK defends homos: the issue has 'come to stay,'" *Post,* October 12, 1998.

[97] Joe Chilaizya, "The High Price of Homosexuality," *Times of Zambia,* October 20, 1998.

[98] Sam Kaseba, "Gay rights a sad story, says Kaunda," *Times of Zambia,* October 24, 1998; and Dickson Jere,"Homos are sick, charges KK," *Post,* October 23, 1998.

[99] Goodson Machona, "Zulu defends homosexual," *Post,* July 15, 1998.

[100] At one point he announced that Zambia's gays and lesbians numbered over half a million, creating visions of NGOs of unprecedented size changing the country's political scene. See "Zambia has 500,000 gays, says Zimt," *Post,* September 3, 1998. At another, he warned there were homosexuals in government, prompting the home affairs minister to demand details, and eliciting a *Times of Zambia* headline declaring "Zulu must name state sodomites."

the auditorium "so that they could manhandle the two gay advocates"; police intervened to protect them.[101]

Within weeks, Zulu and Chisambisha had decided to form an NGO, the Lesbian, Gays, Bisexual and Transgender Persons Association (LEGATRA). Its creation was announced to the press by ZIMT, and again drew banner headlines. At first it planned to operate through the parent organization. Ultimately, though, LEGATRA hoped to apply for legal registration.[102]

The idea of an association roused still more outrage. The ministers of legal affairs and of information were followed by the minister of home affairs and a spokesman for the national police in warning that anyone trying to register such an association would be arrested.[103] The minister of legal affairs observed that "the registration of such an association was in itself a crime." And government spokesman David Mpamba, calling homosexuality "un-African and an abomination to society which would cause social decay," called on Alfred Zulu to step down "for misleading the nation on a moral issue of homosexuality."[104]

The minister of health warned against allowing LEGATRA to register, stating that "allowing homosexual groups in Zambia would worsen the AIDS situation."[105] In Parliament, then Vice-President Christon Tembo announced that people defending the rights of homosexuals faced jail. Since the penal code prohibited homosexual conduct, "If anybody promotes gay rights after this statement the law will take its course. We need to protect public morality. Human rights do not operate in a vacuum."[106] And he added, "An association formed to further the interests of homosexuals can never be registered in Zambia.… [T]hose who will persist in championing the cause for homosexuality

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101 Patrick Kangumu, "Students jeer ZIMT chiefs," *Zambia Daily Mail,* October 16, 1998; IGLHRC interview by Scott Long with Alfred Zulu, Lusaka, Zambia, December 2, 1998.

102 Goodson Machona, "Gays form NGO," *Post,* August 31, 1998; and IGLHRC interviews by Scott Long with Alfred Zulu and Gershom Musonda, ZIMT, December 2, 1998, with Francis Chisambisha, Decem ber 3, 1998, and with "Charles Phiri," December 2, 1998, all in Lusaka, Zambia.

103 "Zambia has 500,000 gays, says ZIMT," *Post,* September 3, 1998; Dickson Kaminda, "Gay promoters face arrest," *Daily Mail,* September 4, 1998; and "Zambia issues warning on gay associations," *Herald,* Harare, September 5, 1998.

104 Mactrevor Bwalya, "Gays' grouping plan thrown out," *Times of Zambia,* September 3, 1998.

105 Kelvin Shimo, "'Homosexuality gives rise to AIDS,'" *Post,* undated clipping, 1998.

106 "You will be arrested, gay lobbyists warned," *Times of Zambia,* September 23, 1998.

activities in Zambia risk being arrested."[107] Several gay men who had given their names to LEGATRA went into hiding after these public threats.[108]

Then president Chiluba finally addressed the issue in October 1998, in a speech on the thirty-fourth anniversary of Zambia's independence. Showing palpable disgust, according to observers, he said, "Homosexuality is the deepest level of depravity. It is unbiblical and abnormal. How do you expect my government to accept something that is abnormal?"[109] He accused Zulu of pandering to foreign funding, and promised that his administration would prevent homosexuality from gaining a foothold in Zambia.

Chiluba's party, the Movement for Multi-Party Democracy (MMD), had been swept into power in a 1991 landslide election victory, propelled by revulsion at the structural adjustment plans imposed in the 1980s. It was an uneasy coalition of trade unions, intellectuals, and conservative rural populations. Chiluba quickly found himself introducing still more rigorous economic reforms.[110] With prices spiraling, urban support for the MMD plummeted; the adminstration found itself more and more reliant on rural constituencies, and by extension on the Christian congregations particularly influential there. One of its first steps had been to promulgate a constitution declaring Zambia a "Christian nation." [111] Now, homosexuality became a

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[107] Amos Malupenga, "Gay activists to be arrested," *Post,* September 23, 1998.

[108] Kelvin Shimo, "Clamp-down on gays begins: Police pursue homos," *Post,* October 19, 1998.

[109] "Chiluba Blasts Gays," *Times of Zambia,* October 19,l 1998.

[110] See I. Mwanawina, "Zambia," in Aderanti Adepoju, ed., *The Impact of Structural Adjustment on the Population of Africa: The Implications for Education, Health, and Employment,* UNFPA (London: James Currey, 1993). See also, N. R. Simutanyi, "Organised Labour, Economic Crisis and Structural Adjustment in Africa: The Case of Zambia," and O. B. Sichone, "Democracy and Crisis in Zambia," both in *Democracy in Zambia: Challenges for the Third Republic,* ed. Owen Sichone and Bornwell Chikulo (Harare: Sapes Books, 1996).

[111] Muleya Mwananyanda of the Zambian human rights group Afronet told IGLHRC that Chiluba's constitutional commitment to a "Christian nation" was partly an effort to give his ramshackle coalition an ideology: "Kaunda had his humanist thing, so Chiluba thought, I will have my Christian thing." IGLHRC interview by Scott Long with Muleya Mwananyanda, Afronet, Lusaka, Zambia, December 2, 1998. "Humanism," a vague synthesis and resembling a form of Christian socialism, had become the official ideology of Kenneth Kaunda's one-party state in the 1970s. With similarities to Julius Nyerere's Ujamaa philosophy in Tanzania, it stressed "traditional society as a kind of extended family encompass[ing] moral, political and economic relations": Henry S. Meebelo, *Main Currents of Zambian Humanist Thought* (Lusaka: Oxford University Press, 1973), p. 4. If Chiluba's change of ideology and phrase had any consequences in the practical

convenient occasion for politicians to cement their alliance with churches, and prove their readiness to defend the religious identity of the state.

Two days after Francis Chisambisha came out in the press, Archbishop John Mambo, superintendent of the Church of God for the Central African Region, said that "homosexuality cannot be an issue of human rights because it is against the teachings of the Bible."[112] Later, at a national conference on human rights, Mambo opposed the registration of gay organizations.[113] Reverend John Jere of Zambia United Christian Action declared, "Our government should take a Biblical stand against such evils" as homosexuality.[114] Zambia is a center for the activities of North American-based fundamentalist Christian evangelists: their approaches and language were invoked in debates. One Zambian newspaper simply reprinted materials describing the work of a U.S. Christian organization which allegedly "converted" gays, Exodus International, to support the idea that "Christian counselling" could cure homosexuals and return them to the fold of society.[115]

Other civil society actors almost uniformly opposed ZIMT and LEGATRA. Many spoke out on the issue despite its irrelevance to their own mandates. Truckers Association of Zambia (TAZ) Chairman Charles Madondo said, "I find it strange that anyone can talk of human rights on somebody doing something not only illegal but also unChristian. Perceiving such practices as human rights is the same as condoning adultery or even murder."[116] The chair of the Zambia Peace Bureau, and the president of the Assocation of Zambian Private Investigators and Security Organizations, gave statements to the press

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realm, it was to replace the extended networks of Kaunda's UNIP government with a more nuclear and patriarchal style and circle.

[112] Reuben Phiri, "Mambo attacks Zulu for defending homosexual," *Post,* July 16, 1998.

[113] "Mambo, gay rights lobbyist differ," *Times of Zambia,* October 8, 1998; and IGLHRC interview by Scott Long with Alfred Zulu, ZIMT, Lusaka, Zambia, December 2, 1998. Mambo, along with other leaders, saw the banning of homosexual organizations as analogous to the banning of certain missionary religious organizations which threatened the popular reach of older churches: thus Mambo also urged the government to control the registration of churches and to prohibit "Satanic churches." Lorraine Makumba, "Universal Church ban hailed," *The Times of Zambia,* September 4, 1998.

[114] Pauline Banda, "Gender Focus: Homosexuality not new but can be stopped here," *Zambia Daily Mail,* September 17, 1998.

[115] Vanessa Furlong, "Homosexuality: Christian counselling is the answer," *Zambia Daily Mail,* undated.

[116] Justine Mwiinga, "TAZ chief condemns homos, lesbians," *Zambia Daily Mail,* September 16, 1998; and "Madondo speaks out on gays," *Times of Zambia,* September 18, 1998.

condemning homosexuality.[117] Traditional chiefs, with an eye on their own relationship to the state, weighed in:

> The Tonga Traditional Association yesterday called on Government to deregister the Zambia Independent Monitoring Team (ZIMT) and arrest all its leaders who have been campaigning for gay rights in Zambia.
>
> Tonga Traditional Association president Dickson Namanza said in Lusaka yesterday that Government was encouraging lawlessness by not arresting the ZIMT leaders, whose gay rights campaign was illegal.…
>
> He said chiefs needed to jointly support Government in its firm stand against the practice whose campaign was being funded by powerful Western donors.
>
> Mr. Namanza called on Government to increase its funding to traditional rulers whom he said played very important roles in issues such as the one ignited by ZIMT and LEGATRA.[118]

Muleya Mwananyanda, information officer of the Zambian human rights group Afronet, told our researcher in 1998 that "the human rights movement is divided on this issue. It is hard not to say that this [homosexuality] is a new kind of right for us. And then people say, 'why should we be fighting for a new right when we don't have our old rights yet?'"[119] In fact, ZIMT was the only human rights organization to speak out for homosexuals. Many other groups expressly working for democracy and human rights went out of their way to speak against homosexuals. George Kunda, head of the Law Association of Zambia, told reporters that

> under existing laws no one was permitted to be involved in unnatural acts like sodomy or lesbianism. . . . On the people who had come out in the open claiming that they were gays he noted that they risked being prosecuted because it was a crime under the Penal Code.…

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[117] "More condemn gay movement formation," *Times of Zambia,* undated.
[118] "Arrest ZIMT officials," *Times of Zambia,* October 22, 1998.
[119] IGLHRC interview by Scott Long with Muleya Mwananyanda, Afronet, Lusaka, Zambia, December 2, 1998.

> "Sodomy or those other things they are fighting for are acts against the order of nature which are not allowed by our existing law," Mr. Kunda said.[120]

The executive director of the Foundation for Democratic Process (FoDEP), a group promoting civic education and fair elections, accused ZIMT of "encouraging the discrimination against gays by encouraging them to come out in the open."[121] The head of Rainbow Monitors, an election-monitoring NGO close to the government, said that "it is a matter of urgency that the campaign for the rights of homosexuals and lesbians be nipped in the bud…. The law in Zambia is very clear on the status of homosexual and other sodomy activities and any persons engaging in or advocating for sodomy is [sic] guilty of breaking the law."[122] Archibald Ngcobo, chair of the Southern African Human Rights Foundation, said that homosexuality remained taboo in Africa: "We should not even gloss over that factor. Based on our cultural side it is against African tradition."[123] And Mike Zulu, president of Focus for Democracy (FOD) told Francis Chisambisha in a public panel, "You chaps are sick. You need help. You need what I call sex therapy…. I wouldn't want any of my children to be spoiled just because of you chaps."[124]

A dean at the University of Zambia saw homosexuality as defining the limits of human rights:

> Rights have to be natural and anything not deriving its legitimacy from the natural phenomenon can't be said to be a right. Social irresponsibility has extended to unthinkable levels that perverts and sadists are busy lurking in the dark bringing ideas against moral standards in the country all in the name of democracy and human rights…. Every society has minimum standards of acceptable behavior and those for homosexuality championing those filthy practices should not be condoned at all. [125]

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[120] "Gays risk prosecution, warns LAZ," *Times of Zambia,* undated clipping, 1998.

[121] Kalila Chellah-Kunda, quoted in "Gays' meeting erupts," *Times of Zambia,* September 3, 1998.

[122] Rev. Lloyd Salimboshi, quoted in "Legatra calls for autonomy of registrar," *Post,* undated clipping.

[123] Quoted in Reuben Phiri, "Mambo attacks Zulu for defending homosexual," *Post,* July 16, 1998.

[124] Dickson Jere, "Another gay surfaces," *Post,* August 24, 1998.

[125] Acting Dean of Student Affairs Darlington Banda, quoted in Douglas Hampande, "Homos shouldn't corrupt Zambians," *Post,* September 29, 1998.

Our researcher in November 1998 met with three members of Zambia's Permanent Human Rights Commission, established by the government in 1997 as an independent monitoring body. The members emphasized that they could not intervene on homosexual issues. The chair, Judge Lombe Chibesakunda, told our researcher that "this is not one of our priority areas of concern. We are concerned with pressing issues, including poverty and prisons." She stressed the importance of "balancing rights," noting that "the rights of children have to be balanced against the rights of gays." And she condemned the intolerance of Western societies "which do not take the idiosyncrasies of a given society into account." Reverend Foston Sakala, another commission member, said, "It is appropriate to consider levels of development of countries. For us, the timing is wrong."[126]

The controversy eventually—and perhaps most dangerously—became one over how civil society was funded, and the motives of its funders. In September 1998, the Norwegian Embassy gave a substantial grant to ZIMT, and expressly targeted part of it for supporting the organization's work with LEGATRA. A new furor erupted when the donation was reported in the state-sponsored press.[127] One letter to the editor demanded, "Are donors gay?"[128] Diplomats of other embassies were questioned by reporters, resulting in the reassuring headline, "Gay rights no condition for Japanese aid."[129] An editorial stated, "We have reason to suspect that many of those behind the alliance formed by gays and lesbians in Zambia are money-mongers who are more interested in donor funds which … the West has promised them."[130]

In an extraordinary confrontation, Norway's ambassador was summoned by the minister of foreign affairs to explain the grant.[131] Speaking under conditions of anonymity, an official at the Norwegian Embassy told our researcher,

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[126] IGLHRC interview by Scott Long with Judge Phyllis Lombe Chibesakunda, Reverend. F. D. Sakala, and Lass Mufusi, Zambian Permanent Human Rights Commission, Lusaka, Zambia, December 5, 1998. See also Nicky Shabolyo, "Rights body mute on gays," *Daily Mail,* September 22, 1998.

[127] "Norwegian envoy supports gay movement," September 18, 1998; "Gays' meeting erupts," *Times of Zambia,* September 18, 1998.

[128] K. Phiri, "Are Donors Gay?" *Times of Zambia,* October 22, 1998.

[129] "Gay rights no condition for Japanese aid," *Times of Zambia,* October 21, 1998.

[130] "Opinon," *Times of Zambia,* undated clipping, 1998.

[131] Mutale Mwamba, "Envoy Summoned," *Times of Zambia,* undated clipping, 1998

> The Ambassador was told quite strongly that it was unacceptable for a foreign embassy to intervene in illegal conduct in this country. It reached the level of a written reply from our foreign minister to the Zambian foreign minister. I cannot tell you its contents. But I can tell you that our position generally is, first, that priorities are set by NGOs themselves, and second, that we were giving support to ZIMT to sponsor discussion. And we assume that having discussions and so forth on an issue is not illegal. But I can tell you that this kind of thing becomes known in the diplomatic community. I believe it will make many embassies more careful than us about whom they support. And I believe it will make many NGOs very careful about what they discuss.[132]

Anders Pedersen, first secretary at the Embassy of Sweden, exemplified this caution. "For me personally," he told our researcher, homosexuality "is an issue you must defend." But he added,

> For us it has been very much a question of—operating here in Zambia, you must make a distinction between our values in our society, and what kind of discussion can we have in Zambia…. The Norwegian Embassy's situation, we defend, we sympathize. But should Sweden stand with them publicly? No; we have decided it is not the right way.[133]

Western donors and embassies in Zambia, as in much of Africa, had shifted their priorities since the 1980s away from funding government projects toward promoting non-governmental organizations. "Donor-driven democratization," as one Zambian political scientiest called it, promoted an independent, often critical civil society: but governments which lost direct aid might well doubly resent the perception that the funds were channeled to enable their opponents. [134] With President Chiluba himself accusing NGOs of selling out Zambians to an agenda set by foreign funders, the controversy over

[132] IGLHRC interview by Scott Long with official who wished to remain anonymous, Embassy of Norway, Lusaka, Zambia, December 4, 1998.
[133] IGLHRC interview by Scott Long with Anders Pedersen, first secretary—political, Embassy of Sweden, Lusaka, Zambia, December 4, 1998.
[134] See Owen B. Sichone, "Problems of the State and Civil Society," in *Democracy in Zambia,* ed. Owen Sichone and Bornwell C. Chikulo (Harare: Sapes Books, 1996).

homosexuality threatened to become one over the legitimacy—and "authenticity"—of civil society itself.

The IGLHRC representative visiting Zambia in November 1998 found a minuscule gay community in terror and disarray. Francis Chisambisha had not seen or spoken to his family since he came out in the *Post* in July. He had earlier been studying at an agricultural college run by the United Church of Zambia. After the article appeared, however, he was barred from taking his exams, and told verbally that he was suspended from the school. Now he stayed with friends, moving from house to house regularly in fear of the police. Others associated with LEGATRA were homeless, expelled by their families who discovered or suspected they were gay.[135]

LEGATRA was still an illegal organization. The Registrar of Societies had not arrested ZIMT staffers who came to present LEGATRA's application for registration; he had repeatedly turned them away, though, claiming he had run out of forms.[136] The IGLHRC representative visited the registrar, Herbert Nyendwa, together with ZIMT and LEGATRA members. Nyendwa confirmed that he could not register the group, "any more than I could a Satanic organization."[137]

LEGATRA ceased to exist within a few months. By 1999, most of its members had fled the country. ZIMT also collapsed as an organization in 2000.

D. Botswana

One explanation for the spread of homophobic rhetoric on the African continent was offered in 1998 by South Africa's Zackie Achmat. Achmat, a former anti-apartheid activist and revered figure in his country's progressive politics, founded his country's National Coalition for Gay and Lesbian Equality; he has since become a renowned campaigner for access to HIV treatment. Many African politicians, Achmat told our researcher,

> want to blame the West for everything, homosexuality included. And they are right, the West is responsible for their rhetoric, but in a different way than they say. The West, the IMF, the World Bank, push structural adjustment plans on these countries. And they are

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[135] IGLHRC interviews by Scott Long with Francis Chisambisha, Lusaka, December 3, 1998, and with Buumba S., Lusaka, Zambia, December 3, 1998.
[136] IGLHRC interview by Scott Long with Gershom Musonda, ZIMT, Lusaka, Zambia, December 2, 1998.
[137] IGLHRC interview by Scott Long with Herbert Nyendwa, Registrar of Societies, Lusaka, Zambia, December 4, 1998.

> starved and devastated by it. Food is unaffordable, health care unavailable; educations, opportunities, pensions are all gone. And the populations are enraged, rightly. And the governments used to depend on one class to support them when the chips were down: civil servants. Intellectuals used to know that you emerged from the universities and you had a lifetime government job. No more: the government jobs are gone, courtesy of the IMF's orders. The civil servants are all redundant. And so these governments are precarious and terrified. The people are roused up against them, and there is no one to support them. Their only real hope is that people die of AIDS or hunger before they are angry enough to rebel.
>
> And what do they find? They say "homosexual" and two sorts come running to them: the Christian churches and the African traditionalists, two groups who usually won't even speak to one another, come flocking behind the government's banner. Suddenly they have support. It's a magic word. They think it is a perfect solution. For now.[138]

In diverse corners of Africa, other countries have heard rhetoric similar to Mugabe's.

In Botswana, discussion of homosexuality intensified in 1998, when the process of revising the penal code raised prospects that the sodomy law might be repealed. Political forces mobilized to forestall the possibility. The ruling Botswana Democratic Party (BDP) faced an election in the next year, and the opposition tentatively favored sodomy law repeal. Molosiwa Selepeng, political affairs secretary in the president's office, told a reporter that "Homosexual practice remains a crime in Botswana and this reflects the overwhelming majority attitudes in this country." He said those attitudes found homosexuality "unnatural and abhorrent." The executive secretary of the ruling BDP said his

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[138] IGLHRC telephone interview by Scott Long with Zackie Achmat, November 22, 1998. For a not-dissimilar account of the effects of structural adjustment and government retrenchment on general political life in Zambia, and the resort to "ritual politics" in the face of state impotence, see Owen B. Sichone, "The Sacred and the Obscene: Personal Notes on Political Ritual, Poverty and Democracy in Zambia," in Jonathan Hyslop, ed., *African Democracy in the Era of Globalisation* (Johannesburg: Witwatersrand University Press, 1999).

party "could not even debate the issue of homosexuality" because it "would shock the Batswana nation."[139]

The vice-president of Botswana, Seretse Ian Khama, also spoke out against homosexuals. Asked in Parliament to clarify the government's position, he said:

> Human rights are not a licence to commit unnatural acts which offend the social norms of behaviour … The law is abundantly clear that homosexuality, performed either by males or females, in public or private is an offence punishable by law.[140]

Several traditional leaders vocally opposed relaxing the penal code, according to a reporter:

> Bakgatla Kgosi Linchwe II lambasted homosexuals as being worse than animals. "To liken them to animals is an insult," said Kgosi Linchwe.
>
> Bangwaketse Kgosi Seepapitso IV told the *Sun* that people who are gay need to be whipped or sent to jail.
>
> Asked whether it was not wise to ignore homosexual people, Kgosi Seepapitso likened the presence of homosexuals in society to a house that is dirty and whose owner would be irresponsible if he did not sweep it clean.[141]

The Evangelical Fellowship of Botswana, a coalition of evangelical churches, intervened as well, launching what it called a "crusade" against homosexuality. Its national secretary, Pastor Biki Vutale, called on "all Christians and all morally upright persons within the four corners of Botswana to reject, resist, denounce, expose, demolish and totally frustrate any effort by

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[139] Molosiwa Selepeng, political affairs secretary to the president of Botswana, and Botsalo Ntuane, BDP executive secretary, both quoted in "The people say no to homosexuality: and the government abides by their will," *Midweek Sun,* Gaborone, Botswana, June 3, 1998.

[140] "Vice President Khama harshly denounced homosexuality," *Midweek Sun,* undated clipping, 1998.

[141] Billy Kokorwe, "Whip them or jail them: Kgosi Seepapitso's view on homosexuals," *Midweek Sun,* June 17, 1998.

whoever to infiltrate such foreign cultures of moral decay and shame into our respectable, blessed, and peaceful country."[142]

Yet in Botswana, as in Namibia, civil society spoke out against the vilification. In particular, the mainstream human rights organization Ditshwanelo defended homosexuals from the start. As early as 1995, it urged decriminalization of homosexual conduct.[143] It provided space, support, and legal help to a group of gays and lesbians who eventually founded an organization called LEGABIBO—Lesbians, Gays, and Bisexuals of Botswana. In 1998, Ditshwanelo organized a roundtable on gay rights, producing a paper on the subject which it submitted to the criminal law reform process.[144] It was attacked for its efforts: Bekezela Nkomo, of the Evangelical Christian Fellowship, said "Ditshwanelo is infiltrated by gays and lesbians with the set aim of desecrating traditional African moral values on the altar of perceived constitutional rights."[145]

However, Anglican leader Walter Makhulu, archbishop of Central and Southern Africa—and the patron of Ditshwanelo—offered a different perspective, telling a reporter who asked about gays and lesbians:

> I am intrigued that you never bother about sexual orientation when people create wealth for your society, and do wonders in contributing to the upliftment of your community. But somehow, when it comes [to] these people's sexual orientation, you have difficulties.

[142] Outsa Mokone, "Evangelical backlash on gays," *Gazette,* Gaborone, Botswana, May 27, 1998.

[143] Joseph Balise, "'Gays' rights must be respected,'" *Sunday Tribune,* Gaborone, September 3, 1995; and Kebonye Seretse, "Ditshwanelo discusses rights of homosexuals," *Botswana Daily News,* Gaborone, Botswana, October 5, 1995.

[144] IGLHRC interview by Kagendo with Gideon Duma Boko, Gaborone, Botswana, December 9, 1998. See also Outsa Mokone, "Gays and lesbians join hands with Ditshwanelo," *Botswana Gazette,* Gaborone, Botswana, May 13, 1998.

[145] "Sodom and Gomorrah: Churches warn against the decriminalization of homosexuality," *Midweek Sun,*Gaborone, May 27, 1998. The debate continued into the following year; at a University of Botswana panel in early 1999, a "right-wing youth activist" stated, to approval from the student audience, that the country was "traumatised by homosexuality" and other "ideas from overseas and donors." "Botswana debates the relaxation of anti-gay laws," *Johannesburg Daily Mail and Guardian,* January 19, 1999.

> Yes, the Bible does say it is opposed [to homosexuality]. But it was written in its own day and in its own time.[146]

Some changes have taken place in Botswana. In late 2000, president Festus Mogae urged the nation "not to be judgmental" about groups vulnerable to HIV, including homosexuals, prisoners, and commercial sex workers. [147] However, Botswana's sodomy law has not only been retained, but broadened to criminalize sexual conduct between women (see Appendix). In 1998, members of LEGABIBO met the attorney general—who told them informally that the organization would never be allowed to register legally, because homosexual conduct remained a criminal act.[148] The organization is still extralegal. Religious forces remain divided: "Despite the Archbishop's efforts, there is still homophobia within the [Anglican] Church: and other churches simply think the Anglican stance is a form of madness," one cleric close to Makhulu told our researcher in 1998.[149]

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[146] Mesh Moeti, "Makhulu's liberal gay views," *Mmegi Monitor/The Reporter,* Gaborone, Botswana, November 3-9, 1995.

[147] "Botswana president: 'Don't be judgmental on homosexuals," at http://www.mask.org.za (citing a report in the *Mmegi Monitor,* Gaborone, Botswana), retrieved August 17, 2002.

[148] IGLHRC interview by Scott Long with Mike, Gaborone, Botswana, December 18, 1998; and IGLHRC interview by Kagendo with Joseph, Gaborone, Botswana, November 8, 2001.

[149] IGLHRC interview by Scott Long with Father Richard Chance, Gaborone, Botswana, December 19, 1998. Homophobic rhetoric and state abuse, sometimes accompanied by the approval of religious authorities, have spread far to the north in Africa. In another example, in 1998, President Yoweri Museveni of Uganda told a press conference, "When I was in America, some time ago, I saw a rally of 300,000 homosexuals. If you have a rally of 20 homosexuals here, I would disperse it." ("Museveni warns off homosexuals, *Monitor,* Kampala, Uganda, July 22, 1998.) His minister of gender, labour, and social development later warned, "The West is bringing up homosexuality and lesbianism under a different name, called sexual orientation … These people want their ideas to be focused in every programme, in case you come across something like sexual orientation, you have to think twice before you defend it." (Minister Janet Mukwaya, quoted in "Minister warns of homosexuals," *Crusader,* Kampala, Uganda, August 18, 1998.) In September, 1999, after (inaccurate) published reports of a wedding between two men in Uganda, Museveni told a conference on reproductive health: "I have told the CID [Criminal Investigations Department] to look for homosexuals, lock them up and charge them." ("Museveni opens a war on gay men," *Monitor,* September 28, 1999. See also "Wandegeya homos marry," *Sunday Vision,* Kampala, Uganda, September 12, 1999; "Police probe Kampala's homosexual weddings," *New Vision,* Kampala, Uganda,

E. South Africa: Signs of Hope

Until 1994, South Africa was ruled by a white minority government which founded its racist ideology in part on the Dutch Reformed Church's conservative theology, barring all expressions of sexuality outside a same-race heterosexual marriage. As the Anglican archbishop of Cape Town, Desmond Tutu, noted, "The apartheid regime enacted laws upon the religious convictions of a minority of the country's population, laws which denied gay and lesbian people their basic human rights and reduced them to social outcasts and criminals in their land of birth."

Speaking in 1995—only a few months before Robert Mugabe's attack on the Zimbabwe book fair—Tutu, another hero of Africa's liberation struggles, addressed himself to debates over the drafting of a constitution to govern the "new South Africa." He affirmed,

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September 13, 1999; and "Museveni, police homo probe out: 'Story was made up,'" *Monitor,* October 5, 1999.) A few days after Museveni's outburst, Kenya's then President Daniel Arap Moi—apparently prompted by a similar rumor of a gay wedding there—declared, "Homosexuality has no place in Kenya." (John Kamau, "Gay wedding row forces government to open the closet," *Sunday News,* Dar es Salaam, November 7, 1999.)

In Uganda in 1999, several people were jailed in the wake of Museveni's mandate. Five men and women who had formed a tiny lesbian and gay group were tortured. Others, terrified, fled the country. Meanwhile, the head of Uganda's Anglican Church, Archbishop Livingstone Mpalanyi-Nkoyooyo, proclaimed immediate support for Museveni. (Daniel Elwana, "Church backs Museveni against homosexuality," *Daily Nation,* Kampala, Uganda, November 14, 1999.) A key official in Museveni's governing Movement published an article on homosexuality which he declared "the official Movement position on the matter." He charged Uganda's "elite and intellectuals" with abandoning their own society: "Just because they have heard that homosexuality exists even amongst the most powerful institutions of the developed societies such as governments, IMF, and World Bank, they believe that these can be some of the virtues which can be packaged to develop the Third World. The starting point is that homosexuality has, hitherto, not been known or practiced in our communities." (James Magode Ikuya, deputy director of information and public relations at the Movement Secretariat, "Movt can never embrace homos," *Monitor,* undated clipping, November 1999.) And in March, 2002, while accepting an award for his country's HIV/AIDS prevention programs, President Museveni said, "We don't have homosexuals in Uganda." ("Commonwealth honors Museveni," *New Vision,* March 4, 2002.) See also Amnesty International Appeal, "Uganda: Criminalizing Homosexuality: A License to Torture," June 27, 2001; and Amnesty International, *Crimes of Hate, Conspiracy of Silence: Torture and Ill-Treatment Based on Sexual Identity,* AC 40/016/2001, pp. 4-6.

> People's sexual nature is fundamental to their humanity.… These laws are still on the Statute Books awaiting your decision whether or not to include gay and lesbian people in the "Rainbow People" of South Africa. It would be a sad day for South Africa if any individual or group of law-abiding citizens in South Africa were to find that the Final Constitution did not guarantee their fundamental human right to a sexual life, whether heterosexual or homosexual.[150]

"Sexual orientation" had been included in the equality protections of the interim constitution when it was adopted in 1993—making South Africa the first country in the world to include that status in its bill of rights. The language owed to the extraordinary efforts and advocacy of gay and lesbian activists; to effective coalition-building with other civil society groups; and to the openness of the African National Congress, which had taken up gay and lesbian rights in its "Policy Guidelines for a Democratic South Africa" in 1992.[151]

The interim constitution, agreed upon by the main political parties, provided the basis for the 1994 elections, the first free vote in South Africa's history, and for the inauguration of Nelson Mandela as president. Following the election, the new parliament took on a dual function as a constitutional assembly, to draft a final constitution. Though all articles were subject to debate, the final constitution had to conform to thirty-three "fundamental principles"—including nondiscrimination—that the parties had agreed would govern the process.

After a two-year discussion process, and hundreds of thousands of public submissions, only one party in the assembly, the African Christian Democratic Party, opposed including sexual orientation among banned discriminations in the final version of the bill of rights. Importantly, the assembly also agreed that the prohibition on discrimination should have "horizontal" effect, binding private actors as well as the state, and that the state should be required to implement this provision in legislation.

The "Equality Clause," part of article 9 of the constitution as adopted on May 8, 1996, holds:

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[150] Quoted in Dunton and Palmberg, "Human Rights and Homosexuality in Southern Africa," p. 37.

[151] African National Congress, "ANC Policy Guidelines for a Democratic South Africa," as adopted at National Conference, 28-31 May 1992; clause B5.1.8, in a section outlining the ANC's position on the Bill of Rights for the prospective new constitution, said any bill must respect "the right not to be discriminated against or subjected to harassment because of sexual orientation."

> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
>
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

In 2000, in accordance with article 9(4), parliament enacted the Promotion of Equality and Prevention of Unfair Discrimination Act, which gives legal force to the constitutional ban on discrimination and provides mechanisms for redress (see Chapter V).

The influence of this constitutional protection has been profound. Rita Makarau, Mugabe supporter and member of Zimbabwe's Parliament, told our researcher in 2000, "Our homosexuals are always quoting the South African constitution."[152] The constitution is a rhetoric in its own right, one which not only creates expectations among its own citizens but resonates beyond its borders.[153] Two instances show its symbolic as well as substantive power.

Speaking at the Fourth World Conference on Women in Beijing, China, in 1995, South Africa's then minister of health, Dr. Nkosazana Dlamini-Zuma, offered the South African example in support of the (ultimately failed) bid to include "sexual orientation" in the text of the conference Platform:

> After the long history of discrimination in South Africa, we decided that when we were the government we would not discriminate against any group of persons, no matter how small their proportion in the population. To show that we do not have a short memory regarding matters of discrimination, our Constitution has a non-discrimination clause and discrimination on the basis of sexual orientation is prohibited. Though the number of people may be small, we do not discriminate against them, as we do not discriminate

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[152] IGLHRC interview by Scott Long with Rita Makarau, Harare, Zimbabwe, August 16, 2000.

[153] See Pierre de Vos, "On the Legal Construction of Gay and Lesbian Identity and South Africa's Transitional Constitution," *South African Journal on Human Rights,* Vol. 12, No. 2 (1996), pp. 265-290.

> against anyone. We support the inclusion of sexual orientation in the Platform.[154]

Judge Albie Sachs, veteran anti-apartheid activist and justice of South Africa's Constitutional Court, wrote in a concurring opinion to the court's unanimous 1998 decision overturning sodomy laws in the country—a decision determining that those laws violated constitutional protections for privacy, dignity, and equality:

> The acknowledgement and acceptance of difference is particularly important in our country where group membership has been the basis of express advantage and disadvantage. The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognising and accepting people as they are…. What the Constitution requires is that the law and public institutions acknowledge the variability of human beings and affirm the equal respect and concern that should be shown to all as they are. At the very least, what is statistically normal ceases to be the basis for establishing what is legally normative. More broadly speaking, the scope of what is constitutionally normal is expanded to include the widest range of perspectives and to acknowledge, accommodate and accept the largest spread of difference. What becomes normal in an open society, then, is not an imposed and standardised form of behaviour that refuses to acknowledge difference, but the acceptance of the principle of difference itself, which accepts the variability of human behaviour.
>
> The invalidation of anti-sodomy laws will mark an important moment in the maturing of an open democracy based on dignity, freedom and equality. As I have said, our future as a nation depends in large measure on how we manage difference. In the past difference has been experienced as a curse, today it can be seen as a source of interactive vitality….
>
> A state that recognises difference does not mean a state without morality or without a point of view. It does not banish concepts of right and wrong, nor envisage a world without good and evil.…

[154] Quoted in *Written Out: How Sexuality Is Used to Attack Women's Organizing*, an IGLHRC report, 2000, pp. 67-68.

> What is central to the character and functioning of the state, however, is that the dictates of the morality which it enforces, and the limits to which it may go, are to be found in the text and spirit of the Constitution itself.[155]

Such language, however, still leaves unresolved the concrete ramifications of South Africa's promise. To predicate the morality of states on dignity and equality rather than precept and prejudice; to make that "interactive vitality" evident as a source of strength—these remain challenges in South Africa, as elsewhere.

South Africa still confronts unfulfilled responsibilities in implementing its constitutional protections: to expand them into the language of law and policy; to spell out their practical implications and construct new institutions to enact them; to translate them into accessible and usable words for local communities, activists, and victims of abuse. Instead, too often, South Africa has let its commitments rest on the shelf or remain idle in constitutional clauses, unsupported by action. The consequences of this failure will be explored later in this report.

[155] Sachs J, Concurring Opinion, *National Coalition for Gay and Lesbian Equality et. al. v Minister of Justice et. al.,* Constitutional Court of South Africa, Case CCT 11/98, at 134-137.

III. THE HAND OF THE STATE: ABUSE AND DISCRIMINATION BY STATE ACTORS

A. "Fatima's" Story

"Fatima" was sixteen when our researcher spoke to him in late 2000. His real name is Tendai N.; he took a woman's name while wearing women's clothes almost constantly between the ages of thirteen and fifteen. Though he now has reverted to men's dress, most of his friends still call him by his nickname. Born in Zambia, he grew up in Harare, Zimbabwe, after his parents moved there when he was a small child. Fatima says:

> I first discovered I was gay when I was nine years old. I was always too feminine for my family, I walked and I danced like a girl when I was a little boy. But my mother realized that I was attracted to men, and she said, I cannot live with a gay in my house. So when I was nine, she threw me out of the house.
>
> We were living in Glen Nora [a high-density suburb of Harare]. So I went out from the house and I caught a lift from Glen Nora to the highway south, and there I just stood on the highway and hitchhiked some trucks. And one truck stopped and asked my problem. I said, my mother threw me out of the house and I said, I need a lift to Beitbridge [the border crossing with South Africa]. So he told me to get in.
>
> We got to Beitbridge and he said, where do you want to go now? And I told him I want to go to Joburg [Johannesburg]. I thought in Joburg I would find a place for myself, you know. So he hid me in the truck and got me across the border without a passport and to Joburg.
>
> In Joburg, for a year and a half, I lived on the street. I had no place to stay. Then when I was ten and a half, I found a job, and I worked in a restaurant for two years, cleaning up the tables because they would hire a child for that. One time I tried to phone my mother; she said, I don't want to see you ever again in my life.
>
> I stayed in Joburg for four years. After a while I lost my job, and then I went back on the street. They caught me because I had no papers, and I was finally deported back to Harare when I was

> thirteen. I phoned my mother as soon as I arrived, and she said, again, I don't ever want to see you.
>
> Well, then for the first time I became really sad. Because, you know, it felt different to have no home when you were so close to home. So I took fifty anti-malaria tablets. Some friends found me and I was rushed to the hospital and they treated me.
>
> When my mother heard I was in the hospital, she did come to get me, and she took me home. I said to her: "Who will accept my situation if you of all people don't?" And so in a way we came back together.
>
> There is some understanding between us now. But I don't live with her. Now I stay with Tina [Machida, a lesbian activist]; she is helping me. But, you know, I want my mother sometimes, and then I am so sad.[156]

The end of October 1999 was a period of high exposure for gays and lesbians in Zimbabwe. On October 25, GALZ representatives were finally permitted to testify before a commission drafting a proposed new constitution: "Sexual preference," one told the audience amid extensive media coverage, "is a human right."

Five days later, on October 30, President Mugabe was in London for what the press later called a "private shopping trip."[157] A group of protesters from the British gay and lesbian group OutRage! surrounded his car. One demonstrator, Peter Tatchell, took the president by the arm and said, "President Mugabe, you are under arrest for torture." Subsequently, Tatchell cited not only Mugabe's incitements to homophobic violence, but murders in Matabeleland in the early 1980s and the torture of two independent journalists, as justification for a citizen's arrest.

When police arrived, Tatchell asked them "to arrest President Mugabe, using the powers in the Criminal Justice Act and the United Nations Convention Against Torture." In the end it was Tatchell who was arrested, and Zimbabwe lodged complaints with the British government. [158]

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[156] IGLHRC interview by Scott Long with Tendai N., Harare, Zimbabwe, August 9 2000.

[157] "UK: Gay Activist Freed After Mugabe Row," *BBC*, October 30, 1999.

[158] "UK: Gay Activist Freed After Mugabe Row," *BBC*, October 30, 1999. See also, OutRage! press release, "Zimbabwe's President Mugabe Detained on Charges of Torture by Gay Rights Protesters," October 30, 1999.

Mugabe's relationship with Britain, never warm, had deteriorated sharply over British opposition to land seizures. The president made the London incident an international issue. In ensuing weeks, he accused the Blair administration of organizing the protest in an attempt to halt his "land reform" program: "They are even using gangster gays on us," he stated. "And each time I pass through London, you get people milling around, trailing you. [You] see that is the gangster regime of Blair."[159] Zimbabwe's state-controlled press joined in. In the ZANU-PF paper, *People's Voice,* one commentator wrote:

> This incident was no doubt well planned…. It was a stone's throw away from M15 headquarters which means security agents witnessed the whole drama…. To make matters worse the British government has declined to apologize because it says it cannot be held responsible for acts of people who elected it into power.
>
> Zimbabweans have their cultural values and customs. It would be an act of sheer folly for anyone to attempt to dictate to us on matters of our culture and customs, still worse where it concerns homosexuality which is alien to our society. Zimbabwe will never tolerate gays and lesbians, not even under any amount of pressure from some quarters. Zimbabwe, like other nations as well as churches, opposes homosexuality because it is against the concept of family and reproduction. We are at a loss as to why some nations are so fond of gays and lesbians.[160]

"How dare spineless British gays lay they [sic] dirty hands on our President!" another columnist exclaimed. "We, the people of Zimbabwe … abhor gays and lesbians. We loathe them in the deepest sense of the word. Yes, we cannot legalise homosexuality and those who do not agree with us must leave Zimbabwe aboard the next flight from the Harare International Airport! Got it, leave this country and leave now!" [161]

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[159] "President Repeats 'Gay Gangster' Accusation," *Herald,* Zimbabwe, November 13, 1999. See also, "Mugabe: UK Set 'Gay Gangsters' on Me," *BBC*, Monday, November 8, 1999.

[160] "British Gay-Gangster Tactics Won't Work," *People's Voice,* Zimbabwe, November 14-20, 1999.

[161] Zvenyika Kambizi, "Really Bad Fellas, These British," *People's Voice,* Zimbabwe, November 14-20, 1999. See also, "Attack on Mugabe Sign of UK Dictatorship," *Sunday Mail,* Zimbabwe, November 28, 1999; "Perverts' Weird Rights Shocking," *Herald,*

Zimbabwe's press reported on the protest the day after it took place.[162] Even more rapid repercussions ran through Zimbabwe's security establishment, however: the Central Intelligence Organization (CIO), responsible for the president's safety, was deeply embarassed. "If it's true that the president was physically assaulted, the security personnel would either be replaced, demoted, or fired for laxity," a CIO source told a Zimbabwean reporter.[163] Some CIO officers apparently decided to make amends through an immediate, and vengeful, display of dedication.

Fatima tells the story of what happened to him on October 31, the day after the London incident:

> It was a Sunday. That Saturday night we had come from the [GALZ] center. We went to a nightclub here in Harare, a few of us together, and then me and my friend Robert, we left at 6 a.m. We slept for three hours, and then we woke up and it was Sunday morning, and we said, let's go out.
>
> We went to a place called the Eight Miles Shopping Center, in Southerton [a suburb of Harare]. We were sitting in a little terrace. It was about 10:30 a.m. I had put a bandanna in my hair, which had a kind of a British flag pattern in it.
>
> One of the men near the terrace, he called me over. "Come here," he said. And then he started saying to me, "You homosexuals, are you British? You want to make this country like your country, a gay country. Our president was beaten up in London, and here you are, demonstrating."
>
> I said, "It is just a bandanna, I didn't know there was a problem." Suddenly there were four people all over us, all plainclothes police. They showed us their I.D.s, they were CIO. They handcuffed me and threw me in a car. They called my friend over, and they said to us, "You gay people, you should be killed."[164]

Zimbabwe, November 15, 1999; and "Homosexuality: Do Not Force it on Zimbabweans," *Herald,* November 16, 1999.

[162] "Gays Pounce on Mugabe," *Sunday Mail,* Zimbabwe, October 31, 1999; and "Gays Ambush Mugabe," *Standard,* Zimbabwe, October 31-November 6, 1999.

[163] Dumisani Muleya, "CIO Quizzed Over Gay Ambush of Mugabe in UK," *Zimbabwe Independent,* November 5, 1999.

[164] IGLHRC interview by Scott Long with Tendai N., Harare, Zimbabwe, August 9 2000.

Robert, Fatima's friend, was twenty-one at the time. He remembers:

> These men, they all came out of a blue Peugeot 504 sedan. They called Fatima over. He went over to their car and took out his I.D. I went over too, to see what was happening. I approached them and they chased me away. They said, "You are loitering for prostitution."
>
> A friend was near there in his car, the one who had dropped us there at the shopping center. And I went to him to protest. And that made them really angry. They came to the car where I was talking to him, and they grabbed me by the trousers and pulled me to their car. They said I was under arrest because I was talking to a white man.
>
> They put me in the same car with Fatima. They were CIO; they showed their I.D.s. The man who had Fatima said he wanted to kill me. He said they would take me out and dump me somewhere. They asked me how much money I had. I had Z$30 [U.S.$1.50] in my pocket—I was a student, I was looked after by my parents. But the idea was, we were gay, so we must have money, we must be looked after by somebody.
>
> Then a police car came; they called in a car that was attending an accident scene. They put me in that car and took me to Warren Park police station. But before taking me, they beat me first.
>
> They forced me to sit on the ground outside where Fatima was. They beat me for a long time on the ears and on the head, till my ears were bleeding. I went to the doctor next day, and I had a perforated eardrum.
>
> Then the man in the car, a regular policeman, he took me to Warren Park. At the station, the policemen were OK, they said, you can go. They told me, don't hang around with these people any more. I think they were scared because I was bruised so bad. I wasn't charged, and I didn't pay a fine.[165]

Fatima remembers:

[165] IGLHRC interview by Scott Long with Robert, Harare, Zimbabwe, August 10, 2000.

> They beat my friend. They didn't beat me then, but they beat him until he was bleeding. They were slapping his face till he was bleeding from the ears. Other people were around, and were just watching, but I heard some of them saying, "They are beating the homosexuals." Then they stopped another car—the driver was also a policeman—and put Robert in it. They said to the driver, "Take this homosexual and drop him somewhere far from town." I thought that would be it, I thought no one would ever see us again.
>
> Then there was just me left. And they kept me in the car and drove around with me. They would stop from place to place, in a field or a parking lot, and beat me, on the chest and the face. That went on until night, with me handcuffed. Finally the officers took me to a police station called Braeside, near Queensdale. It was night by then, and they handed me over to the policemen there.
>
> They threw me into a cell and took off the handcuffs. There were other prisoners there, six of them. They said, "Here's a homosexual. You can do whatever you want with him. You can have sex with him if you want."
>
> For some reason the prisoners left me alone. I was pretty bruised. I slept there one night. In the morning, the policemen said I would have to pay a fine, Z$100 [U.S.$4], because I was doing prostitution.
>
> I phoned Tina; I was staying with her at the time. She came to pay the fine. They gave me a booklet and said, I must write down everywhere I go, and the CIO would come and check it.[166]

Tina Machida remembers:

> Fatima was staying with me because he had no place else to go. And the police, they said, what are you doing with this child? What is your relation to him? I said, he has no family he can stay with. But they took this book and said to write down everything he did, keep a

[166] IGLHRC interview by Scott Long with Tendai N., Harare, Zimbabwe, August 9, 2000.

> record of where he is going. I was frightened, they already have records on me. I had to ask Fatima to move out.[167]

Fatima was forced to move into the GALZ center. He says he still flinches in fear whenever he sees policemen or police cars. His friend Robert says, "GALZ told me I should sue. But a friend told me it was an especially bad idea to mess with CIOs. So I tried to forget about it. It's very unsafe here. I am much more careful in straight places now. It's very unsafe to let anyone know you are gay."[168]

B. Words Hurt: Stories of Police Abuse

Fatima's story shows how the official language of homophobia, voiced at the highest levels, can translate almost immediately into violence by state authorities on the streets.

It also shows the background of prejudice and hatred in community and family which makes people easy targets of official injustice. Expelled from his home at the age of nine for being "too feminine," Fatima was a vulnerable target for state repression and revenge.

This chapter and the next will examine how sexual or gender non-conformity subjects people throughout southern Africa to violence, repression, and discrimination. Abuse can come from many quarters. This chapter will recount some of the actions of state authorities, enabled by the laws already described. The next will examine how people are subject to violence at the hands of non-state actors in their communities; in public spaces; and in their families and domestic lives.

It is important to remember, however, that—as Fatima's story illustrates—these spheres and stories cannot easily be separated. They combine, intertwine, and reinforce one another, to enforce heterosexual norms and suppress either "deviance" or dissent.

The most common forms of day-to-day harassment are simply based on the look or behavior of the victim. Certain kinds of appearance, gesture, dress become no longer casual but criminal, no longer innocent but infused with meaning. In southern Africa, public statements by political leaders decrying "gays" or "lesbians" or "homosexuals" work to make those identities a vivid presence in the public eye. Whatever the terms they use or the specific behaviors they abominate, they help to define and focus attention on—in some cases, to

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[167] IGLHRC interview by Scott Long with Tina Machida, Harare, Zimbabwe, August 10, 2000.

[168] IGLHRC interview by Scott Long with Robert, Harare, Zimbabwe, August 10, 2000.

create—a class of people corresponding to the despised name. Regressive language and an often-repressive legal system collude and combine. They make gays and lesbians visible in rhetoric and imagination before they are ever perceptible as a political or social force. They put the public—and the police—on the lookout for telltale signs that will betray a person as belonging to one of those obscure communities.

Those signs vary, depending on the scraps of information or belief police or public have about "homosexuality" or "perversion." They may be public displays of affection between members of the same sex—actions which heterosexuals would take for granted, but which gays or lesbians learn to suppress. They may be articles of clothing or styles of dress. They may be as simple as a way of walking, talking, or moving.

Police in the region rarely consult a lawbook before deciding whom to harass. Yet they can also take their pick of laws to invoke against the offending person. As discussed below, laws criminalizing consensual homosexual sex exist in Botswana, Namibia, Zambia, and Zimbabwe; and police regularly infer private sexual conduct from public gesture or dress. Prohibitions of "public indecency" or prostitution are ready instruments to rid streets or sidewalks of unwanted behaviors.

In Namibia, on April 30, 2001, members of the Special Field Forces (SFF), an elite police unit, moved into Katatura, a Windhoek township, and began rounding up men wearing earrings. They were acting in evident response to weeks of mounting homophobic statements by the president and ruling party. The SFF, indeed, report directly to the president and are not subject to oversight or accountability by any other part of the government.[169] The president had warned homosexuals that "The police are ordered to arrest you." The SFF took him at his word.

Stallon Shimanda was stopped by the SFF at a shopping center and asked, at gunpoint, why he was wearing earrings. Shimanda told the *Namibian* newspaper:

> I pleaded with these SFF guys that I bought the earrings and they were not stolen. Even when I asked them to take me to the Police charge office instead of taking my earrings, they did not want to hear anything else other than demand that I remove them and give them the earrings…. They claimed that it was an order from the President

[169] Human Rights Watch interview with Norman Tjombe, Legal Action Center, Windhoek, Namibia, July 19, 2001.

> to take earrings off any male person. They asked who was I to contradict a Presidential order.

One of the SFF members, Victoria Pinias, told a reporter for the *Namibian,* "Where did you see men wearing earrings in our Oshiwambo culture? These things never happened before Independence. Why are they only happening now after Independence?… We will order any men to take their earrings off or will use force to rip them from your ear if you don't want to comply."[170]

"These are the people we fear," explains Ian Swartz, director of The Rainbow Project (TRP). Since TRP's founding in 1997, it has received numerous reports of SFF personnel harassing people on the streets. "They swagger around with machine guns—they harass and abuse people—activists, political opponents, gays, etc."[171]

Phil ya Nangoloh, of the National Society for Human Rights, says,"There is no legal justification for the SFF. They are not part of the police. They are not part of the army. Yet there are more SFF forces than police, more than four thousand. They are deployed throughout the country but they have no training in how to handle civil matters. They answer only to Nujoma and what the president says is regarded as the law."[172]

The perception that no one can or will hold the SFF accountable for abuse leaves victims reluctant to come forward with their stories. For example, five gay men who were beaten on the street of a rural town in northern Namibia by a group of SFF officers in 2001 called TRP for assistance. They explained that they could not report the beatings to the police, nor could they go to their homes, because they would never be able to adequately explain their physical injuries to their families. In desperation, they fled to Zambia, then finally returned home to Namibia. In addition to TRP, the men called the Legal Action Center and Behind the Mask, a South African resource center for lesbian, gay, bisexual, and transgender people across the continent. However, in the end, they decided not

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[170] See Max Hamata, "SFF Launch Earring 'Purge,'" *Namibian,* May 2, 2001; and "Govt. Repeats That No 'Earring' Order Given," *Namibian,* May 9, 2001. Government spokesmen denied that any order from the president lay behind the actions, and after reporters documented the arrests, SFF officials reportedly reprimanded some of the arresting officers. However, SFF officers also threatened a journalist from the *Namibian* who was interviewing two of the victims, destroying his notes and threatening to impound his camera.

[171] Human Rights Watch interview with Ian Swartz, Windhoek, Namibia, July 16, 2001..

[172] Human Rights Watch interview with Phil ya Nangoloh, Windhoek, Namibia, July 19, 2001.

to come forward publicly, because they feared retaliation by the SFF, as well as rejection by their families and communities.[173]

Simone, an eighteen-year-old lesbian who lives in Windhoek, described her fear of the SFF. "I used to feel safe on the streets, but after the President said to deport us, now I am afraid, I'm scared of the SFF—it's their job to collect us and deport us."[174] She also reported that some verbal harassment on the streets now takes the form of people saying, "Call the SFF, we've got a moffie here."[175] Another Namibian lesbian told us in 2001, "Everyone is afraid after the President's remarks: afraid to walk alone, to go into government buildings, afraid when you see the police or a soldier. I realized that people are serious about not wanting lesbians and gays in Namibia."[176] Although many of the lesbians and gay men interviewed for this report said they felt safer in Windhoek than in any other part of the country, several explained that they stay home after dark. "The SFF attack at night—I just won't go out after dark."[177]

Swartz notes, though, that it is not just the SFF who abuse suspected homosexuals. He took a report from two women who are lesbians in the northern town of Ondangwa. One evening they went to a shebeen (township pub) with five gay men. The owner of the shebeen called the police to report their presence. They were taken to a holding cell and beaten by the police. Before they were released from police custody, they were told that they had to change or leave because they "were not welcome here." [178]

In Namibia, "If you are educated and financially independent, the police and SFF won't harass you," Ian Swartz explained. "But if you are poor, black and of course if you are a sex worker, they will harass you and beat you and no one will care." In Windhoek, Swartz says, transvestite sex workers report steady abuse by government authorities.

Norman Tjombe of the Legal Action Center confirmed Swartz's account. LAC has received numerous reports of police harassment, especially of gay, lesbian, or transgender people who are involved in sex work. "The police harass them, then beat them with *sjamboks* [rubber batons]," Tjombe explained. He

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173 Ibid.

174 Human Rights Watch interview with Simone (not real name), Windhoek, Namibia, July 18, 2001.

175 Ibid.

176 IGLHRC interview by Kagendo with Isabel (not real name), Windhoek, Namibia, November 20, 2001.

177 Human Rights Watch interview with Sarah (not real name), Windhoek, Namibia, July 17, 2001.

178 Ibid.

says that persecution of sexual or gender non-conformity is not a written policy, but "when it is promoted by someone as high as the president or minister in charge of law enforcement, it becomes the *de facto* government policy."[179]

Two stories from Zimbabwe and Zambia also indicate how which police there may punish signs of affection between men. In Zimbabwe, Andrew K. recounts how, in 1999,

> I went to a party in Waterfalls [a suburb of Harare], and I was detained there with a friend after the party. We went out in the street while the party was going on. It was after dark. Probably we were touching each other, holding hands, not more. Then the police came, two or three of them on foot. It was a gay party, so I wonder whether they were waiting for someone to leave it doing what we did.
>
> They handcuffed us and took us to the station, Waterfalls Police Station. They said it was because we were holding each other's hands and being homosexuals. It was because we were touching each other romantically, I think, like heterosexual lovers; they couldn't stand that. My friend was taller that I was, so they said to me, "You are the woman." They wanted me to undress and show I was a man, but I refused.
>
> We spent just one night at the station; in the morning I had to phone a friend to come and fetch us. He paid money for the fine, I don't remember how much. They didn't give me a paper so I don't know what the fine is for. It affected me very much. It made me want to leave the country.[180]

In Zambia, Aubrey M. reports:

> In April 2000, I left a disco in Lusaka with someone. Of course it wasn't a gay disco, but I suspected this man was gay, and I was right. We drove for awhile in the man's car and we ended up at about 4 a.m. in the Northmead area [a Lusaka suburb], parking on a quiet road under some trees. We started kissing.

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[179] Human Rights Watch interview with Norman Tjombe, Legal Action Center, Windhoek, Namibia, July 19, 2001.
[180] IGLHRC interview by Scott Long with Andrew K., Harare, Zimbabwe, August 3, 2000.

> A police car pulled up. And one paramilitary policeman comes rapping on the window. He wanted to know what two men were doing there together, in the car. He wanted to know if "something" was going on. You could see that he was really suspicious, and really curious at the same time.
>
> We were really scared. I thought fast: I told him we had been in the car with a [female] prostitute, and she had just left. He looked almost relieved that there was a way out.
>
> Nonetheless, the sight of two men alone in a car alarmed him. He insisted on taking us to the police station, getting our names and seeing our I.D.s. At the station he told people he "almost" had a case of some homosexuals. We had to pay a bribe of 20,000 kwacha [ca. U.S.$10] to get him to let us go. [181]

Even a hairstyle can initiate harassment. Francis Chisambisha remembers another incident in Zambia, several months after the furor over his coming-out had receded. Early one evening, Chisambisha was chatting with two gay friends on a streetcorner in the Ramwala area of Lusaka, when four policewoman confronted them. "They said, 'We've been watching you, you've been standing here for some time. Let's go to the police station.'"

The three were taken to the police station at the Intercity Bus Terminal. Chisambisha is sure the officers did not recognize him. "If they had it would have been bad for us. One friend even had a copy of the LEGATRA constitution in his bag; he managed to throw it out along the way." At the station, though, police told his friend, who had long braided hair: "You're the people we have been looking for. You want to behave like women. Look at your hair! We will lock you up and you'll appear in court.'" The three were interrogated separately for over three hours, and freed only after paying a bribe of 8000 kwacha [ca. U.S.$5].[182]

Francis Chisambisha, whose coming-out in the press provoked months of controversy in Zambia, recounts how his public identity exposed him to harassment. Chisambisha remained in the country for over a year after the collapse of LEGATRA and the end of the furor, staying with friends and relatives in the Kabwata district of Lusaka. He says, "For a long time I did not

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[181] IGLHRC interview by Scott Long with Aubrey M., Lusaka, Zambia, July 26, 2000.

[182] IGLHRC interview by Scott Long with Francis Chisambisha, Johannesburg, South Africa, July 17, 2000.

have so many problems. My picture had been in the paper, but it made me look bigger and taller than I am." A strange incident happened in the autumn of 1999:

> I was approached by one of the ministers, the deputy minister of home affairs [Edwin Hatembo]. He came to me through two other friends of mine, who knew him a little. They all came to me together, we met in a bar in Woodlands. The minister said, "You have challenged the president, are you really gay, did you come out of your own consent? Don't you know you have challenged the president?" He said they could give me immunity if I went on national T.V. to confess that I am not gay, that some people who were challenging the president had used me. He said they could take me anywhere in the world, they could get me back into school.[183]

Chisambisha refused. He managed to attend an international gay and lesbian conference in South Africa in the autumn of 1999; when he returned home, his situation changed.

> Strange people began visiting me. One of them told me he was a police officer; he said, "I want you to be my friend; tell me about this conference." He visited me a lot. Sometimes he would leave a message with the cousin I was staying with, to come meet him in a pub. Or he would just wander in after work, sometimes in civilian clothes.
>
> I was about to go for the night in November of 1999. It was three days before [former president] Kaunda's son was shot [on November 4]. Suddenly, six police officers surrounded me and said, "Where are you going?" They were from a branch of the National Service Squad, an anti-crime unit. They took me back to the house. They were very flirtatious with me in the car, rubbing against me as if they were tempting me for a reason. The people I was staying with came out

[183] IGLHRC interview by Scott Long with Francis Chisambisha, Johannesburg, South Africa, July 17, 2000. One of the friends who had introduced the minister to Chisambisha later confirmed that the meeting took place: IGLHRC interview by Scott Long with "D.", Lusaka, Zambia, July 24, 2000.

> and the police told them, "There is no reason for him to be out. Keep him in or we will arrest him."[184]

Some months later, feeling "watched," Chisambisha fled Zambia and sought political asylum in South Africa.

Non-conforming gender identity or expression is particularly likely to become a magnet for abuse. "Sexy" is the nickname of a thirty-one-year-old gay man in Gaborone, Botswana. He remembers what happened to friends of his in the city in 2001:

> These two friends of mine, they were staying at my house. They wanted to go to this club that allows every person—they don't discriminate. So they put on those wraps, those sarongs, put on some high heels and some makeup and went to that club. When they got there, they had fun with some friends, people were just happy seeing them in that way.
>
> But after that, they went to another club. Immediately when they got there, people saw them and reported them to the police. So the police came and arrested them. There was no charge they could lay to those two guys, so they just used "common nuisance." They were sent home after they were finished with the police and they were fined 50 pula [U.S.$10].[185]

Chauta, from Lusaka, Zambia, is twenty years old. At twelve, he realized (he still uses the male pronoun) he was "a woman trapped in a man's body": he felt "out of place with groups of guys, whereas with a group of girls I felt free, felt that I could do what I wanted." He knows of only two other biological men who feel, and dress, the same way. Recently a friend has helped him contact a transgender group in South Africa, and he hopes to visit there someday.

When, at twelve, he told his mother of his discovery, "She was supportive: 'You are still my child.'" Since fourteen, he has engaged in a kind of cross-dressing, usually wearing very tight trousers, called "hipsters" in Lusaka, "the kind fashionable women wear. And I wear these women's long body tops, with low-cut chests. And makeup."

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[184] IGLHRC interview by Scott Long with Francis Chisambisha, Johannesburg, South Africa, July 17, 2000.

[185] IGLHRC interview by Kagendo with "Sexy," Gaborone, Botswana, November 7, 2001.

"It isn't quite easy in Zambia," Chauta says. "The police say, this kind of thing shouldn't be permitted in Zambia." He remembers many incidents of harassment. A typical one happened only a few weeks before our researcher spoke to him:

> I was having a drink in Nchilenge [a town in Luapula province] with my cousin. We didn't know there were cops there. But this guy in the bar started harassing me because he thought I was a woman. To get away from him, I left the bar for a while. As I tried to come back in, I was stopped by two cops. "Why are you dressed like this?" they said. They said they would take me to the police station, for dressing like this.
>
> They held me there for three hours, at the reception. I paid them all the money I had on me to get away; I knew if they put me in the cells I would have trouble with the men there.[186]

It is in Zimbabwe, where gays and lesbians have struggled hardest to achieve visibility, that we found the most widespread accounts of police harassment. In part this reflects the existence, and success, of GALZ as a resource to which victims of violence can turn, so that their stories are recorded even if redress is remote. In part, though, it reflects the mixed benefits of visibility itself, leading as it does to a heightened awareness of homosexuality, and a heightened threat.

The following stories from Zimbabwe are examples. They show recurring themes:

- Police attention to—and regulation of—gender norms in behavior and dress: any deviation from "masculine" or "feminine" expectations can become a criminal offence.
- The identification of either gender or sexual non-conformity in public with prostitution—which appears to serve as a catchall category for the unwanted public expression of sexuality.
- The familiarity of gay activists, or even some "known" gays, to the police.

These three combine to put many GALZ members, and others, at regular risk.

[186] IGLHRC interview by Scott Long with Chauta M., Lusaka, Zambia, July 28, 2000.

1. Tina's story

Chipo (Tina) Machida is a prominent lesbian activist who has been organizing black lesbians, both within and outside GALZ, for nearly a decade.

On February 14, 1998, she remembers, a group of about twenty GALZ activists, both men and women, had gathered at one member's home in the afternoon, for a Valentine's Day party. Three policemen knocked on the door: "They said, 'You are making a lot of noise, is this a shebeen?' And they took down names, and then they took most of the beer away."[187] The group then went to a popular nightclub, Sandro's, in downtown Harare.

At about midnight, according to Machida, six or seven of the group decided to go home. Outside the club, while they were getting into a car owned by one of them, "three cops in uniform and three in plainclothes came up. The plainclothes pulled us out of the car. We thought they were robbers—but they handcuffed us." Machida recognized one of the uniformed police as having interrupted the private party earlier. "He had followed us to the nightclub to carry on harassing us."

Two members of the group, Tina and Wallace M., were arrested. "We were on the executive committee of GALZ at the time, and that may be why they picked us out." The officers refused to give a reason for the arrests, or to reveal their own names or numbers. Only after the two were taken to Harare Central were they told, according to Machida, that they had been arrested for "public indecency."[188] Machida says,

> At the police station, we told them, "Why don't you just write what you are arresting us for: for being gay, instead of making up these other stories? All we did was get into a car to go home." The officer who interrogated us was waving a gun. He called us names: He kept asking both of us, "Are *you* a man? Are *you?*" He said, "Our president doesn't like people like you."

Wallace says,

> When I was in detention, I was beaten—on the legs, the chest, everywhere except the face. It was a nightmare. You fall into the hands of the police and you realize all your talk about human rights

[187] Quotations from Tina Machida are from IGLHRC interviews by Scott Long in Harare, Zimbabwe, August 10, 2000.

[188] Apparently under the Miscellaneous Offences Act: see Appendix, below.

> means nothing to them: they can keep you there for as long as they want.[189]

At about 4:45 a.m., according to Machida, a high-ranking officer whom others called the "Big Chief" came in. He told the two to pay the fine for public indecency, and go home. "We had phoned Keith [Goddard, the programmes manager of GALZ]," says Machida, "and he said not to agree to pay the fine. But we knew they would lock us up until Monday, and they were threatening to put me in with the men. They told Wallace, you will be the guys' wife today." Each agreed to pay a Z$60 (U.S.$4) fine.

GALZ pressed suit against the Harare commissioner of police for unlawful arrest.[190] The case, however, never reached court. "There was really no guarantee," Machida says, "that if I pursue this, I will have protection":

> I'm already a target: I don't want to be cross-examined and have my picture in the newspaper for suing the police. I would never deny I'm a lesbian. But what will be the consequences of standing up to the police that way. I have an eight-month-old baby. What will happen to my baby? They can take it to a children's home if they want.

In January 2000, Machida was arrested again:

> It was early evening, I was coming home from shopping with my friend Elena. It was in Longford [a suburb of Harare], the bottle shop had just closed, and we had our beers closed in a paper bag. The police were waiting for us near the shop—three plainclothesmen.
>
> We were arrested and taken to Braeside police station, then to Central Station. They charged us with soliciting for prostitution.
>
> It was such nonsense! They didn't even make a secret that they were doing this because we were lesbians. The officers kept saying: "You think we don't know you, but you are Keith's friend, you work for

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[189] IGLHRC interview by Scott Long with Wallace M., Harare, Zimbabwe, August 4, 2000.

[190] Letter from Kantor and Immerman, legal practitioners, to commissioner of police, June 29, 1998, "Notice in Terms of Police Act (Chapter 11:10) and State Liabilities Act (Chapter 8:14)." On file with Human Rights Watch.

> GALZ." And again one of them whispered to us: "You'd better not stay the night, because we aren't going to put you in the women's cells, but in the men's."
>
> We were frightened. We didn't have a cent between us. I phoned a friend to bring some money to pay the fine—it was Z$100 [U.S.$3]. And they let us go. For us it is difficult to take the matter further. They will keep targeting you.

2. Romeo's story

Romeo Tshuma is a long-time GALZ member, employee, and activist. He recalls:

> One night in late 1997 I went to a nightclub with some friends. Or we tried to go. When I was getting out of the car, a plainclothes policeman came up to us and said something to me about "impersonating a woman for the purposes of prostitution." Impersonating a woman? I didn't know what he meant. I was wearing tight jeans and a close-fitting shirt. The policeman didn't bother my friends—they included both gay and non-gay people. All of them walked inside. The policeman only stopped me, showed me his I.D., and said I was guilty. I tried to cry out to my friends: he seized hold of me and said, "You will explain it at Harare Central."
>
> He put me in a car. There were three policemen in the car in addition to him, all in plainclothes. We arrived at the Central Police Station. They didn't take me to the ordinary holding area: they hauled me upstairs to a room. The policeman who took me there said to a sergeant, "Well, is this a man?" And the sergeant said, "Look at you! Are you a woman? Are you gay?" I said, "I am a man and I am gay. There is nothing wrong with that."
>
> They tried to get me to take off my clothes to prove that I was a man. I refused, and they threatened to beat me up. So I dared them to arrest me and open a file. The officer who arrested me was named Makoni; he pushed me around a lot, shoving me; he was a very violent man. But the sergeant in uniform kept asking me questions for four hours: questions like, "Do you get fucked in the ass? Is it painful? What does your family say? Do you know this is not acceptable in this country?"

> I was arrested around 11 p.m. Around 4 a.m. they finally let me go, with no charges.[191]

Tshuma was detained again a year later:

> In 1998, a friend from Swaziland came to visit. He was staying with me in the GALZ office. We went out to a Chicken Inn on Speke Avenue to buy takeaway. Two guys started following us on the street: plainclothes police, again.
>
> We ordered food and decided to eat there, so we went upstairs in the restaurant. And the two men followed us. One of them came up to us and said: "Hello, there, I know you." They produced police I.D.s and said: "Let's go to Harare Central for some questions."
>
> I refused. I tried to run away. I barged out of there and went out on the street: I knew I couldn't get away from them for good, but I wanted to call GALZ to let them know I was at the police station, so they would come and pay bail if necessary. After I made the call I came back and my friend and the police were not there. He had been taken to the police station.
>
> So I went to Harare Central, and they were waiting for me. One of the plainclothesmen met me and said, "Come inside, you ran away." Then he slapped me.
>
> But by then they had interrogated my friend and he asked if he could call the Swazi embassy, because his sister was married to a high official there. So the cops panicked. And after the plainclothesman slapped me, another policeman came up and said: "Don't do that, these guys are related to the ambassador."
>
> I started screaming and demanding that they arrest me and open up a file. They refused, and they started treating me very nicely, till a car from the Swazi embassy actually came to pick us up. And the cops told my friend, "It was a mistake."

[191] IGLHRC interview by Scott Long with Romeo Tshuma, Harare, Zimbabwe, August 8, 2000.

> I asked for paper, and I wrote down the names of the two policemen. But before they let us go, the police took [the paper] away. They said to us, "Don't do this again!" Do what? But you know, we actually felt that whatever we were doing was not right.[192]

3. Kuda's story

Kuda Kwashe is a GALZ member and self-described "proud queen."[193]

On January 17, 1998, at about 4 p.m. he was walking through the Montagu Shopping Center in Harare. By his own account he was wearing "clogs and short-shorts, and a regular T-shirt." He was stopped by a police officer who identified himself as Constable Machote, along with two other officers who refused to identify themselves.

Kwashe was told he was being arrested for "dressing like a woman," although he was not wearing women's clothes. The police also told him that he "walked like a woman." Kwashe demanded to know what law he was violating.[194] In response, the officers physically forced him into the back of a police car. There, he says,

> They called me a whore, a white man's whore, and all sorts of other things. They kept calling me a woman, they wanted to know what I had under my shorts. I got very angry.

According to the police, Kwashe (who is over six and a half feet tall) became enraged and smashed the window of the police vehicle.

Kwashe was taken to the Harare Central Police Station. There, he says,

> They gathered a bunch of the police together. They were having a little party. They called me names for hours, they were really enjoying that, and they spat on me again and again. They couldn't get over the clothes I was wearing.

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[192] IGLHRC interview by Scott Long with Romeo Tshuma, Harare, Zimbabwe, August 8, 2000.

[193] IGLHRC interview by Scott Long with Kuda Kwashe, Harare, Zimbabwe, August 16, 2000.

[194] Although Kwashe was never charged with an offence, and was not cross-dressing, a provision in Zimbabwe's Miscellaneous Offences Act criminalizes any person who "appears in any public place" without wearing "such articles of clothing as decency, custom, or circumstances require": the language is an open invitation to police regulation of any remotely unconventional dress. See the Appendix for more information on this and similar provisions in the region.

Kwashe was detained for over six hours, and was finally released after being required to pay Z$600 [U.S. $40] in damages for the broken window. No charge was preferred, however, which GALZ advisors considered "virtually an admission by the police that he was not at fault."[195] Kwashe says, "I know the police watch me since then. Well, let them. I'll walk the way I want."

4. Dominic's story

Dominic S. is twenty years old, and lives in Bulawayo. He says:

> At Christmas 1999, I went to a nightclub called Fuse. I had a fight with this guy—he provoked me. When I am at straight clubs I try to pretend, it's safer that way. I hang around with girls and I joke with them, flirt with them. Well, this man came over and said, "You are a poofter: you're gay, I know you are gay. You can't have that girl. Get away from her." He held up his hand to hit me and we started fighting.
>
> The security guard threw us out, but first he called the police. So the police picked us up on the sidewalk outside, and took us both to Bulawayo Central Police Station. But the other guy knew what to say. He changed his statement to say, "Dominic was making advances on me, he tried to sexually assault me." So the police let him go. But I was detained for three days, and charged with indecent assault.
>
> The police didn't beat me but they humiliated me. They kept asking me, "Why are you gay? How many white people do you know? Why are you wearing earrings?"
>
> I was only allowed one phone call, on the first day. The police had written a document saying I was charged with indecent assault, and if I could not pay a Z$500 [U.S.$25] fine I would be held for three weeks. I could only make a phone call after I signed it. Looking back I guess that paper was an admission of guilt. I had seen quite a

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[195] Letter from Kantor and Immerman, legal practitioners, to commissioner of police, June 19, 1998, "Notice in Terms of Police Act (Chapter 11:10) and State Liabilities Act (Chapter 8:14)." On file with Human Rights Watch. See also, communication from Kantor and Immermann to Keith Goddard, December 1, 1998.

> bit of the gay community in Bulawayo, but nothing had prepared me for this, and I didn't know what to do.
>
> I called a friend, but he didn't get the message for two days. When he did he came to the police station; he was told that I was a gay guy who had committed the crime of hitting a straight guy, and perhaps I had tried to rape him. My friend bailed me out by paying the Z$500 fine.[196]

Dominic was arrested again in early 2000:

> I was with a friend in this place we ordinarily go to on Sundays to have tea. It's a coffee shop in Bulawayo, and the guys who work in the place know we are gay and usually tolerate us.
>
> One day a cellphone was stolen inside the café. My friend and I were sitting there; everyone was being searched when they were leaving by the café security. It was a private security firm, called Mills Security.
>
> The security guards came to our table and said they were taking us to the police. They said, "Gays can do anything, they are a menace to society. You cannot trust them."
>
> They didn't even bother to search us, they just said, "We are taking you to the police." I guess they thought if they could get us arrested it would get them off the hook for having let the theft take place.
>
> My friend had his cellphone, and insisted he would talk to a lawyer he knew. So they held him there. But the café security took me physically and drove me to the police, to Bulawayo Central. The police there knew me. The sergeant at the desk said, "Oh, this one again." And he said, "Gay people are always a problem."
>
> I have never in my life been so ashamed. It is a small town, really; everyone knows me, and I had colleagues from school who worked at the police.

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[196] This and subsequent quotations are from an IGLHRC interview by Scott Long with Dominic S., Bulawayo, Zimbabwe, August 14, 2000.

> I didn't answer any of their questions. They were saying, "You can go to prison for ten years." I was worried what my father would say, and my mother, knowing I am the only child. She looks to me to help her in the future but there is little I can do. They told me they would bring me up for not answering their questions.
>
> They didn't ask me any questions about the theft of the cellphone. All their questions were about being gay. "You are wearing a beret—why? You know this sickness is not allowed. Why do you accept Western culture? We know you gays are being used by white men. You do it for money." I said: "I am not a prostitute." They didn't believe me. About twelve policemen gathered as if I were the evening's entertainment, asking me the same questions. They threatened to take me to the other room, where they said they tortured people.
>
> I was held for about an hour. My friend went to talk to the boss of the security firm at the restaurant—Mr. Mills. He threatened to sue. Mr. Mills called the police and said it had been a mistake. So in the end they let me go.[197]

As in Kuda Kwashe's case, Dominic reports that police interpret gender nonconformity as evidence of criminality. "Even stranger things have happened because of just the way I walk," he says. In June of 2000,

> It was late at night and I was coming home from a club. I was just walking to where I take my minitaxi, in the center of Bulawayo. A policeman stopped me and said: "Are you a woman?" I was so surprised I didn't know what to say. He said, "I am arresting you for soliciting for prostitution."
>
> Well, there were girls nearby who *were* prostitutes. But I finally said, "I am a man." I guess my voice was deep enough to convince him. "I'm sorry," he said, "I thought you were a woman. But you should be careful," he said, "you could get into trouble that way."

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[197] IGLHRC requested a meeting with Mills Security officials in Bulawayo in August 2000, but the request was denied.

5. "Natasha's" story

"Natasha" is the adopted name of Thema N., a male-to-female transgender person. ("Natasha" refers to herself as "gay," not "transgender," but uses the feminine gender.) She was twenty-five years old when our researcher spoke to her in 2000, and was living in Mzilikazi in Bulawayo.

Natasha's story suggests that police and prison authorities single out gender-nonconforming people for particular abuse. It also suggests, however, that she was made vulnerable to such abuse by previous patterns of social and cultural exclusion. Both society in general and the law in particular enforce, in different ways, rigid norms of gendered behavior. The former punished Natasha by making her an outcast: the latter, by making her an inmate.

"I discovered I was gay at the age of five," she says. "I used to play with the girls and their dolls; I felt so feminine that I always used to see myself as a woman."[198]

> My family were very understanding at first. My mother thought that having this girlish boy was just like having a child who was disabled, and she took it as a trial. I started meeting other gay people in 1988. There were not many but I did have a sort of community. I was the most feminine, and now I am a twenty-four-hour drag queen. I have worn women's clothes since 1987, when I was thirteen years old.
>
> I know four or five other drag queens in Bulawayo. One is in prison now; the others have gone to South Africa. We don't fight among ourselves; we are a community amongst ourselves. Whenever we are together we are still friends, because of what we do.[199]

Natasha left high school at fourteen, partly, she says, "Because the other pupils made it impossible." She worked briefly at hair salons: "But even there it is very hard to keep work, because people think I am sick, being a man biologically." Eventually she moved into prostitution. "I used to go to South Africa, and there, in Joburg, I would stand with straight women that would do the same job.. . . Back then they could tell I was a man, biologically. Now men just pick me, not knowing whether I'm gay or male or not."

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[198] IGLHRC interview by Scott Long with Thema N., Bulawayo, Zimbabwe, August 13, 2000.

[199] IGLHRC interview by Scott Long with Thema N., Bulawayo, Zimbabwe, August 14, 2000.

Natasha supports her parents and a brother on her earnings. Ultimately, she hopes to return to South Africa and undergo sex reassignment surgery (SRS); doctors have told her the procedure is illegal in Zimbabwe. Her I.D. still reflects a male identity, which makes it hard for her to find either accomodation or a job. “In the law they know I am still a man, and this is Zimbabwe. If you go and ask about these things, they will make your life very difficult.”[200]

Natasha has had many experiences with police and courts, particularly in Bulawayo, where she is regularly arrested—usually, it appears, under the provisions of the Miscellaneous Offences Act, a catchall law used to control prostitution or “disorderliness.”[201] Generally, these end with paying the police—in the form of bribes, or of fines at Bulawayo Central Police Station; if she has no money on hand, though, a prison sentence can result. Natasha believes the courts usually treat transgender sex workers no differently from women sex workers. The police are a different matter, she says: “They single you out, they really hate you if you are like me. The bribes are twice as much as for the regular women.”

> Almost every time I go to the streets I pay some policeman. The police know who you are, and they come through and when they see you they take the money. Usually they ask Z$100 to Z$150 [U.S.$3-5] each time. They only make you pay a fine as opposed to a bribe if they catch you the second time in a night—for instance, the first time a policeman comes, you bribe him; but if the same or another comes along again, they have to take you in. Then you spend the night at the station and pay in the morning. [202]

The first time Natasha was jailed in Bulawayo Central,

> I was taken to the cells and I slept alone in a different cell from the others. I was in the men’s section but alone. They gave me my food alone and I was never allowed to talk to the others. Even when I was taken to wash, they took me separately and closed the door and left me in there alone. They were not really trying to protect me: they wanted to prevent me from sleeping with other men. They thought I would get at them if I was put with them.

[200] Ibid.
[201] See Appendix for more information.
[202] IGLHRC interview by Scott Long with Thema N., Bulawayo, Zimbabwe, August 14, 2000.

> But every time I was in jail the guards would use us, all the drag queens. They used to say, "You bitches come here"—if we don't, they will beat us, or force us into doing things we won't like. They would kick us, or strip us in front of the other men, which was very painful and embarassing. Sometimes we were never given food, just because we were homosexual prostitutes. They used to force us, at Bulawayo Central, to have sex with them.
>
> Sometimes also in the streets, if you don't have money to bribe them, the police will force you to have sex with them. And sometimes they will deny you a condom. Sometimes three or more of them will force you to have sex with them. Then they will rob you, too. Sometimes the policemen will come to your place to collect the bribes you owe them. Then they will wait for you to finish your business and take all the money you have earned. They are like amateur pimps, really. All this has happened to me many times.
>
> Actually, the thing that hurts the most, it is strange to say this, but it is the swearing at you. Calling us "you bitch," "you mother," "you pervert," *ngochani* [a Shona term now used, in a derogatory sense, for people suspected of same-sex sexual conduct, particularly men]. And they do that constantly. You must believe how this hurts me. I am a human being and I have my dignity.

Natasha spent two months in prison in mid-2000:

> The last time I was arrested was May 5 of this year. I was standing on the street with two other friends like me [transgender sex workers]. Two guys came, and wanted to pick one of us. Then two policemen in plainclothes came. They asked us what we were doing there. We retorted, we were waiting for these two guys… The policeman said we were loitering. We asked them to give us a fine. They denied it and said, we'll meet in court.
>
> I was arrested the very same day. Some other policemen came and picked me up. They just came for me, because I had spoken up….
>
> Some of the police know about me [being transgender]. The ones who arrested me didn't, and so I had to tell them. They locked me up in the cells, alone, for one and a half days…. The judge denied the

> fines and gave me a sentence for three months, with one month suspended. He said he'd seen me too frequently in court, so that the only thing to do with me was to take me to jail. I was taken to Bulawayo Prison.

She was placed in the men's section, in what she describes as a severely overcrowded cell.

> Some of the inmates knew about me: some of them used to be my clients on the road. There was another prisoner like me [transgender] there, "Maia." We were kept in separate cells. We weren't allowed to exercise like the other prisoners. In the afternoon she and I were let out of our cells and forced to do work. Some of it was ploughing in the fields, some of it was cleaning the garden or watering vegetables. The other prisoners worked in other places. If we failed or got tired, the guards beat us. Often they forced us to have sex with them, or with other prisoners in front of them.
>
> They hated us because we were homosexuals. If any guard felt like being rude or brutal, he could take it out on the two of us, he could just come and beat you up. If we were late for anything, for lunchtime or dinnertime, they would beat us up again. We complained to the officers above the guards, and it got better, but only for a little while.
>
> The cells were very cold. There were no mattresses, just a blanket on the floor. Mats or carpets were only given to those who were sick. But the other prisoners would give me mats or blankets in return for sex. They gave me and "Maia" soap to wash, milk, and bread in return for sex. Sometimes the guards would do that as well.
>
> I got sick. I had a pain in my eye, and if I walked I had heart palpitations. Some of the other prisoners tried to strangle "Maia" because they wanted to have sex with her. The guards used to frighten her with dogs. My leg was hurt by beatings; it was dislocated by some other prisoners when they held me down for sex. It was hard for me to work, but the guards would call the dogs to threaten me when I got tired.

> My leg still hurts. I saw a doctor in the prison clinic; he gave me two tablets for my eye but when I told him about my leg he ignored me. But now I am free. Mentally I am OK: all I need is to be free, and then the other things fall away. [203]

C. Under Permanent Investigation: The Effect of Sodomy Laws

In November 2000, Namibia's minister of home affairs Jerry Ekandjo was asked in a riotous National Assembly session to account for his recent, ominous language. An opposition member reminded Ekandjo, while SWAPO members of Parliament shouted insults at her, that he had recently called for "eliminating" gays and lesbians. Where in Namibia's laws, she demanded, was there anything to justify such "elimination"? An emotional Ekandjo referred her to anatomy and religion before citing the law:

> If one man allows another man to penetrate a penis through his anus, whether voluntarily, that is what we call sodomy. Homosexuality is un-Christian. Sodomy is similar to rape. As far as I am concerned sodomy is a crime. Yes, homosexuality is a crime.[204]

A close reading of Ekandjo's statement reveals much about the relations between law, stigma, and identity—in southern Africa as elsewhere.

The minister was right on one matter: "sodomy" is a crime in Namibia. So-called sodomy laws—laws which include the criminalizing of consensual, non-commercial adult homosexual conduct—have been held by the United Nations Human Rights Committee to violate basic rights to privacy and non-discrimination.[205] Nonetheless, they persist in many jurisdictions around the globe. Their language rarely mentions homosexuality *per se*: they usually far pre-date the coinage of that term. The words with which they describe what they punish are various and often vague. For example, "sodomy" sometimes means, as the minister indicated, anal intercourse between men; sometimes only the passive partner is penalized, sometimes both partners. In other jurisdictions, "sodomy" may mean anal, or also oral, intercourse between any two people, heterosexual couples included. In still other laws, "sodomy," or other terms,

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[203] Ibid.

[204] Quoted in Max Hamata, "Ekandjo elaborates on anti-gay stance," *Namibian,* November 3, 2000.

[205] *Nicholas Toonen v Australia,* U.N. GAOR, Hum. Rts. Comm., 15th Sess., Case no. 488/1992, U.N. Doc. CCPR/c/50/D/488/1992.

may be used to criminalize any sexual conduct between two people of the same sex, regardless of the orifice(s) used.

Namibia and Zimbabwe still retain the crime of "sodomy" as part of their common law, inherited from the first Dutch colonists who founded the Cape Colony in the seventeenth century. South Africa also kept the common-law offense of "sodomy" until, in 1998, its Constitutional Court found it to violate the Equality Clause. Zambia and Botswana do not mention "sodomy," but have provisions in their colonial-era, British-inspired penal codes which criminalize "carnal knowledge against the order of nature" with severe prison terms.

"SODOMY LAWS" IN SOUTHERN AFRICA: HOW CONSENSUAL HOMOSEXUAL CONDUCT BETWEEN ADULTS IS CRIMINALIZED

***Namibia** and **Zimbabwe** both hold that "sodomy" is a crime, under the common law in force in both. **South Africa** shares the same common-law tradition, and "sodomy" was illegal there until a 1998 Constitutional Court decision found its criminalization violated the constitution. One standard legal reference work defines "sodomy" as "unlawful and intentional sexual relations per anum between two human males." The lesser crime of "unnatural offences" is also still in force in **Namibia** and **Zimbabwe.** It is understood to criminalize non-anal sexual relations between men. Penalties for these offences vary at the discretion of judges.*

***Botswana** and **Zambia** both have penal codes inherited from the era of British colonialism:*

Botswana Penal Code

Section 164:
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 any other person to have carnal knowledge of him or her against the order of nature;
is guilty of an offence and is liable to imprisonment for a term not exceeding seven years.

Section 165:
Any person who attempts to commit any of the offences specified in section 164 is guilty of an offence and is liable to imprisonment for a term not exceeding five years.

Section 167:
Any person who, whether in public or private, commits any act of gross indecency with another person, or procures another person to commit any act of gross indecency with him or her, or attempts to procure the commission of any such act by any person with himself or herself, with another person whether in public or private, is guilty of an offence.

Zambia Penal Code

Section 155:
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.

Section 156:
Any person who attempts to commit any of the offences specified in the last preceding section is guilty of a felony and is liable to imprisonment for seven years.

Section 158:
Any male person who, whether in public or private, commits any act of gross indecency with another 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.

For more detail on these and related laws—and on the definitions of "sodomy," "carnal knowledge," "gross indecency," and other terms—see the Appendix.

These laws are only part of a confusing canon of provisions by which states may try to regulate people's sexual behavior. Laws on rape, as minister Ekandjo intuited, may be connected to sodomy laws in intricate and often incoherent ways. For instance, until a few months before the minister spoke, no law specifically criminalized a man raping a man in Namibia. If prosecuted, the act would be charged only as "sodomy"—with a much lower penalty than a man who raped a woman would face. Consensual and non-consensual "sodomy" were simply not separated in the law.

Natasha, in Bulawayo, knew that being a cross-dressing prostitute was the reason for her repeated arrests; unsurprisingly, though, she rarely knew the specific charge, which probably came from a law on public conduct in which sex was not even mentioned. The police, indeed, may have known only marginally more than she did. The simple lesson is that sex laws are complex. Yet probably in few places are laws targeting sexuality as confusing as in much of Africa, with its overlay of colonial, modern, and customary legal forms. The Appendix to this report attempts to detail (though not exhaustively) many of the laws in southern Africa that punish consensual sexual conduct between adults, or which are used to target people for their sexual orientation or gender identity.

Minister Ekandjo was technically wrong on another matter: "homosexuality" is not a crime in Namibia, or elsewhere. The letter of the sodomy laws criminalizes *conduct,* not the *condition* of being "homosexual." And yet the minister, in a different sense, is on the mark. On paper, sodomy laws simply punish certain sexual acts (however vaguely defined), including consensual acts that usually take place in private. However, the state apparatus rarely confines itself to seeking out the secretive conduct itself and catching offenders: instead it extends to identifying and singling out the *kinds* of people presumed to be prone to, or proselytizers for, the criminalized behaviors. Sodomy laws help create "sodomites." The public is encouraged and co-opted into this effort.

Sodomy laws thus impute to people not just the commission of an act, but the propensity to commit it. They invite authorities to assume that a single lapse points to a habitual condition.[206] That condition in turn ultimately justifies judgment on a person's nature: a nature which must then be legible in mannerism, appearance, dress. The laws collude with other forces—social prejudice and stereotype, folklore, and religious teaching—to generate an atmosphere of stigma, in which certain outward marks signal the presence of a certain kind of person, and certain identities and groups become automatic targets of the law.

The effect of sodomy laws thus goes beyond the legal penalties they provide. They create and maintain prejudice and stigma. They separate out people—variously called "sodomites," "gays and lesbians," "homosexuals," or other names—and define them as objects of contempt and hatred. Minister Ekandjo is correct. The language of the law itself does not justify a call to "eliminate" certain kinds of persons from the land—but a logic connects them.

It is impossible to say how frequently the sodomy laws in the region are actually enforced. A high official in the police in Harare, Zimbabwe, told our researcher in 2000 that he believes "two or three" arrests for consensual sodomy happen every year in the city.[207] The head of the crime division of the Zambian National Police told us in the same year that he believes three to five people are charged annually under section 155 of Zambia's penal code.[208] The last known

[206] It is worth noting that the law used to punish homosexual conduct in Egypt, a law on the combatting of prostitution (law 10/1961), actually requires that "debauchery" be "habitual"—that is, that "debauched" acts (defined in jurisprudence as anal intercourse between men) be committed by the accused at least twice with the same or different people.

[207] IGLHRC interview by Scott Long with superintendent Wayne Bvudzijena, Harare Central Police Station, Harare, Zimbabwe, August 10, 2000.

[208] IGLHRC interview by Scott Long with Colonel C. Musemba, superintendent of crime, Zambian National Police, Lusaka, Zambia, July 24, 2000. Colonel Musemba promised to produce statistics of arrests and convictions under articles 155 and 158, the

arrest in Botswana for "carnal knowledge against the order of nature" to reach a Magistrate's Court happened in 1994; however, as discussed in the Appendix to this report, other cases may apparently reach customary courts, where records are still less carefully maintained. Namibia's Legal Assistance Center told us in late 2001 that it understood two arrests for sodomy had taken place in the north of the country earlier that year.[209]

Extent matters less than the power of example. A sodomy arrest is a rude reminder that the state respects neither the private spaces nor the intimate experiences of stigmatized populations. The arrest brings the threat not only of fines or jail, but of public shame. A statement taken by Gays and Lesbians of Zimbabwe in 1997 recounts what many would call a typical story:

> "Martin" and I had met on this particular day and took a drive along the Beira road towards the border on the outskirts of Mutare. Admittedly although it was a very private spot it was a particularly dangerous one, where border jumpers and smugglers used to cross.
>
> The police overwhelmed the car and dragged "Martin" away. I watched as he was slapped repeatedly and then driven away. Only hours later did I see him again at the Police headquarters in Mutare.
>
> During this absence they had obviously extracted the information they required to lay a charge. They did see me with my pants down but at no time did they actually catch us engaging in their so-called "unnatural act" …. Even when I was spotted by the C.I.D. [Criminal Investigations Division] officer with my pants down he was a good 20-30 meters away. "Martin's" pants were not pulled down and at no time was he seen in a compromising situation.
>
> We were coerced into giving statements by the C.I.D. Assistant Inspector Masendeka. He threatened to place me in handcuffs and leg-irons and lock me in a cell should I fail to cooperate. He wanted to know what we were doing there and why.

relevant provisions of Zambia's penal code (for more information, see Appendix); to date these have not been forthcoming.

[209] IGLHRC interview by Kagendo with Clement Daniels, Legal Assistance Centre, Windhoek, Namibia, November 16, 2001.

> We were detained for six hours and eventually using a well-worn approach he won us over with his "Please help us to understand what this is all about, we want to help you" technique.
>
> Suggestions of being released should we cooperate in this regard were made and we made full statements of what we had been up to.
>
> We were told the next day that unfortunately we were to be charged. We were told the best thing to do was to sign an admission of guilt and that the whole ordeal would be dealt with promptly with no more than a fine. To frustrate the course of justice would lead to delays, perhaps an appeal, and further investigations, and this would only attract the attention of the media.
>
> We foolishly fell for this ploy that inadvertently led to our own prosecution by providing the State with all the evidence needed to make a case.
>
> The magistrate, a Mrs. Hlekani Mwayera conducted her court in a heavyhanded and uncompromising way and I wish that it be recorded … that under the present political climate in Zimbabwe, where gross repression and violation of human rights goes unchecked, she had to adopt this unfortunate position….
>
> She sentenced us to a Z$500 [U.S.$25] fine and three months' jail suspended for five years, in defence of the State she said that the type of crime was on the increase and harsher penalties had to be imposed to protect morality.
>
> The news paper carried the article on the front page in graphic detail … [saying] "Caught in the Act."
>
> "Martin" subsequently lost his job at his security company.[210]

Not all arrests under sodomy laws begin with public displays of affection, however. In Bulawayo, Zimbabwe, on November 11, 1998, Darnley A. and Ronald W. were arrested for sodomy. The two gay men had been involved in what one of their lawyers called a "domestic altercation" in their home; when

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[210] February 25, 1997 statement in GALZ files; "Martin's" name has been changed.

police arrived, one of the pair was initially held for assault. However, police dropped the charge, and replaced it with consensual sodomy, on determining the two men were engaged in a sexual relationship.[211]

A well-known case in Maun, Botswana, similarly showed the fragility of privacy protections. On December 26, 1994 two men—Graham N., a British citizen, and Utjiwa K., a Botswanan citizen—were arrested in their home. The police, reportedly acting on suspicion, had seen the two through their window engaging in erotic behavior.[212] The pair faced "alternative" charges of either "carnal knowledge against the order of nature" (section 164 of the penal code) or "gross indecency" (section 167).[213] The former carried a potential seven-year prison sentence, the latter carried no stipulated sentence; the "alternative" evidently represented an incentive to plead guilty to the latter and avoid prison. The British citizen complied, and received a fine of P1000 (U.S.$100); he later left the country. The Botswanan refused to bargain; his attorney raised constitutional issues, resulting in the case being referred to the High Court of Botswana at Francistown.

Almost seven years of suspensions followed. Arguments were finally heard in September, 2001, with defendants arguing that the relevant sections of the Penal Code violated constitutional freedoms of assembly and association, as well as rights to privacy and equality. [214] The Francistown High Court finally passed judgment on March 22, 2002, and upheld the constitutionality of the provisions; Justice Mwaikasu reportedly stated that "public morals or moral values" were "pivotal to the balancing of the interests of the members of a given society and stand as the binding fabric of any society."[215]

In Zambia, one recent case exhibits the battery of prejudices with which the criminal justice system confronts homosexuality. The indictment in the case

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[211] They were convicted and fined Z$400 each; both later left the country. IGLHRC interview by Scott Long with attorney L. Nkomo, Webb, Low, and Barry, Bulawayo, Zimbabwe, August 14, 2000. A constitutional challenge to the common-law offense of sodomy was later attempted based on this case. See Appendix below.

[212] "Two Charged for Homosexuality," *Botswana Guardian,* January 13, 1995; and "British Citizen Faces Gay Charges," *SA Times,* South Africa, January 18, 1995.

[213] See Appendix for more information on the laws.

[214] IGLHRC interview by Kagendo, with Gideon Duma Boko, Lecturer in Law, University of Botswana, November 9, 2000; and "Applicant's Heads of Argument," High Court of Botswana at Francistown, in the matter between Utjiwa K. and the state (no date or case no.). For further information on the constitutional aspects of the case, see Appendix below.

[215] Cited in e-mail to Scott Long from Maureen Akena, Ditshwanelo, September 16, 2002.

states that on May 16, 1998, in Kabwe, Emmanuel Sikombe "attempted to have carnal knowledge of Mukamba Mokoma against the order of nature." It asserts (confusing terminologies from two different articles of the penal code) that he "did an act of gross indecency with another male person by putting Mukamba Mokoma's penis in his mouth."[216]

Sikombe was thirty-seven, a secondary school teacher, and married with three children but separated from his wife. He taught geography and mathematics at Muteteshi Basic School in Kabwe, and sometimes gave extra lessons at his home. On May 16, two students visited him for lessons: Bornwell Sinupwe, twenty-two years old but in the last year of secondary school, and Mukamba Mokoma, twenty-four years old, who had been receiving maths instruction.[217]

What happened was the subject of differing accounts at Sikombe's trial, which took place over a year later, on April 27, 1999. Mokoma alleged that he woke to find Sikombe placing his penis in his mouth. Sikombe denied the charges, and suggested that Mokoma had reported him to the police in order to blackmail him. On May 18, Sikombe was summoned to the police and told that Mokoma had accused him of possessing "pornograppic materials" [sic].

Sikombe was arrested but released on bail after a hearing on May 21. Trial was postponed for almost a year because the complainant disappeared to the Western Province,despite demands from the court for his return.[218]

The trial record shows police and prosecutors were initially confused about how to correlate the alleged act with charges in the penal code. Inspector Pascal Chakota testified that initially "I arrested [Sikombe] for sodomy." "Sodomy" is not mentioned in Zambian law, but "carnal knowledge. . . against the order of nature" is; legal history suggests that this crime should be restricted to anal, not oral, sex.[219] However, Sikombe was instead formally charged with under section 156 of the penal code, with what the trial documents call "attempt to commit unnatural offences"—though "unnatural offences" are not mentioned

[216] All citations are from the case file and trial transcript obtained by IGLHRC: Case no. IB/535 of 1998, in the Subordinate Court of the First Class for the Kabwe District, "The People v Emmanuel Sikombe." The transcript was hastily typed; errors in the citations are in the original.

[217] Despite their recorded ages both are repeatedly referred to as "boys" in court records. Mokoma is also identified in the transcript as "Lukamba Lukopa," apparently a misprint.

[218] Throughout the process Sikombe was represented by a public advocate from the Kabwe Legal Aid Society.

[219] See Appendix for details of the interpretation of "carnal knowledge . . . against the order of nature" and other provisions in Zambian law.

in Zambian penal code.[220] Finally, this was changed at his first hearing to "indecent practices between males" under section 158.[221] The question of whether the alleged relations between Mokoma and Sikombe were consensual or not was not raised by the prosecution, and did not figure in the judgment.[222]

Rather, the judgment focused on Sikombe's sexuality. The record suggests that Sikombe was under suspicion in the community as a man living alone. Kambole Muganba, the complainant's brother-in-law and "guardian," testified:

> Accused was at the College there for about 3 months. He was new. I learnt in the 3 months that his home was always visited by boys…. I never saw any woman. He was staying alone.… I don't knew [sic] why he preferred boys to girls.

Perhaps the most remarkable item in the trial record is the statement of Magistrate F. B. M. Ngosa, in sentencing Sikombe to five years' imprisonment on July 12, 1999. It virtually anthologizes the judicial system's prejudices about homosexual conduct—as a threat to manhood, to health, to morality, and to biology:

> I am aware that accused is a first offender and he deserves liniency. However, accuseds behavior is alien to the African Custom. I fail to understand him to be honest. He claims to be married person. I wonder how he could opt to act the way he did. There are so many

[220] "Unnatural offences" are a complex of crimes in Roman-Dutch common law (which is not in force in Zambia), covering non-anal homosexual acts. Section 156 of the Zambian Penal Code, however, criminalizes only the attempt to commit "carnal knowledge" or anal sex. Prosecutors appear to have treated oral sex as though it were an attempt at anal sex.

[221] As explained in the Appendix, "gross indecency" is a Zambian inheritance from nineteenth-century British law, where it was meant to criminalize oral rather than anal sex. What is notable is the succession of false starts necessary before the police found a charge corresponding to the act. Meanwhile, the sentence Sikombe faced was thus reduced from seven to five years.

[222] Mokoma claimed Sikombe sucked his penis twice during the night. Sikombe continued to deny the charges, saying, according to the court transcript, "Anyone can accuse any one for the purpose of obtaining money." The three men—Mokoma, Sikombe, and Bornwell Sinkupe—had slept in the same bed that night; Sinkupe testified that he had seen nothing happen: the transcript records him as saying, apparently to the accused, "I have spent nights with you before this incident. Nothing of this before happened to me."

> prostitutes if the problem was that he needs to relievy himself of the sexual draught he was passing through because of the absency of his wife surely the mouth is not the same as a vagina. God gave specitic functions to each organs he gave them. The mouth is for eating etc and the vagina is for both sex and urenating . Accused couldn't change God's desire. For behaving in the way he did, he emplied God made a mistake his distribution of functions. We are living in an HIV AIDS area and this behaviour couldn't be condoned by this court. If accused is HIV positive naturally [the complainant] has become one.[223] Accused in my view if he is a sick man and he has done this to many boys he is a sexual serial killer. There has been secretion of fluids. He is merelly bankrupt and devoid of human, behavior and good behaviour. A detrrent sentence is appropriate.

Our researcher interviewed Sikombe in 2000 at Mukobeko Medium Security Prison, outside Kabwe, where he was serving his sentence. He denied all the charges: "I think Mokoma had heard things about me and wanted to blackmail me if he could. But when he took the story to his brother-in-law they believed him and they decided to go to the police instead." He also said he had been abused in prison because he was said to be homosexual. Each block in the penitentiary was presided over by a captain, chosen by guards from among the prisoners. "The captains beat me because they say I will corrupt the other prisoners. The guards stop it when it happens in front of them, but they know it goes on behind their backs. When we go to the [prison] farm to work, the captains do the beatings then, not inside."[224] Sikombe was ultimately released on parole on November 22, 2000. He informed us in 2001 that his prison record had left him unable to find work.[225]

D. Extortion

The possibility of extortion in the Sikombe case illustrates one of the central effects of sodomy laws. As Keith Goddard of GALZ says, "Sodomy cases are broadly advertised in public space through the State press, with names released. The angle of these articles is always to shame the accused and, as far

[223] No evidence to this effect had been introduced.
[224] IGLHRC interview by Scott Long with Emmanuel Sikombe, Mukobeko Prison, Kabwe, Zambia, July 22, 2000.
[225] Letter from Emmanuel Sikombe to IGLHRC, February 2001.

as possible, to suggest that abuse was involved."[226] The Victorian law on "gross indecency," on which several colonial-era southern African provisions were modelled, was known in Britain as the "blackmailer's charter": it encouraged entrepreneurial initiatives to exploit the stigma it imposed.[227] Such laws in Africa today have a similar impact.

Blackmail appears to be most feared by gays and lesbians in Zimbabwe, in part because of the public notoriety thrust on homosexuality there in the last seven years. One legal advisor to GALZ reports that "between three and ten" cases of extortion come to the organization's attention annually, and suspects those are the "tip of the iceberg: most victims don't want anyone to know, not even us."[228]

The same source believes that "a disproportionate number of victims are white," because they can afford to pay. However, our interviews suggest this may not be so. The belief, fostered by media and state, that homosexuality stems from white corruption leads to the idea that gay and lesbian blacks are receiving white money. As Robert says of the police who beat him, "The idea was, we're gay, so we must have money, we must be looked after by somebody." And the identification of homosexuality with prostitution—a common identification by police and public alike—means that many of the poor and unemployed assume that gays have ready and regular access to cash.

Simba M., thirty years old when our researcher spoke to him in 2000, is nicknamed "Teresa" by his gay friends. He does not cross-dress but proudly calls himself effeminate. He was born in Mashonaland East but has lived in Bulawayo since 1993. From an early age, he says, he liked to talk and be with girls: "My family said I would 'swing' like a girl when I walked. And I ended up knowing I was gay. I didn't even know there were words for it. I thought it was normal for everyone, I had no sense of being different from the others."[229]

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226 E-mail communication from Goddard to Scott Long, IGLHRC, August 25, 2002. Prior to 2001, when Zimbabwe finally revised its legislation, a man accused of raping another man was not charged with rape—which was restricted to penis-vagina penetration—but with "sodomy," a crime which made no distinction between forcible and consensual commission. The result, Goddard contends, was that people accused of "sodomy" tended to be categorized in the public imagination with rapists as a class. Legal change has not resulted in the shifting of this stigma.

227 H. Montgomery Hyde, *The Other Love: An Historical and Contemporary Survey of Homosexuality in Britain* (London: Heinemann, 1971), p. 136.

228 IGLHRC interview by Scott Long with attorney who wished to remain anonymous, Harare, Zimbabwe, August 5, 2000.

229 All quotations from "Teresa" are from IGLHRC interviews by Scott Long in Bulawayo, Zimbabwe, August 13, 2000.

In his family only his three sisters know about his sexuality: he has not told his four brothers or his parents. Still, he is highly visible in Bulawayo's small gay community, which he first discovered in the mid-1990s. In 1995, he visited the GALZ Center in Harare: "It made me feel strong and safe. I thought what we were doing was allowed in Zimbabwe. I saw that people there were free. I didn't imagine that there were blackmailers, that there was a law." He continued:

> In October of 1996, I began to realize we were less free. I met a guy in Bulawayo who was a blackmailer. I took him to my place because he had offered to give me a massage. He pretended to be gay, even though he is not—I found out later that he had done this to other friends of mine as well.
>
> He gave me a massage, and then he said: "You know, this is illegal. I am going to the police and telling them what you are doing." I didn't know what he meant. We hadn't had sex. I had some idea that gay sex was illegal, but I had no clear idea. I said: "No, it was only a game." He said: "We know you, we always see you in town, you walk like a woman, with different types of guys."
>
> Then I understood what was up. He asked for money or he would go to the police. I had only Z$1,000 [ca. U.S.$100], my money for rent and to buy a little food and go to Harare—I was going to visit GALZ that week. I told him I had Z$50 but I made the mistake of taking Z$100 [U.S.$3] out of my pocket—he said, give me all the money you have, and I had to give him the Z$1000.
>
> After I paid out, I was afraid he might come back and try something; so I left the house for three weeks and went to stay with my sister, without telling her what happened.
>
> A year later I saw him again in a nightclub. He just stared at me. Probably he was prowling for other gay guys. It was his thing: he pretends he's gay and interested and at the end of the day he gives you hard times.

Another, more serious incident happened in 1999:

> I had a friend, named Lloyd. He is definitely gay. He came to my place as a friend, and started to admire the place and me. He wanted sex. He was only seventeen or eighteen; I knew he was too young, so I refused, I told him, if you were five years older I might, but not now. He said it was OK and that he loved me, but I still refused.
>
> But he had no place to go, because of his family. So I let him stay with me for some weeks. There was no sex, though.
>
> Then Lloyd disappeared and went elsewhere, I don't know where. But sometime later, I met Lloyd on the street. He talked strangely and said, I am coming to your place without an invitation. After a week, on a Sunday he came to a kiosk which my sister owned. I was there with two gay friends, Carlos and Lionel—they all worked there on Sundays. This was a Sunday in June of 1999. He started to threaten me, he was shouting and threatening, saying he would tell the police I had had sex with him unless I gave him money.
>
> We left him there, and the three of us went back to my place. I hoped he would calm down. We started to cook dinner. He came back around 8 p.m., knocked at the door but would not come in. He was very angry and he demanded money. I closed the door on him. Then he started kicking on it. He kicked it in and came in the apartment. He wanted to beat me up; he hit Carlos and Lionel. My neighbors started to come to help, and then Lionel called the police.
>
> When the police came they only listened to Lloyd. He was screaming at them that I had had sex with them [Lionel and Carlos]. So the police took all of us to Bulawayo Central. They refused to take my report; they only wanted to take Lloyd's report.

"Teresa's" friend Carlos remembers:

> The way the case was handled was completely unprofessional. The officer in charge went around the police station calling other officers to come see what happened, to look at the "women." He was making fun of "Teresa," and started making fun of Lionel and myself. He took "Teresa" separately into an interrogation room. Then they brought Lloyd into the room and helped him make fun of her. The policeman who was presiding over the interrogation said, "Why are

> you wearing earrings? Why are your friends wearing women's hairstyles?" And Lloyd would pitch in: "How came a man makes dinner for other men?"[230]

In the interrogation room, according to "Teresa,"

> The officer wanted me to take off my pants, to see which genitals I had. He was saying that if I was a girl, he wanted to have sex with me. Lloyd was telling them I had taken him home drunk from a bar, fondled him, led him to come, and then taken his sperm to sell for money to a witch doctor. The message was that this was one way gays get money, selling other men's sperm. The police believed it. He also said I had given him an STD.[231]

Carlos and Lionel remained at the front desk. "We could hear voices in the distance screaming at 'Teresa' and we got angry and started shouting. I banged on the desk at the front office, and demanded the officer there that they should ask these questions of me. We said that if they hurt 'Teresa' we would charge them with assault. The officer who was interrogating 'Teresa' came out. He told us that he would also charge Lionel and myself with sodomy, 'Because I believe you fuck.'"[232]

A high police official—Carlos believed he was an assistant commissioner—eventually arrived:

> He demanded to know, "Who penetrated who? If Lloyd penetrated 'Teresa,' he is guilty of sodomy." So Lloyd started changing his story, saying that "Teresa" had fucked him. The police only laughed at this, because "Teresa" was feminine. But they also threatened "Teresa" that they would charge him with rape. [233]

The police demanded that Lloyd and "Teresa" submit to forensic examinations to determine whether and how sexual relations had taken place.

[230] IGLHRC interview by Scott Long with Carlos Mpofu, Bulawayo, Zimbabwe, August 12, 2000.
[231] IGLHRC interview by Scott Long with "Teresa," Bulawayo, Zimbabwe, August 13, 2000.
[232] IGLHRC interview by Scott Long with Carlos Mpofu, Bulawayo, Zimbabwe, August 12, 2000.
[233] Ibid.

"We all took a taxi to Central Hospital," Carlos said—"they wouldn't let us take a police car, and they insisted that we pay. Lionel and I insisted on following. It was midnight, and the doctors only arrived at 1:30. Lloyd and 'Teresa' were both there in police custody. But the doctors said they could only do the tests the next day, so they asked us to come back next afternoon."[234]

Lloyd did not appear the next day. "Teresa" says,

> I had a form from the police saying that I was under investigation for rape. They checked my private parts to see if there were any signs of sex, or sperm going through, and they also checked my anus. They also checked to see if I had any STD but this came back negative. They were very cold during the whole thing.
>
> After that, the police made me come back to the station every day for the next month. And after that, for two more weeks I had to go every Monday. The police said they wanted to see the two parties, but Lloyd never came to those meetings. They would ask me a few questions and then send me home. Eventually Lloyd called them and said he was dropping the charges. And that was the end of it.
>
> Later I went to Lloyd's place and met his father, who said, "Oh, this is not the first time this has happened." Lloyd had done it to a pharmacist at a psychiatric hospital, who apparently actually went to jail.
>
> Afterward, my landlady threw me out of my apartment after giving me twenty-four hours' notice. My boss at work heard something about the story and started probing, but apparently he couldn't confirm anything. My great luck was that it never came out in the papers. But a lot of the police knew I was gay, and so they believed anything this man [Lloyd] said about me. When I see the police now, on the streets, I am afraid.[235]

Our researcher was also able to interview Lloyd, the alleged extortionist. He refused to speak about the reported incidents. However, the need for secrecy in his own life appeared to weigh heavily on him.

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[234] Ibid.

[235] IGLHRC interview by Scott Long with "Teresa," Bulawayo, Zimbabwe, August 13, 2000.

> I have not told any of my family members I am gay; I'm afraid. They are religious people. It is extremely difficult for me. I am not ashamed—it is inborn in me, it is an inborn thing—but I can't tell anyone; they do discriminate.
>
> People in my neighborhood do suspect I'm gay. They ask me and bother me: "Why don't you walk around with girls, there are girls who are interested in you and you give them the cold shoulder. What is your problem?" They will discuss it in public. I am pointed out.
>
> I know fifteen or so gay people in Bulawayo. None of them are my friends.[236]

Sex as well as money can provide a motive. Nhlanhla N., twenty years old when our researcher spoke to him in 2000, lived with his family in the Mzilikazi district of Bulawayo. He feels he has been conspicuous in his neighborhood as a "sissy" since his early teenage years. And, he says,

> When I was sixteen, in 1996-97, there was this guy who forcibly wanted to go out with me, forcing me to have sex. He would just come to my house when my mother was not there and say, "Let's have sex." And grab me and take me and I would threaten to scream and only then would he leave. If I'd go to stores, he would run after and try to grab me and take me to his house. And I would have to run away.
>
> He felt angry because I rejected him. He is a jailbird, he had been in prison. So he said, "Since you don't want to come to do whatever I want to do with you, then we will meet in prison." He threatened he would tell the police that I was gay. He used to say that again and again. He said also that he would turn himself over [to] the police for stealing, and say that I was his accomplice.
>
> I was so scared. But I never did give in. And then he disappeared, because he was in prison again. But he is out of jail now. When I go to stores I sometimes bump into him. Once he did it again, he

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[236] IGLHRC interview by Scott Long with Lloyd, Bulawayo, Zimbabwe, August 13, 2000.

> threatened he would send me to jail with him. I ran away, and since then I haven't met him.[237]

"Munashe" tells another story of extortion. He is twenty-eight; since 1995 he has taught secondary school in his home city of Mutare. In early 1999, he says,

> I met this guy through a friend of mine. He is not gay, but he is quite handsome, though. And he knew that my friend and I were gay. We would go out and buy beer, and he thought maybe we had money.
>
> One night, I went to my gay friend's place, and this straight guy was there. After a while I said I was going home, and he said, "It's late, I'll accompany you part of the way." Halfway to my place, I decided to stop at a pub. He asked if I had money to get him a beer too…. And then in the pub the guy said, "It's late, why don't you let me sleep in your home?"
>
> I found no reason why I should be suspicious; I treated this guy as a brother. But when we got home he was very curious about sex. He wanted to know how gay people did it. I told him about it, and I said, some do it not because they are gay, but for money. To my surprise, he said he wouldn't mind doing it if a person offered [him] money. He said, "We can have sex if you help me with Z$200 [U.S.$12]."
>
> I refused. I told him, "You are a friend; I can't have sex with you. I don't have sex with people and pay them money. And I am not a rich man."
>
> So he said, "How much will you give me for escorting you home from your friend's place?" I told him he had offered that and it was free. But he insisted on being paid. He said, "Give me Z$100 [U.S.$6] or I will take something from the house. I can even go to the police and tell them that you tried to seduce me." And then he raised the price to Z$200. I tried to get him to come back the next day but he wanted the money now, or something as an assurance. He was

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[237] IGLHRC interview by Scott Long with Nhlanhla N., Bulawayo, Zimbabwe, August 13, 2000..

> holding a pint bottle of beer, and he broke it and threatened me with it.
>
> I was living with my younger brother and [he] woke up because the guy was screaming: "He promised me money: Give me money!" He told my brother that I had tried to fuck him. And he said: "I will come to your school and tell your headmaster he employs gay people. I will go to the police." There were other lodgers there, it was after midnight, and they all came.
>
> I had to give him some money to make him go. But he would come by often in the evening after that, still demanding money. Every week, once or twice a week, he came; sometimes he knocked on my bedroom window at 2 A.M. I am terrified. He said, "I will make life hell for you if you don't give me money." The headmaster and the other teachers at my school didn't know about me.
>
> I called GALZ in Harare. They said to tell him that I would go to the police if he didn't stop, and to make sure I had people around me as witnesses when I talked to him. And when I did that, he stopped.[238]

GALZ advised a high-risk strategy, based on the belief that, given two crimes—sodomy and extortion—authorities would not prosecute both; and on the bet that, of the two, they would prosecute extortion.

Yet the most famous case of extortion and sodomy in Zimbabwe showed that police were quite willing to take both blackmailer and victim to court. In that case, an attempt at extortion gave authorities the chance to open a political prosecution for non-consensual sodomy (and Zimbabwean law at the time made no distinction between consensual and forced sodomy). The prosecution was aimed at discrediting Keith Goddard, programmes manager of GALZ.

In 1997, Goddard began receiving letters from a man named Siphephele Vuma. In the first, dated May 31, 1997, Vuma wrote "informing you about my misfortunes and financial problems," and gave Goddard "up to the 25th of June to send me a telegram worth between Z$7,000 and Z$10,000 [U.S.$350-$500]." Goddard did not know who Vuma was; the letters were unsolicited and he did not respond. Vuma wrote Goddard again later in 1997, claiming that sexual relations had taken place between the two, and demanding goods and cash.

[238] IGLHRC interview by Scott Long with "Munashe," Harare, Zimbabwe, August 5, 2000.

Goddard then took the two letters to the police, asking them to investigate. The police apparently did nothing.

In January 1998, a third, threatening letter from Vuma accused Goddard of having sodomised him, and demanded goods and cash totaling approximately U.S.$2,000. Goddard also handed this letter over to Harare police.

On May 1, 1998, Sergeant Dowa of the Harare Central Police Station CID (CriminalInvestigations Department) visited Goddard, asking him to file a complaint against Vuma for attempted extortion. Two weeks later, Goddard was summoned to the police station. He was asked to identify a young man sitting in the office. Goddard said he had seen the man only once, shortly before he received the third extortion letter, when the man had approached him at the GALZ office. Sergeant Dowa confirmed that the man was Siphephele Vuma.

Goddard was asked to leave the room while Vuma made a statement. Called back, Goddard was told he would be charged with having sodomised Vuma at gunpoint.[239]

A remarkable pair of parallel—and paradoxical—trials then began, in which both alleged sodomite and alleged blackmailer faced charges. Vuma was arraigned on June 9, 1998, charged with attempted extortion for demanding (in the end) Z$7,000, a color television and VCR, a stereo, a two-plate stove, an electric kettle and electric iron from Goddard. Initially, Vuma pleaded guilty; however, the judge, Regional Magistrate Custom Kachambwa, changed his plea to not guilty, saying Vuma's conflicting explanations for his actions—in particular, his claim that he had been sodomised—"amounted to a defence."[240]

Goddard appeared in court on June 12, 1998, and was arraigned for sodomy. The state alleged that, on February 13, 1998, he had met Vuma at a Harare nightclub, taken him home after promising him a job, and then "produced a pistol, inducing Vuma into submission."

Derek Matyszak, one of Goddard's attorneys, notes that "any confidence in the independence of the judiciary is not sustained down at the magistrate's court. Magistrates are civil servants, and all promotions go through the president''s office. It is absolutely plain that Keith's was a political trial":

> The victim of a blackmailer reported the blackmail to the police, and was himself arrested for sodomy. Even the police could see this was

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[239] IGLHRC interview by Scott Long with Keith Goddard, Harare, Zimbabwe, August 5, 2000; and "Statement from Gays and Lesbians of Zimbabwe," June 17, 1998, on file with GALZ.

[240] "Chipinge Man Facing Charges of Extortion," *Herald,* Zimbabwe, June 11, 1998.

> a problem. So they arrested the blackmailer as well, to make themselves look impartial.[241]

Goddard's case was repeatedly postponed, and ultimately placed on remand, obliging him to appear in court monthly but inconclusively. In May 1999, according to Matyszak, the prosecution decided "there was no way the sodomy case would kick off while the complainant, Siphephele Vuma, was going through trial at the High Court where he is being charged with extortion."[242] This ensnared both cases in a catch-22, since Vuma's only defense against the extortion charge was to prove that forcible sodomy had actually taken place.

Vuma's case, therefore, also lingered in limbo. Ultimately, Vuma claimed that only the third letter he had allegedly written Goddard was authentic, and was a legitimate claim for compensation for the trauma he had suffered due to assault; the other two letters were forgeries, he asserted. (Only the third letter was written after the date when, as he finally told police, the alleged sodomy had taken place.) Vuma said he had written the letter on the instructions of a police officer in his home town of Chipenge; he could not remember the name of the officer, who he said had since been transferred.[243]

Over three years later, both cases remain unresolved. Goddard's case was eventually removed from remand, but he is still subject to summons at the prosecutors' discretion. Matyszak believes that "The state now realizes it had no basis for arresting Keith; on appeal, at the least, to a court less politically malleable than the Magistrate's Court, they would lose, and they do not want a judgment from a High Court saying they should never have brought charges." Yet the charges still remain a potent potential form of harassment against both Goddard and GALZ. As Matyszak says, "They have a loaded gun in the drawer; and any time they want to get at Keith, they will dust it off and the whole thing can be set in motion again."[244]

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[241] IGLHRC interview by Scott Long with Derek Matyszak, Harare, Zimbabwe, August 8, 2000.

[242] "Trial into Sodomy Allegations Against Goddard Not Now," *Herald,* Zimbabwe, May 12, 1999.

[243] IGLHRC interview by Scott Long with Derek Matyszak, Harare, Zimbabwe, August 8, 2000.

[244] Ibid.

E. State Discrimination and Abuse in other Spheres

Repressive law and homophobic rhetoric, particularly in combination, have a sweeping and negative effect on the capacity of gay, lesbian, bisexual, and transgender people to organize, to express themselves, to appear in the public sphere, to exercise basic freedoms, and to access essential services.

1. Association and assembly

Even the existence of gay and lesbian organizations—their basic right to association—is endangered. The example of Zambia, where state officials warned that any attempt to register such an organization would be a criminal offence, far from being extreme, is exemplary of the problem. In Botswana, the law has left the lesbian, gay, bisexual, and transgender rights group LEGABIBO only able to operate under the auspices of a supportive human rights organization, Ditshwanelo. LEGABIBO's leader told us,

> We have to register, which we intend to do—everybody is quite unanimous about that. We need to be able to set up an organization, a body that is responsible for the funds which we hope to raise through donors and so on. The catch, though, is the government has stated quite categorically that they will not register us because we engage in activities which are not compatible with the penal code…. [I]f we try to register, the government will refuse, but in order for us to get funds and to run any programs, such as the HIV/AIDS program, we need to get donors.[245]

Public gatherings of homosexuals—the exercise of the right of assembly—are almost inconceivable under the pressure of law and state homophobia. The few attempts of gays and lesbians to engage in public political manifestations, always in coalition with and to some extent under the protection of other, more mainstream groups, have been met with intimidation. In 1998, when GALZ was invited to join an NGO-sponsored march through central Harare to celebrate Human Rights Day on December 10, its prospective presence provoked threats. However, authorities refused to assign police to protect the marchers—saying that GALZ's participation might provoke a riot. Although the march took place without incident, some other organizations withdrew in fear.[246]

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[245] IGLHRC interview by Kagendo with Mike, Gaborone, Botswana, November 8, 2001.

[246] IGLHRC interview by Scott Long with Keith Goddard, Harare, Zimbabwe, December 6, 1998.

When Namibia's The Rainbow Project (TRP) organized a series of workshops for discussing sexuality in November 2001, the largest security firm in Windhoek refused to hire out security guards to protect the event, reportedly because it feared its own contracts with SWAPO would be jeopardized.[247] When TRP and a coalition of NGOs organized a march in Windhoek to protest President Nujoma's homophobic attacks in April 2001, the SWAPO Youth League—which had declared they would present a petition to the National Assembly to arrest all gays and lesbian immediately—threatened to disrupt it. Organizers asked for a police presence to ensure the marchers' safety. Their request was denied. Instead, officials assigned members of the Special Field Forces (SFF)—the president's elite troop, repeatedly implicated in attacks on activists—to guard the march. The "protection" amounted to intimidation.[248]

2. Censorship

State censorship, the denial of the fundamental right to freedom of expression, is a basic threat to conditions of lesbian, gay, bisexual, and transgender existence. Censorship prevents self-expression, the assertion and communication of an identity. The often violent punishment of non-conforming modes of dress, appearance, and manner—the steady police harassment, described above, of people who break gendered norms for public behavior, as well as the condoned community retaliation against such people, to be explored below—is a form of censorship.

Censorship is also used to stifle the development of a community. It represses the sharing of experiences and the exchange of information which help people discover what they hold in common with others. In this form—directed at organizations as well as individuals—the censorship of lesbian, gay, bisexual, and transgender expression in southern Africa is particularly egregious. It prevents groups from engaging in outreach, supporting their members, or establishing a public presence. As explained in the Appendix below, the censorship powers of most governments in the region remain extensive. Zimbabwe's extraordinarily broad Censorship and Entertainments Control Act—one of the repressive instruments left behind by the white settler regime—was invoked against GALZ to bar it from the Zimbabwe International Book Fair in 1995. It has repeatedly been used to confiscate GALZ materials. GALZ maintains a resource center in its offices, full of materials on homosexuality meant to inform and support its members as well as inform the general public.

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247 IGLHRC telephone interview by Scott Long and Kamal Fizazi with a march organizer who wished to remain anonymous, March 23, 2001.

248 Human Rights Watch interview with Ian Swartz, Windhoek, Namibia, July 16, 2001.

Derek Matyszak, an attorney who has worked with GALZ, says that the center is "under constant threat of being seized. The video library is actually kept off premises. The police could sweep in and take all the books and videos, a storehouse it took GALZ years to accumulate, and it could be years before GALZ got them back, if at all."[249]

Romeo Tshuma remembers a 1996 raid on GALZ's quarters: "We had just moved to this house. Two policemen came here and demanded that I produce a list of the executive committee and membership. We managed to hide the list of members—it was taken to someone's house. They kept coming back and searching the offices."[250] In the 1996 raid, another member says, "They [the police] did not know where to start. They couldn't tell one video from another." And he adds, "They sweep irregularly. They have generally left GALZ alone in recent years—either because they have lost interest, or because they are afraid of the international response. But of course they always have the power to come back."[251]

Materials and information sent to GALZ from abroad are routinely seized under the Censorship and Entertainments Act, which creates a Board empowered to ban materials from public viewing or sale. The issue has become a running contest between GALZ and the government. As long ago as 1994, Matyszak says, "GALZ decided to test the Censorship Board, to see if they really would ban anything homosexual, regardless of how sexual it actually was. They rigorously cut out any references to homosexuality from publicly shown films—the kiss between two men in the film *American Beauty* was cut out, for instance. What would they do with a film for private viewing?"

GALZ selected and submitted the Merchant/Ivory film *Maurice*, based on E.M. Forster's novel, to the board. The board banned it; "it was clear from the language of their decision," Matyszak says, "that they had barely seen the film."[252] The rejection notice stated that

> an examination of the video would speak for itself, and the entirely homosexual theme of the content. It was considered that the film

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[249] IGLHRC interview by Scott Long with Derek Matyszak, Harare, Zimbabwe, August 3, 2000.

[250] IGLHRC interview by Scott Long with Romeo Tshuma, GALZ, Harare, Zimbabwe, August 8, 2000.

[251] IGLHRC interview by Scott Long with a GALZ member who declined to be named, Harare, Zimbabwe, August 3, 2000.

[252] IGLHRC interview by Scott Long with Derek Matyszak, Harare, Zimbabwe, August 3, 2000.

> offended … and was accordingly rejected. The subject matter of the film is of course contry [sic] to Zimbabwean legislation.
>
> The film would have little appeal to the normal Zimbabwe cinema audience, other than perhaps one of prurient interest, but obviously of greater interest to those persons inclined to such perverted sexual activity as may be found in the organisation to which the video was sent from a source in England, namely the Gays and Lesbians of Zimbabwe.[253]

GALZ tried to sue the board in the *Maurice* case, but eventually dropped it—"we had other legal battles at the time," Keith Goddard says.[254] Matyszak adds, "the upshot is that GALZ simply doesn't expect to import films now."[255]

Goddard told us in 2000,

> Stuff continues to be seized, but irregularly. They will let blatantly sexual material sent to us get through, but seize a book about gay clergymen. It is totally and completely inconsistent.
>
> Now, when we ask the board about seized material, sometimes they will say it has been burnt. Sometimes also, they will release it, without our even going through our lawyers, if we give a call. There's no pattern to it at all.[256]

One seizure notice which GALZ showed our researcher was a three-page list of items confiscated; the extensive roster included four copies of the *Advocate* and three of *Out*—both are U.S. gay news magazines; one book called, *Coming Out*; and "one envelope of newspaper cuttings."[257] Other, more recent notices recorded the seizure of the book, *It's Not Unusual (A Gay and Lesbian History)*, and the video, *An Evening with Elton John*.

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[253] Notice from the Censorship Board, dated March 1, 1995, on file with Human Rights Watch.

[254] IGLHRC interview by Scott Long with Keith Goddard, Harare, Zimbabwe, August 3, 2000.

[255] IGLHRC interview by Scott Long with Derek Matyszak, Zimbabwe, August 3, 2000.

[256] IGLHRC interview by Scott Long with Keith Goddard, GALZ, Harare, Zimbabwe, August 5, 2000.

[257] Notice of Seizure ref. 2/10/96, Harare Main Post Office, 20 October 1996.

3. Human rights abuses in the context of schooling

Young lesbian, gay, bisexual, or transgender people face discrimination in school environments, where authorities routinely either participate in, or fail to protect them against, harassment and abuse. Discrimination is often rife in places where tolerance should be taught. In Namibia virtually every gay or lesbian person interviewed for this report told of persistent discrimination in public schools.

"It started in grade school," one woman said: "I was different and the teachers seemed to know. They would harass me. They would not let me attend classes—they would ask me, 'Are you a girl or a boy?' And when the other students harassed me, I could not go to the teachers because they would agree with the students. Finally I just gave up even trying to go to school. I failed tenth grade. Now I can't get a job."[258]

Genevieve, in Windhoek, told us she was repeatedly harassed by her teachers and the principal of her secondary school because she wore her school uniform with trousers instead of with a skirt. As a result, she failed tenth grade and dropped out of school. What particularly confused Genevieve was that, during the winter, girls were told to wear trousers with their uniform; but she was punished for continuing to wear the winter uniform after the weather changed.[259]

Isaiah, a twenty-year-old gay man who managed to get through primary and secondary school and is studying at the university, explained, "School was not my favorite place—I was frightened in the classroom because if I could not answer the question I was harassed. The male students would beat me on the head and call me 'moffie,' but none of my teachers ever tried to stop it." Isaiah credits the fact that he nonetheless stayed in school to his having discovered three other gay boys. "We were all harassed—they would come up to us and shove and push us and call us 'moffies,' but at least we were not alone."

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[258] Human Rights Watch interview with Elden (not real name), Windhoek, Namibia, July 18, 2001.

[259] Human Rights Watch interview with Genevieve (not real name), Windhoek, Namibia, July 18, 2001. Although schools traditionally have had significant latitude to control student dress, including requiring that students wear school uniforms, they may not punish students merely for breaching stereotypes controlling how girls and boys should dress—for wearing the school uniform designated for the opposite sex, for example. Article 5 of the Convention on the Elimination of All Forms of Discrimination against Women mandates states "To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based … on stereotyped roles for men and women."

Harassment has continued even at the university. The day after President Nujoma called for gays and lesbians to be deported, Isaiah says, he arrived at the campus to find a group of students greeting him with the chant, "You are going to be deported."[260]

Isaiah, like many of the gay men and lesbians interviewed, expressed intense fear of being deported. "I feel very frightened because I think [Nujoma] meant what he said and where would I go?"[261] For numerous young people who were forced out of school because of their sexual orientation, the very idea of being deported is confounding. "I am Namibian, I was born here, I've never been out of the country, what would I do?" asked Irma, an eighteen-year-old lesbian from Windhoek.[262] A few voiced defiance in the face of the threat of deportation. One lesbian said, "After I saw the president's speech I thought 'I'm a human being and I happen to be Namibian and a lesbian but Namibia is my country—I deserve respect, and besides, where are they going to deport me?'"[263]

The men we interviewed spoke more of verbal and physical harassment at school. The women reported fearing sexual violence. "There is a myth that everyone talked about at school," one young woman recounted— "that being raped by a man will turn women straight. They say, 'lesbians must be raped to be turned normal.'"[264]

For women's rights activists, the harassment of lesbians and the acceptance of rape as a "cure" are consistent with a culture they say condones sexual violence against women. Elizabeth Khaxas of Sister Namibia points to a high teen pregnancy rate, and the subsequent school dropout rate, as similar phenomena stemming from the same root causes. She comments, "Most young black lesbians that we know dropped out of school. But it is not just lesbians, it is other girls who leave because they become pregnant. Once a girl is pregnant, she cannot go back to school. Many of these pregnancies are a result of sex with a teacher. But teachers protect themselves, the principals protect the teachers, and the school boards are not strong enough to stop this abuse."[265] Khaxas believes that neither violence against lesbians, nor other syndromes which

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[260] Human Rights Watch interview with Isaiah (not real name), Windhoek, Namibia, July 18, 2001.
[261] Ibid.
[262] Human Rights Watch interview with Irma (not real name), Windhoek, Namibia, July 20, 2001.
[263] Human Rights Watch interview with Justine (not real name), Windhoek, Namibia, July 19, 2001.
[264] Ibid.
[265] Human Rights Watch interview with Elizabeth Khaxas, Windhoek, Namibia, July 17, 2001.

impede women's access to education, can be remedied without state action to promote equality: "These girls experience intense pressure to have sex. The Legal Action Center has done several reports about the high incidence of rape and domestic violence in Namibia. Violence is used to keep women in their place. There is a national campaign to address HIV but it does not address inequality and how women cannot talk to men, including their husbands, about sex. Girls will keep being pressure to have sex or raped and then they will drop out or get forced out of school until we address this basic problem." [266]

4. Health and HIV/AIDS

The prevailing pattern of HIV/AIDS transmission in southern Africa is through heterosexual contact. Yet lack of access to information, along with discrimination in provision of basic services, puts lesbian, gay, bisexual, and transgender people in the region at particular risk both of contracting HIV/AIDS, and of suffering disproportionately from its medical consequences.

Only in South Africa, among countries in the region, is information on HIV/AIDS prevention specifically targeted toward women who have sex with women, or men who have sex with men. Elsewhere, states refuse to distribute such information—much less engage in active outreach or campaigns—because it would mean "promoting homosexuality."

In Botswana, AIDS education and prevention programs aimed at heterosexuals are increasingly visible. One gay man says,

> Everywhere, wherever you go, there are posters on the road, stickers—they are really preaching about it. Every Monday there is a radio program that talks about AIDS and they talk about a lot of different issues…. Our government is supplying condoms for free. You can go to hospitals, schools, everywhere, sometimes even on the streets. They are trying to promote it, they really are helping people.
>
> But they aren't focusing on gay people, it is for everyone else. For gay safer sex, [my friend] "Sexy" and I went [to Zimbabwe] to a safer sex workshop at GALZ. [267]

[266] Ibid. See also*: Sexual Violence against Girls in South African Schools* (New York: Human Rights Watch, 2001).

[267] IGLHRC interview by Kagendo with Ronza, Gaborone, Botswana, November 7, 2001.

In Namibia, a national campaign to prevent HIV transmission and promote awareness does not address same-sex sexual relations. State officials who tried to promote outreach to men having sex with men and other stigmatized, vulnerable groups have been harassed or silenced. In 1998, our researcher spoke with Michaela Hubschle, then deputy minister in Namibia's Ministry of Prisons and Correctional Services. Hubschle was a strong proponent of prisoner's rights who had actually organized observances of Human Rights Day in penitentiaries. "Very few people since this country was created want the human rights of prisoners, and their health, protected," she said. "If you try and do anything they not only belittle it but abuse you." Hubschle had publicly called for distributing condoms in prisons, after consulting with The Rainbow Project on HIV/AIDS issues for men having sex with men. She had also condemned the law against homosexual sex, since men who admitted to homosexual conduct in prisons were made subject to additional penalties. Speaking before prisoners themselves in Windhoek, she deplored the fact that "these practices … are usually met with disciplinary measures, not health measures."[268]

As a result, she said, other ministers refused to meet with or speak to her. Forces in her own party, SWAPO, were "preparing a campaign" against her.

> SWAPO people went to the papers asking that I be exposed. Exposed for what? It is as if they think they can blackmail me because they have information on me. One paper called me the "Minister of Condoms."
>
> You see how things are done here. On my answering machine two weeks ago was a message with twelve and a half minutes of insults. "We will fuck you, we will never use condoms, it doesn't matter if you get AIDS." They made the sounds of someone with an orgasm. Who gave them the direct office number?[269]

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[268] Quoted in Crispin Inambao, "Prisoners Should Not Be Condemned to AIDS Sentence," Africa News Service, June 15, 1998.

[269] IGLHRC interview by Scott Long with Michaela Hubschle, deputy minister of prisons and correctional services, Windhoek, Namibia, December 17, 1998. This was not the last warning that Hubschle faced apparently from someone within SWAPO. The next year, when she stated publicly that officials "responsible for torture must be immediately suspended from their duties and stand trial," the *Namibian* received a letter to the editor accusing Hubschle of echoing statements by human rights leader Phil ya Nangoloh, and urging her to resign for "collaboration with the enemies of our struggle for freedom and independence." The letter was hand-delivered to the *Namibian* in a government envelope. See "Call for Michaela Hubschle to resign," *Namibian,* September 17, 1999.

Hubschle left the government in 2000; she now works as an advocate for human rights.

In 2001, urged by South African officials to consider distributing condoms in detention, another Namibian official reiterated, "Giving condoms to prisoners is the same as promoting sodomy…. Consenting sex between two male prisoners will be considered sodomy and it is punishable."[270]

Similarly, when Namibia's health minister, Dr. Libertina Amathila, urged in 2001 that the government consider decriminalizing (and regulating) sex work as an HIV prevention measure, she was subjected to a storm of attack. SWAPO's chief whip in the National Council accused her of "promoting" prostitution[271]; a branch of the SWAPO Women's Council called for harsher strictures on prostitution as well as homosexuality (saying among other things that both practices interfered with Namibian women finding partners).[272] The minister withdrew the proposal.

Part of the worldwide history of responses to HIV/AIDS is the story of NGOs filling the gaps left by government inaction. Some groups in southern Africa courageously try to compensate for state neglect. However, the criminalization of homosexual conduct means that even NGOs who try to make accurate, life-saving information available to men who have sex with men or women who have sex with women] could conceivably face prosecution, or a campaign of hysteria and harassment such as the one that extinguished the fledgling group in Zambia (see above). At the very least, groups such as GALZ, which manage to provide essential information and counselling to their own members, still find themselves hindered from engaging in broader, public outreach campaigns.

"Tsitsi Tiripano" was the pseudonym adopted by Poliyana Mangwiro, an open lesbian activist in GALZ who died of AIDS-related complications in May 2001. She had been openly HIV-positive, and helped sustain "GALZ Positive," a counselling and support group for HIV-positive members. Mangwiro told our researcher in 2000,

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[270] Deputy Commissioner of Prisons Fwafwa Mabakeng, quoted in Max Hamata, "Condoms clash on cards," *Namibian,* September 6, 2001.

[271] Henock ya Kasita, quoted in Absalom Shigweda, "Prisoners told 'go play with yourselves,'" *Namibian,* May 10, 2001.

[272] Petition from the Khomas regional branch of the SWAPO Women's Council to Justice Minister Ngarikutuke, in Christof Maletsky and Patience Smith, "SWAPO women add voice on homosexuality, prostitution," *Namibian,* May 28, 2001.

> I am living with HIV/AIDS since 1998. I am the only positive lesbian I know in the country. It was a double coming out and it was very difficult for me.
>
> Now GALZ is standing up for gays and people are standing up for themselves; but it is different around HIV. Even other members look at you with a lot of fear. It is more difficult if you are in GALZ Positive, it is hard to stand up and harder to be stood up for, you know?
>
> There is no medicine [for most people living with AIDS in Zimbabwe]. The only treatment I am on is vitamin supplements. The Ministry of Health won't help GALZ Positive or communicate with us. They say, homosexuals are spreading AIDS.

Even customs officials, Mangwiro said, confiscated condoms shipped to GALZ Positive from abroad: "They say, are you a health center?"[273]

Romeo Tshuma, thirty years old, is also a leader in GALZ Positive. He joined GALZ in 1996. "It was a bad time. I wasn't sure I was doing the right thing by working here. There was much police pressure, it was very scary. But I decided to work for the center and for the community."

In 1998 he took training as a counsellor in GALZ's support programs:

> I was trying to gain confidence and strength to learn my HIV status. I was suspecting it. Late in 1998 I went for the test and learned I was positive. I understood my situation through the examples of others, and through what I had learned through counselling.
>
> After that, I was admitted to a local hospital with TB [tuberculosis]. GALZ members were gossiping about me. So I decided not long after that to tell the rest of the organization I was HIV-positive. I came out because I wanted to help other people and be an example that we can survive.[274]

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[273] IGLHRC interview by Scott Long with Poliyana Mangwiro, GALZ, Harare, Zimbabwe, August 11, 2000.

[274] IGLHRC interview by Scott Long with Romeo Tshuma, GALZ, Harare, Zimbabwe, August 8, 2000.

As of 2000, GALZ Positive had twenty-six members. Public officials spurned contact with the group, and Tshuma says he would often have to "force himself" into meetings to talk about being gay and HIV-positive. The National AIDS Coordination Program—a state-coordinated coalition run through the Ministry of Health—would not let GALZ Positive join; its head, Chipo Mbanje, "refused to talk to me," says Tshuma.

The Zimbabwe National Network of People Living with HIV/AIDS (ZNNP+)—a national support organization, largely funded by the state, which also carries out awareness campaigns—also rebuffed approaches. After many attempts, Tshuma says, he finally got GALZ Positive invited to the 1999 general congress of ZNNP+. A few days after an invitation arrived, however, another letter came, saying the invitation had been a "mistake."[275]

Peter Joaneti, another GALZ Positive member, has belonged to its parent group since 1994; he tested HIV-positive in 1996. He was furious at the ZNNP+ excuse that they "had used the wrong directory" in inviting GALZ. He says,

> GALZ Positive decided they should send me to the general congress anyway. I phoned three former board directors of ZNNP+, who were sympathetic, and they all said I should go.
>
> On the very day I went to check in, someone from their office phoned and said I should not come, there would be problems if I came. I went anyway. I was told, when I got there, that I could come in but only if I didn't introduce myself as a member of GALZ.[276]

"They told us," Tshuma remembers, "to hide our identity so people wouldn't be violent toward us. But they were really afraid the government would defund them if they admitted GALZ." Joaneti insisted on saying whom he represented. "I was provocative and it was good." He was asked to serve on the Youth Advisory Board of ZNNP+. However, he adds, "Now I always introduce myself as gay. But not necessarily from GALZ." Tshuma adds, "We are a ZNNP+ member now. But they still don't send us information about meetings and such things. I met with the president of ZNNP+ six months ago

[275] Ibid.

[276] IGLHRC interview by Scott Long with Peter Joaneti, GALZ, Harare, Zimbabwe, August 9, 2000.

and he said, 'I'll let you know of anything happening.' But we still have no word."[277]

Prejudice and discrimination also affect lesbian, gay, bisexual, and transgender people's access to medical treatment for HIV and other conditions. Confidentiality can be violated and verbal abuse inflicted by those supposedly sworn to give care.

Wendell, a gay man in Namibia, says, "We don't have people, like doctors, who are gay-friendly and would examine you and say, well, you have got this STD [sexually transmitted disease], you should do this, and things like that …[b]ecause there are several times that people were laughed at because the STD was on the wrong side [anal]—which really offends you as a person."[278] Derrick, a gay man and youth activist in Windhoek, refers to his own experiences as well as those of lesbian friends:

> What happens with lesbians, such as with STDs, they report it and [medical professionals] will definitely tell the lesbians, "Come and get your boyfriend." And the girl will say, "I don't have a boyfriend." And then they will say, "Where did you get it? Huh? Are you telling me you got this from a woman?" And blah, blah, blah—the way they talk to you is so bad, really.
>
> And the woman will come back from the hospital and say, "Oh, the nurse said this to me and that to me." And then the rest that are infected will be scared to go to the hospital. We need to get some good doctors and nurses for the LGBT [lesbian, gay, bisexual, and transgender] people, where I can feel comfortable to talk with…. Imagine me going to a doctor and saying "I'm a homosexual and I want this and that from you." You see, it's really best if you find and stay with one doctor that you can really talk face-to-face. I need a doctor I can trust, a doctor that will never take my problems outside. Especially here, the story spreads very fast.[279]

277 IGLHRC interviews by Scott Long with Romeo Tshuma and Peter Joaneti, Harare, Zimbabwe, August 8 and 9, 2000.
278 IGLHRC interview by Kagendo with Wendell (not real name), Windhoek, Namibia, November 15, 2001.
279 IGLHRC interview by Kagendo with Derrick (not real name), Windhoek, Namibia, November 15, 2001.

Romeo Tshuma recalls that in late 1998, “when I had TB, I went to Belvedere Clinic, a municipal clinic. I gave them the GALZ address. The presiding doctor recognized the address and said, are you homosexual? And then he didn’t want to treat me, he said he didn’t know how. But I made him treat me.”[280]

Tshuma also remembers,

> I had a friend who died. He had AIDS and had another STD. He went to a local clinic in Mbare [a high-density area of Harare]. The nurses were not helpful. No, it was worse than that. They embarrassed him, after that he wouldn’t go to a hospital because of the embarrassment. They called the other nurses round, they said, “Come and see, how can a man have an STD in his ass, are you a homosexual?” He died in part, I think, because he had no place to go.

“Even now,” Tshuma says, “when GALZ Positive members go to the clinics, they say, ‘Oh, the gay guy is here.’ A person can feel intimdiated by this. They gather around because they want to see what a gay person looks like.”[281]

Tshuma is nonetheless committed to political activism.

> Knowing my status has given me peace and strength. I say to people who are worrying about being tested, that you need to know what you are facing. I feel really strong today. Not, I think, because of medication. It was my mind that gave me the strength to get as well as I am today. I know I have one thing to fight for; I only have one thing to think about in my life—I am HIV-positive and I will fight for my health and my rights.

Still, he says, the road has been hard. “My brother said to me when I first came out as gay, I wish you were not part of the family. This was in 1998. He actually said to me, before he even knew that I was HIV-positive: ‘You will die of AIDS: only gay people die of AIDS.’”[282]

Peter Joaneti says,

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[280] IGLHRC interview by Scott Long with Romeo Tshuma, Harare, Zimbabwe, August 8, 2000.
[281] Ibid.
[282] Ibid.

> There is a double discrimination in society for gay and HIV-positive people. In the community, in the gay world, people gossip about your HIV status, talk about your personal life and health. And people out there say you are HIV-positive because you are gay. And they believe gays cause the spread of HIV/AIDS.[283]

That some in Southern Africa still believe AIDS to be a "gay disease," despite the massive AIDS crisis across the continent spread by unprotected heterosexual sex, is still further testimony to the lethal failure of states to promote full awareness. As The Rainbow Project's Ian Swartz observes, governments refuse to include homosexuals in any HIV/AIDS materials on HIV/AIDS, but their leaders persist in blaming homosexuals for AIDS in Africa.[284]

Still worse, if some heterosexuals feel that gays cause HIV, some homosexuals feel themselves invulnerable to it—precisely because they have never seen AIDS information directed at them. In Namibia, Derrick, who gives safer-sex workshops for gays and lesbians for The Rainbow Project, told us, "Some of the youth believe that if you are gay—ah, it was so hard when we first started with the youth!—that if you were gay or lesbian, that you don't get AIDS."[285]

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[283] IGLHRC interview by Scott Long with Peter Joaneti, Harare, Zimbabwe, August 9, 2000.

[284] Human Rights Watch interview with Ian Swartz, Windhoek, Namibia, July 17, 2001.

[285] IGLHRC interview by Kagendo with Derrick (not real name), Windhoek, Namibia, November 15, 2001.

IV. "NOWHERE IS REALLY SAFE": VIOLENCE AND HARASSMENT BY NON-STATE ACTORS

A. Carlos' Story

Carlos Mpofu, from Bulowayo, Zimbabwe, was twenty years old when our researcher spoke to him in 2000.

> I first realized about my sexuality when I was about twelve. I realized I wasn't attracted to girls: my first wet dream wasn't with a girl, but a man. It first made me think of the sexual side, and what side I was on. And then I was always a feminine child. But I didn't have a word for it. The only word I knew was *incubikile*—an Ndebele word, but it wasn't specific for gays, it meant anyone who was handicapped or deformed.[286]
>
> Later I found out there were older words that had always been used for people like me: *isitabane* or *isikesane*. But I didn't know that then.
>
> I only started doing anything about it seven years later, when I was nineteen. I've only been openly gay to my family and society for one and a half years. It has been exacting; it has had its ups and downs. There were glorious moments and moments when I thought, "Why did I come out? I want to die." I've done so much. I told myself I was coming out to fight for gay rights. I wanted to be in the forefront of the battle. I am not a coward. My being in the community has a reason to it. I've done things faster than other people who have been out for five years.
>
> I come from a family of three children—two boys, one girl, I'm the middle child. My father was a soldier, a normal middle-class family, very Pentecostal. My parents divorced when I was twelve, my mother remarried. I was already becoming rebellious. I was still in primary school, an all-boys' school. They could tolerate a bit of femininity in one or two boys; they had a slot for it.

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[286] According to Keith Goddard, programmes manager of GALZ, the term also means someone believed to have both sets of sexual organs. E-mail communication from Goddard to Scott Long, Human Rights Watch, October 8, 2002.

But I was so feminine it was a problem with the teachers. And I had even more problems in high school, when I reached thirteen. Other boys already knew what being gay was all about. I was just finding out; the words scared the shit out of me.

In my second year of high school I became active in a church. Beyond services, I went to Sunday school and youth meetings. My "feminism" was not an issue there. They didn't notice it so much at first, for some reason. I was precocious and very intelligent. I challenged the pastors and directors of the church. As I got more involved, my family worried less about the feminine thing; they took it as a phase.

While in high school I was also doing a diploma in Bible school with the church, to get me ready for church leadership; and I went through all well. In the church I was given a position as a junior youth leader, leading 250 kids between eight and fifteen. I was seventeen. I became a very prominent Sunday school teacher; my church was one of the biggest in the city.

It was a hectic three years but the best I ever had in my life. Everything was moving smoothly. And then I got a job as secretary to the pastor, one of the best-known pastors in the city. I was promoted to be administrative clerk of the church school, and I did both jobs simultaneously.

And then in 1997 people started talking about me again, how feminine I was. I guess as I grew older they started to notice more. A girl and I started a Pentecostal dance group; it was a girl's troupe, but I became a "temple dancer" too. Then people really started attacking me. That went too far. "Why is this young man as graceful as a young lady?" In 1998 my parents became more worried. And late that year things got more serious.

In September one lady with a child in my class complained to the pastor. She went to him and said she had a problem with one of the Sunday school teachers; I was too feminine for her son. He was eight or nine, and impressionable, she was afraid I would molest him, or I already had. The pastor didn't believe it. He called a meeting, and decided all the talk about me was children's gossip.

But I was singled out and stigmatized within the church after that. Members of the congregation would go to teenagers I taught and say, “Be careful of Mr. Mpofu, he’s gay, he might molest you.” I only heard about this talk a month or more later. In December 1998, there was another incident. There was a Man’s Network, a social group within the church. One man in it accused me of staring too hard at him. That made my reputation even worse.

Meanwhile, in high school I had just begun inching toward acting on my feelings. I had started dating my O-level teacher. I never had real sexual contact, just small stuff; and we never even discussed the fact that we were both gay. But we knew that we enjoyed each other’s company. He was much older. We broke off for a while, because we were frightened. But in December 1998, we reconciled. One night early in the next year we went out; we were holding hands and cuddling, sort of, at a movie house. One of my workmates was in the theater, a fellow teacher at the church school.

On Monday, I went back to work and Pastor Bismarck called me in. He said, “I have heard a very disturbing thing and I want to discuss it with you.”

I was fired on the spot for being gay. They “preaccused” me of things they thought I would do to schoolkids—molest them or corrupt them. They said they had to fire me to prevent that. I lost both jobs within ten minutes, and all my positions within the church. My boss took me to my parents, and told them he had seen me “growing gay.” So then the problems with my family began as well. That was the most painful and important incident about being gay, which made me realize who I am.

My life in church was like I was in a marriage, and got jilted by the husband. Christians shouldn’t act like that. I always want to tell people, don’t expect sympathy from the church if you are gay.

I was suicidal for about a month. I attempted to commit suicide; but my friends found me and revived me.

I had heard on and off about GALZ, and wondered whether to join. I finally called them, after hours of agonizing. I didn’t tell them my story, just asked to join. They told me about GLOM here [Gays and Lesbians of Matabeleland, a small, newly formed Bulawayo group associated with GALZ], and I got involved.

My parents wanted to ignore the whole thing. For two months the issue was never mentioned at home. My mother stopped speaking to me. But by May I was involved with gay parties and functions in Bulawayo.

In June I fell in love. We made the mistake of being too careless. We did the kinds of crazy things you do when you are in love. Bulawayo is a small city and my mother was well known. My elder brother's girlfriend saw us kissing in town. This was the beginning of the biggest family problems at home.

My parents were told. They wanted to chase me out of the home. When they decided they couldn't do that, they banned me from leaving the house. I was in college again after losing my job, taking computer courses, but I had to drop out because I couldn't leave home to go. My father, my mother, and my stepfather all tried to force me to go to the rural areas for forced marriage, and to receive treatments to drive out the spirits. They finally gave it up: but they kept a close leash on me. In July/August I decided to move to Harare, to stay with GALZ. I had to find an excuse to leave town, and finally I told my parents I had a training course in management; a friend forged a letter of invitation.

Slowly, while I was away, my mother was coming to accept my gayness. I only came back to Bulawayo in December. I came back to look after my mother, who was very sick. My elder brother couldn't—he was a soldier in Gweru.

But then my mother got extremely ill, and my relations took advantage of the opportunity to chase me out of the house again. So in January 2000 I was on the streets again.

I was very depressed again. I moved out of the house permanently, and became a heavy drinker. My home became the nightclubs; in the day I slept at my friend "Teresa's" place. I went way down below zero. I became down and out, in the dumps, as we say in gay circles.

I was very promiscuous, in and out of everybody’s bed, leading a very dangerous life. I began to realize the type of gay men we have in the city. I had no contact with my family for a while; I stopped thinking about HIV/AIDS; I knew all the blackmailers. I attempted suicide again.

The time when “Teresa” was blackmailed and arrested was very hard for me [see Chapter III]. That was when I first realized how homophobia was everywhere around us.

There was a time in March 2000 when the police tried to arrest me and a friend of mine for standing outside a nightclub, the Sun City club in Bulawayo. There were plenty of men lined up outside the nightclub. But they singled me and my friend out, and wanted to arrest us for “soliciting for prostitution.” I stood up for myself: “You cannot do this to someone just for standing outside a nightclub, and say it is soliciting.” Being articulate and aware of my rights helped to save us.

I had always been beaten up by other boys for being too much a girl. And it got worse as I grew older. Even prior to joining GLOM I was beaten up one or two times a month. When I was still working for Pastor Bismarck I went to visit my grandmother in the locations, and I was beaten up by a pack of guys who called me gay.

But when I joined GLOM it really got bad. They hated to see groups of us gays together. In July 1999 “Teresa,” Lionel, and I had gone on errand to hand-deliver mail to some GLOM members in the locations. It was around 8:00 in the evening in Entumbane [a high-density suburb of Bulawayo]. A mob of people, ten or fifteen of them, started chasing us, throwing stones and calling us names. They were still a ways away when they started throwing stones, and we managed to escape: we ran and hid in the bushes.

And one Sunday morning in April 2000, in broad daylight, Lionel and “Teresa” and I were walking near the Pie City in the center of town. I got hit by three guys who said, “You are gay, we have seen you in the clubs.” And to me they said, “You thought you were too good to talk to us.” They hit me and I hit back. I got a burst lip and lots of bruises. I went to the police and reported it at Bulawayo Central. They seemed helpful at first; but they never followed it up.

I would keep on reporting to the police when I am beaten up again. Why? Because I believe it's my right and their duty. The same group of people do it again and again. I want them to know we are not afraid. We can use open spaces, be it hospitals or streets or police stations. We can use those spaces freely.

A lot of bad things happen here around the GLOM Center—we rent this house on the line between two districts in Bulawayo, with Bellevue on the one side and Nketa on the other. Bellevue is lower-density and more peaceful, but Nketa is pretty rough. There are a lot of young guys there with time on their hands. They know the center is here, and they hate us and harass us all the time.

"Teresa" and Dominic and I had a mob come after us in June 2000, trying to beat us up for being gay. It was 7 or 8 p.m., after dark. There were about thirty of them, some with bricks, sharp objects, chains; others were throwing stones. "Teresa" had to jump in a moving vehicle. Dominic and I ran in opposite directions. We had just come from the shops—we used to go to the nearest shops, in Nketa, back then. We have stopped going over there since; we will walk the two kilometers to Bellevue to shop instead.

My mother died in April. I wasn't there, I didn't know.

Life is hard. I realize how many people hate us for being homosexual, even our own blood. And I have to wonder why.

By now everyone in Zimbabwe knows that homosexuality exists. If you ever went to a boys' school or stayed in a hostel, and say you never played "hide under the pillow," you are lying. At boys' school there was always a homosexual performance going on. It just was not spoken about. I was known as the queen of the school. I used to have boys carry my bags to my next lesson. They would come for sexual favors, of a sort. "Disgusting," some of them would say by day, and tease me; and at night they would say, "Let's play Wrestlemania II!" and we'd rub our private parts together.

> Men can do anything! The things I've proved and seen. At church I saw all the secrets. It's not the sex they hate us for, it's our freedom about it, freedom to be womanly, to be what we are.
>
> They can beat me up, but I will get up and walk down the street. And there will be more and more liberated queens, as we liberate what is inside all the people of Zimbabwe. I believe Chaka was gay, the greatest African leader in southern Africa. It has always been there.
>
> I want to help empower gay men. The stigma is within us, the violence is within us. I want the future generations to find things better: not worse laws, worse politicians. That is my dream.[287]

Carlos Mpofu died in 2002.

B. Visibility, Violence, Discrimination

Carlos' story illustrates the threat of abuse that many self-identified gays and lesbians face. It shows the multiple spheres in which violence and discrimination can be found. State authorities, under such conditions, have an obligation to respond—to offer redress for violations, and to punish the offenders—but also to prevent violations, by supporting and sustaining an atmosphere of respect for rights and understanding. Carlos' story indicts the failure of the state to act.

Throughout southern Africa, wherever sodomy laws survive and politicians exploit homophobia, self-described gays and lesbians have struggled to win political and social visibility. In some places they have achieved triumphs. Gays and Lesbians of Zimbabwe (GALZ), for example, has carved out a place for itself and for its constituences in the political sphere: and it can rightly take credit for creating a new sense of tolerance in some urban and educated circles.[288] Even many successes, however, have been mixed blessings. Consciousness has been raised; understanding often has not. The idea that gays and lesbians exist has (with the help of state leaders' rhetoric) been hammered into public awareness; but often this has fed the suspicions of neighbors, parents,

[287] IGLHRC interview by Scott Long with Carlos Mpofu, Bulawayo, Zimbabwe, August 12, 2000.

[288] E-mail communication from Keith Goddard, GALZ, to Scott Long, Human Rights Watch, October 8, 2002.

and strangers alike, encouraging each to hunt down traces of homosexuality in their communities, vicinities, and homes.

In many places, non-state actors continue to act out the mandates given by state leaders: to "eliminate" gays and lesbians, to treat them like "animals," to "fight against the enemy," to "condemn" and "reject" homosexuals. Those who hide their difference still find the fear of violence haunts them.

Looking back on the last twenty years in her country, Tina Machida traces a dangerous transition—from a time when same-sex relations were fitted, however uneasily, into existing categorizations of kinship, to a time when they have come to represent everything threatening those traditional ties:

> In the 1970s and 1980s, people were walking in same-sex couples in public all the time: it was no problem. People called them "aunties," "cousins." They didn't know the words "gay" or "lesbian" and didn't come out in response so strongly, so violently.
>
> But now lots of people are more aware of what is going on. After the visibility came suspicion.
>
> There is lots more gay-bashing now than before. On the other hand, when it comes to family, some families are actually trying to understand. If there is someone who can educate them, talk to them, some families are willing to listen. But not all. Sometimes there is no one to do the teaching. And some families just chase away their children without hearing a word.[289]

This chapter will describe how violence and abuse are inflicted, and how they are felt, in a range of spheres: in the *community*; in *other spaces,* including workplaces, churches, and the gathering places where gays and lesbians can meet; and in the *family.*

1. Violence in the community: punishing vocal dissidence

In southern Africa, gay, lesbian, bisexual, or transgender people who speak out—whose identities and difference are known, through the press or through their political activity—may find their physical safety or even their lives in danger.

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[289] IGLHRC interview by Scott Long with Chipo (Tina) Machida, Harare, Zimbabwe, August 10, 2000.

Three stories from Zimbabwe, where the political visibility of gays and lesbians has been perhaps highest but hardest won, show the pattern.

a. Poliyana's story

When Poliyana Mangwiro of GALZ looked back in 2000 on her long and courageous career as a lesbian voice and organizer, few things were more memorable than her coming out, which she called "one for the history books":

> In 1996, at the second book fair, I came out to the Zimbabwean public and to my family. I didn't know it would cause so much controversy! I just wanted to get up and say who I am. I came out in Harare Gardens, in the press … with everyone talking about *ngochani.* I never expected that.[290]

Poliyana was a volunteer at GALZ's stand at the Zimbabwe International Book Fair. As already described above, GALZ's participation was embattled on two fronts that year, facing challenges from the government as well as threats from hostile onlookers. Friday, August 2 was a public day at the fair. GALZ was soon forced to abandon its stand by menacing crowds. Before then, however, Mangwiro was photographed at the stand by the press, as well as by students who were visiting the fair from the high school in her home community, Marondera, a small town some sixty-five kilometers from Harare.

According to Mangwiro, the students "took the pictures they had taken of me back home and showed them to the ZANU-PF Youth League and the [ZANU-PF] Women's League."[291] Mangwiro had been active in both, and the chair of the former. Outraged, the group members organized a frightening reception for her on her return.

On August 3, Mangwiro took a bus back to Marondera, arriving in the evening. "There were a lot of people by my lodging, singing and waving placards written with *pasi nengochani* [down with homosexuals]. They were threatening the owner of the house where I stay, wanting her to throw me out or they would destroy the house."[292]

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[290] IGLHRC interview by Scott Long with Poliyana Mangwiro, Harare, Zimbabwe, August 11, 2000.

[291] "Tsitsi Tiripano Report on the incident that took place in Marondera," quoted in *Submission from the Gays and Lesbians of Zimbabwe (GALZ) to the World Conference Against Racism,* 2001. On file with Human Rights Watch.

[292] Ibid.

Mangwiro's family had already left. The crowd began to threaten her with physical violence. She left the scene, found a public phone, and called Keith Goddard, GALZ's programmes manager in Harare. "I told him my life was threatened."[293] Since the phone was near the municipality offices, she also went to see the governor, Edward Garwe. "Governor Garwe advised me to leave Marondera for a while until things became more settled."[294]

The demonstrators prevented Mangwiro from entering her home to get her clothes or belongings. They pursued her to the bus stop, "shouting and throwing stones, humiliating me until I got in the bus."[295] She returned to Harare, where GALZ lodged her in a hotel for a time; she then stayed with relations in other rural areas for two weeks.

When she eventually returned to Marondera, she told our researcher, "nothing happened now: people just pointed fingers on the streets, and said 'That *ngochani*,' so that I could hear, or: 'Are you still with your girlfriend?' But neither the tuck shops nor the main shops would sell me anything." Although she had an account with Topics, a large chain store, they refused to allow her to settle it: "They said they wouldn't take gay money."[296]

Mangwiro stayed part time in Marondera for several years, moving back to Harare in 1998. "Toward the end in Marondera, people were OK, coming to me and asking about my girlfriend, but genuinely this time. But I was still very scared to go out at night, ever."

Mangwiro saw signs of hope in her experience:

> It showed that people need someone to educate them about homosexuality. Now they say, "We know what a lesbian or gay is, we didn't before." But you can't educate through normal channels, like schools: they will say you are recruiting. I believe you can do it though HIV/AIDS work. It helps to raise the issue.[297]

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[293] IGLHRC interview by Scott Long with Poliyana Mangwiro, Harare, Zimbabwe, August 11, 2000.

[294] "Tsisti Tiripano Report on the incident that took place in Marondera," quoted in *Submission from the Gays and Lesbians of Zimbabwe (GALZ) to the World Conference Against Racism*, 2001. On file with Human Rights Watch.

[295] Ibid.

[296] IGLHRC interview by Scott Long with Poliyana Mangwiro, Harare, Zimbabwe, August 11, 2000.

[297] Ibid.

b. Dumisani's story

Dumisani Dube, twenty-eight when our researcher spoke to him in 2000, tells a similar story of how publicity awakened public paranoia. Formerly a teacher, Dube joined GALZ in 1998 after attending a safer-sex workshop, and quickly became a leader, serving as volunteer publications officer. In 1999, Dube bravely decided to give a newspaper interview about his homosexuality and his work. He did so, he says, because "I wanted to work for the day when homosexuality can be accepted not as a lifestyle but as a life. Some people think that gays are only black people who sleep with white people for money. A lifestyle is something you choose to get into. A life is something you are born with, something that is in you, something that is natural."[298]

The interview, with Dube's photo, appeared in September 1999. It was generally sympathetic:

> The charming and confident 17 year old [sic] Dumisani Macdonald Dube describes himself as a man who loves other men.
>
> "In short, it means I am gay and that's no easy life in Zimbabwe, where homosexuals are being scorned," says Dumi, one of the few Zimbabweans who have broken the silence about their sexuality.
>
> Dumi who has a BA degree in industrial psychology from South Africa has refused to be a prisoner in a society which does not still tolerate same sex relationships. He says, he is not different but merely misunderstood, discriminated and victimised. And he is challenging people's perceptions everywhere.[299]

About two weeks later, Dube says, "the problems started."

> I was living in Highfield [a suburb of Harare]. I had a friend—he was not gay but he and his friends knew I was gay. He used to come to my house for a couple of drinks.
>
> Then suddenly one day his sister appeared in front of my gate and started shouting. It was a weekend, my landlord had gone to the

[298] This and other quotations are from an IGLHRC interview by Scott Long with Dumisani Dube, Harare, Zimbabwe, August 4, 2000.

[299] Andrew Zhakata, "Coming Out of the Closet: Gays Fighting for Acceptance in Zimbabwe," *National Observer,* Zimbabwe, September 10-16, 1999.

> rural areas. She had brought some of her friends along, and a couple of them were real thugs. She was shouting, "You homosexual, don't talk to my brother! I want this homosexual out of the neighborhood!" A crowd started to gather.
>
> One of the thugs, he tried to get in the house. The door was locked, so he kicked it in. I ran away, out the back door. They got hold of two of my friends; one was my partner. They broke his spectacles, and they beat up the other guy around the head till he was bleeding from the forehead.
>
> When the landlord came back, he made me move out of the house. One of my friends told me, "Don't go into town: we hear people saying in the shops, 'If we see him again, we will beat him.'" So I stayed with my grandmother and uncle; then some of the same people came to tell my grandmother that I was gay. My uncle was also against that. He started shouting. He would get drunk at night and scream, "I don't want to stay with a homosexual, homosexuals out of my house." So I had to move again and I went to stay with a cousin in Harare.
>
> That was also in Highfield. Then one day ten guys came to the house, including a brother of that guy whose sister had started the trouble. They said, "We want you to come to our house and apologize to the mother of this guy." They were very threatening, so I had to go. I went with my cousin's brother's wife, for safety. They were threatening to hit me all the way. I had to apologize to the mother for talking to her son, and say: "I am gay but don't worry, he is not gay."

On the night his door was broken down, Dube went to the police station in Highfield to report the incident. However, "The sister and the guy who kicked the door down had told me that they had gone to the police too, to report me for being gay." Dube says he was "nervous" about contacting the police. However, officers said they had received no reports of homosexuals in the neighborhood.

> The next day I also went to Harare Central Police Station to report about it. I wanted them to make the guy pay for the breaking of the door, since my landlord was making me pay for it. I gave them the

> names of the offenders. But I never got a response, though I have gone back several times.

Dube and his partner took extra precautions after the incident. "We were living separately but we spent nights together. But every time we returned to where we lived, we took a very long way. We didn't want people to see us walking together in public."

Dube says,

> Lots of gays are abused. If the police would cooperate, GALZ would have a way of breaking through to courts and getting some punishment, or protection: but police don't act because they are afraid of standing up for homosexuals. If a policeman stands up for homosexuals, they will say, "You are homosexual yourself." Because of the state of homophobia, giving counselling to people who have been through violence is all GALZ can do.[300]

c. Ska's story

In 1999, the Mugabe government in Zimbabwe created a Constitutional Commission to revise the country's nearly two-decade-old constitution, which had been negotiated at the end of the liberation struggle. The so-called Lancaster House constitution had been successively amended to increase the power of the executive and diminish opportunities for opposition. The commission was Mugabe's response to pressures from a broad civil society coalition to replace the document with a more democratic one.

It quickly became clear that the process was unlikely to accommodate those demands. Mugabe packed the commission with supporters of his ZANU-PF party; in response, the coalition which had pressed for change refused to participate. However, GALZ chose to request a voice in the process. It had little hope that the commission would produce a progressive constitution, but wanted to call the government to account on its promises that new protections against discrimination would be included. GALZ received no response to its request for a place on the commission.[301] However, it produced a detailed

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[300] IGLHRC interview by Scott Long with Dumisani Dube, Harare, Zimbabwe, August 4, 2000.

[301] A letter to commission president, Eddison Zvobgo, requesting a seat, presented on the first day on which the commission received communications from the public, got no reply. IGLHRC interview by Scott Long with Keith Goddard, GALZ, Harare, Zimbabwe, August 4, 2000; and "Mugabe Constitutional Comission ignores gay plea," *SAPA-DPA,* June 28, 1999. In the end the draft constitutional concentrated still more powers in the

submission on sexual orientation and human rights. It also sent four of its members to testify at a commission hearing—a historic opportunity to stand up and speak out.

Sikhanyisiwe Ngwenya, a twenty-three-year-old lesbian, was the first representative. Predictably, her speech, short but unequivocal, did not just set a precedent—as the first address by an out black lesbian to a political gathering in Zimbabwe—but sparked an uproar. When the slight but strong-voiced Ngwenya introduced herself and said, "I am a Zimbabwean lesbian," the outbursts began. "All Satanic!" some shouted. "We do not like that in Africa!" When the chair called for order, hecklers cried, "No order with lesbians!"[302] With difficulty, Ngwenya went on to say:

> I would like for the new Constitution to include the rights of lesbians in Zimbabwe. Zimbabwe as a nation must accept the fact that there are lesbians in Zimbabwe from all races and creeds and I am one of them.
>
> Discrimination against women is high in Zimbabwe and as lesbians we are made to suffer even more than the ordinary women. As a person I have the right to my sexual preference and that should not be used to discriminate against me….
>
> Nobody taught me to be lesbian. I have always been lesbian and always will be lesbian. I knew I was lesbian when I was 12 years old. I have no problems with being lesbian and I am proud to be a black lesbian in Zimbabwe. Many people say that people like me don't exist. Well, here is living proof that we do and I am not the only one.[303]

Our researcher spoke to Ngwenya, known to her friends as "Ska," some nine months after her historic appearance. She said,

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presidency, and expanded the government's authority to expropriate property. The opposition Movement for Democratic Change (MDC) and the National Constitutional Assembly (NCA), a civil society coalition, both campaigned for its rejection in a referendum in early 2000. The government lost the vote—a major shock to the regime, and one which increased its determination to employ intimidation and, if necessary, fraud in parliamentary and presidential elections that followed.

[302] "Zimbabwe gay rights face dim future," *BBC World News,* November 17, 1999.

[303] Text on file with Human Rights Watch.

I’ve been out for years now. It’s been great, but there were a lot of problems. People and the government don’t understand.

It was great for myself and for other gay people when I came out as a black person who was a lesbian. People started to realize that we are here.

I came out to myself and to my friends—not to my parents—before the Gay Games in 1998. I got a scholarship, I went to the Gay Games to play. I play soccer and I just told my father that I was going to Amsterdam for a soccer match. Someone told him what kind of match it was. After I got back from Amsterdam I was kicked out of the house.

My father was eventually transferred to work in Bulawayo, and my mother told me then to come back home. Till then, I stayed with an auntie. But that wasn’t all that happened. I played for the national women’s soccer team. And then I was fired, kicked off that, at the end of 1998. The coach came to me and said, we’ve had a meeting about you—the chairperson, secretary, treasurer, and coach of the team—and you are a lesbian and people know it and we do not want people to think that all women on the team are lesbians. He said, we do not think it is right for a woman like you to be on the team. He wouldn’t put it in writing. Keith [Goddard] told me to ask for an official letter, but they refused. I thought about something legal, but suing would not have helped. You know, the government here hates homosexuals.

My mother was supportive then. I stayed in her house till the end of 1999 when I appeared before the Constitutional Commission. I decided to go and present on behalf of gays and lesbians.

I testified before the commission because I wanted the people of Zimbabwe and the world to know that there are lesbians in Zimbabwe, that we do exist. I wanted to fight for my rights. I came out a lot then: I was on T.V., in the newspapers, on CNN and the BBC.

When we started to present our case, some of the commission were shouting, “You are not normal.” There was a big uproar. The head of the commission said, “Be quiet, we invited these people to give their presentation.” But they wouldn’t shut up. It wasn’t a big audience, forty or fifty people. But some of them were supportive: they actually clapped when I was done.

But my father had moved back into Harare then. He kicked me out afterward. He beat me up bad, and told me to go away. I came to stay at GALZ.

It was really uncomfortable; I had no money. I moved in with an American friend for a while, but she went back to the U.S. and I was stranded again. Now I still live at GALZ.

After I came out on T.V., four or five days later, I was coming home from Arcadia one evening around 9 p.m. There is a hotel called the Hotel Elizabeth. These two guys come running up to me on the street outside the hotel. “We are policemen. Show us your I.D.” I said, can you show me something to prove you are policemen? They laughed.

No, I don’t believe they were police. They decided to beat me. One was holding me, one was slapping me. They took Z$1,400 [U.S.$40] and my I.D. And they were saying, “You lesbian, we know you, we saw you on T.V. What do you want, our girlfriends, our wives? What do you think they will think of you? Aren’t you ashamed of yourself?”

I went to the police in the morning, Harare Central. They said, “Why didn’t you defend yourself?” That was all. There was nothing I could do. The police knew I was a lesbian. When we started the GALZ office, they would come to it every day, almost. The officer knew me. There was nothing I could do.

I didn’t go to the doctor because I didn’t have money. It happens often to GALZ people, you are beaten up by teams or pairs of guys. When you go to the police, they do nothing.

The other time it was bad for me was after Peter Tatchell [whose attempted citizen’s arrest of Zimbabwe’s president in London in October 1999 is described above]. I was in town in the CBD [central

> business district]. It was about 4 p.m. These other guys, I think they knew me from T.V. They started shouting at me, "Our president has been arrested in London because of gay people in Zimbabwe. You are sending these people to attack our president. We are going to kill all you gays in Zimbabwe." They came after me and they were going to beat me, but I ran away.
>
> People here know me, they know I am lesbian. Sometimes I am very scared to go into town; I try not to walk or travel by myself. If I try to find a job, I can't, because everybody knows me; I can't find accomodation either. It is very hard.[304]

2. Violence in the community: policing visible difference

Mangwiro's, Dube's, and Ngwenya's stories exemplify the consequences of speaking out. Yet one does not need media attention to incur community harassment: the dubious celebrity which photos or headlines confer are not the only routes toward facing retaliation.

Communities throughout southern Africa monitor the behavior of their members. The daily lives of gays and lesbians exist under a collective scrutiny which is always intimidating, and often directly menacing. Many tell stories of how "the people you hang around with"; appearance or behavior, one's "walk" or "look"; or simply the power of rumor are enough to make one suspect, and mark one as a target.

In Windhoek, Namibia, Wendell, a young gay man, speaks of how he has learned to censor his own behavior—and even his purchases:

> You know, we don't have things like gay-friendly bars, gay-friendly shops—we don't have things that are very gay-friendly here in Namibia. Even if you want to buy a feminine kind of pants, you have to say you know this is for my girlfriend that I'm buying—that's really sad, really sad.
>
> I cannot even wear the clothes I want to wear, whether it be very tight jeans with a tight top or whatever. I can't—I have to be choosy whenever I go to a shop…. It is kind of depressing just to go through

[304] IGLHRC interview by Scott Long with Sikhanyisiwe Ngwenya, Harare, Zimbabwe, August 11, 2000.

> all those processes—you know, you have to pretend in order to be in safe surroundings. We've been doing a lot of acting.[305]

Derrick, who directs The Rainbow Project's youth outreach in Namibia, says,

> Certain places, you really have to put your gay attitude to one side, because you really think this is not a safe place. And then you have to really try to look like a boy. "Oh, you don't smoke?" You have to take a cigarette and act like one, you see. And then walking down the street, you will get two or three guys telling you, "Moffie! Moffie!"[306]

Two factors were often cited as contributing to community violence and harassment: first, the populist power of a rhetoric of cultural traditionalism; and second, the rigidity of norms of gender.

Paul, a student in Zimbabwe, spoke of the first in describing to our researcher how tradition turned to exclusion:

> Mugabe says he is only trying to follow African traditional culture. But in that culture parents wouldn't throw you out of the home because you are gay, neighbors wouldn't beat you up for it. I think what is traditional is simply not to talk about it. Mugabe was the one who started to talk about it. What is traditional would be to turn away and close your mouth.
>
> But now it's all different. Some parents would say, this is a Western thing and would disown you from the family. They would chase you away from home. Some families and communities have lost their identity, don't know whether they live in an English way of life or an African way of life. Older, middle-aged people—for them we gays stand for something they have lost. They look at us and think they see all the reasons they have lost it.[307]

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[305] IGLHRC interview by Kagendo, with Wendell (not real name), Windhoek, Namibia, November 15, 2001.

[306] IGLHRC interview by Kagendo, with Derrick (not real name), Windhoek, Namibia, November 15, 2001.

[307] IGLHRC interview by Scott Long with Paul, Harare, Zimbabwe, August 4, 2001. Even relatively sympathetic approaches to homosexuality in Zimbabwe tend still to paint it as a phenomenon external to "tradition" or the country's identity. A text on

The fear of being marked as a cultural outcast is profound. In Namibia, again and again, people we interviewed returned to the president's threat to deport them, which seemed to symbolize the devastating state of being written out of a community. Derrick told us:

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transforming traditional cultural practices, approved for use in universities and teacher training colleges by the Zimbabwe Ministry of Education, devotes a page to homosexuality after a long, ambivalent discussion of bridewealth and a short condemnation of rape:

> There is another aspect of contemporary sexual behaviour which is said to be not traditionally African, that is, homosexual behaviour. People often say that homosexuality is not a problem in African societies: it is taboo even to talk about it. Nevertheless, there are some new situations in which homosexual practices have become widespread.
>
> One relates to the old colonial situation in which thousands of immigrant workers in towns and mines were crowded together in hostels, away from their families. In such situations, many men find compensation for the absence of family life in homosexual practices. Secondly, in prisons where men or women are confined together without company of the opposite sex, homosexual practices have developed in Zimbabwe as elsewhere in the world. Thirdly, homeless boys and young men on the city streets live and sleep together, with little opportunity to attract the affections of girls. Such boys and men frequently indulge in homosexual practices.
>
> In these cases, we find homosexual practices developing in opposition to traditional cultural values because of the particular circumstances in which young men find themselves.

The ultimate conclusion is more tolerant than the government, which—perhaps unwittingly—endorsed the text, might prefer: "With the increasing prevalence of such practices, the cultural values change. People who perform homosexual acts no longer regard them with the horror that the culture demands…. As elsewhere in the world, and as happened with extra-marital sex, we can expect social antagonism to homosexuality slowly to erode." However, the text still identifies homosexual conduct not only as external to "traditional culture" (and it is worth noting that "culture" itself is earlier sweepingly defined as "everything that we learn in our society") but as allied with forces that unravel society, whether with crime, with the economic disruption of colonialism, or with the social as well as economic catastrophes that leave men and children homeless. Homosexuality is portrayed as something which men (primarily: women are mentioned only in prisons) practice only in "new situations"—indeed, only in extraordinary ones. M.F.C. Bourdillon, *Where Are the Ancestors? Changing Culture in Zimbabwe* (Harare: University of Zimbabwe, 1997), p. 43.

> They say that gays and lesbians must be eliminated from the face of Namibia…. And when I hear that on the television, me and my parents were watching there, I could just see the atmosphere in the house was not that nice. I stood up and go to my room and I was really crying, not crying, but I could feel the tears on my face—it was like a slap in the face.[308]

Wendell, in Windhoek, says:

> When I first heard it, I was very afraid because of the fact that they want to deport us…. I thought about my friend that I know that teaches, and these friends who are engineers, and I was thinking now if people are removed from these places, what happens to society, what happens? And I even thought about myself,… well, if I'm taken away, how is this going to affect my family, how is my mom going to live with that, seeing that her son is being taken to another place, and she has to say yes to that because of the government thing.
>
> At first I was very afraid. But then I decided for myself that I would not mind if somebody would come to attack me or anything. I would just say I'm still gay and it is what is within me. I should not hide it. I have lived my life as an open book.[309]

Lesbian, gay, bisexual, and transgender people in southern Africa also affirm, again and again, that words exist in their indigenous languages to describe them. Those words may not be synonymous with "gay" or coterminous with the concept of sexuality; some of them may describe acts and not identities, or ritual functions rather than modern social roles; but their existence at least shows, people argue, that the conduct did not come with the colonial invasion. And to many, that is a crucial reassurance.

Francis Chisambisha says that in Zambia's Northern Province, a man who had sex with men was called *chimbusi kayupe*—"a male hyena which marries itself." In Botswana, Ronza says that "I am a Tswana. In our culture, they have got a name for gay. They call it—it's a bit vulgar—they call it a *matanyola*. But

[308] IGLHRC interview by Kagendo with Derrick (not real name), Windhoek, Namibia, November 15, 2001.
[309] IGLHRC interview by Kagendo with Wendell (not real name), Windhoek, Namibia, November 15, 2001.

there is no word for women, that word is for men." A leader of Botswana's LEGABIBO adds,

> I find it strange—these claims that homosexuality has never existed before the white man came. But there is actually a word for that in Tswana. So where did that word come from? The word that they use, the old proper Tswana word, is *matanyola*, which basically just means anal sex. In fact, most Botswana guys who are straight will engage in certain circumstances in bi sex, because they don't think of it as being anything, just doing it. It's been going on for centuries. But the word that is being used now is just "gay."[310]

One Namibian writer asked his father about the meaning of the word *eshenge* in his mother tongue, Oshiwambo:

> After a giggle of embarassment, my father replied. "He who is being approached from behind." I could hear my father praying that I wouldn't ask for an explanation. "Did you also grow up with them, or did they only appear in our generation?" I asked.
>
> "They have been around—since the beginning of time!" my father replied. "These are people who were created by God, and they should just be left alone!"[311]

Ramashala, in Windhoek, insists that, in Namibia's cultures, "Homosexuality was there, it was there in the beginning and it's still there today—and will continue to be there tomorrow." Yet he also looks to broader solidarities: asked by an IGLHRC interviewer, "Do you think being gay is an African thing?" he says, "No: being gay is a global thing."[312]

Beyond the rhetoric of cultural exclusion, a second key factor behind the assaults is gender—the policing, and punishment, of people who do not behave as "men" or "women" are supposed to do. The kind of sex the victims have may matter less than their looks and demeanor. Our researcher asked Carlos Mpofu

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310 IGLHRC interview by Kagendo with Mike, LEGABIBO, Gaborone, Botswana, November 8, 2001.

311 Lazarus Jacob, "Running gays through the cultural spell-check," *Free Press: The Media Magazine of Southern Africa,* No. 5, 1995, p. 18.

312 IGLHRC interview by Kagendo with Ramashala, Windhoek, Namibia, November 15, 2001.

why he believes he has been the object of physical attacks: do his attackers target him for what they believe is his sexual behavior, or for the fact of his effeminacy?

> I think it is both. Some of them, when they see me or "Teresa," think, "He is walking like a woman, he has sex with men." With others, it is an ego thing. They think, "I am a man, he is acting like a woman, he is insulting my manhood." It is all about their ego at the end of the day.
>
> But the second one is predominant. By now everybody knows there is homosexual activity. Some of the ones who beat you on a Sunday have been doing it on a Saturday night! But they still think they are men. It is the effeminacy they object to. I am a liberated queen, and I enjoy flaunting it.[313]

Being a "liberated queen" is an important part of being "gay" for many gay Zimbabwean men. Within GALZ, a group of "liberated queens" have formed a sub-group called "Chengetanai"—in Shona, "to take care of each other." It is for men who claim the right to be effeminate by society's definition, in manner or in dress. Each October, GALZ and the Chengetanai hold a drag pageant to choose a new queen of drag queens, the "Jacaranda Queen"; it is, several people said, "the event of the social season."

Yet, while the aspiration of Zimbabwe's queens is, as Carlos Mpofu said, "to be liberated everywhere," few have the temerity, under the pressure of hatred and the threat of retaliation, to express themselves fully anywhere except behind closed doors. As one queen told our researcher about the Jacaranda Pageant, "It's so wonderful because for one day a year we can be who we really want to be."[314] The rest of the time, the minutiae of personal appearance can be met with random violence.

Nhlanhla N., twenty years old in 2000 and living in Bulawayo, had not—yet—found or joined the "liberated queens." He had only recently discovered the GLOM office as a safe space and resource, and it was there that we interviewed him. Nhlanhla says, hesitantly and slowly, "The problem I have is people teasing me and wanting to beat me up because of my sexual orientation."

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[313] IGLHRC interview by Scott Long with Carlos Mpofu, Bulawayo, Zimbabwe, August 13, 2000.

[314] IGLHRC interview by Scott Long with Chesterfield Samba, GALZ, Harare, Zimbabwe, August 11, 2000.

Asked what he means by "sexual orientation," he says, "I am like a girl. I am a sissy." Although he identifies himself as "gay," the sense of not fitting into the norms of manhood is his strongest feeling of non-conformity, and viewing himself thus, rather than realizing his sexual desires, seems to have constituted his "coming out" to himself:

> I'm greatly talked about in the neighborhood, and it makes me afraid. Because I am sissy I get harassed all the time. Men in my neighborhood see I am gay because of the way I walk. They make passes at me, get fresh with me, and want to sleep with me. I have been identified like this since I was fourteen, till now.
>
> My mother knows. But people tell her bad things about me. They tell her I am soliciting, that I am a prostitute. My mother is sometimes confused, and she condemns me for doing these things. She blames me for being gay, but doesn't like to talk about it. But people go talk to her.
>
> There is one person, my neighbor next door, who has it in for me. She always shouts at me when I pass, saying "Why don't you get married, or have a girlfriend?" I'm afraid she will set somebody on me. She threatens me; her husband is a policeman, and she says she'll tell him to arrest me. She says she will call young boys to beat me up, and "That will stop what you are doing."
>
> That's how I feel all the time, being sworn at, threatened. I am always by myself.[315]

One rare person in the region who has built a life around crossing gender norms is Musonda Chitalu in Zambia. Our researcher interviewed Chitalu in July 2000. Born female in 1974, and named Janet Chitalu, Musonda has adopted a new name and now identifies as male. He now wears only men's clothes—and has become almost as notorious in Zambia as was Francis Chisambisha, the subject of newspaper articles as well as the object of harassment and discrimination. Many people in Zambia, when told that Human Rights Watch was investigating "gay issues" in the country, knew that notoriety through the press, and told us to find "Janet Chitalu."

[315] IGLHRC interview by Scott Long with Nhlanhla N., Bulawayo, Zimbabwe, August 13, 2000.

Chitalu does not see himself as "gay" or "homosexual." He might be identified, in the United States or Europe, as a "pre-operative female-to-male transgender person." Yet the category does not quite correspond—not least because, in Chitalu's story, it was society which identified him as unnaturally masculine while he persisted in believing himself to have a female body. By his account, interpretive codes which viewers imposed on his physical appearance re-cast him as a man, though for a long time he wanted to remain a woman. There is no clear medical or social category for Chitalu in contemporary Zambia. He is uncertain of how to define himself. Although he says "I am a man," he also calls himself a "hermaphrodite" and "intersex," terms acquired from doctors who may themselves have been unsure of their meaning (see below). What is certain is that Chitalu has lived his life, despite hardships and harassment, with extraordinary individuality, self-confidence, and courage.

Musonda/Janet was born in Nchelenge in Luapula province. "I started realizing as I was growing toward thirteen that my development was different," he says. "I had no breasts, my body was so physical, I looked muscular like a boy. My brothers and sisters were mocking me all the time." Musonda—who is short-haired but could otherwise pass as a woman on the street, save for his clothes—is reluctant or unable to identify these differences more exactly. He told both our researcher and a newspaper interviewer that "I had the inner conviction that I was a female"; but Chitalu began wearing men's trousers from time to time "because they fit my body better."[316]

Chitalu attended Matero Girls' Secondary School, a boarding school in Lusaka, and was a prize-winning runner. However, "people started doubting my sex," he told our researcher, and dropped Chitalu from the girls' running team. After two years, a new headmaster came, and he "rejected" me, Chitalu says: "There was no proper reason, he just chased me out when I came to sit for the exams. And the next day when I came back he told me I was a freak and told me he would call the paramilitary police to chase me out."

Chitalu spent two years out of school. In 1992, at seventeen, he was readmitted to another boarding school near Nchelenge. Though still insisting he was a woman, Chitalu says, he was not believed:

> The headmaster there didn't want to admit me because he wasn't sure if I was male or female. He suggested that I go to have a medical test in order to see. When I refused, he said I was "disloyal." He

[316] IGLHRC interview by Scott Long with Musonda Chitalu, Lusaka, Zambia, July 26, 2000; he used almost the same language when interviewed in Goodson Machona, "Janet seeks sex change," *Post,* Zambia, July 23, 1998.

> only admitted me when my father went there and threatened to sue. And he only let me in on condition that I wouldn't live in the school. So I had to squat in the village in a place with no electricity, so it was very hard to study. The headmaster was always finding excuses to put me on suspension, because he wanted me out of there. But I pulled through and I got my certificate.

In 1995, Chitalu moved to Lusaka. "Things were not so easy. I stayed with my sister at first and then she threw me out. There were always problems on the street and road, I always had rocks thrown at me." [317]

Chitalu cannot say exactly when he decided that he was not a woman but a man. However, a traumatic event—which he described, in tears, to a reporter in 1998 as "an incident I will never forget"—may have played a part.[318] Chitalu did not cry while retelling it to our researcher, but his emotion was evident. A group of *kaponyas* or street toughs grabbed him in a market. He was still wearing women's clothes at the time; they accused him of impersonating a woman. "They held me down and pulled down my knickers. It was awful," Chitalu told us; he told the reporter that "I'll never forget the anguish and humiliation." After that, Chitalu swore never to wear women's clothes again.[319]

Chitalu was noticed on the street by a reporter from the *Times of Zambia*, who did a story about him in 1996[320]; after that, a women's NGO briefly gave him a job. However, for the most part "I had no money and no employment." In 1998, Chitalu legally changed his first name from Janet to "Musonda"—a name he says is used by both men and women—and, astonishingly, changed his registered sex from female to male as well (his I.D. card indeed lists "Musonda Chitalu" as male). Chitalu says, "I had to go before a court to do it by deed poll. It was difficult and they didn't want to do it at first, until I produced medical papers."[321]

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[317] IGLHRC interview by Scott Long with Musonda Chitalu, Lusaka, Zambia, July 26, 2000.

[318] Goodson Machona, "Janet seeks sex change," *Post*, Zambia, July 23, 1998.

[319] IGLHRC interview by Scott Long with Musonda Chitalu, Lusaka, Zambia, July 26, 2000.

[320] Vincent Zulu, "The story of Janet, the woman with a man's body," *Times of Zambia,* June 30, 1996.

[321] IGLHRC interview by Scott Long with Musonda Chitalu, Lusaka, Zambia, July 26, 2000. It is astonishing that the Zambian court was willing to change Chitalu's registered sex and identity papers without his first having had sex reassignment surgery; many countries refuse to take this step even for post-operative transsexuals. See IGLHRC's Action Alert, "Rights for Ransom: Act Now to Defend Transgender Rights in Proposed

The physician Chitalu saw before the court hearing put a name to his "condition" for the first time. The doctor used the word "hermaphrodite"; another doctor, later, referred to Chitalu as "intersexed." Intersex is a term used in many countries to refer to people who are born with anatomical or physiological characteristics which do not conform to social or cultural norms of what is male or female.[322] It is unclear whether the doctor used the term in this sense or was fully informed about the meanings of "intersex[ed]."[323]

Chitalu's story points to the difficulty of imposing an identity derived from European or American models on individual experiences shaped by a different cultural context. Largely on his own, Chitalu has negotiated an identity for himself between a sense of difference derived from others' disdain, and a powerful inner sense of being a "normal" human being with dignity and rights. What is also certain is that this negotiated identity now revolves around Chitalu's wishing to be treated as male.

According to Chitalu, doctors recommended a "sex-change operation," or sex reassignment surgery (SRS). Chitalu went to the University Teaching Hospital of Zambia, and was told that "the medical help I need" could only be found in the U.S. or South Africa. Chitalu hopes to save enough money to travel to South Africa for such an operation. He hopes afterward to be able to marry a

Law," December 7, 2001, at www.iglhrc.org/world/w_eur/Spain2001Dec.htm, for a statement on the consequences of this refusal, as well as on the rights of pre- as well as post-operative transgender people to have their identities recognized before the law. (Importantly, however, a 2002 ruling by the European Court of Human Rights in *Goodwin v United Kingdom* held that the refusal to change the identity papers of a post-operative transsexual violated protection for privacy and the right to marry and found a family in the European Convention.) In Chitalu's case, the readiness of the court to recognize in law Chitalu's own gender identification is laudable, but in all likelihood has less to do with an inclusive legal understanding of gender issues than with confusion in the face of an unprecedented case not anticipated in existing provisions.

322 It can thus encompass people born with so-called ambiguous genitalia—for instance, a clitoris that is viewed by a doctor as too large or a penis that is perceived as too small—as well as people with sex chromosome variations or other conditions. For more information on intersex people, and on the medical abuses to which they are subjected in Western countries in the name of "correcting" their conditions—which can include surgical mutilation or removal of "ambiguous" genitalia—see the website of the Intersex Society of North America, which also accesses a number of international links, at www.isna.org.

323 IGLHRC interview by Scott Long with Musonda Chitalu, Lusaka, Zambia, July 26, 2000. Chitalu says that the doctor who defined him as a "hermaphrodite" told him that his hormones were "fully in the male range" and that he had "male chromosomes." It is not certain that these opinions reflected the result of testing. "With me the condition is a bit advanced because of my age, so they said," Chitalu also remarked.

woman. And he hopes to work in, or found, an NGO supporting youth. His church, the Northmead Assembly of God, has been extremely supportive, even writing a letter to the Ministry of Health asking for SRS for Chitalu. "Without them and my Christian faith," Chitalu says, "I couldn't survive"; and Christianity indeed seems to have provided him, from his early years, a definition of human dignity which could transcend gender, and which would survive no matter whether he was seen or named as female or as male.

Yet the harassment continues. Chitalu's secondary school certificate still shows him as Janet; the National Examinations Council in the Ministry of Education refused to change the name, making his degree useless, and "it may take a lot of bribes" to get it done, Chitalu says. "Boys still throw rocks at me when I go down the street, all the time, everywhere." During the 1998 controversies over homosexuality in Zambia, he was identified as "gay," and "that worried me," he said: "What would people do?"[324] And Zimbabwean border police detained and stripped him at the Chirundu border post when he tried to visit Harare—this time, because they did not believe that he was, as his identity papers said, male.

Musonda Chitalu resisted gender norms in a comprehensive way. Others in the region find that small deviations can still elicit violence. Peter Joaneti, a GALZ staffer, recalls that in Harare,

> One night early in this year [2000] I was in a minitaxi going home. And the conductor asked me, "Why are you wearing two earrings? Are you *ngochani*?" So I told him, "Yes. Are you hetero?"
>
> And he started beating me over the head, right there in the taxi. I was afraid the other passengers would start joining in. I managed to call on my cellphone to my younger brother, who came and met the taxi and got me off.[325]

Tina Machida told us in August 2000 that "Just last week in front of a shop in Queensdale [a Harare suburb] Fatima and I were attacked. Four guys came up to us and called Fatima *ngochani*. I came to his defence and they shouted

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[324] IGLHRC interview by Scott Long with Musonda Chitalu, Lusaka, Zambia, July 26, 2000. The *Post* article about Chitalu was written by the same reporter who had interviewed Francis Chisambisha, and appeared only nine days later; the reporter evidently contacted Chitalu in the hopes of extending or expanding his scandalous gay "scoop."

[325] IGLHRC interview by Scott Long with Peter Joaneti, Harare, Zimbabwe, August 9, 2000.

that at me too. They started to hit us. We fought back, and they ran away. But they know that if we go to the police, nothing will happen."[326]

And "Teresa," in Bulawayo, told us,

> In the afternoon these guys will just shout at us, but after hours they want to beat us till we die. I have a small scar under my eye: that was from the time in Bellevue East, when the mob chased Carlos and Dominic [and] myself. I had a red eye for weeks after that, where they hit me. They roam at night, with sticks and clubs and rocks. They are not necessarily looking for homosexuals, but they are looking for trouble, and a man with a swing in his hips means trouble.
>
> It only takes one person to start a mob. One of them sees you and starts shouting, "homo, gay, Banana [a reference to the former Zimbabwean president conviced of sodomy]"—the repertory.
>
> Normally we don't go to the shops if there is a case in the papers of "sodomy": we don't go around for a few days after. If they see a screaming queen or someone who they think is a homosexual, they will say, "You rape children." They think every gay man is a pedophile—I mean, the people in high-density areas.
>
> In low-density areas they are a little more educated. They're more likely to leave you alone. There is also an attitude in the low-density areas of respect for privacy: since you have a little yourself, you respect it in others. It's a feeling of "It's not my business": you shut the gate, you don't gossip with the neighbors. In the high-density areas there is no privacy, so you cannot be let alone. "It's not my business" means nothing. People gossip, and news and words spread.[327]

A researcher for Human Rights Watch and IGLHRC experienced the harassment and danger personally in August 2000. While he and three GLOM members, including "Teresa," walked in broad daylight down a road to the

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[326] IGLHRC interview by Scott Long with Chipo (Tina) Machida, Harare, Zimbabwe, August 10, 2000.

[327] IGLHRC interview by Scott Long with "Teresa," Bulawayo, Zimbabwe, August 13, 2000.

GLOM Center, a small rented house on the edge of the Nketa high-density area of Bulawayo, a group of about seven young men began shouting insults and pelting them with stones.

Behind the eruptions of violence and the displays of discrimination lies a constant pattern of prejudice manifested through name-calling and rumor. Andrew K. says that in his small Zimbabwean town, Mutoroshanga, people “talk about me and gossip about me. Sometimes they call me queer and shout at me on the streets, calling me dog, *ngochani*, all those things.” He has only discussed his sexuality, gingerly, with his immediate family, but believes “the word has gotten out.” He says, “It is OK in Zimbabwe if you keep it private. It is not OK if it becomes public. But it is very hard to keep it private. And then it is very lonely. I am intensely lonely in the town.”[328]

Justin, a student at a teacher’s college in Mutare, told our researcher that “Although Mutare is a small community, the discrimination we face everywhere is also there.”

> It is in the streets, in the college. Even though you try to hide, a few now know that is what I am. They know it through the people I hang around with….
>
> When people see someone with an earring, or who uses makeup, or who has a strange hairstyle, they shout “Homo.” In certain incidents they shout at you across the street. They talk all the time about homosexuality, in terms of “Are you a woman or a man?” People at our college start shouting when papers carry articles about homosexuality. They call out, “It’s un-African, a white-dominated thing, these people are possessed.”
>
> They believe that because homosexuality is not talked about in African culture. They associate it with people possessed by bad spirits. They think you should go to traditional healers. Sometimes the healers will say, you should sleep with a young child for good luck.
>
> My friend is very feminine. He prances like the *chengetanai*. He trimmed his eyebrows, curled his hair, wore earrings. People call

[328] IGLHRC interview by Scott Long with Andrew K., Harare, Zimbabwe, August 3, 2000.

> him *sisi*—in Shona, from the English. People don't want to associate with a person who acts in that sort of way.
>
> It happened to me. My friend, the one who is too much feminine: people will shout at him [in] the street. Last year, a group of schoolkids in the bus from a boys' high school saw the two of us in the street while the bus was stopped at a robot [traffic light]. They were all shouting "*ngochani*" at us from the bus; people in the street were trying to see who was being called that.
>
> My friend is beaten up a lot. In secondary school no one wanted to be seen with him; teachers didn't want him to come to their offices, tried to brush him off. I was a prefect. People would say to me, "Why do you, a respectable person, hang around with him?" It was very difficult for him. [329]

Justin worries about the effect of rumor and stereotype on his career:

> If I become a teacher, I will spend most of my time with kids. I am worried about the future. I will try my best not to raise suspicions. But it also means trying to keep the kids from coming physically close to me, or getting friendly. I will have to watch everything I do, because someone could become suspicious. It means I will have to behave differently from the other teachers: I can't have normal friendly relations with students, because in my case those could be suspect.[330]

Tina Machida said the pressure ruins relationships and families as well as individual lives.

> You feel alone. It is not so easy for lesbian couples to stay together, or gay couples, for that matter. To stay under the same roof—people will suspect. Neighbors will want to know if you are related. If the surnames are different, they will be curious.

[329] IGLHRC interview by Scott Long with Justin (not real name), Harare, Zimbabwe, August 4, 2000.
[330] Ibid.

> In my house, we avoid the neighbors, try to avoid them knowing more about us. But even if you don’t have a partner under the same roof, if you are seeing each other every day while living separately, people will start knowing.[331]

The state provides little protection. Many victims are afraid to approach the police. Chauta N., who cross-dresses in Lusaka, Zambia, says,

> In my neighborhood they are used to me now. But elsewhere—Kamwala, Kabwata—they call me names, laugh at me. Sometimes I’m beaten up. Those who are drunk, if you pass bars by the shops, they’ll stop you and beat you. I don’t report it to the police, because the guys make threats—they turn round before they leave you there on the ground and say, we’ll report *you* to the police.[332]

In Namibia, Ian Swartz says that the police often refuse to respond when they see lesbians, gay men, or transgender people attacked. Swartz himself witnessed a gang attack as he was driving through Windhoek late one evening.

> I saw a transvestite—she was young and probably working the streets. I saw five young men jump her and beat her to the ground. A police van drove right past it—they could not have avoided seeing what was happening but they did not stop. I got the registration number of the van. But when I followed up I could not find anything—the hospital said no one was brought in, the police said there was no report and even said that there was no van with that registration number.[333]

In Zimbabwe, a *Herald* headline, “Angry mob beats suspected lesbians,” reported a violent incident:

> Two suspected lesbians who were allegedly caught in an indecent position in Harare’s Highfield suburb were lucky to escape with their lives after an angry mob beat them up on Wednesday afternoon.

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331 IGLHRC interview by Scott Long with Chipo (Tina) Machida, Harare, Zimbabwe, August 10, 2000.
332 IGLHRC interview by Scott Long with Chauta N., Lusaka, Zambia, July 26, 2000.
333 Human Rights Watch interview with Ian Swartz, Windhoek, Namibia, July 16,2001.

> The "lovebirds" were allegedly parked at an open space on the suburb's fringes when small boys passing by spotted them.
>
> Amused by what they had seen, the boys ran to nearby houses and called some friends to witness what was going on.
>
> This allegedly aroused the suspicion of a few women who followed the boys and spotted the pair in action.
>
> The pair was saved by a policeman who shepherded them into a passing car, which disappeared from the scene with the crowd in hot pursuit.
>
> Several people who called The Herald described the women's actions as inhuman.[334]

Although the police apparently acted appropriately in defense of the pair, police spokesman Superintendent Wayne Bvudzijena reportedly apologized for their failure to punish the couple—saying that "although what the pair is alleged to have done was improper, the force's hands were tied as there was no law against lesbianism."[335]

In a brief interview almost a year after the alleged incident, Superintendent Bvudzijena was unable to give Human Rights Watch and IGLHRC further details about the story. He said, though, that the mob's reaction, "if true, would be a natural one." His comments both then and earlier suggest a police force at least as concerned to eliminate "improper" behavior from public space as to discourage "mob violence."[336]

Nor are the courts more sympathetic. In 1999, a Harare judge passed sentence on a man convicted of stealing computer equipment from the GALZ Center. The magistrate, Edson Musabanya, went out of his way to note that the accused "had not done himself or his mother any good in associating with members of GALZ." He added that the accused "knew full well what he was doing when he went merry making with the gays and lesbians"; and that "Even if you say you had gone to the party to drink beer only, you rushed in where

[334] "Angry mob beats suspected lesbians," *Herald,* August 29, 1999.
[335] Ibid.
[336] IGLHRC interview by Scott Long with Superintendent Wayne Bvudzijena, Harare, Zimbabwe, August 10, 2000.

angels fear to tread and for that you are a fool." [337] The comments were reported on the front page of the *Herald*.

In such an environment, difference is under sustained threat, with little prospect of protection. Tina Machida says,

> If I stay in the closet, then I'm safe. But it's a false safety—one person will suspect and tell another person. So you think, why not fight for my rights! But if you do that, the problems only multiply….
>
> Nowhere is really safe. What can you do to protect yourself? All I can say is, we try wherever possible to move in groups.[338]

3. Violence and harassment in clubs and gathering places

Derrick, a young activist in Namibia, tells how, again and again,

> Me and my friends went out to the club and dressed really nice. And at the end of the day, we would be there, beaten up. Because they would call us queers and blah, blah, blah…. Some clubs are really difficult. It's dangerous really—it can cost your life, it can really cost your life. But at some there are really nice, gay-friendly clubs…. But I think if you are a gay person and going to a club, maybe it's best if you went with a car and if you leave early. It's safe it you leave the club earlier. But if you are by foot or you mean to take a cab, it will be very dangerous.[339]

Gay-identified men and some lesbians throughout southern Africa recount stories of repeated attacks or harassment at or around bars, pubs, and clubs. Incursions of sexual or gender non-conformity into insular, male-dominated spaces are met by brutal retaliation. One gay man confirms,

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[337] GALZ, "Letter of Complaint from GALZ to Chief Magistrate," January 28, 1999. Magistrate Musabanya cited judicial privilege in responding that the complaint was "irregular"; the chief magistrate, in a letter to GALZ dated March 9, 1999, acknowledged that "your point was well made and well driven home," but declined to discipline or reprimand the magistrate.

[338] IGLHRC interview by Scott Long with Chipo (Tina) Machida, Harare, Zimbabwe,August 10, 2000.

[339] IGLHRC interview by Kagendo with Derrick (not real name), Windhoek, Namibia, November 15, 2001.

> Pubs are a constant problem. They do not want to share the space with gay people. Someone enters in a pub, and if he sees there are gay people, he goes out. And sometimes he will wait outside for you, to beat you when you leave.[340]

A preponderance of these stories come from Zimbabwe. They seem also to reveal anxieties surrounding race and class that are deeply rooted in Zimbawe's still profoundly stratified society.

"Wellington Ncube" says,

> One of the worst problems people face is going to clubs. They get attacked in clubs for being gay. But clubs, the few of them that are friendly, are the only places you can go to have a good time. And maybe meet another person who might be gay.
>
> They are all straight clubs. You cannot have a gay bar in Zimbabwe at this point. The majority of the population is still too homophobic. We don't want to suggest that most of our help comes from outside the community. If people see a gay bar, they will say, it will influence people to be gay. And they would wonder where the money comes from. The war veterans[341] would attack: after all, *they* don't accept help from outside the country. There is this obsession with influence, with anything that encourages what they call the Western influence in our country.[342]

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[340] IGLHRC interview by Scott Long with Douglas M., Harare, Zimbabwe, August 4, 2000.

[341] The Zimbabwe Liberation War Veterans Association (WVA) association was formed in 1989 to lobby for increased government assistance to veterans of the *chimurenga* or struggle against white rule. An alliance between the government and one section of the WVA led to the veterans' being used to spearhead the occupations of white farmland that began in early 2000, following the government's defeat in a referendum on a new constitution. Increasingly the government has mobilized bands of young men to carry out similar occupations and to intimidate opposition members: although these informal militia are mostly composed of people far too young to have fought in the 1970s, they are still popularly referred to as "war veterans." See "Fast Track Land Reform in Zimbabwe," Human Rights Watch Short Report (New York: Human Rights Watch, February 2002).

[342] IGLHRC interview by Scott Long with "Wellington Ncube" (not real name) Harare, Zimbabwe, August 4, 2000.

The fears center not just around "Western" influence—but on the invidious impact, and scarcity, of money. The division between gays and straights in Zimbabwe is often entangled, among blacks, with another division between what are known as "clear beer" and "dark beer" people—between men who buy bottled lager, and those who can only afford cartons of cheap *chibuku*, unpasteurized dark beer. The brands are signs of relative class and status, and increasingly are markers for masculinity. One gay man says, "They call gays 'clear-drinkers,' because they think we get money from white people to afford it." In mid-1999, he remembers,

> In Mutare, I went into this pub with my friend, who is also a regular patron. Two guys came up and said, "Can you buy us some dark beer?" We refused, told them we didn't have money. It was an excuse. I said to my friend, "We have to be careful, they might say you are trying to seduce them."
>
> But the guys saw that we were drinking clear beer already. They said, "Are two moffies drinking beer here? How do they dare?" They told some other guys outside. And then suddenly four or five of these guys come in and gather around us and start harassing us. "What are you doing here? Why do you drink beer like women do? You are degrading our culture. You must get out." We didn't go back there for three or four months.
>
> One time the same friend, who is very feminine, was beaten up in a beer hall. Guys are always coming up to ask us for money. Because I have a job and I dress well, they say, "You must get this money from sleeping with white people." From there, they start shouting. And the trouble begins. [343]

"They think gay men have more money," another man says.[344] Gays are seen as "working class"—which in Zimbabwean parlance, amid massive unemployment, means upper class, or comparatively wealthy because employed.

That identification is also inextricable from the identification of homosexuality with whiteness. Wealthy means white, in a country scarred not only by the recent memory of racist rule but the continuing reality of inequality.

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[343] IGLHRC interview by Scott Long with Douglas M., Harare, Zimbabwe, August 4, 2000.
[344] IGLHRC interview by Scott Long with Kelvin, Harare, Zimbabwe, August 6, 2000.

As revealed in the testimonies recounted in Chapter III, black gays in Zimbabwe are believed to have white money in their pockets. "Teresa" says:

> Some say, black men only sleep with white men to sell sex. White people in this country, in the whole of Africa, have done one really horrible thing, to convince people that being gay means money.[345]

And another gay man says, "Everyone has this misconception, that black gay men are just men who do it with whites for money."[346]

Simbarashe ("Simba") Zwangobani, twenty years old when we spoke to him in 2000, says, "Nothing is harder than to be gay and friends with a white man. Usually everyone thinks 'gay' as soon as they see you together. It's gotten that way: a white man and a black man together are automatically assumed to be gay."[347]

Yet the presence of white men is not necessary to incite harassment. Peter Joaneti says that, in 1999, at Time and Place, a bar which had a reputation as "gay-friendly" at the time,

> I was standing with a friend. A certain guy came and introduced himself to me, and asked me to buy him a drink. I refused. So he went over and told a friend of his that we were homosexuals and he would drive us out of the club. There was a bartender who was very homophobic, and he connived with them: I think he was tired of having us there. So they got about fifteen of the customers together to attack us.
>
> Inside the club they started beating us. And they took us out on the street and called some street kids over to come and help beat us. We got a taxi to take us to the police. We had bruises all over our faces, our noses were bleeding.
>
> At Harare Central, the sergeant started off helpful. He told us if we saw some of these guys on the street we should stop a policeman and

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[345] IGLHRC interview by Scott Long with "Teresa," Bulawayo, Zimbabwe, August 13, 2000.
[346] IGLHRC interview by Scott Long with Edson, Bulawayo, Zimbabwe, August 13, 2000.
[347] IGLHRC interview by Scott Long with Simbarashe Zwangobani, Harare, Zimbabwe, August 5, 2000.

> ask him for help. Then I told him I was gay. And one cop said, “You proposed sex to them, right? That was why they beat you up.” Other cops asked, “How could someone beat you up just because you wouldn’t buy them a drink?”[348]

Simba Zwangobani also remembers,

> In May 1999 I went with seven other gays to a club called the Rose and Crown. We were standing together and a man started applauding and making fun of us, saying “You moffies!” And then suddenly the whole club descended on us. We were beaten and thrown out of there. It wouldn’t help in any of these cases to go to the police. When you’ve already been beaten up, you don’t want to get laughed at on top of it.[349]

“Wellington Ncube” confirms,

> We used to go to Time and Place after GALZ meetings; it was very friendly at times. But this always changes. Now it is unsafe. If we go there even in a big group, big numbers of straight people will walk out. It’s safe when they’re gone, but sometimes they wait for you outside. So you can’t leave alone, you all have to leave together. But if you go there in small groups, it is not safe.[350]

Romeo Tshuma, a longtime activist and employee of GALZ, was beaten severely by staff of a supposedly friendly club with which the organization had a contract. On March 27, 1998, GALZ was scheduled to hold a private fundraising party called the “Queen of Clubs” at Sandro’s Nightclub in central Harare. The club’s manager had approved and signed a contract. Tshuma and Juan May Lopes-Pinto, then GALZ’s operations manager, were to come to the club at 6:00 p.m. to begin setting up the venue.

According to GALZ, when Tshuma arrived at 6:30 to put up temporary decorations for the event, the club’s bouncer, “known as Shumba,” began

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[348] IGLHRC interview by Scott Long with Peter Joaneti, Harare, Zimbabwe, August 9, 2000.
[349] IGLHRC interview by Scott Long with Simbarashe Zwangobani, Harare, Zimbabwe, August 5, 2000.
[350] IGLHRC interview by Scott Long with “Wellington Ncube” (not real name) Harare, Zimbabwe, August 4, 2000.

harassing him verbally and tearing the decorations down. Together with other employees, he "announced that due [to] the nature of the function, they were not going to allow it to take place and further continued to make homophobic and offensive remarks. When Mr. Tshuma disputed such remarks the bouncer at the door without warning began to strike him continuously."[351] Tshuma told our researcher,

> This big guy, the bouncer, said, "You gays want to take over this nightclub. I will punish you before the rest arrive." He beat me and then he pushed me into the street. He shouted, "This homosexual is going to take over this nightclub and I will not allow it. I will beat him so he'll tell his friends not to come." Some of the passersby came over, and when they figured out what was going on, they started backing him and beating on me too.
>
> Juan came, in his car. He saw what was happening and so he drove off to find a policeman. The policeman said he would come but he never did.
>
> Juan came back and got me in the car. I had been beaten very seriously. We went to Harare Central Police Station to report it. The sergeant at the enquiries desk took a statement. And then he said, "What were you doing there?" I told him it was a gay event.
>
> He said, "What did you expect? If you have a gay event in this city, people will beat you up."
>
> Some of us are well known, and if we report even something that doesn't have to do with a gay issue, they will say, "You are gay, this is what happens to you."[352]

Tina Machida tells another story. "A month ago," she says, "Kelvin, Robert, Fatima, me, and another friend were all at the Florida nightclub here in Queenside":

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[351] Letter from Juan May Lopes-Pinto, operations manager, GALZ, to Mr. Banks, Sandro's Restaurant and Night Club, March 31, 1998. On file with GALZ.

[352] IGLHRC interview by Scott Long with Romeo Tshuma, Harare, Zimbabwe, August 8, 2000.

> A bunch of guys in the corner, customers, were talking about us. One of them, a guy, came over and said, "You gays, you all get out of here."
>
> Well, I knew three of those guys. They had been in my house, at a party I had on the first of July. They had gatecrashed, they were not invited. They said they came "out of curiosity." They were asked to leave. But then they waited by the gate for people to leave, and they beat them up. Two women were beaten pretty badly. The guys told them, "This gate is the end of the road for you homosexuals. No one is getting out." One of the women came back in and told us, and one of the men at the party took everyone home by car.
>
> And at [the] bar, those three guys were among that group. And they were telling us, "homosexuals out of the bar." I told Robert and Kelvin and the rest to leave. But I stayed behind. I refused to leave. I was so angry. They picked up a chair and wanted to beat me up. The owner sent over his bouncer to tell me to get out. I said, "Come tell me yourself. Don't send your bouncer with the message."
>
> I took a taxi home—I spent money, because I knew they would follow me. But next day, one of the hooligans came over to my house. He said he was sorry. The guys at the bar had asked him to come over and start a fight. They offered him beers for it. They were hoping I would hit him, so the fight could begin.[353]

Kelvin adds, "That happens in clubs all the time, if you visit almost any club—a club that is not gay-friendly. But you never know whether a club will be gay-friendly. A club that is one night will not be the next night, because the police or some hooligans have visited it."[354]

"Wellington Ncube" says, "The only way to respond to bar attacks is to say 'We are here, stop the violence.' But for this we need unity among gay people, and this has failed to happen." Tina Machida points to the way race and xenophobia are deployed to impede gays and lesbians from standing up:

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[353] IGLHRC interview by Scott Long with Chipo (Tina) Machida, Harare, Zimbabwe, August 10, 2000.
[354] IGLHRC interview by Scott Long with Kelvin, Harare, Zimbabwe, August 4, 2000.

> The trouble is so great. And they have their image of what you are all set in stone. Once they have you, they identify you as "Keith's friend"—not gay or lesbian, but "Keith's friend." And it is all because of that stupid story with the blackmail. They defamed all of us that way—they think Keith Goddard is the one who teaches everyone to be gay. And he is now the only white man who comes to the [GALZ] center.[355]

4. Discrimination and harassment at the workplace

That gays are imagined to have access to "white" money is a cruel irony. Mass unemployment prevails in the region; we spoke to many lesbian, gay, bisexual, and transgender people who had never had salaried jobs. They were supported by their families, or lived by casual labor or in a barter economy.

While particular inequalities are difficult to disentangle amid the general fact of poverty, discrimination based on sexual orientation or gender identity appears to be widespread. Many lesbian, gay, bisexual, and transgender people we spoke to who had been employed had been harassed or fired. Effective protection is absent in most countries; indeed, the climate of homophobia actively encourages dismissals. In Zambia, Chauta N., who wears clothing identified as feminine, reports,

> I've been fired at least three times. The first was at the Supreme Furniture Shop. Even at the interview they said, you are too girlish. I was wearing men's clothes then, but I tried dressing more comfortably after I was hired. They fired me right away.
>
> The second was at the Interconti [the Intercontinental Hotel]. I was a bellboy and given a week or two to work, then I was fired.
>
> At another place, when they were interviewing me, they said, no, you are too womanlike. And then they threw me out.
>
> I can't keep a job and be me. But I don't want to keep their money and be someone else. It wouldn't be my money, would it? It wouldn't be me they were paying.[356]

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[355] IGLHRC interview by Scott Long with Chipo (Tina) Machida, Harare, Zimbabwe, August 10, 2000.
[356] IGLHRC interview by Scott Long with Chauta N., Lusaka, Zambia, July 28, 2000.

"Princess Diana," a gay Zambian man, told us: "At work, people will be talking things about you, it doesn't mean that you can't do the work, maybe you are the best person to do the work, but just because they have discovered that you are a gay or a lesbian, and then they'll say all those things. And in Zambia, the government is not protecting you." "Princess Diana" has left the country for South Africa.[357]

Paradoxically, Namibia—one of the countries whose leaders is most vocally homophobic—is the only African country outside South Africa to offer workplace protections against sexual orientation-based discrimination. The Labour Act—passed in 1992, early in Namibia's independent history, and long before the SWAPO government discovered the political uses of homophobia—includes sexual orientation in a list of barred grounds for discriminatory labor practices, and allows victims to seek remedy before a Labour Court. Only one sexual orientation -elated case under the act is known: this certainly reflects lack of knowledge about its protections, and fear of employing them, rather than the frequency of discrimination. Elizabeth Khaxas of Sister Namibia, who worked in a school before becoming a full-time feminist activist, has written about the difficulty of turning a little-known legal remedy into effective action in a deeply hostile society. Her words are relevant to the similar struggle to implement state promises in South Africa:

> How many of us know that [the law] explicitly protects us from harassment at the work place? And how many of us are willing to expose ourselves to possible harassment and the ensuing legal battles over our right to live our lives and loves openly at work? What if the parents of the school where I am a principal decide tomorrow they don't want a lesbian on the staff or the school management? Will … I have to take the parents and the ministry to court to assert my rights under the Labour Act? Being subjected to this kind of constant fear at the workplace is a form of discrimination. It prevents me from sharing the most important aspect of my life with my colleagues at work, consciously hiding issues that heterosexual people openly assume as part of their lives.[358]

[357] IGLHRC interview by Kagendo with "Princess Diana," Johannesburg, South Africa, November 28, 2001.

[358] Liz Frank and Elizabeth Khaxas, "Lesbians in Namibia," in Monika Reinfelder, ed., *Amazon to Zami: Towards a Global Lesbian Feminism* (London: Cassell, 1996), p. 115.

Sarah, a thirty-two-year-old lesbian, has experienced how remote reality is from the promises of the act. She worked until 2001 for a NGO that provided services in areas of northern Namibia.

> After the president gave his speech [in March 2001] calling for us to be arrested and deported, my supervisor called me and two other women into her office. She asked if we were lesbians, if we participated in lesbian activities. We lied and said no. She said, "Lesbians are not allowed to be in Namibia—it's unnatural."
>
> Then I was transferred from a job at the headquarters in Windhoek to work in the north. When I got there the staff all knew that I was a lesbian. They would ask me why I dressed the way I did, why I wouldn't change my lifestyle, and they would tell me that I have to get married and have children. The staff all lived in the same hostel. There was a young man on staff who was very rough with his words. He would threaten to beat me or rape me and he would kick my chair when he walked past where I was sitting.[359]

But the worst part for Sarah was not the verbal harassment, the threats of physical violence, or even the isolation: it was the refusal of her co-workers to ensure her safety.

> Everyone knows the [area was] unsafe. I felt very unsafe. . . . The [people we served] were very homophobic and the staff had told them about me. Also there were lots of rapes . . . and the women who worked there were not to go out alone. But I was always sent out alone. I was very scared. I asked for a transfer and was refused. I asked for support in my work and was told there was nothing anyone would do and that I had to take it or leave it. I wrote to the Labour Committee but they never responded. I quit. It was too unsafe.[360]

In August 2002, flaunting his disregard for the paper protections of the Labour Act, President Sam Nujoma told a trade union congress: "I warn you as workers not to allow homosexuality. Africa will be destroyed."[361]

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[359] Human Rights Watch interview with Sarah (not real name), Windhoek, Namibia, July 17, 2001.
[360] Ibid.
[361] Maggi Barnard, "Nujoma targets imperialism, gays," *Namibian,* August 19, 2002.

5. Discrimination and harassment at the hands of the church

“I always want to tell people, don’t expect sympathy from the church if you are gay,” said Carlos Mpofu—who was dismissed as a Sunday school teacher and expelled from his congregation in Bulawayo, Zimbabwe, when his sexuality was suspected.[362]

We heard some dissenting voices in the region. Musonda Chitalu, in Zambia, found the greatest single source of support for her gender non-conformity—once it was understood as a “medical condition”—to be her local Assembly of God church. In Botswana, Anglican Archbishop Walter Makhulu has supported not only human rights in general but the rights of marginalized minorities in particular.

Some churches have tried to differentiate between the respective scopes of moral strictures and rights protections. In April 2001, amid a wave of President Nujoma’s homophobic statements, the Council of Churches in Namibia (CCN) issued a protest conceding that individual churches condemned homosexuality and that it remained a “complex issue,” but strongly affirming that the Council “rejected any form of discrimination based on sexual orientation.”[363] Evangelical Lutheran Church leaders in Namibia met later that year with gay and lesbian activists, in a series of inconclusive discussions. Some ministers stressed the church’s commitment to understanding, others “pushed the agenda of homosexuality as a sin,” according to Elizabeth Khaxas.[364] Khaxas believes that, while some of Namibia’s churches may not support the state, most will not help or minister to gays and lesbians unless they repent, and thus they give their tacit support to homophobia.[365]

Many Christian denominations in Africa have gone out of their way to attack gay and lesbian people in the last seven years. Chapter II, above, includes examples. The leaders of the Zimbabwe Council of Churches leapt to support President Mugabe’s homophobic harangues—and closed ranks to shut GALZ out of the World Council of Churches’ international gathering in Harare. Most Christian denominations in Zambia fulminated vociferously against homosexuality during the 1998 burst of hysteria after Francis Chisambisha’s revelation. And the Anglican bishop of Uganda wasted no time in

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[362] IGLHRC interview by Scott Long with Carlos Mpofu, Bulawayo, Zimbabwe, August 13, 2000.

[363] “CCN defends gay rights,” *Namibian,* April 10, 2001.

[364] Elizabeth Khaxas, “Putting love before the law: Churches debate the issue of homosexuality,” *Sister Namibia,* November/December 2001, pp. 18-19.

[365] Human Rights Watch interview with Elizabeth Khaxas, Windhoek, Namibia, July 17, 2001.

congratulating President Yoweri Museveni when he ordered police to “lock up” lesbians and gays.

The role, and rhetoric, of churches is particularly important because of their central place in many African societies. They are not only nodes of solidarity and linchpins of community. In many areas, they furnish essential services, such as education and health care, which the state has either abandoned or never made a pretense of providing. Francis Chisambisha, at the time he came out publicly, was studying in a college run by the United Church of Zambia. He was forbidden to take his exams, and forced out.[366]

Many individual congregations hound and vilify lesbian, gay, bisexual, and transgender members. In Botswana, Patrick Modisaemang told our researcher that “they will expel you from most churches if they find you are homosexual. They will think that you are possessed by demons.”[367] In Namibia, Sarah described her fear of the church.

> My parents were very poor. I grew up with several brothers and played soccer. I was a goalie. I was even selected to play on the school team. I started dating girls when I was thirteen. My brothers would say to me, “you are our brother.” My father died and then my mother became very ill. After that the teachers started messing with me. I failed twelfth grade. There was no one to take care of us. I began working to support my younger brothers and sisters.
>
> I couldn’t go to the church for support. I can’t ever go back to the church. Once you are in the church they start on you—they humiliate you and exclude you and finally you are driven out of the church. They tell me that being homosexual is un-African. If it is not African, where did this thing come from? I am a black African and I will stay African. Nothing will change that. And besides, where in the Bible is it written to rape and beat and kill women?[368]

Isaiah, in Namibia, explained that the church has a significant role because it is in churches that people are taught that homosexuality is a sin. “However,

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[366] IGLHRC interview by Scott Long with Francis Chisambisha, Lusaka, Zambia, November 20, 1998.
[367] IGLHRC interview by Scott Long with Patrick Modisaemang, Gaborone, Botswana, December 19, 1998.
[368] Human Rights Watch interview with Sarah (not real name), Windhoek, Namibia, July 17, 2001.

the same ministers who focus on homosexuality never talk about how adultery is a sin or how rape is a sin," explained Isaiah. "I went to church for love and support. The pastor arranged a prayer evening and told everyone that I had a demon. They beat me, and threw me down and totally controlled my body. I never returned."[369]

Many feel churches encourage families to reject lesbian, gay, bisexual, or transgender children. "My mother threw me out of our house and said it was because she was a Christian," Buumba S. in Zambia says. "What kind of Christianity is that?"[370] And, in Namibia, Isabel found that the church as a conformist community helped inculcate prejudices in her family and insecurities in her own self.

> My mother was a Christian so she brought us up to be very involved in the church. When I was about twelve I realized that I like girls. The feeling just got stronger and stronger. People would say to me, "How come you are alone, you must bring a boyfriend." I wanted to run away—just to be alone. I had my first experience with a teacher. It was not a deep thing, but then I got an invitation to her wedding. I thought, "I am totally on the wrong track." At church they would ask, "When will you marry?" I realized I had to do the right thing. But I did not want to go out [from the church].
>
> I finally got married when I was twenty-one. I have a son and a daughter. But my husband realized I was not "right." He called me a tomboy. After seven years I got divorced. That's when my life began. But it was very difficult. My mother and children were upset. It took a long time to feel at peace. People can look at me and judge me but I must live the way I am.[371]

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[369] Human Rights Watch interview with Isaiah (not real name), Windhoek, Namibia, July 18, 2001.

[370] IGLHRC interview by Scott Long with Buumba S., Lusaka, Zambia, December 3, 1998.

[371] Human Rights Watch interview with Isabel (not real name), July 18, 2001. IGLHRC and Human Rights Watch are concerned by sexual relationships which involve the potential for abuse of power, and urge states and institutions to enact safeguards which do not discriminate between same-sex and heterosexual activity.

"It is dangerous to generalize about 'the church' in Africa," one cleric rightly reminded us.[372] In particular, no attempt to account for the conduct of Christian churches can fail to note the divide between older, established denominations, whose presence in Africa dates from the colonial era—the Roman Catholic Church, the Anglican Church, and the Dutch Reformed Church among them—and the welter of small evangelical denominations which mushroom across the continent. The divisions are not mapped on strictly class or racial lines; many poorer blacks continue to attend Roman Catholic services in Zimbabwe, or Lutheran services in Namibia. However, the appeal of evangelical churches is clearly strongest in places where poverty and misery are most severe. And a wave of evangelical enthusiasm seems to be sweeping across southern Africa.

Since the first incursions of colonialism, Africa has been an assimilative and explosive ground in the history of world religions. Charismatic religious outbursts have synthesized indigenous and Christian beliefs, with many becoming or laying the ground for liberation movements. The evangelical wave now mounting, however, is promoted by a renewed burst of North American missionary activity. That activity is concentrated among fundamentalist churches and faith-based NGOs.[373] Many such groups import a homophobic agenda intact. For instance, Exodus International—a U.S. NGO which promotes pseudo-medical methods of "treating" and "curing" homosexuality, all accompanied by Christian conversion—announced as early as 1996 that its "ministry opportunities" in South Africa had "sky-rocketed." One of their ministers told an audience of 700 in a Cape Town auditorium how homosexuality could be "overcome."[374] By 1999, Exodus reported that it had three offices in South Africa, "with eleven different support groups," and had undertaken missions to Kenya and Zimbabwe.[375] In 1998, at least one

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[372] IGLHRC interview by Scott Long with a Catholic priest who wished to remain anonymous, Lusaka, Zambia, December 4, 1998.

[373] Some such groups are evincing interest in Africa for the first time. Some, indeed, may have been freed to do so by the fall of the apartheid regime in South Africa, which many U.S. fundamentalist groups had supported—a support which would at the time have severely impeded their outreach to blacks in South Africa or elsewhere in the continent.

[374] "Ex-gay ministry soars in South Africa," *Exodus International Update,* November 1996.

[375] "A life-changing trip to Africa," and "Blazing a trail of freedom in Christ," *Exodus International Update,* May 1999.

newspaper article in Zambia recycled Exodus materials in promoting a "Christian response" to homosexuality.[376]

Zambia is in fact a center of Christian evangelical activity, supported by the ruling MMD party and by the constitution's definition of Zambia as a "Christian nation." Visiting Zambia in 2000, Human Rights Watch and IGLHRC found that one channel of state television broadcasting had been turned over to evangelical programming, nearly all of it from the U.S. and Canada. One clergyman in Namibia told us in 1998, "Zambia, and also Nigeria, now send out waves of their own evangelical missionaries to countries all over Africa."[377]

The same cleric stated,

> These evangelical movements tend to be attractive. Let me put it this way: the mainline European churches, if I can call them that, tend to be staid and fixed and quiet. These fundamentalist churches are not. They speak a language which sounds very much like the language of African traditionalism, and that contributes to some degree of popularity. And you could say that they have put other churches somewhat on the defensive.[378]

Some older denominations have spoken out in defense of equal treatment for gays and lesbians. However, when the Council of Churches in Namibia criticized the president's homophobic rhetoric, Nujoma responded:

> The church as far as I am concerned, is foreign philosophers … the first missionaries in Namibia spied for the colonisers who followed them. Our constitution recognises freedom of worship but I don't care about it because it's artificial, it's foreign philosophers.[379]

Inadvertently Nujoma stressed one advantage the evangelical churches enjoy: often backed by foreign, fundamentalist missionary work, which can sometimes rival the resources of the established churches, the newer sects are

376 Vanessa Furlong, "Homosexuality: Christian counselling is the answer," *Zambia Daily Mail,* undated clipping.

377 IGLHRC interview by Scott Long with Reverend Roger Key, dean of the Anglican Church, Windhoek, Namibia, December 16, 1998.

378 IGLHRC interview by Scott Long with Reverend Roger Key, dean of the Anglican Church, Windhoek, Namibia, December 16, 1998.

379 Tangeni Amupadhi, "Church seeks to reach Nujoma: CCN wants to clear air," *Namibian,* May 16, 2001.

nonetheless not burdened by mainstream denominations' historical association with colonialism.

There are signs that established denominations may have hardened their positions on homosexuality in response to the evangelical upsurge. An Anglican clergyman in Botswana—working for, and wholeheartedly supporting the views of, his liberal archbishop—told us that, nonetheless, "There is some feeling in the church that we should be doing more to represent Biblical positions as fully congruent with African understandings in this debate."[380]

The 1998 meeting of Anglican primates worldwide, the Lambeth Conference, held in Canterbury, United Kingdom, was a key moment in this hardening. African bishops spearheaded a conservative campaign to reverse liberal trends in the Anglican Church internationally. In particular, they pushed a resolution condemning homosexual practice as "incompatible with scripture." A proposed passage in the resolution which would have condemned homophobia as well was altered to read "irrational fear of homosexuals," which might be taken to mean that the church comprehended some aversions as reasonable.

The resolution put the church on record as opposed both to recognizing same-sex unions, and to ordaining those involved in such unions.[381] The resolution, along with the role of African prelates in propelling it forward, was widely publicized in southern Africa. And one Anglican leader told IGLHRC it was a "setback" for the "atmosphere among churches in general": a blow to the ability of any church in the region to speak out against officials who invoked moral judgments to justify restricting rights.[382]

6. Violence and silence in the family

Justin, from Mutare, Zimbabwe, says that if his family discovered his homosexuality,

> My mother would be greatly offended. In African culture, your mother expects you to get married, expects you to have a daughter-

[380] IGLHRC interview by Scott Long with Father Richard Chance, Gaborone, Botswana, December 19, 1998.

[381] There were indications that funds from non-Anglican U.S. fundamentalist groups had been used to support the African position, and conservative stances more generally, at the Lambeth conference. See David Harris, "Lambeth Analysis," *Anglican Journal* (Anglican Church of Canada), September 1998, http://www.anglicanjournal.com/124/07/-lambeth01.html, retrieved August 24, 2002.

[382] IGLHRC interview by Scott Long with Reverend Roger Key, dean of the Anglican Church, Windhoek, Namibia, December 16, 1998.

> in-law at home. It would be worse for my mother to know I will not get married than that I am gay. That is what they expect, what they have seen from their childhood; it is an unheard-of thing not to marry, and they will worry what the community will think of it. It is a disgrace to the family.
>
> I could get married, but I would have problems sexually with women, my wife would suspect and then could find out about my private life. And why should I lie to someone?[383]

His fears are echoed by many gays and lesbians. Some people, indeed, isolate themselves from their own families, out of shame or fear. “Teresa,” in Bulawayo, Zimbabwe, says, “I didn’t stay with my mother when she was dying. I didn’t want the neighbors to gossip to her.”[384]

Prejudice in the family is not merely an issue of emotional estrangment. It can lead to brutal violence. When, in her early twenties, Tina Machida’s parents learned she was a lesbian,

> They tried to force me to find a boyfriend but I could not fit in with what they wanted. I was afraid that I was going to end up in trouble because of my attitude so I used to bring a gay boy home and tell my parents we were lovers and that we were saving so we could get married. They believed me and he came to dinner once a week. When they found out that we were lying, our weekly dinners were banned and he was not allowed to come back to our house.
>
> My parents decided to look for a husband on my behalf so they brought several boys home to meet me but I was not interested so in the end they forced an old man on me. They locked me in a room and brought him everyday to rape me so I would fall pregnant and be forced to marry him. They did this to me until I was pregnant after which they told me I was free to do whatever I wanted but that I must go and stay with this man or they would throw me out of the house. They did throw me out eventually thinking that, as I was not

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383 IGLHRC interview by Scott Long with Justin (not real name), Harare, Zimbabwe, August 4, 2000.
384 IGLHRC interview by Scott Long with “Teresa,” Bulawayo, Zimbabwe, August 13, 2000.

> employed, I would end up going to this man's house. Instead, I went to stay with my friends.
>
> I went for an abortion and I was in the hospital for a month. After that I used to hide whenever I saw my relatives. I did not contact them for six months. The police were looking for me so I used to move during the night only. In the end, the police found me and took me home where I was locked up and beaten until I could not even lift my arms or get up.
>
> I stayed in that room for months pretending I was sick so they would not bring the horrible man again but they did and I fell pregnant again. I ran away and went to stay with my girlfriend. I did not go for an abortion this time because I was scared it would kill me. The first time had been really painful. I kept the pregnancy [this time] until I had a miscarriage at seven months and the baby died.[385]

Parents who detect their children's difference may force them to undergo traditional "treatments" to "cure" their behaviors. Buumba S., a lesbian in Zambia, believes that to be a common practice. "If you are gay, if you don't interact sexually in a normal way, your parents will think you are interacting with spirits," she told our researcher.[386] Peter Joaneti, whose parents moved to Zimbabwe from Zambia when he was ten, tells one such story.

> I never knew much about gayness when I was a child. In grade six, I picked up that I was completely different from other guys. In grade seven, I was called a "poofter": and when I asked, I found out that meant a man who got fucked by another man. The homosexual issue hadn't become so big in Zimbabwe; later on, words like that began to be heard more. I began coming to terms with the fact that I was homosexual at around fifteen.
>
> So then I told my family. I was fifteen. I said, "I love other men, I think I'm homosexual." I didn't know it would provoke them.

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[385] Chipo (Tina) Machida, "Lesbians Have Always Been There," *GALZ,* No. 14 (Christmas 1994); confirmed in an IGLHRC interview by Scott Long with Machida, Harare, Zimbabwe, August 10, 2000.

[386] IGLHRC interview by Scott Long with Buumba S., Lusaka, Zambia, December 3, 1998.

> When I was born my mother was expecting a girl, all her preparations were for a girl, and I was treated like a girl as a baby. So I didn't think it would be provoking. But my brother said, "You cannot say that in front of people. I will kill you if you keep on telling people that is what you are." And my mother said, "You must keep it to yourself."
>
> I was taken to a healer, a *sangoma,* in Harare, with my father and his aunties. They told me, "In our culture it is not acceptable." They thought I was possessed by a demon.
>
> I was seventeen by then. The healer gave me some *muti,* a tree herb mixed with water. I was supposed to bathe in it and drink some every morning. And there were rituals I was supposed to do with my family. I stopped acting gay for a while, stopped seeing other men. But it didn't last a year.
>
> My family wanted to drive me out of the home. But I was already the breadwinner, I was bringing in too much money. Five years later, they actually drove me away for a week. But the bringer of money had to come back. They chased me because I was bringing my boyfriend home and they feared I would provoke my younger brothers to be gay. Finally, I moved out voluntarily. I feel free.[387]

Many parents "chase their children out," as Tina Machida says—drive them from their lives altogether. For children under 18 (as in the case of "Fatima," described earlier), this can be devastating. In Namibia, The Rainbow Project often tries to help young people who have been rejected by their families. Says Ian Swartz, "What is hard are the really young ones who simply can't hide who they are. We had a fourteen-year-old, Marshall, come to us for help. He's so gay he simply can't hide it."[388]

Yet for older youths, the loss of family ties can also expose them to hardship and danger. It can result in the loss of housing or education: Swartz says, "The safest thing to do is stay in the closet—even after you've left home and are at university. Just last week I had two young men seeking help. Two brothers were rejected by their families. They were students at Polytechnic—

[387] IGLHRC interview by Scott Long with Peter Joaneti, Harare, Zimbabwe, August 9, 2000.

[388] Human Rights Watch interview with Ian Swartz, Windhoek, Namibia, July 16, 2001.

but since their families found out they were gay they were refusing to pay their school fees."

Buumba S. relates that when her mother accused her of being a lesbian—during the controversy over LEGATRA in Zambia in 1998—and she answered that she was, "My mother thought it was outright disobedience, a sin. She said she had standing in the Christian community and she couldn't endure this. She said, you have to leave home. She is very much the matriarch of our extended clan, and no one else in the family would or could take me in or help me." Buumba found work with a Christian charity supporting street children; by the end of 1998 she ran, and lived in, a children's shelter built from discarded steel drums in a field on the edge of Lusaka. "It's a kind of self-imposed exile out there, with the kids," she said, "just to get out of the whole situation. But I have to be careful. I'm afraid the shelter would get closed if the government found out a gay person was working there."[389]

Dominic S., twenty years old when we interviewed him, was from Bulawayo, Zimbabwe, and living periodically on the street. His adolescent coming-out led to family violence and the loss of his legal identity:

> My life has changed enormously in the last five years. Here it is a taboo to be seen as a gay man. Parents will be expecting a man-child to keep a family, get married, have children. Whether you are gay or not, at least you should have a family. And if you are a feminine man, they think even that is beyond you. I knew I was gay at a tender age—I thought I knew what it was about! But I didn't know what to do about my homosexuality.
>
> I was always very different. But I really discovered it when I was fifteen. I went to a boys' school then, and I saw other boys making love. I didn't talk about it. I had a close friend, Sylvester, who said, "I've discovered something about you. You are gay, like me." He was the first person I was open to about my homosexuality.
>
> My family was Catholic and I went to a very strict Catholic school. I didn't know anything about sex. I had a very violent father. I was the only child. My mother is now divorced. For the first few years after the divorce, I stayed with my father and stepmother.

[389] IGLHRC interview by Scott Long with Buumba S., Lusaka, Zambia, December 3, 2000.

Back at school, I wasn’t allowed to be homosexual, of course. My schoolmates knew about gay people from the press and the president. They knew about me, they recognized me, and they would harass me. When I was doing my fifth form I was senior prefect—a sports person, you know. But suddenly all these merits were taken from me. I was demoted. The school authorities found out when my schoolmates said, “Dominic has been seeing Sylvester, he is gay, he is a sissy.”

Since it was illegal in Zimbabwe, school authorities called my mother. I was lucky they called her and not my father. She denied it to them; and she kept it a secret, she didn’t tell my dad. The school authorities told her I needed psychiatric treatment to change me. My mother just grew distant. She didn’t want to talk with me about it.

She was close to my father’s sister-cousins and they began to sense it. But then my stepmother was suspicious also, because my schoolmates told their families, and their families talked. And so my stepmother began opening my mail. She opened one of my letters from Sylvester, and discovered I was gay.

My stepmother told my father. He disowned me, and threw me out of the house. It was 1998, I was eighteen; I knew I didn’t have a dad anymore and it was very painful for me. I tried to talk to him. He said, “I am not going to have a child who is going to be a sodomist.” My stepmother encouraged him. She used to give me a very hard time. She had two big boys of her own, and she thought I was going to sodomize them.

My mother was married to another man. I couldn’t stay with my father any longer; but my mother’s new husband had figured out I was gay, and he couldn’t stand me either. …

I was still in Catholic school in Bulawayo. My progress was affected—I failed my A-level exams. My father was paying my school fees. But then he stopped. And he also took all my papers—the ones I had at home, and he even took the ones I had left at school. He took my A-level certificates, my fourth form certificates, my I.D., even my birth certificate. So for him I was not a person, and he tried to ensure that for everybody else I would not be a person either. He

> tried to erase my existence. I couldn't get a job, couldn't go to any institute: they needed my certificates.
>
> I'm still in this situation. I can't confront my father: I don't have the strength. He is a very violent person. If he still has them—he may have burned them—he will never surrender them to me. I don't exist for him. And he has told all his relations to write me off.
>
> I stay away from home. I feel I can only disappoint my mother and my grandma.
>
> But I have come out. I have met other gay friends, who taught me ways I can behave in public as a gay person. I want to do counselling with GLOM, to help educate people about their gayness, sexual orientation, and sex. I want to be active in the community so that we see a gay consciousness arise in the town: so people know about it and learn to accept it, and themselves. Gay people can do more than sex. They can be active people in the community.[390]

The misery of rejection by one's family is compounded by the lack of either legal recognition or social respect for gay and lesbian people's own relationships. No state in the region fully acknowledges those relationships before the law. In the face of homophobia and silence, lesbian, gay, bisexual, or transgender people face sometimes-insurmountable difficulties in forming families of their own; a relationship of care, once founded, may be reviled by others or disregarded by authorities.

The irrationality, and the pain, this produces was brought home for many in Zimbabwe after the suicide, in October 1999, of Siphanilizwe Nyathi in Harare. "Phangi," as he was known to his friends, was a respected member of GALZ and a counsellor and father figure to many younger gay men. In an angry public statement, Keith Goddard said,

> What we can say is that, along with all other lesbians and gays in this country, Phangi was forced to endure the numerous stresses and strains brought on by homophobia.

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[390] IGLHRC interview by Scott Long with Dominic S., Harare, Zimbabwe, August 4, 2000.

> Society shuns us and equates us with gangsters and perverts and our relationships are criminalised.
>
> We get no rest from persecutors and we see no chances for alleviation or escape, or any possibility of momentary respite or peace.
>
> Phangi was one of our finest and most highly trained counsellors and provided a strong shoulder for those coping with the pressures and problems that accompany being gay or lesbian in Zimbabwe. Those he helped are now bereft and struggling to derive some small meaning from this ghastly tragedy.[391]

Nyathi's partner of eight years, Herbert Mondhlani, was shunned by Nyathi's family, who shut him out of burial and inheritance arrangements and expressly barred him from attending the funeral. However, a delegation of Nyathi's friends from GALZ attempted to attend and videotape the funeral for him. Nyathi's family had security guards drive them away. The state-sponsored *Sunday News* in Bulawayo, reporting on the event, quoted an indignant "source" present at the funeral as saying,

> It is purely unAfrican. I have never heard of such a thing since I was born. How could a man ask to pay his respect to a deceased young man on the basis of a same sex relationship?[392]

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[391] "GALZ leader commits suicide," *Standard,* Harare, Zimbabwe, October 24-30,1999.

[392] Quoted in Siphanbaniso Dube, "Gays spark row at funeral," *Sunday News,* Bulawayo, November 7, 1999. See also, "Gay man shocks family," *Daily News,* November 12, 1999. However, others were shocked instead by the family's intolerance. The independent press ran several unusually sympathetic articles, including a front-page interview with Mondhlani: "Gay to fight for rights," *Daily News,* November 13, 1999. Mondhlani, a state employee—he had worked for the University of Zimbabwe and for the National Railways of Zimbabwe—had been a GALZ member from early on, but had dropped out of the organization as it became more visible and political. The interview, which appeared in the country's only independent daily, painted or was edited to paint a relatively bright picture of gay lives in Zimbabwe: Mondhlani actually was quoted as saying that "Mugabe is our inspiration. His sacrifice during the liberation is what is inspiring us to fight for our cause." He also said that he believed "Mugabe's personal views are tolerant." Yet he also spoke out as a gay professional man, one who had had a long-term relationship with another man: to hear that voice was immensely significant in Zimbabwe.

Mondhlani himself placed memorial messages in several newspapers—itself an extraordinary act, as these memorials are usually reserved for the mourning of heterosexual spouses or blood kin. One read:

> One month in God's eternal peace. I ask myself why Phangi? For eight years together we fought against bigotry, prejudice, ignorance, rejection and phariseeism.
>
> Together we triumphed, won friends and made no enemies.
>
> Why did you leave me to fight the last mile alone?
>
> Herbert Mondhlani

Herbert Mondhlani died in 2000.

7. Suicide: "The closet is a dark room"

"I've thought about suicide," Dominic S. says. Indications are that the rate of suicide or attempted suicide among young gays and lesbians—facing the prospect or the reality of both family rejection and rejection by society—is high. Phangi Nyathi was the eleventh member of GALZ (out of less than a hundred active members) to attempt or commit suicide in 1999 alone.[393]

Justin, from Mutare, Zimbabwe, says, "I feel very lonely, depressed, and at times distressed. I have these feelings of suicide, of wanting to try it, of not wanting to live this way anymore. Of twenty or more gays in Mutare, I know maybe half of those people who have tried to kill themselves."[394]

Simba Zwangobani in Zimbabwe remembers:

> One time I really broke down. It was a four-day holiday, I was living at GALZ … I tried to commit suicide. One of the office staff found me. I said, I will never do that again. But again another time I tried it. I've tried suicide three times in all.

[393] IGLHRC interview by Scott Long with Dumisani Dube, Harare, Zimbabwe, August 4, 2000

[394] IGLHRC interview by Scott Long with Justin (not real name) Harare, Zimbabwe, August 4, 2000.

> I've heard before that most people look at me and say, he's so happy—I'm not happy most of the time. But I have a strong character.[395]

Dumisani Dube also tells of "another bad incident" in his own life:

> In my last relationship, we had a very big problem. My partner's brother discovered we were gay. He told the family, who got down on my partner and insisted we break up.
>
> I was so depressed. On December 31, 1999, I tried to commit suicide. I took sleeping pills. They took me to Parirenyatwa Hospital and I was saved. But it's hard to help having those feelings, when you see how the world around you looks on you.[396]

In Windhoek, Namibia, Simone, a young lesbian, says,

> I was unhappy as a child. I knew I was different. I told my mother during an argument when I was sixteen. She told my father and they sent me to a psychiatrist. He told me that my problem was that I didn't accept who I was. That God intended for me to like men. I tried to pretend. It was like flying around with no airport to land at. I tried to kill myself. I cut myself—I wanted to make people understand the pain. I just wanted to be what I wanted to be.
>
> My father and I fight. My little brother throws the Bible at me and tells me it's a sin. It can be very lonely. I kept all my feeling inside, all bottled up until the pain just took over. I didn't care. I thought, "I hate myself, I hate the loneliness, I hate the pain. I hate my life." So I tried to kill myself again. I still don't feel safe. Why don't they just leave us alone? We don't rape or beat or steal but still they call us criminals.[397]

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[395] IGLHRC interview by Scott Long with Simbarashe Zwangobani, Harare, Zimbabwe, August 5, 2000.
[396] IGLHRC interview by Scott Long with Dumisani Dube, Harare, Zimbabwe, August 4, 2000.
[397] Human Rights Watch interview with Simone (not real name), Windhoek, Namibia, July 18, 2001.

Derrick, a youth activist with The Rainbow Project (TRP) in Namibia, tells how suicide has affected his life.

> This year, a friend of mine committed suicide. He was having this argument with his mom—actually, he was one of my ex-lovers. He was having this argument with his mother and it was about something and his mother suddenly came up with the gay issues. "Yeah, you are going out with males—why don't you get yourself a girlfriend?" It started so small, from what I hear, and it got to be very nasty. And—he took tablets. He told his mom, "Mom, you already know that I am gay and I thought you already made peace with it, so why are you involving this issue in here? Then I really think I have to make an end to this life." And the mom thought he was just making a joke and said, "I really don't care if you kill yourself."
>
> So he went to his room and took some high-blood pressure tablets, I don't know how much he took. Around 12:00 that evening he started vomiting, choking and the person working late nights rushed with him to the hospital, but it was too late. The doctor said it was too late, there was nothing they could do for him.
>
> And two of my friends also tried to commit suicide. The Rainbow Project had a storytelling [event] and I did write something about how we should get the youth to stop trying to commit suicide, although I didn't know the answer. It was two pages. And, when I saw these people who had tried to commit suicide there, I did not have the guts to read it there, I didn't know if they would feel offended because they are my friends. So I just went on stage and read a poem only. But today I feel like I should have just read it, even if it offended them, I should have just done it.… It was just telling the youth, it's not okay to commit suicide, if you have got such a big problem, come and talk to the people, talk to the counsellors, talk to your pastor, your lawyer, someone you trust, your teacher….
>
> And I also wanted to talk about my ex-boyfriend. Most of the youth at TRP knew him and how he committed suicide. And I wanted to tell them more about him, about how he was such a nice person. But in my mind I think he did a very wrong thing. I think he should have

> at least talked to me—but he was five hundred kilometers away. But still today I feel he should have said something, to me especially, He knew very well that he could count on me. I am very mad at him. I didn’t even want to cry at his funeral, but the tears just came running down.[398]

Leila, a Namibian lesbian, also tried to commit suicide; the end of a secretive, five-year relationship left her devastated, friendless, and alone. She survived the attempt, and is struggling to build a different life. Not long before we spoke to her, she had told her mother she is a lesbian. Her mother was very upset; Leila made her promise not to tell her sisters: “I want to tell them on my own time.”

She is volunteering with both Sister Namibia and The Rainbow Project, and both have given her much strength. She says: “The closet is a very dark room.”[399]

8. “The pressure is mostly on women”

For lesbians and bisexual women, economic needs are added to social and cultural preconceptions to create a burden of demands which many find all but unendurable. Families see an unmarried daughter as a debit in the balance sheet, the loss of *lobola* or bridewealth. Many activists interviewed for this report cited entrenched societal attitudes mandating that women be submissive, as well as attitudes toward sexuality which stress men’s entitlement to sex and require women to satisfy men’s sexual needs. In Namibia, TRP’s Ian Swartz put it succinctly: “Women are men’s property. They must do all the work and women are not allowed to say ‘no.’”[400]

In Zimbabwe, Tina Machida says,

> The pressure in public is stronger on men, still. The pressure now in families, really, is mostly on women. Because with the men there is a certain attitude of “do your own thing.” There is no respect for sons who go their own way, and families won’t rally around them. But there is a sort of resignation to what is happening in their son’s life.

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[398] IGLHRC interview by Kagendo with Derrick (not real name), Windhoek, Namibia, November 15, 2001.

[399] IGLHRC interview by Kagendo with Leila (not real name), Windhoek, Namibia, November 16, 2001.

[400] Human Rights Watch interview with Ian Swartz, Windhoek, Namibia, July 16, 2001.

> But with women—even if the families say they accept their daughters are different, they don't: they still keep pushing for marriage and *lobola*. Some daughters give in and do what their parents want. Some daughters go away for good.[401]

In Namibia, Ian Swartz sees the pressure on women as coming both from community violence and family repression: but the two often work in tandem. Swartz confirmed that (as in Machida's own case) when families suspect that their daughter is a lesbian, they often arrange for a man to rape her. Swartz explained, "Women who are lesbians or heterosexual but not available to men will be dealt with. They face physical violence and the constant threat of sexual violence. About 25 percent of the women who call the TRP hotline are calling to report a rape. They usually don't tell us at first, but in a later conversation they will disclose being raped. They virtually never will tell us their names or where they live. What's worse is that some of their families honestly believe forcing their daughter to have sex will 'fix' them."[402]

Even those daughters who are able to "go away for good" may not find freedom in doing so. The difficulties for women in living an independent life are profound. Irma, a young Namibian lesbian with an extremely "masculine" appearance, describes some:

> I have always been different and everyone could tell. I remember when I was eleven thinking, "I am not normal." The teachers didn't like me and they would harass me. No one would stand up for me. I don't know who my father is and my mother is dead. Lots of times the teachers would not let me attend class. I dropped out. I don't have an identity. I need a birth certificate but I don't have one. It makes me worried about being deported.
>
> I want to get a job. But I am afraid they will force me to be a woman. I live with an older woman. She is not a relative but she gives me a place to live. The men in the neighborhood tell me they will rape me. I try to avoid them, but it is hard. I can't go to the police, they will ask me if I am a man.[403]

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[401] IGLHRC interview by Scott Long with Chipo (Tina) Machida, Harare, Zimbabwe, August 10, 2000.
[402] Human Rights Watch interview with Ian Swartz, Windhoek, Namibia, July 16, 2001.
[403] Human Rights Watch interview with Irma (not real name), Windhoek, Namibia, July 18, 2001.

Poliyana Mangwiro, herself from rural Zimbabwe, spoke about the problems women like her face:

> Most black women, particularly in the rural areas, didn’t even go to school. Those women will not even recognize the name lesbian: they will just say, “I have a feeling toward women.” They can’t imagine a whole lot of women without husbands—what a thing! And they have no skills that will help them live on their own.
>
> Lesbians desperately need to know how to do something that will bring them income. Many lesbians are divorced. And if you divorce, you will have no job, no support, no education, and children to care for. Except that if they call you a lesbian, your husband will get custody of the kids, and you will lose them.
>
> Some of these women are looking after three or four children. The society will not give them jobs, and they are forced to turn back to their parents.
>
> We desperately need a project that will develop skills like handicrafts, design, cooking, things that women can do to help them get jobs and work.[404]

We spoke to Gloria, a twenty-three-year-old woman from the rural community of Masvingo, three hundred kilometers from Harare. Shy and reticent, she too did not use the term “lesbian,” but said that she had noticed “these feelings” in herself at the age of seventeen. “Because of not knowing where to go,” she said, “I kept it secret.” At that time, she discovered an advertisement for GALZ in the newspaper, wrote a letter, and received an answer. Not until two years later, in July 2000, did she come to Harare and visit the GALZ Center.

Although she said her visit to GALZ “made me feel better,” Gloria had never had a relationship with another woman, and she had never spoken to other women in Masvingo about her feelings. She believed there might be two or three other women in Masvingo who had similar feelings, but she would not raise the issue with them.

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[404] IGLHRC interview by Scott Long with Poliyana Mangwiro, Harare, Zimbabwe, August 11, 2000.

She is one of a family of several daughters; her father died in 1999. "They want me to get married now, my family, she says: "It is very late. They are expecting me to have a husband, and they have one picked out for me." The extended family ask her mother why Gloria is not married, and say: "We want *lobola*."

Gloria was unsure how she would respond. She feared how her family might react to her feelings: "Maybe they would chase me out. I don't know what they think." But she was also afraid to move to Harare, where "I don't know what I would do."[405]

Mangwiro's lesbian support group—or support group for women with feelings toward women—within GALZ had about twenty members at the time. Many, like Gloria, were from rural areas and only able to attend intermittently.

Mangwiro herself had realized she had desires toward women fifteen years earlier. Her father had forced her into a polygamous marriage as a child. "I was a second wife when I was fifteen, and I ran away when I was seventeen. I didn't know I was a 'lesbian.' But I was going out with my husband's first wife. We were close to each other. It was not a sexual relationship, but we held each other very tight."

After running away, "I came to Harare. I worked here for many years." A foreign friend introduced Mangwiro to GALZ.

In the 1990s, Poliyana married a second time: "Because," she said, "I did not want my father to kill himself." Her second husband was a GALZ member, gay himself and supportive of Poliyana's relationship with her lesbian partner.

"It helps me, in ways, to be married," she told us. "It is easier for a woman to have a husband to point to. But it makes me feel like I'm still in the closet. Everyone knows I am a lesbian. But I feel I have made a compromise. It's our compromises, though, that keep us alive."[406]

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[405] IGLHRC interview by Scott Long with Gloria, Masvingo, Zimbabwe, August 9, 2000.
[406] IGLHRC interview by Scott Long with Poliyana Mangwiro, Harare, Zimbabwe, August 11, 2000.

V. REALIZING RIGHTS: THE CHALLENGE OF SOUTH AFRICA

No one can write about the countries of the region without recognizing South Africa's influence, and difference. Both stem from the same sources: its comparative wealth, the length and example of its struggle against white rule, its diversity, its size. We treat the South African experience in a discrete chapter here to acknowledge its uniqueness, but also to stress how important its model is for the rest of the region. The model is not exclusively positive. States can learn not only from South Africa's successes, but from its challenges and failures in implementing a sweeping commitment to remedy abuses and achieve change.

South Africa has one of the most progressive and inclusive constitutions in the world. It has extended human rights protections across the board, acknowledging the respect due to diversity in a way that the ideologies, prevalent in many countries, of "national unity" or "cultural authenticity" still prevent. In particular, the South Africa government has shown, in the word of law, an unprecedented African commitment to acknowledging and upholding the human rights of lesbian, gay, bisexual, and transgender residents and citizens.

The word of leaders has not always matched the word of law. Activists complain that the South African government has not made public, unequivocal statements against the discrimination lesbian, gay, bisexual, and transgender people still face. Nevertheless, the manipulation of homophobia common elsewhere in southern Africa, while still practiced occasionally in the country, has not become a common feature of political life. South Africa is the only country on the continent to have openly gay and lesbian bars, newspapers and magazines, NGOs and community centers. It even has, in Cape Town, a tourist industry catering to gay visitors. Many gay and lesbian people from surrounding countries told us they hoped, someday, to emigrate to South Africa.

Yet these benefits are only enjoyed in practice by a relatively affluent few. South Africa's promises of equality rose against a background and history of radical inequality. Poverty as grim as the worst shantytowns in Lusaka can be found a few miles, or blocks, from shops and offices as posh as anything in London. That gross disparity cuts across lesbian, gay, bisexual, and transgender lives. The institutions tourists see still cater to a small minority within South Africa. Most of the population is still shut off from accessing them—or from experiencing the freedoms described on paper—by deep economic inequity, social isolation, and cultural exclusion.

Mike Waters, from the opposition Democratic Alliance, a white man and the only openly gay member of Parliament, told our researcher, "There is a vacuum between what the constitution says and what is happening on the ground."[407] From a very different vantage, Joyce, an African, HIV-positive lesbian living in Soweto, and a survivor of multiple rapes and acts of violence, said, "I think our constitution is there—but it's something that's written but is not being practiced."[408]

A. Equality and the Law

To the extent that a more liberal atmosphere for gay and lesbian people has arisen in South Africa, most would attribute it to the constitution's Equality Clause. Derek, a gay man in Cape Town, told us, "Things have gotten easier since the constitution passed. Everyone knows about their rights—not necessarily knowing what they are, but they know they have rights."[409] Activists fought long and hard to secure a constitution containing protections against discrimination based on sexual orientation. Its final passage in 1996 was greeted by celebrations in gay and lesbian organizations and communities.

Writing in 1993, Edwin Cameron, an openly gay South African jurist and now a judge on the Supreme Court of Appeal, had listed the potential consequences for lesbian and gay people of obtaining protection in the final constitution:

- The decriminalization of gay sex acts, by abolishing the common law crimes of sodomy and "unnatural sexual offences," as well as provisions of the Sexual Offences Act which also criminalized such acts;[410]

- A uniform age of consent for homosexual and heterosexual sex;

- Guarantees of free speech and association;

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[407] IGLHRC interview by Scott Long with Mike Waters, Johannesburg, South Africa, November 23, 2001.
[408] IGLHRC interview by Kagendo with Joyce, Johannesburg, South Africa, November 23, 2001.
[409] Human Rights Watch interview with Derek, Cape Town, South Africa, August 5, 2001.
[410] See the Appendix for detailed information on the status of homosexual conduct in apartheid-era South African law.

- Laws against discrimination based on sexual orientation, including [in] such areas as employment, tenancies, provision of public resources and services, and insurance;

- Formal recognition of permanent domestic partnerships, including partner benefits in pensions, medical aid, immigration and insurance; rights of intestate inheritance; fair and non-discriminatory assessment of abilities in relation to adoption and child care; and legal standing to act on behalf of a partner who has lost the ability to make conscious choices.[411]

Almost a decade later, what has actually been won?

In the courts, a great deal. The new South Africa has a powerful court system, in which the Constitutional Court (and, to some extent, the High Court) can strike down unconstitutional provisions and practices, and even rewrite, or "read" new language into, existing legislation. Years of constitutional litigation have turned some of Cameron's hopes into law. The Gay and Lesbian Equality Project, an advocacy and legal service NGO and the successor organization to the National Coalition for Gay and Lesbian Equality (NCGLE), proudly lists cases—many of which it filed or participated in—which have brought forward the judicial understanding of sexual orientation and the law.

Most importantly, the first of Cameron's expectations has been fulfilled:

> 1998: *National Coalition for Gay and Lesbian Equality et. al. v Minister of Justice et. al*. The Constitutional Court of South Africa overturned the common-law offence of sodomy; section 20A of the Sexual Offences Act; the listing of sodomy as an item in schedule 1 of the Criminal Procedure Act; and other mentions of sodomy in law.[412] The court found that they violated constitutional protections for equality, privacy, and dignity. The criminalization of consensual homosexual conduct disappeared from South Africa.

Other cases have formalized recognition for lesbian and gay partnership rights:

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[411] Edwin Cameron, "Sexual Orientation and the Constitution: A Test Case for Human Rights," *South African Law Journal,* 1993, p. 467.

[412] For detailed information on these provisions, see the Appendix.

1998: *Langemaat v Minister of Safety and Security*. The High Court ordered that a state medical scheme recognize the same-sex relationship of an enrolled member and extend spousal benefits to the partner.[413]

1999: *National Coalition for Gay and Lesbian Equality et. al. v Minister of Home Affairs et. al*. The High Court and, on appeal, the Constitutional Court ordered that same-sex partnerships be recognized for the purpose of granting residence permits to the foreign partners of South African citizens and permanent residents. The decision overturned section 25(c) of the Aliens Control Act, which restricted those immigration benefits to married couples alone. The Constitutional Court thus recognized "permanent same-sex life partnerships," saying that in immigration, at least, they deserved the same benefits as married people.[414]

1999: *Martin v Beka Provident Fund*. The Pension Funds Adjudicator—a special division of the High Court of South Africa—ordered that same-sex partnerships be recognized for the purpose of receiving survivors' benefits from pension funds. Importantly, the decision held this right does not depend on an explicit direction from the deceased partner in a will.[415]

2002: *Satchwell v The President of South Africa and the Minister of Justice*. The High Court and, on review, the Constitutional Court found that same-sex partners must be included in benefits given to the spouses of judges under the Judges Remuneration Act. The Constitutional Court ordered the act changed to include, after "spouse" in the delineation of benefits, the additional words "or partner, in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support."[416]

[413] *Langemaat v Minister of Safety and Security and Two Others,* case no. 19077/97, 4 February 1998.
[414] *National Coalition for Gay and Lesbian Equality and 13 Others v The Minister of Home Affairs et. al.,* case no. 3988/98.
[415] *Martin v Beka Provident Fund*, case no. PFA/GA/563/99, in the Tribunal of the Pension Funds Adjudicator.
[416] *Satchwell v the President of South Africa and another,* case no. CCT45/01.

A series of decisions in the 1990s gave a gay or lesbian parent equal rights in custody decisions about children after a divorce.

> 1993: *Van Rooyen v Van Rooyen*. Even before the Equality Clause in the new Constitution entered into force, a court ruled that a divorced mother could not be denied access to minor children because she was participating in a lesbian relationship.[417]
>
> 1998: *Greyling v Minister of Welfare*. The High Court overturned a magistrate's decision removing a child from a lesbian mother and giving her to her grandparents solely because of fear that the child would suffer psychological damage because of the lesbian relationship.
>
> 1998: *Mohapi v Mohapi*. The High Court awarded full custody of a child after a divorce to the mother, now involved in a stable lesbian relationship.

A recent decision says that gay and lesbian people can care for children not just as *individuals*—but recognizes adoption rights for same-sex *partners:*

> 2001: *Du Toit and De Vos v Minister of Social Welfare*. A High Court judge ordered "read into" the Child Care Act and the Guardianship Act new language which allows lesbian and gay couples to be joint, legal parents of a minor adopted child. Specifically, he ordered (similarly to *Satchwell)* that "spouse" in the acts be complemented with the words "or the two members of a permanent same-sex life relationship." At the time of writing, the case is now awaiting review by the Constitutional Court (see also below).[418]

[417] *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W)A*,* Witwatersrand Local Division, case no. 22547/92. The ruling also found, however, that the lifestyle could present a "danger" to minor children and forbade the mother from sharing a bedroom with her partner while the child was in the house. This determination would likely be found discriminatory today. This and other decisions were significant, but (unlike *De Vos v Minister of Welfare,* below) mostly unreported—meaning they did not establish precedents throughout the judicial system.

[418] High Court of South Africa, Transvaal Provincial Division, *Du Toit and De Vos v Minister of Welfare,* case no. 23704/2001.

Evert Knoesen, coordinator of the Equal Rights Project at the Equality Project, describes what has been the NGO's long-term litigation strategy:

> First it was essential to get sodomy laws repealed. They were a basis, clearly, for relegating lesbians and gays to a second-class status in the law. After that, we would move on to partnership recognition. To approach this through immigration benefits as a beginning meant getting them recognized in the realm where there would be the least financial implications, and the state would be least threatened. From there, we would move into areas where we would leverage recognition of real, economic benefits for gay and lesbian people, and couples.[419]

So far, the strategy has been a success. Yet questions arise. Despite the governing African National Congress (ANC) party's formal commitment to gay and lesbian rights, the state has contested in court almost every single precedent-setting case meant to define those rights under the Equality Clause—including defending the constitutionality of sodomy laws themselves. When the High Court has found against the government, it has regularly appealed. "They fight everything they can and some things they can't," says Evert Knoesen.[420] Although the government's determination to appeal decisions to the Constitutional Court arguably assists in arriving at a single ruling binding on all other courts within the judicial system, such an insistent state combativeness can also undermine a culture of rights.

Moreover, the litigatory approach to change is slow, halting, and subject to sudden derailments. Knoesen says, "We live in fear of rogue lawsuits that might challenge courts in ways they, or we, aren't ready for." The fear reflects the piecemeal manner of pursuing protections through the courts. Judges rewrite the language of laws bit by bit, decision by decision, assembling a patchwork of uneven progress; but legislation attuned to the spirit of the Equality Clause could achieve quicker, more comprehensive change.

Nevertheless, a range of positive protections have indeed been written into legislation:

- The Labour Relations Act (1995) bars unfair dismissals, including dismissals on the basis of sexual orientation.

[419] IGLHRC interview by Scott Long with Evert Knoesen, Equality Project, Johannesburg, South Africa, November 21, 2001.
[420] Ibid.

- The Employment Equity Act (1998) bars unfair discrimination "in any employment policy or practice," which would include benefits such as pensions and insurance, on all the grounds listed in the Equality Clause, as well as "family responsibility" and "HIV status."

- The Medical Schemes Act (1998) defines a "dependant" so as to include same-sex partners, as well as unmarried heterosexual partners.

- The Rental Housing Act (1999) bars discrimination in rental housing on all the grounds prohibited in the Equality Clause, including sexual orientation.

- The Domestic Violence Act (1999), allows any person in a "domestic relationship"—effectively meaning any cohabitation between people who are not close blood kin but living in the "same residence"—to get a protection order against abuse. It replaced an older Family Violence Act which had stipulated that protection orders were only available to married people.

Most sweepingly, the Promotion of Equality and Prevention of Unfair Discrimination Act (2000), or "Equality Act," commits the government to "promote equality" on all the grounds in the constitution's Equality Clause. Barring discrimination in all spheres of state activity, it also implements the constitutional ban on discrimination by private actors. However, the specific mechanisms for redress created by the act focus on gender-, race-, and disability-based discrimination.[421]

Yet serious legal disparities remain.

Homosexual sex was legalized by the Constitutional Court's decision; but the age of consent remains unequal—sixteen for heterosexuals, nineteen for men having sex with men.[422]

Moreover, South African law on rape is confused and discriminatory. Rape is defined as non-consensual penetration of a vagina by a penis. Other forms of rape—including the rape of men by men, or women by women—would be charged only as "indecent assault," which carries a lower penalty.

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[421] See Shadrack B. O. Gutto, *Equality and Non-Discrimination in South Africa: The Political Economy of Law and Law Making* (Cape Town: New Africa Education, 2001), for a detailed discussion of the act, its strengths and limitations.

[422] It appears that the confusion of present law does not stipulate an age of consent for women having sex with women.

Finally, the courts' recognitions of gay and lesbian partnerships in specific situations are still far from leading to a comprehensive rewriting of laws on marriage—or a clear understanding of what legal status same-sex partnerships actually can enjoy.

Encouragingly, the South African Law Commission has, at the government's request, undertaken a major review of the law on sexual offenses, engaging in wide consultation on a new Sexual Offences Act.[423] Draft proposals included the redefinition of rape in gender-neutral terms, including criminalization of homosexual rape. While the process has been subject to long delays, a final report on the commission's recommendations was due to be published in time to enable the Department of Justice and Constitutional Development to introduce a bill before Parliament in 2003.[424]

Yet parliamentarian Mike Waters still points to "insufficient alignment" between the constitution and the laws. "And beyond law," he asks, "what happens on the level of policy? Do they actually look at policies and run them all through the filter of every status in the clause to see who might be directly or indirectly discriminated against? Or do they quietly leave some of them, like sexual orientation, out?" Waters has asked a formal question in Parliament of every minister, demanding whether their department retained regulations discriminating against gays, women, or the disabled. "If I were the president," he says, "I would ask every minister to go through all regulations and see where they contradict the constitution. There should be a delegated researcher in every department to evaluate policy in constitutional terms."[425]

Parliament's docket is admittedly overcrowded—and despite that, legislative progress has been made. Yet the issues go beyond the letter of the law. They cut to the core of how the government reaches out to, and defends, the people it claims to represent. Many people interviewed voiced skepticism about the government's commitment to the rights of gay and lesbian people, given the relative silence of officials on those issues—including national, provincial, and city representatives; and the lack of resources steered toward safeguarding those rights.

[423] The commission, a body appointed by the chief justice of the Constitutional Court, and mostly composed of jurists and legal academics, develops discussion papers offering legislative proposals for Parliament's consideration.

[424] *See*, minutes of the briefing by the the South African Law Commission to the Parliamentary Joint Monitoring Committee on Improvement of Quality of Life and Status of Women, October 18, 2002, at www.pmg.org.za, retrieved October 25, 2002. *See* also, the South African Law Commission website at www.server.law.wits.ac.za/salc/.

[425] IGLHRC interview by Scott Long with Mike Waters, Johannesburg, South Africa, November 23, 2001.

B. Persisting Prejudice, Ongoing Abuse

1. Violence and discrimination in the community

Law and litigation have not filtered down to the level of everyday life. The fact of prejudice against lesbian, gay, bisexual, and transgender people persists, and the state has done little to counteract it.

In communities across South Africa, people reported to us that a concept of homosexual conduct as "un-African" remains powerful, and repressive.[426] Many of our interviewees, straight and gay, called it the single most common condemnation they hear.

Nonceba, a heterosexual African woman from Eastern Cape, told us that "Folks say homosexuality was brought in by whites to spoil our culture. It is evil to mention it at all."[427] Diwysa, a heterosexual African woman from the same province, described how homosexuality is seen within her rural community: "People say it is a demon. We don't talk about sex to begin with in black culture, and our elders do not mention homosexuality at all…. People use culture as an excuse not to understand."[428] Tsembani, an African gay man who is the coordinator of the HIV/AIDS Program at the Durban Gay and Lesbian Community Health Centre, says, "When I do my trainings [for healthcare providers, on gay and lesbian rights] people always say to me 'homosexuality does not exist within the black culture,' that it 'came with white culture.' … They try to put the culture up as a shield.'"[429]

Thulani Mhlongo, a gay man from Soweto who leads the Township AIDS Project and SOHACA (Soweto HIV/AIDS Counselors Association) and is a longtime activist for gay and lesbian rights in South Africa, encounters such attitudes often. He says, "The oldest argument against homosexuality is that it is

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[426] The very identity of its constituent communities is a politically contested issue in South Africa. In this chapter, in accordance with prevailing usage in South Africa, Human Rights Watch and IGLHRC will use "black" to refer to all three subcategories of those not previously designated "white" in South Africa, including those of African or Indian ancestry as well as those of mixed race. "African" will be used to refer specifically to those of African ancestry and "coloured" for those of mixed race. However, some informants quoted employed the term "black" exclusively to mean those of African ancestry.

[427] Human Rights Watch interview with Nonceba, Eastern Cape, South Africa, July 24, 2001.

[428] Human Rights Watch interview with Diwysa, Eastern Cape, South Africa, July 24, 2001.

[429] Human Rights Watch interview with Tsembani, Durban, South Africa, July 17, 2001.

not a part of traditional African culture, especially in rural areas. But I work with traditional healers who acknowledge that it has always existed."[430]

Charmaine, a member of an African lesbian support group organized in Gugulethu by the Triangle Project (a Western Cape lesbian, gay, bisexual, and transgender advocacy and service organization), told us: "In the black community it says that there is no such thing as gay and lesbian. In white and coloured communities, there is no culture and so they learned about things in school. Black communities didn't have the same kind of education and so we didn't have the opportunity to learn about these things in school." Another member of the support group said, "For example I was told in school that bisexual meant someone with two sex organs. It wasn't until I got to the Triangle Project that I understood."[431]

Yet the power of "tradition" is not unique to African life in South Africa. The comment that there is "no culture" in coloured communities may imply that there is no codified body of customary law there; it also may be a way of saying, disparagingly, that mixed-race people lack cohesive traditions of their own. Some coloured people endorse comparable ideas as well. Vainola Makan, a coloured lesbian who works with Khib Women's Center—an African women's organization dedicated to the empowerment and emancipation of women—stressed that coloured communities do not focus on custom or tradition as sources of value. "If you are part of a Zulu or Xhosa or Venda commmunity it will be more difficult for you." On the other hand, another feminist activist, Bernedette Muthien, vigorously disagreed:

> If coloured communities are not hierarchical and patriarchal then I don't know what is. Within that, they rigidly police and socialize you, so much so that you are struggling around your sexuality and cannot be open and fluid and deal with a larger sexuality…. Coloured communities are governed by a Christianity that is just as patriarchal as customary law.[432]

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[430] Human Rights Watch interview with Thulani Mhlongo, Soweto, South Africa, July 12, 2001.

[431] Human Rights Watch interview with members of the Triangle Project's Black Lesbian Support Group, Gugulethu, South Africa, August 3, 2001.

[432] Human Rights Watch interview with Bernedette Muthien, programme convenor of the Applied Programme at the African Gender Institute, Cape Town, South Africa, August 2, 2001;and Human Rights Watch interview with Vainola Makan of Khib Women's Center, a black women's organization dedicated to the emancipation of women, Cape Town, South Africa, August 2, 2001.

Meanwhile, Vasu Reddy, of the Durban Gay and Lesbian Community Health Centre, spoke to Human Rights Watch of the role of the traditional in Indian life in South Africa: "The challenge from within Indian communities is a debate that homosexuality is generally unnatural, deviant, not normal…. There is a tightly knit family structure, a very patriarchal structure, and homosexuality challenges that. Only in the last ten years has there been a kind of visible Indian lesbian and gay subculture in South Africa."[433]

Whites in South Africa also have a "culture," or several cultures; some can be as rigidly repressive as the African customary systems whites describe and, when convenient, decry. Mazibuko Jara, formerly an activist with the National Coalition for Gay and Lesbian Equality, told us,

> Do you think if you go to Northern Province or Pietermaritzburg and talk to some little group of Afrikaner farmers you'll find they are so loving and accepting of their gay sons, where in the townships they are not? Don't be ridiculous. It's a racist notion. Homophobia doesn't come from one culture as opposed to another. It comes from isolation and traditionalism. . . . Apartheid brought homophobia in because they felt threatened and they wanted to circle the wagons, hang on to the Afrikaner's traditional family with a servant wife bearing sixteen sons to the farmer…. And then homophobia came to the townships because apartheid cut them off from communication and change, and put them on the defensive where the family was all people had to hang on to. It is more violent [for LGBT people] in the townships because there is more violence generally in the townships. But there is not more hatred there.[434]

Our own interviews suggested that a homophobia phrased in "cultural" terms may also reflect personal and even professional feelings of powerlessness. As a way of sounding out some deep-set ideas about sexuality and culture, Human Rights Watch researchers conducted interviews with more than a dozen heterosexual women in two groups from the Eastern Cape regarding their feelings towards lesbians and gay men. The interviews were conducted on the condition of anonymity and with the assistance of an NGO. Most of the women

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[433] Human Rights Watch interview with Vasu Reddy, Durban Community Lesbian and Gay Health Centre, Durban, South Africa, July 17, 2001.

[434] IGLHRC interview by Scott Long with Mazibuko Jara, Johannesburg, South Africa, November 24, 2001.

interviewed worked as organizers and peer educators addressing violence against women in their cities and towns throughout the Eastern Cape.[435]

The women were almost uniform in their discomfort with lesbianism and homosexuality. One woman described homosexuals as loud, alcoholic, and untrustworthy.[436] Another said, “They are possessed by the devil, they have forked tongues. If we find them, we beat it [the devil] out of them. If we can’t, we drive them out of our village.”[437]

The more the women talked about their feelings about homosexuality, however, the more evident their frustration became over taboos on discussing sexuality that hampered their work on violence against women. The enforced silence contributed to women’s general lack of control over their sexuality—and lesbians seemed to some speakers, on further discussion, to be victims of that silence as well. “People are very quiet,” one woman said. They don’t want to talk about sexuality. They don’t want to talk about being raped.”[438] Another woman from a rural community added, “But there are lesbians, they hide because they fear the repercussions. They would be ostracized. Besides we can’t talk about it because women take whatever men say. Women don’t have a voice even if they have an idea.”[439]

Silence translates into isolation and abuse. The situations some young gays and lesbians face at home or in school are similar to those their counterparts confront in Zimbabwe or Namibia. Some people are bullied or commanded to change appearance or behavior. Lamour, a young lesbian in Durban, told us: “There was a lesbian at school who wanted to wear pants, not skirts. The rules said pants were not for girls. The teacher didn’t let her write her exams unless she wore a skirt.”[440]

Lebo, in Durban, told Human Rights Watch that “there’s prejudice at my home. My gay friends can’t visit, my father chases them away. My mother would be willing to accept me, but my father changes her response. I enjoy the gay life but it’s hard to have only this life. I’m afraid the gay life will drive me

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435 The women were mostly African; some coloured women also participated.

436 Human Rights Watch interview with “Nockwaka” (not real name), Eastern Cape, South Africa, July 24, 2001.

437 Human Rights Watch interview with “Phumi” (not real name), Eastern Cape, South Africa, July 25, 2001.

438 Human Rights Watch interview with “Phumi” (not real name) Eastern Cape, South Africa, July 25, 2001.

439 Human Rights Watch interview with “Thokozile” (not real name), Eastern Cape, South Africa, July 24, 2001.

440 Human Rights Watch interview with Lamour, Durban, South Africa, July 13, 2001.

out of my home." His parents had heard that he was gay from gossiping neighbors, and confronted him. "They said, 'Choose your family or this lifestyle.'"[441]

"Maria," a twenty-three-year-old lesbian in Mamelodi, was driven out of her home in 1996 by her mother when she came out. She reports that later, in school, "Once the kids said to me I was a lesbian because I had a vagina that didn't close. It was overheard by a teacher, who called me to the office and asked point blank if I was a lesbian. I said yes. I was suspended from school about a week later when another girl and I were accused of sleeping together. The other girl was suspended also. But I was strong enough to go to school in that environment. No one will chase me away."[442]

Pubs and gathering places are often dangerous. Simon, a gay man in Mamelodi, says, "I get harassed in pubs now by straight men—they will come on to me and then if I don't accept the flirtation, they might hit or slap me. I often fight with boys after clubbing; straight men hang outside or inside the clubs. I think the police equate rape and gay sex. If you go to them and say you were raped, they will say you wanted to have sex, that you went wherever you were just to have sex."[443]

Beverly Ditsie, who lives in Soweto and is a long-time lesbian leader in Gauteng and nationally, says that lesbians "take a risk going to the shebeen. They can stand seeing an effeminate gay boy come in—they'll say, oh, he's a moffie. But when the lesbians come in, they start the harassment. The men keep coming on to them, saying 'Well, what are you?' Lesbians can say, 'We are like them, the gay boys,' and the straight men still come on to them."[444]

Tutuzeni, a lesbian in Gugulethu, told us, "The men don't want the butch lesbians to enter their environment. They fight always with butch lesbians because they think the lesbians want to be men and they are trying to protect their territory."[445]

Harassment and violence on the streets is a steady theme of people's stories. Palesa, twenty-five years old, says,

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[441] Human Rights Watch interview with Lebo, Durban, South Africa, July 13, 2001.

[442] Human Rights Watch interview with "Maria" (not real name), Mamelodi, South Africa, July 11, 2001.

[443] Human Rights Watch interview with Simon, Mamelodi, South Africa, July 11, 2001.

[444] Human Rights Watch interview with Beverly Ditsie, Johannesburg, South Africa, August 2, 2001.

[445] Human Rights Watch interview with Tutuzeni, Gugulethu, South Africa, August 3, 2001.

> I have found it to be more unsafe being a lesbian in public, out with a girlfriend, than when by myself. Sometimes when I am walking in town, I have to make sure we don't kiss or hold hands because of what people will say. I feel like I have to protect her and make sure she gets home safe… I don't usually walk with straight friends, but with my lesbian friends because we are used to the harassment. But if I walk with straight people they don't know what to do. With my lesbian friends we sometimes swear back, but that's not my style. I don't like unnecessary fights. And men threaten and actually rape them because they are lesbians.
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> I go to town with other lesbians to feel safe. To their homes[,] ... or I will just stay at home. I don't go to clubs really. I would love to, but I don't think they are safe…. I don't feel safe being out at night as a lesbian.[446]

Pat, a coloured lesbian from Mitchell's Plain, says that many older lesbians she knows "don't know what is going on outside and they are scared to go out…. They stay at home, and get drunk. And feel safe."[447]

Noni, an eighteen-year-old lesbian, says that in Mamelodi where she lives,

> There is an older gay man named Jacob who gets harassed a lot. I think they leave me alone, especially because Jacob has publicly supported me. He tells them on the street that he loves and has accepted me. Most people in the community don't talk to Jacob.
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> Once last year, when I was seventeen, the boys in the street wanted to beat me and my friends up. Four boys came up to us and told us that they were going to take us and rape us…. They had told some of my friends before that they were going to rape me. My friends and I had gone to the shop and these boys got angry. They asked, why are you coming in here? Go away. We're going to take you. Jacob helped us, he told them to leave us alone, that they would have to deal with him if they were going to try and hurt us. These boys are afraid of Jacob.

[446] Human Rights Watch interview with Palesa, Johannesburg, South Africa, July 28, 2001.

[447] Human Rights Watch interview with Pat, Gugulethu, South Africa, August 3, 2001.

> We went to the police station to report it right away. I was worried that if I didn't report it, and was walking around at night, these boys would try it again.[448]

The police were fair and helpful, she says: but she adds, "I wanted to find more support. But there was nothing."

Harassment does not just come from within one's own community; and it may intersect with other forms of hatred. Katlego, twenty, from Mamelodi, says she had few problems in the township. But when she moved to Pretoria and attended a predominantly white school, "I was harassed at school regularly, either because of my sexuality or because of my race. I was called both 'kaffir' and 'moffie'—same folks saying both things." In Pretoria, she says, "I had stones and bottles thrown at me."[449]

The abuse lesbian, gay, bisexual, and transgender people face can take brutal forms. Most lesbians we spoke to believe they are disproportionately likely to be victims of rape. In the absence of adequate statistical investigation, the evidence is anecdotal; the fear, though, is palpable. In Cape Town, Bernedette Muthien says,

> Lesbians are particularly targeted for gang rape. African lesbians are more likely to be raped as lesbians in the townships. To what extent are coloured lesbians also targeted for rape because of their sexual orientation? There are no statistics for this, I don't know what percent of coloured lesbians are targeted for corrective rape action. Growing up, I never heard that lesbians were targeted in this way and so I want to know when that started happening. Gangsterism has always existed in the townships, so you can't attribute it to that. I don't know why black lesbians are targeted more, either. I'd like to know how many women are being raped by brothers, fathers, etc., in coloured townships. Why is no one studying this? Has it just been under-reported, not studied, or what?[450]

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[448] Human Rights Watch interview with Noni, Mamelodi, South Africa, July 11, 2001.
[449] Human Rights Watch interview with Katlego, Mamelodi, South Africa, July 11, 2001.
[450] Human Rights Watch interview with Bernedette Muthien, Cape Town, South Africa, August 2, 2001.

There is a massive rate of rape and gender-based violence in South Africa.[451] It is difficult to distinguish particular factors and prejudices contributing to individual cases. Collection of statistics by the South Africa Police Service (SAPS) is often insufficiently detailed to allow tracking different types of offenses in ways that could inform policy and state response to abuse. As with many other types of offences, no specific 'crime code" exists to identify assaults believed to based on sexual orientation in the general collection of crime statistics; nor are stations mandated to collect such reports.[452] Beverly Ditsie says, "There are no statistics being maintained" by police or other professionals "about rape based on women's sexuality. No categories at all. It's not like they ask, even."[453]

Joyce works with people in Soweto on changing their sexual behaviors and norms. She is also a mother and a lesbian openly living with HIV/AIDS. She has been gang-raped. And, she says,

> My daughter was raped when she was six because of my coming out and telling people about HIV. They were trying to shut my mouth…. I was only happy that she was not infected, although she was young. It makes me angry but I'm working on that. It's been three years but she's fine and she's a very clever child….

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[451] See *Violence Against Women in South Africa: State Response to Domestic Violence and Rape* (New York: Human Rights Watch, 1995), *South Africa: Violence Against Women and the Medico-Legal System* (New York: Human Rights Watch, 1997), and *South Africa: The State Response to Scared at School: Sexual Violence Against Girls in South African Schools* (New York: Human Rights Watch, 2001).

[452] For other, comparable shortcomings of SAPS's crime statistics, see *Unequal Protection: The State Response to Violent Crime on South African Farms* (New York: Human Rights Watch, 2001), pp. 140-143. SAPS's collection and analysis of statistical data have been widely faulted. After developing a new "crime code" list in the 1990s SAPS was slow to implement it, and the codes it contained did not correspond to legal requirements for the collection of data at local stations: for instance the Domestic Violence Act (Act 116/1998) obliged police to collect domestic violence reports, but in the absence of a crime code those went unreflected in centrally collated statistics. SAPS actually suspended publishing its crime statistics for a period in 2000, on the grounds that they were inconsistently collected (see Gavin Stewart, "Tshwete promises to publish statistics," *Dispatch,* September 1, 2000). Publication was later resumed—though it is not clear that data collection has significantly been rectified—but since then statistics have only offered estimated rates per 100,000 of population without giving absolute numbers.

[453] Human Rights Watch interview with Beverly Ditsie, Johannesburg, South Africa, July 28, 2001.

> I was working at Baragwanath [Baragwanath Chris Hani Hospital in Soweto] doing voluntary work…. Most of the people I was seeing were from my community. So [the rapists] were trying to say, "Look, you don't have to come here, you're not a doctor, you don't have to tell us how to live although we're HIV-positive."[454]

Joyce says,

> in Soweto when you come out and say, "Hey, I'm a lesbian," …they're always seeing lesbians and asking "Where are they from? They're not from here, we don't see people like this." Then you find out that it's because of their sexuality why women are being raped. Even men who are gay are being raped….

Des'ree, a member of the Triangle Project's Black Lesbian Support Group in Gugulethu, told Human Rights Watch that

> About a year ago, I went out with my girlfriend, we went out and had a few drinks. We were about to leave to go back to my home, and as we were walking out, a guy followed and grabbed my girlfriend. He asked me if it was OK, he just wanted to talk to her, and I said fine—they were neighbors. I was standing near them and I heard her say she didn't want to speak to him any more. I went to say, she doesn't want to speak to you, and then the whole thing started—where he knew we were going out together, and he was trying to get to me through her. He told me I was depriving him of a girlfriend and told us that he wouldn't let her go, and we struggled with him for a while and I saw him getting more violent—I saw him pulling out what I thought was a knife so I ran home and got my brother and a few of his friends…. And they went with me and beat him up. After that he never bothered us again because he knew that I am protected. We didn't go to the police.[455]

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[454] IGLHRC interview by Kagendo with Joyce, Johannesburg, South Africa, November 23, 2001.

[455] Des'ree, in a Human Rights Watch interview with members of the Triangle Project's Black Lesbian Support Group, Gugulethu, South Africa, August 3, 2001.

Another member of the support group said: "Quite a lot of lesbians have been raped. Some of them are confused, scared to go to the police, they won't do anything about it."

Violence within relationships is also a recurrent story among lesbians and gays in South Africa. Tutuzeni, in Gugulethu, said butch lesbians "believe that they have to hit their girlfriends." The law now gives same-sex partners the same protections as heterosexuals. Yet many do not know about those protections, or fear to use them. Charmaine, in Gugulethu, told us:

> What's happening in the townships, you have the Domestic Violence Act and that is something that can help straight people, but when the straight women are preaching about the Domestic Violence Act, they never talk about it as though it would include lesbian relationships. Many lesbians think it is only for straight women. If your girlfriend is beating you, you will think, I can't go to the police and if you do go, the police will say, "What are you doing?"[456]

Pat, a lesbian remembering a relationship with a physically abusive lover, says, "I never went to the police because I did not know that they would be able to help me."[457]

2. State responsibilities: official responses to abuse

Victims' experiences with the police, and with other government agencies, differ. They are inflected by race and class and gender—and by one's ability to articulate and defend one's own rights forcefully. Adie, a white activist in

[456] Human Rights Watch interview with members of Triangle Project's Black Lesbian Support Group, Gugulethu, South Africa, August 3, 2001. Many complaints about state failure adequately to prepare criminal justice personnel have arisen in the implementation of the Domestic Violence Act (DVA) since its 1998 passage. One independent study determined that "there is no movement within the government to bolster the DVA by providing resources and training," and found an "alarming lack of infrastructure and resources within the system" as well as "demotivated, untrained and frustrated law enforcement personnel." The study concluded that "the Domestic Violence Act is inaccessible to many people," an inaccessibility only compounded for those already disposed to mistrust criminal justice processes. See Penny Parenzee, Lillian Artz, and Kelley Moult, *Monitoring the Implementation of the Domestic Violence Act: First Research Report 2000-2001,* based on research conducted by the Consortium on Violence Against Women (Institute of Criminology, University of Cape Town; Gender Project, Community Law Centre, University of the Western Cape; and Rape Crisis Cape Town), 2001, pp. 105-113.

[457] Human Rights Watch interview with Pat, Gugulethu, South Africa, August 3, 2001.

Durban, describes what happened after she was assaulted one night: "We went to the Sunnyside police station to lay a charge." When she told the policeman what happened, he "turned around and in his broken English said, ah, yes, yes, because they called you a lesbian. And the entire police station came to a standstill. What it told me was that there had been a workshop in that police station about gay and lesbian rights. He didn't just ignore it. It's not like in Zimbabwe where you fight the police and then you think I'll go to the justice system and nobody wants to hear it…. Here we have recourse."[458]

Thulani Mhlongo, who does HIV/AIDS counselling in Soweto, says,

> At this point I would be comfortable going to the police. We encourage gay men to report harassment and abuse to the police. Here is an example of how things have changed recently. Men have been denied service at a public clinic by a Muslim doctor, because they wore earrings. I talked to the clinic manager; there was a witness who saw what happened. He told me to come back, at which point the doctor apologized. I think that happened because we told them that we would go to the Equality Project and make a court case if the behavior continued.[459]

Others report different experiences. Joyce, a victim of multiple rapes, says,

> You don't know if you'll get good police. There are good policewomen and men, but it's hard to find them…. Some will just laugh. But if you know your rights, if you start telling them "I'm going to report you and I know you have to help me and if you don't I'm going to take it further," that's when they'll say, "No, sorry." But if you don't know your rights, they're not scared.[460]

The old South African Police (SAP) were reformed and demilitarized in 1994, and renamed the South African Police Service (SAPS). The 1995 South African Police Service Act (Act 68/1995) created Community Police Forums and Boards to strengthen relationships between police and the people they

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[458] Human Rights Watch interview with Adie, Durban, South Africa, July 15, 2001.

[459] Human Rights Watch interview with Thulani Mhlongo, Township AIDS Project/Soweto HIV/AIDS Counselors Association, Soweto, South Africa, July 12, 2001.

[460] IGLHRC interview by Kagendo with Joyce, Johannesburg, South Africa, November 23, 2001.

served. In 1995, SAPS banned sexual orientation-based discrimination in internal employment.[461]

SAPS has struggled to create a culture of rights awareness within its ranks. Between 1998 and 2000, the service developed a program on "Human Rights and Policing," with a package of materials to be distributed to all police stations throughout the country. The materials (including videos, posters, and booklets) mentioned sexual orientation among constitutional equality protections.[462] Although SAPS promised direct trainings to accompany the packages, it was slow to develop a cadre of trainers and begin conducting workshops; it also confronted widespread illiteracy and indifference among officers.[463] Outside analysts noted that officers who only received the packages but did not undergo trainings showed little attitude change.[464] And representatives of communities protected by the Equality Clause were rarely consulted about materials or trainings.[465]

Few state agencies, indeed, have invited or funded trainings by lesbian, gay, bisexual, and transgender organizations. "Where it has happened, LGBT groups have had to advocate for [trainings], then pay for the training themselves," says Wendy Isaack of the Equality Project.[466]

The failure of SAPS to engage in outreach has contributed to continuing mistrust. Suspicion of the police is widespread, based on a past in which—as Beverly Ditsie observes—they were seen as "really only there to protect white properties and businesses…. I think it is a general sentiment throughout the country that you do not trust the police."[467] But non-white LGBT people, at the

[461] See http://www.mask.org.za/SECTIONS/AfricaPerCountry/ABC/south%20africa/south%20africa_021.htm, retrieved October 29, 2002.

[462] See http://www.saps.org.za/17_policy/19_humanrights/index.htm, retrieved October 29, 2002.

[463] Lillian Artz and Barbara de Oliveira, "Policing," in *South African Human Rights Yearbook*, Vol. 8 (Durban: Center for Socio-Legal Studies, University of Natal, 2000), p. 189.

[464] Isabelle de Grandpre, "Human Rights and Policing," *Democracy Watch* (publication of the Center for Socio-Legal Studies, University of Natal), Vol. 7, 1999.

[465] IGLHRC interview by Scott Long with Wendy Isaack, Equality Project, Johannesburg, South Africa, November 21, 2001.

[466] Ibid.

[467] Human Rights Watch interview with Beverly Ditsie, Johannesburg, South Africa, August 2, 2001.

least, have double reasons to distrust them: not only a history of racism, but a history of police persecution of gays and lesbians.[468]

Recent incidents have perpetuated that mistrust. On August 17, 2002, police raided a popular Johannesburg gay club, Therapy, allegedly for liquor violations. Police reportedly called customers “fags” and “moffies”; they described the club as a “fag joint”; drag artists employed by the club, and customers found to be carrying condoms, were mocked repeatedly by officers who searched the patrons.[469]

Such accounts of homophobia make many lesbian, gay, bisexual, and transgender people reluctant to report crimes to the police. Nonhlahla Mkhize of the Durban Gay and Lesbian Community Health Centre says, “If you are a lesbian and go to the police and say you were bashed by a guy they are likely to file it, but if you say it was with another woman—they start asking you a thousand questions instead of checking it out and following up: ‘What was the person doing, what did you say?’ And it becomes your fault.”[470]

Beverly Ditsie says there is good reason not to go to the police. “I don’t think the cops presently have a consciousness about violence against lesbians…. They don’t care if you were targeted. Unless it is to make it your fault—did you take the man’s girlfriend or wife? Is that why he tried to beat you up and rape you? They are always asking why you were being assaulted, instead of, you were assaulted and we can help you.”[471]

Lamour, in Durban, told us one story:

> I was fighting with a taxi driver. The driver took me on a long indirect route, he made me wait while he dropped off others—I was afraid to get out along the way and so I stayed in the taxi. The driver kept looking at me in the rear-view mirror, then he started calling me a lesbian. At first I thought he knew me, because I couldn’t figure out how else he would know that I was gay. But I told him that I would report him for what he said and the way he had treated me. So

[468] See Glen Retief, *Policing the Perverts: an exploratory investigation of the nature and social impact of police action towards gay and bisexual men in South Africa,* research report submitted to the Institute of Criminology at the University of Cape Town and to the Human Sciences Research Council, March 1993.

[469] “Homophobic police raid Therapy,” at http://www.equality.org.za/news/2002/-20020819therapy.htm, retrieved October 29, 2002.

[470] Human Rights Watch interview with Nonhlahla Mkhize, Durban, South Africa, July 20, 2001.

[471] Human Rights Watch interview with Beverly Ditsie, Johannesburg, South Africa, August 2, 2001.

> I took down his registration number, and many of the other people in the taxi supported me. But when I went to the police, they laughed in my face…. They said, "Why are you going out with a woman, why are you doing this?"[472]

Tutuzeni, in a group interview in Gugulethu, confirmed the atmosphere of mistrust: "Being a lesbian and going to the police—ach!" And another voice intervened: "It's useless to go to the police and report. The police laugh at you and say you are a girl, or the police can take you to the jail, they don't care about lesbians."[473]

3. State responsibilities: community education

Others note that the state has done little to combat community prejudices against lesbian, gay, bisexual, and transgender people. Asked what would make her life easier, "Maria" said: "If people accept us: community education."[474] Member of Parliament Mike Waters says, "The government's role should be to educate people. People see gays as promiscuous and deviant, still. The minister of education has shown courage in introducing, against a Christian backlash, sex education in schools, including some information on sexual orientation. But there is not much in the way of diversity education or rights education."

One student in Durban finds existing school programs ineffectual. "Schools should have a discussion about gay issues as part of the curriculum. Not all kids know about it. Some don't know the word homosexual. When kids come out then they would have some support."[475] Tumi told us: "The same as HIV/AIDS education has been integrated into the school curriculum, so should queer issues."[476]

Palesa said the government should create public "campaigns to talk about homosexuality. So that people can see we are not evil, we are people as normal as they are…. We are a part of South Africa, young people are growing up as lesbians and there is not so much information for them. They don't talk about safer sex for them, only for straight people…. The constitution protects us but it is not implemented. They say 'rights, rights' but we are not protected. There

[472] Human Rights Watch interview with Lamour, Durban, South Africa, July 13, 2001.
[473] Human Rights Watch interview with members of Triangle Project's Black Lesbian Support Group, Gugulethu, South Africa, August 3, 2001.
[474] Human Rights Watch interview with "Maria," Mamelodi, South Africa, July 11, 2001.
[475] Human Rights Watch interview with a student who wished to remain anonymous, Durban, South Africa, July 13, 2001.
[476] Human Rights Watch interview with Tumi, Durban, South Africa, July 13, 2001.

are still lesbians being raped, still gay men being bashed. The government should stop talking and let us see what they can do."[477]

Like other South African NGOs, lesbian, gay, bisexual, and transgender organizations have limited resources and capacity to reach out even to their own constituencies (particularly when they consist of closeted individuals), much less to campaign for understanding in a broader community. Like other South African NGOS, such groups often resenthaving to give support and information to their community, and struggle to change social patterns and prejudice, with little or no state support. Adie in Durban says, "To help lesbian and gay folks, the government should run a consciousness-raising campaign, because 90 percent of the population still don't know what gays and lesbians are…. Why must we [activists and NGOs] take on that burden, to conscientize the world? Why isn't the government taking that on?"[478]

Nonhlahla Mkhize, of the Durban Gay and Lesbian Community Health Centre, notes that the state provides almost no resources on homosexuality. "The city library is under-resourced with gay and lesbian materials. There's an inventory of library resources on gay and lesbian issues but many of them are homophobic to begin with, for example psychiatric texts that say gay or lesbian people are abnormal or wrong. We have developed a list for positive books and sent it to the Unicity Council, but nothing much has come from it. Instead we have had to get books donated and set up our own library."[479] Yet she also observes that the NGO center, unlike neutral state institutions, is of limited usefulness to the closeted individuals who may need it most:

> Lesbians are referred [to us] by word of mouth; most people call saying that they found out about us from this person or that person…. Coming to the center, just to walk in on their own is an important form of coming out….. As much as we are proud to have a gay and lesbian center in the city, I am not sure it is helping people to feel comfortable to come there. To most folks it is a gay center and everyone who goes there must be gay.[480]

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[477] Human Rights Watch interview with Palesa, Johannesburg, South Africa, July 28, 2001.

[478] Human Rights Watch interview with Adie, Durban, South Africa, July 15, 2001.

[479] Human Rights Watch interview with Nonhlahla Mkhize, Durban, South Africa, July 20,. 2001.

[480] Ibid.

The Durban Gay and Lesbian Community Health Centre distributes condoms within clubs and communities, runs workshops and seminars, and educates communities on gay and HIV/AIDS issues. They receive no local or central government funding. The center's chief AIDS worker, Tsembani, says:

> As HIV coordinator, I visit hospitals and tell them about gay issues, how gay people are different. I go to private hospitals and public clinics….. The trainings involve the human rights issues, as well, that each individual is protected by the constitution. We have the right to equality, privacy, and to accessing every resource in South Africa for everyone….[481]

One obvious question is why the state does not furnish such trainings and information itself for public clinics. In Soweto, Thulani Mhlongo notes that "We have a national medical minimum standard [for health care workers] so that whenever you are trained you can work anywhere in the country. It should include a package of life skills, on sexuality, violence, abuse, women's and sexual rights, women abuse."[482] And Tsembani says,

> The constitution supports and protects but there's no action from the government with respect to gay communities. There should be services initiated by the government for gay people. Gay people should do things for themselves, but government should spread the word also…. If it comes from the government, people will be able to understand LGBT issues more easily.
>
> And government should provide information specific to the gay community about AIDS, not just to the straight community. The center has fliers for queer communities, but they go out to fewer people than they should. As a government of national unity, this government should be producing that kind of information for all people.

Vasu Reddy, a founder of the Durban Gay and Lesbian Community Health Centre, says:

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[481] Human Rights Watch interview with Tsembani, HIV/AIDS coordinator, Durban Gay and Lesbian Community Health Center, Durban, South Africa, July 17, 2001.

[482] Human Rights Watch interview with Thulani Mhlongo, Township AIDS Project/Soweto HIV/AIDS Counselors Association, Soweto, South Africa, July 12, 2001.

> I believe the government should be supporting the center, but the government isn't…. The center asked for a meeting with the mayor to see what kind of assistance the city could give us, given that it is providing assistance to the city as a whole. There have been no follow-ups from the mayor's office at all.
>
> I don't think it is the role of government to be the redeeming grace of the gay and lesbian community. But government needs to play a role…. A major challenge for the government is to facilitate funding and expertise, and facilitate networking among certain sectors of service providers and the lesbian and gay community.[483]

C. Gender Identity and Expression

One young woman in Mamelodi told Human Rights Watch, "I am a lesbian, a man. Becaue of how I dress, what I like, I am closer to being a man than a woman. People often ask am I a man or a woman. I say I am a lesbian."[484] And another told us, "Most people look at me and think I am a lesbian, maybe because of how I dress, that I dress like guys, or because of how I talk. I get called lesbian or tomboy a lot."[485]

Gender norms are as powerful in South Africa as they are elsewhere in the region, and the abuse directed at people who transgress against them can be as severe. This makes it particularly important to examine what protections South Africa accords transgender people, or gender identity and expression.

Although the Equality Clause mentions only sexual orientation, sex, and gender—not "gender identity" or "gender expression"—the Constitutional Court affirmed, even if only cursorily, that "transsexuals" were implicit in those provisions in its historic 1998 decision overturning sodomy laws:

> The concept "sexual orientation" as used in s 9(3) of the 1996 Constitution must be given a generous interpretation of which it is linguistically and textually fully capable of bearing. It applies equally to the orientation of persons who are bi-sexual or transsexual and it

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483 Human Rights Watch interview with Vasu Reddy, Durban Gay and Lesbian Community Health Centre, Durban, South Africa, July 17, 2001.
484 Human Rights Watch interview with Noni, Mamelodi, South Africa, July 11, 2001.
485 Human Rights Watch interview with Patty, Mamelodi, South Africa, July 11, 2001.

> also applies to the orientation of persons who might on a single occasion only be erotically attracted to a member of their own sex. [486]

"It has not filtered down," says Wendy Isaack, who heads the Gay and Lesbian Legal Advice Centre at the Equality Project. "The transgender people who seek legal advice from us are some of the worst off." She told our researcher in 2001 how a male-to-female transgender client who is serving an eighteen-month prison sentence is kept in solitary confinement for twenty-three hours a day. "Because he is pre-operative he is held in the men's section of the prison; but then they say they have to isolate him so that he will not be raped."[487] Other clients have been harassed and victimized in public places: "for instance, they're beaten up or arrested because they go to the wrong bathroom in a shopping mall."[488]

South Africa is the only country in sub-Saharan Africa where hospitals offer sex reassignment surgery (SRS).[489] However, the country no longer allows

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[486] *National Coalition for Gay and Lesbian Equality et. al. v Minister of Justice et. al.* 1999 (1) SA 6 (CC) at 21.

[487] IGLHRC interview by Scott Long with Wendy Isaack, Equality Project, Johannesburg, South Africa, November 21, 2001. The United Nations Standard Minimum Rules for the Treatment of Prisoners state (Art. 8A) that "Men and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women the whole of the premises allocated to women shall be entirely separate." Inasmuch as one evident purpose of the rule is to prevent sexual abuse of women—and biological males who identify as women are likely to be particular targets for sexual and physical abuse—placing pre- or post-operative transgender people with prisoners of their own birth sex may place them in grave danger. However, the needs of pre-operative transgender people can still present complex problems for prison authorities. It is clear that placing transgender people, for their own "protection," in an environment ordinarily reserved to punish disciplinary infractions is an unacceptable solution—one also prohibited by the Standard Minimum Rules, which state (Art. 30) that no prisoner shall be punished except for a stipulated disciplinary offence. It is incumbent upon South African authorities to develop protocols for the protection of transgender and other vulnerable prisoners, to ensure their full safety through measures which are non-punitive and do not entail social isolation. These protocols should be developed in consultation with lesbian, gay, bisexual, and transgender groups.

[488] IGLHRC interview by Scott Long with Wendy Isaack, Equality Project, Johannesburg, South Africa, November 21, 2001.

[489] This long-standing medical practice in South Africa has had negative consequences as well. In a particularly gruesome revelation of previously-hidden apartheid-era practices, the press revealed and the government acknowledged in 2000 that the South African Defence Force (SADF) had carried out a "sexual realignment programme" prior to 1994.

people who have undergone SRS to change their legal identity papers to reflect their new, post-operative gender—an astonishing step backwards, flouting the Constitutional Court's promises of protection. For almost three decades the Births, Marriages and Deaths Registration Act, passed in 1963, allowed altering the birth register of any person who had "undergone a change of sex." In 1992, however, the act was replaced by a new Births and Deaths Registration Act (51/1992), which reversed that position. Section 33(3) says that any person

> who was in the process of undergoing a change of sex before the commencement of the Act, may on completion of the said process apply … for the alteration of the sex description in his birth register.

People who began hormone therapy or some other aspect of the SRS process after 1992 can no longer get their papers changed. "It is an absurd legal situation," says Evert Knoesen of the Equality Project. "Some can normalize their legal status if they sneaked in under the deadline—meaning that now, nine years later, hardly anyone remains who qualifies. But no one who begins the process today has the possibility."[490] Transgender people whose legal identity no longer corresponds to their appearance are left in a social as well as legal limbo. The disparity may deprive them of their rights to access basic services,

From the 1970s until an unknown date in the 1980s or 1990s, SADF members who were identified as lesbian or gay were subjected to aversion therapy—electroshock treatment designed to alter their sexual orientation, and amounting to torture—as well as medical experimentation. In some cases, gay men were reportedly forced to undergo chemical castration, and lesbians and gay men were compelled to undergo sex reassignment surgery. In at least one case reported to the Equality Project, initial surgical removal of a person's genitalia was undertaken; however, hormone therapy was afterwards suspended, leaving the person in a humiliating limbo of contradictory sex and gender identity. Suicides reportedly resulted. One of the doctors responsible for the program is reportedly now resident in Canada. The Equality Project has requested the minister of defence to appoint a commission of inquiry; no definite answer has yet been forthcoming. IGLHRC interviews by Scott Long with Carrie Shelver, Johannesburg, South Africa, August 18, 2000, and with Evert Knoesen, Johannesburg, South Africa, November 21, 2001. *See* also, "Request for the Appointment of a Commission of Inquiry" from the Equality Project to Minister of Defence Mosuia Patrick Gerard Lekota, August 14, 2000, as well as confidential transcripts of interviews with program survivors, on file with IGLHRC.

[490] IGLHRC interview by Scott Long with Evert Knoesen, Johannesburg, South Africa, November 21, 2001.

rent housing, or obtain employment, and may subject them to steady harassment, including police interference, in their daily lives.[491]

The inequity meshes with other discriminatory provisions in South Africa law. For instance, it means that female-to-male transgender people lack adequate protections against rape—since they are still legally male, and under South Africa's confused Sexual Offences Act, non-consensual sex between two men is punishable only as the lesser crime of "indecent assault."[492] (The South African Law Commission's proposed revisions to the Sexual Offences Act, which may become law in 2003, would, however, change this situation and describe such acts as rape.)

In 1996, the issue of transgender identity, and identity papers, was addressed by the South African Law Commission. In a report on the "Legal Consequences of Sexual Realignment and Related Matters," the commission recommended legislation to allow a change of papers after SRS—although it said that such a measure was not constitutionally required.[493] The report generated brief controversy and was then forgotten. The Commission on Gender Equality has also been asked to address the issue; it stated vaguely, four years ago, that "A holistic strategy is now being devised to deal with this complaint."[494] No such strategy has been forthcoming. Knoesen says, "The question has disappeared into the mists of indifference."[495]

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[491] For an account of some of the consequences of disparity between apparent gender and legally recorded sex, see IGLHRC's report, "The Rights of Transvestites in Argentina," by Lohana Berkins, Scott Long, and Alejandra Sarda, at http://www.iglhrc.org/news/factsheets/Argentina_trans.html.

[492] Wendy Isaack, for instance, observes that "Many transgender people are abused or raped in their communities. Many work as sex workers and are exposed to rape by clients or street thugs. And the law won't say it is rape." IGLHRC interview by Scott Long with Wendy Isaack, Johannesburg, South Africa, November 21, 2001.

[493] South African Law Commission, "Investigation into the Legal Consequences of Sexual Realignment and Related Matters" (Project 52, RP 32/1996). *See* also, "Law would benefit sex-change people," *Sunday Times,* June 19, 1994.

[494] South African Commission on Gender Equality, *Annual Report 1998,* at http://www.cge.org.za/docs/ann_report4.html, retrieved August 25, 2002.

[495] IGLHRC interview by Scott Long with Evert Knoesen, Johannesburg, South Africa, November 21, 2001.

D. Knowing Rights, Accessing Redress

Adie, a white lesbian activist in Durban, felt empowered when she went to a police station to report an assault: "Here we have recourse…. I don't so much see the police as a resource, but I know my rights in the country."[496]

Knowing one's rights is crucial to enjoying them, particularly as South Africa embarks on a project of equality which still feels almost experimental to many. People told us again and again of needing to spell out to officials—police, health care workers, and others—what the constitution mandated them to provide. Having the strength to threaten legal action sometimes is the only way to get attention to one's everyday nights.

Yet not everyone has Adie's confidence, or knowledge. A 2000 survey of South Africans by the independent Community Agency for Social Enquiry (CASE) found that 36 percent of respondents had never heard of the Bill of Rights; another 29 percent could not say what its purpose was. Asked how they would make contact with human rights institutions if needed, 59 percent of those surveyed "said they would not know where to go."[497]

In such a situation, people's capacity to claim their rights is obviously at risk. Since 1996, the government has begun to conduct campaigns of rights education. But it has not targeted lesbian, gay, bisexual, or transgender people. The state produces no campaigns or materials to inform communities about constitutional protections for sexual orientation.

Wendy Isaack of the Equality Project says, "It's all rather like they give us these rights for Christmas, they plop them down in front of you, and then the government feels satisfied and moves on to other things. But you don't give someone a gift without an instruction manual. I'm sorry, where's the instruction manual?"[498]

As Beverly Ditsie sees it, "The responsibility for informing people of their rights should have been a function of the government arm that deals with education. … [At the time the constitution was passed], there was no government office given the task to raise people's awareness. … So it became that their responsibility was to educate and advertise about the constitution with fliers—and that is a drop in the ocean."[499] Nonhlahla Mkhize, of the Durban

[496] Human Rights Watch interview with Adie, Durban, South Africa, July 15, 2001.

[497] Community Agency for Social Enquiry, "Awareness of Human Rights Institutions," 2000, at http://www.case.org.za/htm/hraware.htm#access, retrieved October 23, 2002.

[498] IGLHRC interview by Scott Long with Wendy Isaack, Johannesburg, South Africa, November 21, 2001.

[499] Human Rights Watch interview with Beverley Ditsie, Johannesburg, South Africa, July 28, 2001.

Gay and Lesbian Community Health Centre, said that, as a result of the government's failure to better inform gay and lesbian people of their rights and how to access them,

> People are aware that there is a constitution but don't know how to apply it, or how one can use the constitution for protection. They ask [when they come into the center] "Who do you go to to apply the law? Do you have to pay?" One client said to me, "I am being verbally abused at home, but what am I supposed to do? Say, 'I have my rights'? That won't do anything." And that's folks' dilemma—they know there is a body of laws but they don't have any idea how to apply them. They need to know what to do in the moment when they are being abused.[500]

One activist, who declined to be named, also is skeptical of the work of some NGOs—including many lesbian, gay, bisexual, and transgender groups and AIDS organizations—in promoting awareness of rights. These comments perhaps reflect the divide between the many NGOs devoted to service provision, and the fewer ones devoted to advocacy. They suggest that many NGOs are so consumed with meeting basic needs that they do not inform themselves about how to turn those needs into rights-based claims:

> If you talk to one of the people who works with these groups, and you say, what are the legal developments in LGBT rights since 1994, they just don't know…. If you say, look at the the political atmosphere of the country and how lesbian and gay rights have fitted in, it's difficult for them to grasp, because they don't work with, or within, the political atmosphere of the country.[501]

One NGO which does help lesbian, gay, bisexual, and transgender people access their rights is the Equality Project. Wendy Isaack, the Gay and Lesbian Legal Advice Center coordinator at the organization's offices in Johannesburg, offers legal advice to people who cannot otherwise afford it, as well as referrals for those who can afford to pay. The center deals with issues such as same-sex domestic violence and people seeking protection orders; people who have been

[500] Human Rights Watch interview with Nonhlahla Mkhize, Durban, South Africa, July 20, 2001.
[501] IGLHRC interview by Scott Long with an activist who wished to remain anonymous, Johannesburg, South Africa, November 21, 2001.

raped or abused; people requesting asylum based on sexual orientation; sex workers; and people denied parenting or partnership rights, including custody, shared benefits, or pensions. Isaack takes in 100 to 150 cases per year; she believes this represents "the tip of the iceberg." "Most people who face these kinds of problems," she says, "don't even know of us."

Isaack reveals the limits of what NGOs can do to help people—whatever their sexual orientation—access their constitutional rights. The cheapest rate to hire a private lawyer, Isaack told us in 2001, is R450 per hour (almost U.S.$50 at the time)—a sum vastly beyond the means of most people in townships. The economic disparity places a huge strain on the resources of the few NGOs providing *pro bono* assistance. Only three attorneys are regularly willing to work for free for the Equality Project; the law clinic at the University of the Witwatersrand provides some law students; but effectively, Isaack says, "this is a one-woman show, meaning me."[502]

Beyond the lack of individual or NGO resources, lesbian, gay, bisexual, and transgender people face special problems in getting informed legal help, Isaack says. "Many lawyers don't know the growing body of jurisprudence on sexual orientation."[503] No law school teaches a class on sexual orientation law; the standard law-school text on the Bill of Rights devotes only four pages out of nearly seven hundred to sexual orientation.[504]

The Equality Project developed a two hundred-page guide to sexual orientation and the law, explaining legal developments since 1994, in simple language, called "Outlawed." Its publication was delayed for three years, for lack of funds.[505]

E. Employment

Unemployment is a harsh reality in South Africa; over one third of the population is jobless. Different communities are differently affected. According to data from the most recent census in 1996, people of African descent made up 90 percent of the unemployed, coloured South Africans 6

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[502] IGLHRC interview by Scott Long with Wendy Isaack, Johannesburg, South Africa, November 21, 2001.
[503] IGLHRC interview by Scott Long with Wendy Isaack, Johannesburg, South Africa, November 21, 2001.
[504] Johan de Waal, Iain Currie, and Gerhard Erasmus, *The Bill of Rights Handbook,* fourth ed. (Cape Town: Juta, 2001), pp. 216-17, 231-32.
[505] IGLHRC interview by Scott Long with Carrie Shelver, Equality Project, Johannesburg, South Africa, November 21, 2001. Publication is expected in 2003.

percent, and whites 2 percent.[506] Yet according to many we interviewed, unemployment, like so many of the social and economic difficulties in South Africa, also impacted lesbian, gay, bisexual, and transgender people in ways not experienced by the population at large. Many people we spoke to were unemployed—and many had given up hope of employment. In an already unfriendly job market, LGBT people have an extra strike against them, especially when they bear the distinguishing marks of defying gender and cultural norms.

The consequences of lack of access to employment are great for lesbian, gay, bisexual, and transgender people. As Patty, an African lesbian in Mamelodi, told us, "I completed my matric [high school degree] in 1996, and have been looking for a job, any job. Most people look at me and think I am a lesbian, maybe because of how I dress, [they think] that I dress like guys, or because of how I talk…. Money is a big factor—I have no job."[507]

We spoke with many people who take steps to conceal their sexuality rather than face possible discrimination. Des'ree, an African lesbian living in Boweni Park, said, "My feeling is that my lesbianism is something private and that I share with people who matter to me. My boss and the people I worked with didn't need to know, because I am not hanging out with them."[508] Palesa, an African lesbian living in Soweto told us, "It is very difficult for a lesbian to get a job if we go to get a job as ourselves. When [potential employers] see that [I] am like this [lesbian], they become negative."[509] In Palesa's efforts to find work, she has been asked directly about her sexuality,

> The last time I went to an interview, the interviewer asked me if I had a boyfriend. I said no. Then he asked me if I had a girlfriend and I just smiled. He said he would call me back and never did. I don't know if it is legal to ask if you have a boy or girlfriend, but it is not a question I think I should be asked because it has nothing to do with why [I] am there. Before he asked about my partner, the person

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[506] Statistics available on the South African Department of Labor website, http://www.labour.gov.za, retrieved April 23, 2000.

[507] Human Rights Watch interview with Patty, Mamelodi, South Africa, July 11, 2001.

[508] Human Rights Watch interview with Des'ree, Gugulethu, South Africa, August 4, 2001.

[509] Human Rights Watch interview with Palesa, Johannesburg, South Africa, July 28, 2001.

> who interviewed me was impressed that I could answer all of the interview questions. So I don't know why I did not get that job.[510]

Finding work within the community where one is known can be especially difficult. As Charmaine, an African lesbian, said, "I stay in Gugulethu, and if I apply for a job to work here and the community knows that I am a lesbian they will think that I will teach the children to be a lesbian. They will not give me the job and say something like, 'You didn't fit the qualifications or the criteria' or someone with more experience got the job. They won't hire you because they think you will teach others or change others into being lesbians."[511]

Refusal to conform to gender norms can mark one as different, and make one unemployable. Funeka Soldaat, a lesbian working with the Triangle Project, observed, "it is difficult when [a lesbian] goes to look for a job and there are these stupid dress codes. If you are a girl, you must wear a skirt."[512]

Pat, a coloured lesbian, told us how gender conformity affected a former girlfriend's attempts to find work. The woman's appearance—she is commonly perceived as a man—placed her outside gender codes prescribing what women and men should look like and the work they could do. When she applied for jobs in traditionally male fields, "Employers would hire her [thinking she was] a man." Yet, despite the fact that she was capable of doing the work, "as soon as they found out she had a pair of breasts, they would say, 'No, we want a man, we thought you were a man.'"[513]

Others reported that the fear of discrimination discouraged them from job-hunting. Thabo told us, "I don't have a job and never tried to get one. It's very hard to be a lesbian. If I go to get a job in a retail store, I won't try to be femme and put on a skirt just to get the job.… [T]hey would just look at me and not give me the job. But I won't put on a skirt. It's the hands that work, not the skirt."[514]

The environment of discrimination is itself experienced differentially; and some interviewees stated they have never faced unequal treatment at work. Class, race, and the environment of employment affect the likelihood. Carol

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[510] Human Rights Watch interview with Palesa, Johannesburg, South Africa, July 28, 2001.
[511] Human Rights Watch interview with Charmaine, Gugulethu, South Africa, August 4, 2001.
[512] Human Rights Watch interview with Funeka, Gugulethu, South Africa, August 4, 2001.
[513] Human Rights Watch interview with Pat, Gugulethu, South Africa, August 4, 2001.
[514] Human Rights Watch interview with Thabo, Soweto, South Africa, July 29, 2001.

Bower, a white lesbian who is the executive Director of RAPCAN (Resources Aimed at Preventing Child Abuse and Neglect), attributed her good fortune to the fact that, as an activist for women's, children's, and gay and lesbian rights, she has often worked in NGOs with other lesbians. Adie, a white lesbian who has been a long-term volunteer with the Pretoria-based lesbian, gay, bisexual, and transgender organization OUT, says: "I work in the public sector and there I think I will not be denied promotions because I am a lesbian." At the same time, she observes, "I don't know what kinds of resources are available to me if I am discriminated against on the job."[515]

Virtually all of the people we interviewed indicated that difficulties in finding employment were compounded by—sometimes, began with—discrimination and homophobia at school and in the homes they grew up in. As Funeka of the Triangle Project put it, "because of the struggles we face to be who we are when growing up, especially as women and lesbians, most of us will never go to tertiary school or to have some skills that will make it easy for us to be employed. For some of us it was difficult to just reach matric." By the same token, "if you have to leave home because of the environment [before finishing school], you won't have the skills to find a job." [516]

Few legal cases have been brought to test both constitutional protections, and newly enacted legislative safeguards, for sexual orientation in the workplace. Evert Knoesen of the Equality Project says, "Fair labor practice is a constitutional prerogative. But the jurisprudence on sexual orientation so far has shown a big gap on labor practice. We need to work to fill it."[517]

F. Parenting

South African law has seen significant changes in adoption rights in recent years. Decisions by the Department of Child Welfare in the 1990s extended the right to adopt to individual homosexuals—while denying same-sex couples the right to adopt jointly.[518] As Evert Knoesen explained to Human Rights Watch in

[515] Human Rights Watch interview with Adie and Louanna, Durban, South Africa, July 15, 2001.
[516] Human Rights Watch interview with Funeka, Gugulethu, South Africa, August 4, 2001.
[517] IGLHRC interview by Scott Long with Evert Knoesen, Johannesburg, South Africa, November 21, 2001.
[518] See IGLHRC's report, *Conceiving Parenthood: Parenting and the Rights of Lesbian, Gay, Bisexual and Transgender People and their Children,* 2000, pp. 188-90.

2001, "This means that the child [in a lesbian or gay couple's home] has no claims for maintenance from the second parent." [519]

This has, however, changed. A significant case was brought by Judge Anna-Marie de Vos of the Pretoria High Court and her partner of eleven years, Suzanne du Toit. De Vos had adopted two children six years before, and raised them jointly with du Toit. Now de Vos questioned what would happen to the children in the event of her death: the law gave her life partner no rights over them.[520] In late 2001, a High Court declared unconstitutional the sections of the Child Care Act of 1983, and the Guardianship Act of 1992, which restricted joint adoptions to legally married couples. Knoesen told us that "adoption authorities fully support the application for the law to be changed so that the two women may jointly adopt the children."[521] In September 2002, the Constitutional Court confirmed the ruling.[522]

G. Partnership

Current South African law gives people no legal right to marry partners of the same sex. Although a succession of court cases has extended to "permanent same-sex life partnerships" some of the economic rights of married heterosexual partners, the process has been piecemeal. The Equality Project estimates, based on a study by the University of Witwatersrand Law School, that, to give gay and lesbian couples the same rights as heterosexual married couples through litigation, between eighty and one hundred separate laws would have to be challenged in court.[523]

No overall legal definition of same-sex partnership has emerged. Evert Knoesen notes that court rulings have required, as one definition of a "permanent partnership," the existence of "shared obligations" between the partners. Knoesen says,

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[519] Human Rights Watch interview with Evert Knoesen, Johannesburg, South Africa, July 13, 2001.

[520] Carmel Rickard, "Gay judges take on the law," *Sunday Times,* South Africa, July 29, 2001.

[521] Human Rights Watch interview with Evert Knoesen, Johannesburg, South Africa, July 13, 2001.

[522] The government had contested the possible application of the ruling to unmarried heterosexual couples, fearing the possible financial consequences of a general extension of benefits to such couples. The Constitutional Court ruling held only that the relevant Acts should be amended to include same-sex couples, and that such differentiation between married couples and same-sex couples was unconstitutional.

[523] IGLHRC interview by Scott Long with Carrie Shelver, Equality Project, New York, United States, September 3, 2001.

> It is modelled on Canadian and European law, and very much drawn from [what in South African terms are] upper-class, middle-class, white issues. They will thus ask if you own a home together, or have a bank account. But many poor couples might not have either one. How can you prove you share obligations if you don't have any resources to do it with?[524]

No parliamentary definition of marriage or partnership has superseded the gradual, often haphazard, allocation of rights to same-sex couples in successive judicial decisions (or has clarified the ambiguous status of unmarried heterosexual couples). As a result, gay and lesbian couples can still be excluded from many automatic benefits guaranteed to heterosexual married couples, including property inheritance rights; the right to receive and dispose of a partner's body in the event of death; recognition as a family and receipt of all benefits accorded; the ability to make decisions regarding medical care should a partner become incapacitated, including the execution of living wills; and receipt of pension, health, and death benefits. Partnership rights in the workplace—access to health plans and other benefits—are particularly significant to the poor in a situation of mass unemployment, where they can help one working partner support a family.

The consequences of same-sex couples' exclusion from legal recognition of their unions are manifold. Some are also true for unmarried heterosexual couples, although the option of marriage always exists as a remedy. There are no ready remedies available for homosexual couples.

Tumi, an African lesbian teacher living in Springs, told us her story, which underscores how powerless couples can be without the clear protection of the law, as well as their dependence on the legally recognized "family" to acknowledge their relationship. "I lost my lover in June 2000—she committed suicide in our home. I came home early from work and found her hanging in our house. It was very hard. I was very upset."[525] Tumi called the police, who came to their home and took away her lover's body so that they could determine the exact cause of death. Tumi contacted her lover's family, with whom she had a strained relationship because they disapproved of her and of her lover's sexual orientation. A few days later, the family "just came in and took all of the furniture, all of my lover's things. They treated me very harshly, blamed me for what happened. I wasn't even able to go to the service for her. I was also

[524] IGLHRC interview by Scott Long with Evert Knoesen, Johannesburg, South Africa, November 21, 2001.
[525] Human Rights Watch interview with Tumi, Springs, South Africa, July 13, 2001.

unable to see the post-mortem report. The medical examiner said he could only give it to family. She and I had been together for many years."[526]

Carol Bower, who had been with her partner for over ten years, found that the larger society was confused about what rights were accorded her relationship. Each woman had had a child before the relationship began, and they had raised the children essentially as brother and sister. However, when Carol's daughter was in the hospital, "a nurse told us that my partner and her son couldn't visit my daughter because they weren't family. I told that nurse that they most definitely could visit, and that as a lesbian couple we were protected by the constitution. The nurse did not know what the right answer was, whether what I said was true or not, and so she let them in. There is still lots of confusion about what is legal and what is not, and we were lucky that time."[527]

Unfortunately, many same-sex couples and lesbian, gay, bisexual, or transgender parents also do not understand what rights they have, and are unable to advocate for themselves effectively. The word of the law sometimes offers a confusing and equivocal response to social discrimination.

For Adie and Louanna, a white lesbian couple from Pretoria who have lived together for two years, conflicting responses from "people who should know the right answers" means that they must be far more persistent and diligent than heterosexual couples.[528] After living together for a year, they read about a decision in a court case that opened the way for same-sex couples, among others, to share medical aid benefits. The couple decided to put Louanna on Adie's medical aid. Yet officials were unable to tell them what requirements their application should meet. Louanna says:

> I called [the medical aid] and asked how long we needed to live together before trying it. They said they didn't know. When Adie called, they told her that there was no time limit. . . . So we go to the police station and write an affidavit under oath saying, "This is my partner and I've been with her for one year continuously and we share a bond, house, etc.," and submitted it to the Department of

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[526] Human Rights Watch interview with Tumi, Springs, South Africa, July 13, 2001.

[527] Human Rights Watch interview with Carol Bower, Athlon, South Africa, August 1, 2001.

[528] Human Rights Watch interview with Adie and Louanna, Durban, South Africa, July 15, 2001.

> Health along with an application … They wrote back and said "Sorry, you have to be together for two years."[529]

The Equality Project continues to mount legal challenges to exclusion, and—as listed above—to score successes. The project also assists couples in preparing partnership affidavits, as a basis for claiming benefits and as a hedge against additional, economic catastrophe if illness or death should strike. Wendy Isaack of the organization says that "around five people a week" request such help. But she confirms that legal triumphs have not yet been understood, much less implemented, throughout the country. "You may have the court cases, but the denials still happen. If a private company refuses to pay out a pension to a surviving partner, for instance, you can go to the Pension Fund Adjudicator. There is a precedent there now. But how many people know about it? And it will take time." [530]

Most advocates believe that a reform of South Africa's laws on marriage is urgently needed. The issue has found its way to the South African Law Commission, which has examined marriage in a succession of discrete proposals. First the Law Commission reviewed the status of African customary marriages in a major research project, recommending that both monogamous and polygynous customary marriages be recognized and registered, with guarantees of equal status and capacity for women.[531] In 1998, the Recognition of Customary Marriages Act made most of those recommendations law. Further recommendations surrounding the recognition of Islamic marriages have yet to be enacted.[532]

Evert Knoesen explains that, in the mid-1990s,

> given the confused state of marriage law, the Law Commission realized . . . that it was not possible to do it in one go. They split the question of reforming marriage law into parts … [One part] included traditional and cultural [Hindu or Muslim] marriages, as well as the question of same-sex relationships and establishing, possibly, some

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[529] Human Rights Watch interview with Adie and Louanna, Durban, South Africa, July 15, 2001.

[530] IGLHRC interview by Scott Long with Wendy Isaack, Johannesburg, South Africa, November 21, 2001.

[531] South African Law Commission, Discussion Paper 74, "Customary Marriages," Project 90, "The Harmonisation of the Common Law and the Indigenous Law," August 1997.

[532] South Africa Law Commission, Discussion Paper 101, Project 59, "Islamic Marriages and Related Matters," 2001.

> form of non-marriage domestic partnership recognition for heterosexuals as well. But this was rather too much too fast. So they split the domestic-partnership and same-sex issues off, and looked only at customary and religious marriages.[533]

Now the Law Commission is left to tackle the thicket of questions around same-sex relationships. A 2001 Issue Paper on "Domestic Partnerships" indicates the direction in which it is moving. The paper suggests that same-sex relationships should be recognized in the course of giving rights to other "non-marriage relationships," since "large numbers of South Africans live with their intimate partners without marrying."[534] It notes that "domestic partnerships have

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[533] IGLHRC interview by Scott Long with Evert Knoesen, Johannesburg, South Africa, November 21, 2001. For a discussion of customary law and marriage, see the Appendix. Knoesen points to possible, unexpected constitutional consequences of the recognition of polygamy—particularly since the South African Constitution (unlike some other constitutions in the region) does not mandate the recognition or special status of customary practices. What happens when the legislature does give those practices special status? Does it open claims under the Equality Clause? Knoesen says, "As it stands, only African marriages can be polygamous—not others. This makes no sense: and there will be a constitutional claim that if polygamy is permitted, it should be permitted to all communities . . . And what does that raise? The possibility of multiple relationships, bisexual relationships for example, being recognized." In fact, some policy statements of the South African government seem to move toward defining "family" in broader ways which no longer need have an exclusive, heterosexual relationship between two people at its center—or with centers which no longer need be *modelled after* such a central relationship. These new definitions might allow the inclusion not only of "traditional" family concepts built around extended kinship relations, but of "modern" extended networks of care. For instance, the Department of Social Welfare, in a 1996 white paper, defined a "family" by *function* and not by *structure,* as: "Individuals who either by contract or agreement choose to live together intimately and function as a unit in a social and economic system. The family is the primary social unit which ideally provides care, nurturing and socialisation for its members. It seeks to provide them with physical, economic, emotional, social, cultural and spiritual security." Government Gazette No. 16493, February 2, 1996, quoted in National Coalition for Gay and Lesbian Equality submission to the SALC, "Project 110: The Review of the Child Care Act: Comment on the Parent-Child Relationship," April 2, 1999. This hardly requires a married, a monogamous, or even a two-person intimate relationship to be the linchpin of a "family" as a site of economic solidarity and care. See also IGLHRC's report, *Conceiving Parenthood: Parenting and the Rights of Lesbian, Gay, Bisexual and Transgender People and their Children,* 2000, pp. 188-90.

[534] South African Law Commission, Issue Paper 17 (Questionnaire), Project 118, "Domestic Partnerships," 2001. See also, "Media Statement by the South African Law

come to be perceived in many cases as functionally similar to marriage." It cites other countries which have recognized domestic partnerships, some for same-sex and some for heterosexual couples. What it does not note, however, is that "domestic partner" status in those states endows a different, more restricted set of rights than does heterosexual marriage.[535]

Indeed, if the Law Commission models its ultimate proposal after European "domestic partnership" laws, which limit (for example) the adoption rights of unmarried partners, it would offer considerably less than the rights already won through litigation under South Africa's constitution.[536] Knoesen believes that

> The Law Commission is clearly moving away from proposing a law which would give gays and lesbians full marriage rights. They will propose some lesser status of "domestic partnership." And indeed they appear to be moving away from a status of domestic partnership which would require state registration. In effect, they seem to want a form of common-law marriage—something which has not really

Commission Concerning Its Investigation Into Domestic Partnerships," October 5, 2001, which describes "early notions of marriage as the only form of acceptable relationship" as outdated—apparently progressive language which however seems aimed at making room for the state to evade its constitutional obligation to make the status of marriage available without discrimination. See also the submission by the Women's Legal Centre, Cape Town, which by contrast urged extending marriage to same-sex partners, but creating a second status of domestic partnership, open to heterosexuals as well and resembling common-law marriage as understood in other jurisdictions, which would retrospectively recognize unregistered relationships and accord them a different set of rights and obligations. Lulama Nongog and Coriaan de Villiers, "Comments to South African Law Commission Issue Paper 17 (Questionnaire)," http://www.wlce.co.za/submission18.html, retrieved August 21, 2002.

[535] In France, for instance, the Pacte Civil de Solidarite (Civil Solidarity Pact, or PACS), which since 2000 has recognized unmarried heterosexual as well as homosexual relationships, maintains unequal adoption restrictions and imposes a three-year waiting period before PACS couples can claim tax and other benefits. Other European states which have opened forms of "domestic partnership" to same-sex couples continue to impose discriminatory restrictions on adoption and child custody. (However, the Netherlands ended such discrimination in 2001 by becoming the first nation in the world to open the status of civil marriage to same-sex couples.)

[536] For example, as noted above, the *De Vos* case opened joint adoption rights to same-sex partners: High Court of South Africa, Transvaal Provincial Division, *Du Toit and De Vos v Minister of Welfare,* case no. 23704/2001.

> existed under South African law, and does not really correspond to what the existing jurisprudence on same-sex partnerships requires.

The commission, Knoesen says, "is unlikely to propose to Parliament even as much as the courts have already, in some specific spheres, offered. But going through the courts to get those rights fully extended could take years."[537]

A recent decision confirms this pessimism. A High Court judge in Pretoria in October 2002 dismissed an application by a lesbian couple asking that their nine-year union be recognized as a marriage. Despite an *amicus curiae* brief from the Equality Project grounding the application in the Equality Clause, the judge flatly refused to consider constitutional issues, noting only that the existing Marriage Act refers solely to heterosexual unions.[538]

H. State Silence

Activists again and again stressed how many responsibilities to serve lesbian, gay, bisexual, and transgender people the South African government still does not meet—and how many positive opportunities it neglects.

Vasu Reddy, co-founder of the Durban Gay and Lesbian Community Health Project, notes, "The South African government should be vigilant and come out vigorously and clearly and unequivocally against homophobia."[539] Yet state silence thwarts the spirit of constitutional protection; limits individuals' ability to access rights; forces overextended NGOs to take up burdens the state should shoulder; and keeps the larger public ignorant that violations of human rights are wrong and will not be tolerated. Despite positive developments in South African law, officials have failed to speak out forcefully in support of lesbian and gay rights, and the government has not devoted resources to community education. There is also a dearth of attentive oversight bodies to monitor whether and how LGBT people's rights are being upheld.

Some we spoke to urged the state to pass existing policy through the fine-toothed comb of the Equality Clause—examining it comprehensively and closely to eliminate vestigial, but still dangerous, discriminatory provisions. Yet

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[537] IGLHRC interview by Scott Long with Evert Knoesen, Johannesburg, South Africa, November 21, 2001.

[538] Donna A. M. Smith, "High Court reserves judgement in gay marriage case," *Behind the Mask,* http://www.q.co.za/2001/2001/20/17-marriage.html, retrieved October 20, 2002; submissions on behalf of the Lesbian and Gay Equality Project, High Court of South Africa, Transvaal Provincial Division, *Fourie and Others v Minister of Home Affairs,* case no. 17280/02.

[539] Human Rights Watch interview with Vasu Reddy, Durban, South Africa, July 20, 2001.

beyond that, most felt the government should be acting on its positive mandate to promote equality. That mandate is expressed in the Equality Act of 2000, which, in section 25.1, requires the state *inter alia* to:

- Develop awareness of fundamental rights in order to promote a climate of understanding, mutual respect, and equality;

- Take measures to develop and implement programmes in order to promote equality …

And, "where necessary or appropriate," it mandates the state to:

- Develop action plans to address any unfair discrimination, hate speech, or harassment;

- Develop codes of practice … in order to promote equality, and develop guidelines, including codes in respect of reasonable accommodation;

- Provide assistance, advice and training on issues of equality;

- Conduct information campaigns to popularise this Act.[540]

In this light, Bernedette Muthien called on the government not to parcel out areas of concern into separate pigeonholes, but to understand their intersections: "If they have poverty elimination programs, then the race, sexuality, gender stuff should be a key part of it."[541]

Contrastingly, Vainola Makan called for specific instruments, and allocations, on sexual-orientation issues: "Government needs to put their money where their mouth is, given the constitution. They have machineries for women, for the disabled, for children, and on this one I think they must give some money."[542]

Many people pointed out that the national government has no oversight body specifically mandated to ensure that constitutional protections on sexual orientation are enforced. The constitution creates a set of "Chapter 9" bodies to

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[540] *Promotion of Equality and Prevention of Unfair Discrimination Act,* Act 4/2000.
[541] Human Rights Watch interview with Bernedette Muthien and Vainola Makan, Cape Town, South Africa, August 2, 2001.
[542] Ibid.

observe how equality rights in that section of the document are upheld. These include a general Human Rights Commission (HRC), and a Commission on Gender Equality (CGE). They have power to monitor, investigate, educate, and advise on specific cases as well as broad patterns of inequality, though they cannot enforce calls for redress.

Carrie Shelver, executive director of the Equality Project, told Human Rights Watch and IGLHRC in 2001 that “No consistent policy on sexual orientation has been issued by the Human Rights Commission or the Gender Equality Commission…. We have had good relations with the Human Rights Commission, but commissioners in the Commission on Gender Equality differ about their position on sexual orientation.”[543]

Evert Knoesen adds that “The CGE barely can be said to have a grasp of the ramifications of sexual orientation issues. And there is the issue of resourcing: they have only a fraction of the budget of the Human Rights Commission.” Meanwhile, he contends, the HRC has been hampered by public opposition: “They are looking at long-term problems in relation to society. They take a progressive stand on issues where society already has strong sentiments—for instance, refugees and illegal immigrants. The public doesn’t see them positively. And this means they haven’t so much clout left to expend on an issue like homosexuality.”

In addition, staffing at the HRC has not been organized thematically, making it difficult to determine where complaints relating to sexual orientation should be taken or how they should be handled. The commission, Knoesen says, is “not very well set up in terms of organizational memory and retaining information: there is nothing in place that will see a body of knowledge on any particular issue being retained. We [at the Equality Project] have far more information on sexual-orientation violations, and law, than they do.”[544]

Others urge creating special mechanisms in the executive or legislature, such as exist for other groups protected under the constitution—for example, the Office for the Status of Women, or parliamentary committees to monitor the implementation of protections for children and the disabled. Bernedette Muthien believes the government’s role is clear: “There must be a sexualities officer in the Office of the President. That would make a huge difference; otherwise the clause will be just lip service. In practice, there’s a Status of Women Office, a Disabilities Office, etc. A sexualities officer would really show government’s

[543] IGLHRC interview by Scott Long with Carrie Shelver, Johannesburg, South Africa, November 21, 2001.
[544] IGLHRC interview by Scott Long with Evert Knoesen, Johannesburg, South Africa, November 21, 2001.

commitment to eradicating violence against queers, violence which is personal, structural and cultural, and endemic in townships and rural areas."[545] And Carol Bower, a white lesbian activist who heads RAPCAN, feels that "there must be a way to hold the government more accountable, to challenge the government to do things obligated by the constitution. For example, there is a joint monitoring committee in Parliament for women. Why isn't there one for gay and lesbian issues?"[546]

Amid the state silence, some lower government officials have felt free to flirt with homophobia. In an April 2001 meeting of the Durban Investment Promotion Agency, the city's mayor, Obed Mlaba, said: "We should stop comparing ourselves to cities like Cape Town. In fact, Cape Town can stay with its moffies and its gays."[547]

Amid wide condemnation of his remarks, the mayor eventually issued a formal apology through a spokesperson, assuring the public that "the rights of all individuals, regardless of race, religion or sexual preference, are protected by our new Constitution. He [the Mayor] is very proud of the Constitution and fully supports it."[548]

Vasu Reddy of the Durban Gay and Lesbian Community Health Centre was grateful for the mayor's apology—but considered it undercut by his office's unresponsiveness to outreach by the group, the only gay and lesbian service organization in KwaZulu-Natal province. The center had asked the mayor to meet and discuss joint work on fighting stigma within the city. Reddy says,

> We want to explore how the Unicity [Durban] could form a partnership with us, since our center is providing a service to the city as a whole, not just gay and lesbian people. The deputy mayor came to the center's opening in May and again apologized for [the] mayor's comments. We asked again for a meeting with the mayor to see what kind of assistance the city could give to the center, again

[545] Human Rights Watch interview with Bernedette Muthien, Cape Town, South Africa, August 3, 2001.
[546] Human Rights Watch interview with Carol Bower, Cape Town, South Africa, August 1, 2001.
[547] Phumi Nhlapo, "Let the moffies have Cape Town - Durban mayor," *Natal Mercury*, April 11, 2001.
[548] Lee Rondganger, "Durban mayor apologises for 'moffie' comments," *Natal Mercury*, April 12, 2001.

> given that it is providing assistance to the city as a whole. There has been no follow-up from the mayor's office at all.[549]

Other politicians have also engaged in homophobic rhetoric. In 1999, Graham McIntosh of the opposition Democratic Party attacked Judge Edwin Cameron, a prominent public figure living with HIV/AIDS, saying that Cameron's serostatus "is a logical consequence of his self-proclaimed, public and enthusiastic support for and practice of a homosexual orientation."[550]

Peter Marais, who has served as mayor of Cape Town and premier of Western Cape Province, has repeatedly criticized constitutional protections for gay and lesbian rights. In 2002, Marais accused a "gay lobby" within the Democratic Alliance party[551] of trying to destroy him with sexual-harassment allegations: "They want to attack my image as a Christian by attaching sleaze to me so that this will make my argument against homosexuals less credible."[552] The ANC (a coalition partner of Marais' New National Party in the province) distanced itself from his remarks—but did so by denying their political dimension or effects, calling them "personal."[553]

The state's silence also creates interstices in which individuals can be subjected to vilification. Sheryl Ozinsky is the openly lesbian manager of Cape Town Tourism (CTT). CTT promotes Cape Town as a tourist destination internationally, and receives 25 percent of its funding from the city. In early 2001, Ozinsky came under fire from religious groups when she announced CTT's intention to pursue the gay niche market and to promote Cape Town as a gay-friendly city. According to Ozinsky, her pursuit of so-called pink tourism rose from practical concerns: "It is a lucrative niche market for us. Gay tourists travel more than other tourists, four and a half times per year versus one time per year for heterosexuals. They spend a lot more money, add flavor to a destination. We have been pursuing the pink tourism niche market and as a

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549 Human Rights Watch interview with Vasu Reddy, Durban, South Africa, July 20, 2001.

550 He also accused Cameron of trying to "sanitise homosexuality and its associated guilt trips," and of trying to persuade the ANC to "treat HIV/AIDS differently from other diseases." Judith Soal, "DP candidate stands by his AIDS comments," *Cape Times,* May 11, 1999.

551 The party was formed from a merger of the Democratic Party with the New National Party, successor to the apartheid-era ruling party.

552 "Gay lobby demands Marais apology," *Daily Dispatch,* May 14, 2002.

553 "Response by ANC to Premier Marais' Statement on DA Gay Conspiracy Against Him," issued by African National Congress/Western Cape, May 13, 2002. As accusations of sexual harassment mounted, Marais resigned.

result Cape Town is probably the sixth most popular gay destination in the world currently."[554]

From approximately February to May of 2001, Ozinsky received thousands of letters at her home and office, many threatening harm. Others went to the press: "I have a file … of anti-gay letters to the press from anti-gay Muslim and Christian groups who were attacking me personally for being gay and for using my position to put forth my own agenda of bringing more gays to Cape Town." She says, "I took my case to the Human Rights Commission. I am waiting to hear back, but it's been months. The case is based on the fact that I am being attacked personally, as a gay person. If a heterosexual person were in this position, they never would have been attacked like this, or accused of taking taxpayer money to promote family tourism into the city. But because I am gay I am accused of promoting my own agendas."[555]

Ozinsky says:

> We were quite surprised at this outburst because if you replace the word black or Jew or Hindu for the word gay, then it becomes another matter entirely and what right does anybody have to voice such negative opinion about gay people when they would never do that about blacks or Jews? It would be unheard of. There would not even be a platform in the daily newspaper through which you could expose such unconstitutional values. It's almost hate speech…. While it is important to talk about issues and get them out, I think there is a fine line between talking openly about issues and speech that incites others and in my opinion this did.[556]

Public officials were largely silent. The board of CTT, which includes three representatives from the City of Cape Town government, had endorsed Ozinsky's support of gay tourism, but neither she nor CTT received official support from any government sector. "The ANC has crafted this constitution, but throughout the debate the ANC was utterly silent. I had an off-the-record conversation with an ANC politician and was told it is a very sensitive issue for the ANC and that they couldn't come out and openly support me."[557] For Ozinsky, the ramifications of this isolation extended far beyond her own

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[554] Human Rights Watch interview with Sheryl Ozinsky, Cape Town, South Africa, August 7, 2001.

[555] Ibid.

[556] Ibid.

[557] Ibid.

situation. "It scared me hugely, because if this is a government that prides itself on human rights and couldn't come out to support me openly because they were worried about the Christian or Muslim vote, then my God, we are in for a tough ride as South Africans. And some of the other political parties were absolutely silent, including the minister of tourism and everybody involved in tourism."[558]

On an international stage as well, elected officials from South Africa have usually remained silent about lesbian, gay, bisexual, and transgender concerns. There have been exceptions, particularly the support given by South African diplomats to sexual-orientation issues at a number of international conferences.[559] However, South Africa has not criticized homophobic comments by the leaders of Namibia, Zimbabwe, or other states; nor has it supported activists who do so.

South Africa has particularly shown itself reluctant to offend other members of the Southern African Development Community (SADC). SADC has progressive positions on gender; for example, a 1997 policy statement committed the organization to eradicating "norms, religious beliefs, practices and stereotypes which legitimize and exacerbate the persistence and tolerance of violence against women."[560]

Yet South Africa has not vocally opposed policies in other SADC countries which encourage those stereotypes to survive. Some of the depth of this reluctance can be seen in the language of asylum cases in South Africa. Although South Africa's immigration policy in principle recognizes the right to asylum based on sexual orientation—and increasingly emigrants from repressive SADC states apply—few if any such claims have been granted. Wendy Isaack says, "I worked on the case of a white lesbian seeking asylum from Zimbabwe. The answer from the Immigration Board was, 'It is not possible a white woman would experience difficulties there, and anyhow, Zimbabwe is a SADC country.'"[561] Francis Chisambisha, of Zambia, sought asylum in South Africa from persecution in Zambia. His well-documented claim was rejected at the

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558 Ibid.

559 See Chapter I, above, for South Africa's position at the 1995 Fourth World Conference on Women in Beijing.

560 Addendum to the "Declaration on Gender and Development" on "The Prevention and Eradication of Violence Against Women and Children," SADC Gender Unit, "Gender Mainstreaming at SADC: Policies, Plans, and Activities" (Botswana, 1999), para. H.ii and H.iv. Cited in Barbara Klugman, "Sexual Rights in Southern Africa: A Beijing Discourse or a Strategic Necessity," *Harvard Journal of Health and Human Rights,* vol. 4, no. 2.

561 IGLHRC interview by Scott Long with Wendy Isaack, Johannesburg, South Africa, November 21, 2001.

first instance; the Immigration Board observed in disbelief that Zambia was a democracy and a SADC member.[562]

Vasu Reddy says, "Government should speak out within the broader context of the 'un-African' issue, on which the South African government has been particularly silent…. If we are all supposedly subscribing to human rights, we cannot be selective about those rights. We cannot, to use a Thabo Mbeki phrase, pursue a 'silent diplomacy' on issues of homosexuality and its un-Africanness as articulated by Nujoma and Mugabe and the rest."[563] Reddy adds,

> If it [condemnation of homophobic speech and actions] is articulated by a leader or leaders, then it immediately sends messages and codes which can be translated into action by the populace…. The effect would echo throughout the region and be a part of nation-building and rebuilding the continent, which is such an integral part of Mbeki's presidency—this issue of recovering ourselves as Africans. Part of that mission has to be … taking a stand on homophobia …. Despite our progressive agenda in terms of the constitution, we need to be verbal and articulate about upholding those tenets.[564]

According to Evert Knoesen, "The government has a clear responsibility in the region around gay and lesbian issues, but is choosing to be silent, to make no public statement concerning other governments' human rights violations."[565]

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[562] IGLHRC interview by Scott Long with Francis Chisambisha, Johannesburg, South Africa, November 20, 2001. The Office of the United Nations High Commisioner for Refugees (UNHCR) recently reaffirmed a long-standing position: "Where homosexuality is illegal in a particular society, the imposition of severe criminal penalties for homosexual conduct could amount to persecution, just as it would for refusing to wear the veil by women in some societies. Even where homosexual practices are not criminalized, a claimant could still establish a valid claim where the State condones or tolerates discriminatory practices or harm perpetrated against him or her, or where the State is unable to protect effectively the claimant against such harm." See UNHCR, "Guidelines on International Protection: Gender-Related Persecution within the context of article 1A(2) of the 1951 Convention and its 1967 Protocol relating to the status of refugees," UN Doc. HCR/GIP/02/01, May 7, 2002, at 17 ("Persecution on account of one's sexual orientation").

[563] Human Rights Watch interview with Vasu Reddy, Durban, South Africa, July 20, 2001.

[564] Ibid.

[565] Human Rights Watch interview with Evert Knoesen, Johannesburg, South Africa, July 13, 2001.

I. Realizing Rights

Nearly everyone we interviewed who identified as gay, lesbian, bisexual, or transgender in South Africa was aware, and proud, of the constitutional protection for sexual orientation. But most who had heard of it had not been helped by it. For the vast majority of people we interviewed, particularly young African lesbians and gay men living in cities, townships, and rural areas, the Equality Clause had not changed the degree or depth of the discrimination and harassment they experienced.

The Equality Clause remains, for the vast majority of South Africans, largely unfelt. It is a distant rumor, a source of hope as well as pride, but unfulfilled.

We asked each of the people we interviewed what they thought would make a difference: how could the government make the clause work for them?

What follows is a reflection on how to make a right realizable.

Governments cannot simply rest content with putting rights on paper. Nor can they confidently congratulate themselves on the bare facts of legislative or jurisprudential progress. To be sure, much has been done in the courts and Parliament in South Africa. Much remains to be done, and should be. Laws need to be passed, or judicial action taken, to remove the last traces of discriminatory provisions on sexual conduct, and to define marriage in an inclusive way. But even when the law books have been purged of prejudice and made consistent with the language of the Equality Clause, more will still need to be done before the words describe realities for South Africa's people.

Governments need to look at each form of inequality and injustice with an eye to at least four matters. They must understand its *particularity*; they must also understand its *intersections* with other forms. They must identify how *redress can be made readily accessible*. And they must *promote rights* and the knowledge of rights, and in the process—as South African law commands—actively promote equality.

Governments must analyze the *particularity* of the inequality suffered by, or discrimination directed at, a community, status, or identity. Homophobia is rooted in a different set of cultural prejudices and social circumstances from, for instance, discrimination against the disabled. It must be addressed in part by disentangling those distinctive contributing factors, and dispelling them in communities and families. Homophobia affects different kinds of communities than does, for example, racism: its victims are differently organized and differently able to resist it. This means that governments should set up particular mechanisms to address, redress, and combat particular forms of inequality. It also means that policies, laws, and practices should be looked at closely to find the hidden ways in which they might further discrimination against particular identities and groups. For example, the decay of public transport systems needs to be seen not just as a problem for the "general population"—but as a life-or-death issue for non-conforming women who may be singled out for rape if walking alone at night. In addition to working closely with NGOs who can contribute to such understandings, governments should designate a focal point on each area of inequality within each ministry and department, to carry forward comparable analyses across all its policies. Not all inequalities are alike. States must move toward equal treatment by addressing specific injustices through appropriate means.

Governments should also, however, attend to the *intersections* of identities, of rights, and of forms of discrimination. On the one hand, no one is "just" gay or lesbian. Everyone has other identities, fits under other forms of status, which can partially empower or further disempower them. Nor can any violation be altogether separated from the context of other abuses or inequities in a society, which may enable it or extend its effects. African or coloured lesbians and gays may be particular targets of violence in townships; but the abuse is inseparable from the almost-unendurable poverty which makes violence a general condition there. Apparent protections which suppose the existence of prosperous, property-owning rights-bearers—such as definitions of "partnership" which require showing "shared obligations"—may omit or unfairly burden the poor who have less by those standards to share, or show.

Most notably, many people spoke to us at length about how inequality between the sexes relegates many South African women to lives as second-class citizens. Women and girls across many of the country's cultures are taught to obey their fathers and husbands, to defer their own needs until those of men are met, and to accept violence as an inevitable form of discipline within the family. Because the roles of men and women are so entrenched, and because men and women who identify as gay or lesbian often challenge those roles, women's rights are an inextricable aspect of rights for lesbian, gay, bisexual, and transgender people. It is in the constant threats of sexual violence reported by lesbians that the intersection between sexism and homophobia is most clear. Many men, angry that women appear to be rejecting them, want to "cure women" by reasserting their violent control. But self-identified gay men and transgender people also suffer from standing at the crossroads of gender and sexuality. Many are persecuted because they refuse to conform to norms of what "men" or "women" should be.

Governments must identify *how redress can be made accessible*. There are clear actions that the South African government can and should take—most notably, creating a special commission or other mechanisms through which people could report discrimination or harassment based on sexual orientation.

Such a mechanism would have the expertise and resources to investigate the complaints, advise a remedy, and identify patterns of violations as well as proposing legal and policy change. This is particularly important in South Africa where very few people have the resources to retain lawyers in legal proceedings—and where only one NGO regularly conducts litigation under the Equality Clause. Yet other steps are needed as well. The government needs to ensure adequate training in sexual orientation law as well as other aspects of equality law, to ensure a ready cadre of lawyers to take up cases where legal action is required. It should create incentives for attorneys to engage in *pro bono* work. It should ensure that people know about opportunities for redress—and that state agencies and officials are trained in how to respond. It does no good that domestic-violence protection orders are now available to same-sex partners, if the information is not publicized in their gathering places or communities—or if people still fear policemen will laugh at them when they step through the station door.

This leads to the next and largest responsibility. The state must *promote rights.* It must do so, first, by training its own personnel in both the particularity and the intersections of rights protections. Police, for example, must know that "sexual orientation" is a protected status, and grasp its multiple cultural and social meanings; they must be ready to respond sensitively to lesbian, gay, bisexual, and transgender victims of crimes and violations; they must understand how gender, or race, or the fact of poverty, makes some LGBT people additionally vulnerable; they must engage in outreach to affected communities, to rebuild trust after years of police harassment and police-endorsed abuse. But the state must also use the multiple tools at its disposal to educate individuals and communities. Schools must teach about sexual orientation, not only in the context of sexual health or HIV/AIDS, but as an issue of equality in a rights-education curriculum. Press and publicity campaigns should promote images of equality in which sexual orientation—and lesbian, gay, bisexual, and transgender faces and voices—are an unequivocal part. The South African government should work with community-based groups and NGOs in developing these campaigns, as well as other educational materials.

The whole work of rights education—whether within marginalized communities, or in the population as a whole—must not fall on those vulnerable to violations. The state must be a full partner as well as a sponsor. It must fund and consult with NGOs fairly, without discrimination, recognizing their right not only to provide essential services, but to advocate against the state as well. But the state must not shunt its duties onto civil society. The state must itself undertake the task of outreach to the possible victims—and the potential perpetrators—of violations.

As part of this, the South African government must publicly affirm the Equality Clause, and promote its values in international relations. South Africa's official silence in the face of homophobia, at home or abroad, is ultimately an affront to the principles on which its new democracy is founded.

None of the men and women we spoke to in South Africa, or elsewhere, were passively waiting for government intervention. They were organizing, campaigning, doing outreach—or leading their lives boldly, walking down streets proudly, looking for hope or love. Many spoke of wanting to claim their own rights, to take charge of their futures. Yet many felt confined by the past, by a complex of intersecting injustices: their lack of education—often a direct result of being expelled for being gay, lesbian, transgender—their joblessness, their poverty, their powerlessness in the family or community.

"We are a country of change," one gay man told us. "We have so many things in the constitution that ordinary people know is there: but every day they live a life in which they are still excluded, opposed, discriminated against."[566] Hopelessness, passivity, fear, and self-loathing result from the endless experience of a chain of negations. Until the South African government breaks that chain, by taking the full breadth of the Equality Clause seriously, part of its population will remain excluded from the constitution's promise.

[566] Human Rights Watch interview with Derek, Cape Town, South Africa, August 5, 2001.

VI. CONCLUSION

State-sponsored homophobia-the campaign of hate engaged in by political leaders in southern Africa—devastates lives. It strikes at core values of democratic societies. And it violates international human rights standards.

A. International Law

1. The right to freedom from discrimination, and the right to privacy

State rhetoric identifying lesbian, gay, bisexual or transgender people as "dogs and pigs," as "perverts," as alien influences to be "uprooted" or "eradicated" from the national life, singles people out on the basis of their sexual orientation or gender identity and marks them in the public view as permanently unequal. It constitutes discrimination and incites to further discrimination.

The International Covenant on Civil and Political Rights (ICCPR) affirms the equality of all people, in two significant provisions.[567] Article 2.1 states:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 26 affirms:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

In the 1994 case of *Nicholas Toonen v Australia,* the U.N. Human Rights Committee, which monitors compliance with and adjudicates violations under the ICCPR, heard a complaint concerning a "sodomy law" punishing

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[567] Botswana became a party to the ICCPR on September 8, 2000. Namibia acceded to the treaty on November 28, 1994. Zambia acceded to it on April 10, 1984, and Zimbabwe on May 13, 1991. South African became a party to the treaty on December 10, 1998.

consensual, adult homosexual conduct in the Australian state of Tasmania. The Committee held that such laws violate protections against discrimination in the ICCPR, as well as article 17, which protects the right to privacy.[568] Specifically, the Committee held that "sexual orientation" was a status protected under the ICCPR from discrimination, finding that "the reference to 'sex' in articles 2, para. 1, and 26 is to be taken as including sexual orientation."[569]

The Human Rights Committee's ruling on "sodomy laws" drew on a standing body of jurisprudence against them. The European Court of Human Rights found in three cases in the 1990s that such laws violated the right to privacy in article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[570] Although the European Court customarily gives a wide "margin of appreciation" to states in respect of difference in practices and values, the Court specifically found that "the protection of public morals" did not present an adequate justification for restricting the right to privacy on the basis of sexual orientation.[571] In *Toonen,* the U.N. Human Rights Committee also declared that it "cannot accept either that for the purposes of article 17 of the Covenant, moral issues are exclusively a matter of domestic concern."[572]

The U.N. Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions has observed the relationship between sodomy laws—and, by extension, other forms of state rhetoric—stigma, and violence:

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[568] Article 17 reads:
1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

[569] *Nicholas Toonen v Australia,* Human Rights Committee, 50th Sess., Case no. 488/1992, UN Doc. CCPR/c/50/D/488/1992, at 8.7.

[570] *Dudgeon v United Kingdom*, 4 Eur. HR Rep. 149 (1981); *Norris v Ireland*, 13 Eur. HR Rep. 186 (1989); and *Modinos v Cyprus,* 16 Eur. HR Rep. 485 (1993).

[571] Thus in *Dudgeon,* the Court held that laws penalizing homosexual conduct could not be held "necessary in a democratic society":

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

In *Norris,* the court held that "such justifications as there are for retaining the law in force unamended are outweighed by the detrimental effects which the very existence of the legislative provisions can have on the life of a person of homosexual orientation."

[572] *Toonen v Australia,* at 8.6.

> The Special Rapporteur … believes that criminalizing matters of sexual orientation increases the social stigmatization of members of sexual minorities, which in turn makes them more vulnerable to violence and human rights abuses, including violations of the right to life. Because of this stigmatization, violent acts directed against persons belonging to sexual minorities are also more likely to be committed in a climate of impunity.[573]

However, the findings of the U.N. Human Rights Committee, and the protections of the ICCPR, go far beyond requiring the abolition of sodomy laws. The Committee has elsewhere found that the prohibitions of discrimination in the ICCPR place a broad mandate on states to remedy unequal treatment in all areas of life. Thus it has declared that article 26 "prohibits discrimination in law or in fact in any field regulated and protected by the public authorities." Any state that regulates private employment, for example, therefore is responsible for offering protections against discrimination in that sphere—including protections against discrimination based on sexual orientation. The Committee has also found that the article bars acts and policies that are discriminatory in *effect,* as well as those that *intend* to discriminate. [574]

The Human Rights Committee has urged states to include in their constitutions the prohibition of discrimination based on sexual orientation.[575] In its 1998 observations on the state report of Zimbabwe, the Committee noted "with concern that homosexuals are subjected to discrimination… The Committee recommends that such legislation [enabling discrimination] be brought into conformity with the Covenant."[576]

2. The right to freedom of expression

Article 19(2) of the ICCPR affirms that:

> Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive, and impart information and

[573] "Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions," UN Doc. E/CN.4/1999/39, 6 January 1999, at 77.

[574] "General Comment 18: Nondiscrimination," Human Rights Committee, 37th Session, 1989, UN Doc. HRI/GEN/1/Rev.1, p. 26.

[575] "Concluding Observations of the Human Rights Committee: Poland," Human Rights Committee, 66th Session, UN Doc. CCPR/C/79/Add.110, at 23.

[576] "Concluding Observations of the Human Rights Committee : Zimbabwe," Human Rights Committee, 62nd Sess., UN Doc. CCPR/C/79/Add.89, at 24.

> ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any media of his choice. [577]

States violate this right when they suppress information on gay and lesbian existence, eradicating it from either the state-controlled or private media. States violate this right when, as in Zimbabwe, they censor gay-themed films or seize gay and lesbian books and magazines. But states also violate this right when they use obscure laws on public conduct or behavior to harass and penalize people for the expression of their sexual orientation or gender identity. States violate this right when they encourage public officials—or incite or excuse other agents—in violence or harassment against men or women who dress, walk, or act in ways at odds with social norms for expressing gender.

3. The rights to freedom of association and assembly

Article 21 of the ICCPR states that "The right of peaceful assembly shall be recognized." Article 22.1 of the ICCPR affirms that "Everyone shall have the right to freedom of association with others."

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[577] This article provides (similarly to articles 17, 21, and 22 of the ICCPR) that the exercise of the rights in paragraph 2 may be "subject to certain restrictions," which must be clearly provided for in law and necessary for "respect of the rights or reputations of others," or to protect "national security," "public order," or "public health and morals." In decisions overturning sodomy laws in the United Kingdom, Ireland, and Cyprus, the European Court of Human Rights has repeatedly held that similar provisions on public order, morals, or health do not justify restricting the basic rights of persons because of their sexual orientation (see above). In one early case, *Hertzberg v Finland*, in 1980, the U.N. Human Rights Committee indeed rejected a challenge to the decision of the Finnish Broadcasting Corporation to censor programming with gay and lesbian content. This case would almost certainly be decided differently today, in the light of *Toonen.* At the time, three Committee members published a dissenting opinion stating that "It is of special importance to protect freedom of expression as regards minority views, including those that offend, shock or disturb the majority." (Individual opinions by members Opsahl, Lallah, and Tarnopolsky in case no. 61/1979, UNGAOR A/37/40, Supp. No. 40). Manfred Nowak, an authoritative commentator on the ICCPR, notes that such a "liberal interpretation of public morals is correct… as a general principle [if] freedom of expression and information is to fulfil its function as one of the most important civil and political rights." He also observes that "there can be no doubt that every communicable type of subjective idea and opinion, of value-neutral news and information, of commercial advertising, art works, political commentary regardless of how critical, pornography, etc., is protected by Art. 19(2), subject to the permissible limitations in para. 3. It is thus impossible to close out undesirable contents, such as pornography or blasphemy, by restrictively defining the scope of protection." Manfred Nowak, *CCPR Commentary* (Kehl: N.P. Engel, 1993), pp. 358 and 341.

States violate these rights when they incite violence against, or deny equal protection to, gays and lesbians participating in public manifestations or peaceful marches. They violate these rights when they offer no protection to gays and lesbians subject to violence when they gather, socialize, or meet in public places, including bars, pubs, and clubs. They violate these rights when, on discriminatory grounds, they deny groups and NGOs the right to register and enjoy a formal, legal existence. They violate these rights when they incite destructive harassment against NGOs and civil society actors for their defense of, or debates about, basic human rights and fundamental freedoms, including those of marginalized identities and communities.

The U.N. General Assembly's "Declaration on Human Rights Defenders" calls special attention to the important role of these rights in the defense of all human rights. In its article 5, the Declaration affirms that

> For the purpose of promoting and protecting human rights and fundamental freedoms, everyone has the right, individually and in association with others, at the national and international levels:
>
> a) To meet or assemble peacefully;
> b) To form, join and participate in non-governmental organizations, associations or groups;
> c) To communicate with non-governmental or intergovernmental organizations.

Article 6 of the Declaration holds that:

> Everyone has the right, individually and in association with others:
>
> (a) To know, seek, obtain, receive and hold information about all human rights and fundamental freedoms, including having access to information as to how those rights and freedoms are given effect in domestic legislative, judicial or administrative systems;
> (b) As provided for in human rights and other applicable international instruments, freely to publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms;
> (c) To study, discuss, form and hold opinions on the observance, both in law and in practice, of all human rights and fundamental freedoms and, through these and other appropriate means, to draw public attention to those matters.

And article 7 affirms that:

> Everyone has the right, individually and in association with others, to develop and discuss new human rights ideas and principles and to advocate their acceptance.

Indeed, the Special Representative of the U.N. Secretary General on Human Rights Defenders has called attention to the "greater risks… faced by defenders of the rights of certain groups as their work challenges social structures, traditional practices and interpretations of religious precepts that may have been used over long periods of time to condone and justify violation of the human rights of members of such groups. Of special importance will be… human rights groups and those who are active on issues of sexuality, especially sexual orientation… These groups are often very vulnerable to prejudice, to marginalization and to public repudiation, not only by state forces but by other social actors."[578]

All these rights have been violated or endangered through the rhetoric employed, the directives issued, and the repressive laws enforced by state officials in Botswana, Namibia, Zambia, and Zimbabwe.[579]

4. The right to freedom from arbitrary arrest and detention

Article 9.1 of the ICCPR states:

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

The *travaux preparatoires* to article 9 of the Convention make clear, in the words of one commentator, that "arbitrary" means not simply "unlawful" arrest or detention, but includes police or judicial actions that display "elements of injustice, unpredictability, unreasonableness, capriciousness and unproportionality," though the reason for the arrest may lie within the letter of the law. In particular, "the specific manner in which an arrest is made must not

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578 "Report of the Special Representative to the Secretary General on human rights defenders," UN Doc. E/CN.4/2001/94, at 89(g).

579 "Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms," U.N. General Assembly Resolution, A/RES/53/144, 8 March 1999.

be discriminatory and must be able to be deemed appropriate and proportional in view of the circumstances of the case."[580]

The U.N. Working Group on Arbitrary Detention has affirmed that the detention of people solely on the basis of their sexual orientation violates fundamental human rights—even though the laws under which they are detained may not expressly refer to homosexual conduct.[581]

The ICCPR's protections are violated when state agents——acting on the basis of sodomy laws, or of vaguely, sweepingly written laws punishing a broad range of public conduct——arrest or detain people on the basis of their sexual orientation, or their gender expression or identity.

5. The right to freedom from torture

Article 7 of the ICCPR states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

This basic, non-derogable protection is violated when state agents beat, maltreat, and abuse people on the basis of their sexual orientation and gender identity. It is violated when non-state actors (whether in the community, in public or private places, or in the family) inflict physical abuse, including sexual abuse, on people because of their sexual orientation or gender identity or expression, enjoying impunity granted by—or acting at the urging of—state authorities.[582]

A lengthy recent statement by the U.N. Special Rapporteur on Torture to the General Assembly is relevant in this regard. It examines, and condemns, many of the causes and consequences of abuses detailed in this report.

> The Special Rapporteur notes that a considerable proportion of the incidents of torture carried out against members of sexual minorities suggests that they are often subjected to violence of a sexual nature,

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[580] Manfred Nowak, *CCPR Commentary* (Kehl: N.P. Engel, 1993), pp. 172-73.

[581] U.N. Working Group on Arbitrary Detention, "Opinion no. 7/2002 (Egypt)", at 7 and 14-15.

[582] The decision of the Inter-American Court of Human Rights in the case of *Velásquez Rodríguez* establishes, in terms clearly applicable in other international systems, the responsibility of states for patterns of violations committed by private individuals. The Court mandated states to "Take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within [its] jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation": *Velásquez Rodríguez v Honduras,* 4 Inter. Am. Ct. HR, Ser. C, No. 4, 1988.

such as rape or sexual assault in order to "punish" them for transgressing gender barriers or for challenging predominant conceptions of gender roles.

The Special Rapporteur has received information according to which members of sexual minorities have been subjected, *inter alia,* to harassment, humiliation and verbal abuse relating to their real or perceived sexual orientation or gender identity and physical abuse, including rape and sexual assault. He notes with concern that, according to the information received, the rape of a man or of a male-to-female transsexual woman is often subject to the lesser charge of "sexual assault," which carries lighter penalties than the more serious crime of rape in a number of countries.… Ill-treatment against sexual minorities is believed to have also been used, *inter alia,* in order to make sex workers leave certain areas, in so-called "social cleansing" campaigns, or to discourage sexual minorities from meeting in certain places, including clubs and bars.

While no relevant statistics are available to the Special Rapporteur, it appears that members of sexual minorities are disproportionately subjected to torture and other forms of ill-treatment, because they fail to conform to socially constructed gender expectations. Indeed, discrimination on grounds of sexual orientation may often contribute to the process of the dehumanization of the victim, which is often a necessary condition for torture and ill-treatment to take place. The Special Rapporteur further notes that members of sexual minorities are a particularly vulnerable group with respect to torture in various contexts and that their status may also affect the consequences of their ill-treatment in terms of their access to complaint procedures or medical treatment in state hospitals, where they may fear further victimization, as well as in terms of legal consequences regarding the legal sanctions flowing from certain abuses. The Special Rapporteur would like to stress that, because of their economic and educational situation, allegedly often exacerbated or caused by discriminatory laws and attitudes, members of sexual minorities are deprived of the means to claim and ensure the enforcement of their rights, including their rights to legal representation and to obtain legal remedies, such as compensation…

> Discriminatory attitudes to members of sexual minorities can mean that they are perceived as less credible by law enforcement agencies or not fully entitled to an equal standard of protection, including protection against violence carried out by non-state agents. The Special Rapporteur has received information according to which members of sexual minorities, when arrested for other alleged offences or when lodging a complaint of harassment by third parties, have been subjected to further victimization by the police, including verbal, physical, and sexual assault, including rape.[583]

6. The human rights of the child

Children have particular rights to protection from violence and from torture or cruel or inhuman treatment. The Convention on the Rights of the Child (CRC)[584] affirms in its article 19 that youth have the right to protection from "all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child." The U.N. Committee on the Rights of the Child has cited this provision in calling for state action against abuse and abandonment of children within the family. [585]

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[583] "Report of the Special Rapporteur on the question of torture and other cruel, inhuman and degrading treatment or punishment," U.N. General Assembly, UN Doc. A/56/156, 3 July 2001.

[584] Botswana acceded to the treaty on March 14, 1995. Namibia has been a party to the treaty since September 30, 1990, South Africa since June 16, 1995, Zambia since December 5, 1991, and Zimbabwe since September 11, 1990.

[585] The Committee on the Rights of the Child has, in a number of instances, called for states to address and prevent discrimination and abuse within the family. It has encouraged states "to launch comprehensive public education campaigns to prevent and combat gender discrimination, *particularly within the family"* (emphasis added): "Concluding Observations of the Committee on the Rights of the Child: Uzbekistan," CRC/C/15/Add. 167, at 31. It has repeatedly called for states to promote "respect for the views of children" in accordance with article 12 of the Convention, noting that these views (which can clearly include the expression of sexual orientation or gender identity) have been unjustly restricted "owing to traditional societal attitudes . . . *especially within the family*" (emphasis added; "Concluding Observations of the Committee on the Rights of the Child: Lebanon," CRC/C/15/Add.169 at 30; see also "Concluding Observations of the Committee on the Rights of the Child: Bahrain," CRC/C/15/Add.175 at 34, and "Concluding Observations of the Committee on the Rights of the Child: Gabon," CRC/C/15/Add.171 at 27-28). The Committee has identified the abandonment of children as a form of abuse (see "Concluding Observations of the Committee on the Rights of the

The Convention on the Rights of the Child also affirms, in article 28.1, that:

> States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:
> (a) Make primary education compulsory and available free to all;
> (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
> (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
> (d) Make educational and vocational information and guidance available and accessible to all children;
> (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

These rights are violated when families expel or abuse children because of their sexual orientation, or gender identity or expression, and when state authorities undertake no effective interventions to address or prevent those actions. These rights are violated when children are harassed or abused at school, or expelled from school, because of their sexual orientation, or because of the way they do not correspond to gender norms for appearance or behavior.

Child: Kenya," CRC/C/15/Add.160 at 41-42, and "Concluding Observations of the Committee on the Rights of the Child: Tanzania," CRC/C/15/Add.156, at 44-45). In one report the Committee "notes the establishment by the state party of a programme to encourage the reinforcement of the family environment and to strengthen parenting skills among both parents. The Committee remains concerned, however, at the high rate of abandonment of children…. In this regard, the Committee also expresses concern at the lack of adequate alternative care facilities and qualified personnel in this field. The Committee recommends that the state party increase its efforts to provide support, including training, for parents, to discourage the abandonment of children." ("Concluding Observations of the Committee on the Rights of the Child: Thailand," CRC/C/15/Add.97 at 22. In "Concluding Observations of the Committee on the Rights of the Child: Belarus," CRC/C/15/Add.180, at 38, the Committee urged the state to "develop strategies and awareness-raising activities to prevent and reduce the abandonment of children.")

The International Covenant on Economic, Social and Cultural Rights (ICESCR) [586] also affirms the right to education, and adds in its article 13.1:

> States parties agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

The CRC expands on these mandates, requiring in article 29.1 that education shall be directed at, *inter alia,*

> The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;…
>
> The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin…

States neglect these obligations, and violate the rights of children, when they fail to introduce curricula that will promote and advance the human rights of all peoples, including those suffering discrimination based on their sexual orientation. States overtly violate these obligations, and show contempt for the rights of children, when they allow educational systems to become centers for disseminating prejudice and practicing hatred.

7. The human rights of women

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[587] commits states in its article 1 to the eradication of

[586] Botswana has not signed the ICESCR. Namibia acceded to the Covenant on November 28, 1994; South Africa signed it on October 3, 1994; Zambia and Zimbabwe acceded to it on April 10, 1984, and May 13, 1991, respectively.

[587] Botswana acceded to the treaty on August 3, 1996, Namibia on November 23, 1992, and Zimbabwe on May 13, 1991. South Africa has been a party since December 15, 1995, and Zambia since June 21, 1985.

"any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

The Convention also protects the rights of women to economic and social equality, including participating in both the planning and the benefits of development, as well as their right to "participate in all community activities" (article 11, article 14). It protects their right to equality in education, including the "elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education" (article 10.c). And it mandates that states "modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women" (article 5.a).

These protections are violated when states reinforce stereotyped gender roles by heaping further stigma upon those who contravene them. They are violated when states encourage communities to discriminate against, or drive out, non-conforming women. They are violated when states vilify women's activists striving to ensure and protect equality rights. They are violated when states condone an atmosphere of violence, in which women who do not conform to gender roles or other social expectations may be abused or raped, in public spaces or in the home.

The Convention requires states to act against abuse and discrimination in families and communities. The U.N. Special Rapporteur on Violence Against Women has observed that communities

> "police" the behaviour of their female members. A woman who is perceived to be acting in a manner deemed to be sexually inappropriate by communal standards is liable to be punished… In most communities, the option available to women for sexual activity is confined to marriage with a man from the same community. Women who choose options which are disapproved of by the community, whether to have a sexual relationship with a man in a non-marital relationship, to have such a relationship outside of ethnic, religious or class communities, or to live out their sexuality in ways other than heterosexuality, are often subjected to violence and degrading treatment… Women, "unprotected" by a marriage union with a man, are vulnerable members of the community, often

> marginalized in community social practices and the victims of social ostracism and abuse.[588]

The Convention also requires states to refrain from discrimination themselves, or from legal or other language that confirms or incites it. In its comments on the state report of Kyrgyzstan, for instance, the Committee on the Elimination of Discrimination Against Women stated:

> The Committee is concerned that lesbianism is classified as a sexual offence in the Penal Code.
>
> The Committee recommends that lesbianism be reconceptualized as a sexual orientation and that penalties for its practice be abolished.[589]

8. The right to health

The International Covenant on Economic, Social, and Cultural Rights (ICESCR), in its article 12.1, affirms "the right of everyone to the highest attainable standard of physical and mental health."

In its General Comment 14, the U.N. Committee on Economic, Social, and Cultural Rights (which evaluates the realization of rights under the Covenant) specifically noted that this article means states may not discriminate based on sexual orientation in the enjoyment of this right.

> By virtue of article 2.2 and article 3 [equality provisions in the treaty], the Covenant proscribes any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), *sexual orientation* [emphasis added] and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health…

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[588] "Report of the Special Rapporteur on violence against women, its causes and consequences," UN Doc. E/CN.4/1997/47, 12 February 1997.

[589] "Concluding Observations of the Committee on the Elimination of Discrimination Against Women : Kyrgyzstan," Committee on the Elimination of Discrimination against Women, 20th Session, UN Doc. A/54/38, January 27, 1999, at 127-28.

> With respect to the right to health, equality of access to health care and health services has to be emphasized. States have a special obligation to provide those who do not have sufficient means with the necessary health insurance and health-care facilities, and to prevent any discrimination on internationally prohibited grounds in the provision of health care and health services, especially with respect to the core obligations of the right to health.[590]

The Committee also emphasized that the right to health includes "access to health-related education and information, including on sexual health"; it observed that information accessibility "includes the right to seek, receive, and impart information and ideas concerning health issues." The Committee called on states to refrain from "censoring, withholding or intentionally misrepresenting health-related information, including sexual education and information, as well as from preventing people's participation in health-related matters." And it required states to meet "obligations in the dissemination of appropriate information relating to healthy lifestyles and nutrition, harmful traditional practices and the availability of services."[591]

Governments violate these protections when they deny, or condone denying, medical services to people based on their sexual orientation or gender expression or identity. Governments violate these protections when they fail to provide—or when they censor—health information targeted at vulnerable individuals and groups, in the context of HIV/AIDS or other diseases. Governments also violate these protections when they interfere with or penalize the efforts of NGOs and civil-society actors to address health issues, or to engage in outreach on such issues to affected populations.

9. The right to marry and found a family

Article 23.2 of the ICCPR states, "The right of men and women of marriageable age to marry and to found a family shall be recognized."

This article does not define marriage as between a man and a woman. In fact, there is no such definition of marriage in the international instruments. In its absence, the strength of international protections against discrimination—including protections based on both sex and sexual orientation—applies to the question of who enjoys this right, and how. Excluding gays and lesbians from

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[590] "General Comment 14: The right to the highest attainable standard of health." Committee on Economic, Social, and Cultural Rights, 22nd Session, UN Doc E/C.12/2000/4, 11/08/2000, at 18-19.

[591] "General Comment 14," CESCR, at 11, 12.b, 35, and 37.

the status of civil marriage constitutes discrimination based on sexual orientation. However, it can also be construed as discrimination based on sex, since marriage would be open to those persons but for the sex of their chosen partner. The ICCPR bans both.

It is important to observe also that United Nations and other international bodies have shown respect for evolving, rather than fixed, definitions of the family. The U.N. Human Rights Committee has noted that "the concept of the family may differ in some respects from state to state, and even from region to region within a state, and … it is therefore not possible to give the concept a standard definition."[592] The U.N. Committee on the Rights of the Child has also stated:

> When considering the family environment, the Convention [CRC] reflects different family structures arising from various cultural patterns and emerging family relationships.[593]

The U.N. Special Rapporteur on Violence Against Women has observed,

> Throughout the world, there exist divisions between the dominant, normative ideal of the family and the empirical realities of family forms. Whether the ideal is the nuclear family or a variation of the joint or extended family, such ideals in many cases are not wholly consistent with the realities of modern family forms. These family forms include, in increasingly large numbers, female-headed households in which women live alone or with their children because of choice (including sexual and employment choices), widowhood, abandonment, displacement or militarization.…
>
> Despite such differences, however, the culturally-specific, ideologically dominant family form in any given society shapes both the norm and that which is defined as existing outside of the norm and, hence, classified as deviant. Thus, the dominant family structure—whether it is dominant in fact or merely in theory—serves as a basis against which relationships are judged. Further, it serves as the standard against which individual women are judged and, in

[592] "General Comment 19: Protection of the family, the right to marriage and equality of the spouses," Human Rights Committee, UN Doc. HRI/GEN/1/Rev.2, at 2.
[593] "Report on the Fifth Session," Committee on the Rights of the Child, UN Doc. CREC/C/24, Annex V.

> many cases, demonized for failing to ascribe to moral and legal dictates with respect to family and sexuality… Such ideology exposes women to violence both within and outside the home by enforcing women's dependent status, particularly among poor and working class women, and by exposing those women who do not fit within or ascribe to traditional sex roles to gender-based hate crimes… Such demonization fuels and legitimates violence against women in the form of sexual harassment, rape, domestic violence, female genital mutilation, forced marriages, honour killings and other forms of femicide.
>
> The Special Rapporteur also maintains that state refusal to recognize non-traditional family forms can deny women (as well as men) within them the full protection of the law against domestic violence and abuse—and can further endanger the situation of human rights defenders.
>
> Increasingly women's human rights defenders are coming under attack for, among other things, challenging traditional notions of the family. Public denouncements, accusations, harassment and physical violence are increasingly employed against women's human rights defenders. Commentators argue that in order to ensure that women's human rights are protected in both public and private life, the acceptance of non-traditional family forms is necessary. It is essential to recognize the potential for and work to prevent violence against women and the oppression of women within all family forms.[594]

By denying legal recognition to same-sex partnerships, states further stigma and foster violence. They deprive a class of people of important economic and social benefits that heterosexual couples can obtain and share. They also deny to that class crucial legal protections.

B. Detailed Recommendations

Human Rights Watch and the International Gay and Lesbian Human Rights Commission (IGLRHC) call on all political leaders in the region:

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[594] "Report of the Special Rapporteur on Violence Against Women," UN Doc. E/CN/1999/68, March 10, 1999, at 8, 9, 10.

- To refrain from statements that incite division, hatred, violence, and discrimination based on sexual orientation or gender expression or identity.

Human Rights Watch and IGLHRC also call on the governments of Botswana, Namibia, Zambia, and Zimbabwe:

- To repeal so-called “sodomy laws,” or laws that criminalize consensual, adult, homosexual acts. In particular,
    - Namibia and Zimbabwe should repeal the common-law offense of sodomy;
    - Namibia should remove sections of the “Combatting of Immoral Practices Act,” 1980, which refer to sexual relations between people not united in a civil or customary marriage as “unlawful carnal intercourse”;
    - Botswana should repeal Sections 164, 165, and 167 of its Penal Code;
    - Zambia should repeal Sections 155, 156, and 158 of its Penal Code.[595]
    - Zimbabwe should also modify or repeal Sections 15-18 of its 2001 Sexual Offences Act that radically increase penalties for “sexual offences” committed by an HIV-positive person, whether or not aware of his serostatus; that list “sodomy” as a “sexual offence”; and that deny accused persons the right to consent before, and confidentiality after, HIV testing.[596]

- To modify or repeal all vague laws that restrict public conduct on moral or other grounds without specifiying the behaviors barred. These include relevant provisions in Sections 172 and 178 of Zambia’s Penal Code; Zimbabwe’s Miscellaneous Offences Act of 1964; and any similar provisions in other states.[597]

- To repeal laws giving governments power to restrict the internationally recognized right to freedom of expression, including Sections 54 and 55 of Zambia’s Penal Code; Zimbabwe’s Censorship and

[595] For detailed information about these provisions, see the Appendix.
[596] For detailed information about these provisions, see the Appendix.
[597] For detailed information about these provisions, see the Appendix.

Entertainments Control Act of 1967; and any similar provisions in other states.

- To end police abuse and surveillance of people and groups based on their sexual orientation or gender identity or expression. Investigations should be launched into allegations of police brutality, extortion, and torture; those found responsible should be held accountable. Police and other officials in the criminal justice system should be trained in sensitivity to minorities and to human rights protections, including protections based on sexual orientation.

- To end discrimination in the provision of health care, and to ensure that gay, lesbian, bisexual, and transgender people as well as all other vulnerable groups have access to relevant and appropriate information on health, including information on sexual health and HIV/AIDS.

- To enact laws protecting against discrimination on the basis of sexual orientation or gender identity or expression.

- In future processes of constitutional revision, to include provisions that:

    - Affirm or strengthen the right to privacy;
    - Strengthen anti-discrimination protections, and include sexual orientation and gender identity or expression in their scope;
    - Eliminate any exemption from equality protections for customary laws or traditional practices.

- To open the status of marriage and all the rights and benefits it entails to same-sex couples; and to ensure that legal rights and protections are available to partners in same-sex relationships as in all relationships, whether married or not.

Human Rights Watch and IGLHRC call on the government of South Africa:

- To enact legislation opening the status of marriage and all the rights and benefits it entails to same-sex couples; and to ensure that basic legal rights and protections, including protections against domestic violence, are available to partners in same-sex relationships as in all relationships, whether married or not.

- To pass a revision of the Sexual Offences Act that equalizes the age of consent for homosexual and heterosexual sexual relations, and defines the crime of rape in such a way that the rape of men by men, or of women by women, is included in the definition and subject to equal punishment.

- To enact measures that would allow post-operative, as well as certain categories of pre-operative, transgender persons legally to change their identity papers to correspond to their preferred gender.

- To create or empower mechanisms to investigate violations of, and determine how state and private agents should enforce and uphold, the sexual-orientation protections of the Equality Clause of the constitution. These measures may include:

    - Ensuring that existing Commissions responding to human rights violations (including the Human Rights Commission and the Commission on Gender Equality) assign to at least one commissioner specific responsibility for sexuality issues, with staff delegated to assist, engage in outreach and publicity, and engage in litigation or mediation where necessary;
    - Ensuring that existing mechanisms for enforcing protections in the Equality Act—including its protections against private-sphere discrimination—are clearly mandated to focus on issues of sexuality and sexual orientation as well as race, gender, and disability;
    - Ensuring that officers in the Office of the President, and officers in each department, are mandated to monitor the impact of existing and proposed laws and policies on the Equality Clause protection of sexual orientation;
    - Ensuring that issues of sexual orientation and gender identity be standing agenda items for consideration in debates by all Parliamentary Portfolio Committees, including those addressing health, welfare, justice, police, and prisons;
    - Creating new mechanisms for responding to issues of sexuality as necessary.

- To develop and implement a state public education campaign promoting understanding of the rights of lesbian, gay, bisexual, and transgender people, in the context of human rights and constitutional protections in general. Civil society, particularly lesbian, gay, bisexual, and transgender groups and NGOs, should be consulted at all stages in the process. This should include:

- Developing, again in cooperation with civil society actors, educational and training materials promoting understanding of the rights of lesbian, gay, bisexual, and transgender people. Such materials should be developed for use at all levels—in families, in schools, in communities, and in training state employees, including officials in the criminal justice and health care sectors.
- Developing, again in cooperation with civil society actors, educational and outreach materials specifically targeted at lesbian, gay, bisexual, and transgender populations——as well as men who have sex with men and women who have sex with women, but who may not identify themselves in the above terms. These materials should explain both their rights and their recourses under the constitution and existing law.
- Ensuring that libraries, the state media, and other state institutions for disseminating information have, and distribute, information on sexual orientation, gender identity, and their constitutionally protected status.
- Ensuring that key state personnel—including police, magistrates, prosecutors, judges, and health care professionals—are trained in lesbian, gay, bisexual, and transgender issues, at the initiative and expense of the state.
- Mandating key state institutions, including the criminal justice and health care sectors, to engage in outreach to lesbian, gay, bisexual, and transgender groups and NGOs, at local as well as national levels, in order to explore barriers to working together, and ways to overcome them.

- To offer funding and support to civil society actors on a non-discriminatory basis, supporting both their service provision and their advocacy work—including NGOs and groups that may advocate against government policy.

- To ensure that legal education in state institutions includes full treatment of the growing body of sexual orientation law.

- To take measures giving incentives to attorneys to engage in pro bono legal work, particularly representing indigent clients or assisting NGOs who do.

- To ensure that the right to asylum from persecution based on sexual orientation and gender identity is respected by South Africa's immigration authorities.

- To develop protocols for the protection of vulnerable prisoners—including lesbian, gay, bisexual, and transgender prisoners—in all places of detention. These protocols should ensure the prisoners' safety in the context of the specific needs of each group, and should do so without imposing punitive measures or social isolation.

- To speak out against all forms of persecution and abuse in other countries, and defend the international relevance of the values in South Africa's Constitution and its Equality Clause.

Human Rights Watch and IGLHRC call on all NGOs in the region as well as internationally, and particularly human rights organizations and movements:

- To speak out whenever state officials incite or practice discrimination or abuse.

- To seek out marginalized and stigmatized groups, and work to bring their concerns into the mainstream of human rights and other social movements.

C. Postscript: Heather's Story

We spoke to Heather, thirty-one years old, born and raised in Harare, in the garden outside GALZ's offices on a bright day in August 2000—the morning after she told her husband she was a lesbian.

She was more confident of her future than many women and men interviewed for this report. Her story grew from an urban, middle-class world not typical of Zimbabwe: one where spaces—from streets to shops to schools—were at least tenuously available for women to be independent, in the at least temporary absence of men. Possibilities open to her were closed to others. Yet it also reflected something both more intimate and more generally human: the exhilaration of first freedom, a sudden, fragile but invigorating sense of personal power.

Heather told us:

> So here I am, today. I feel as if I have no problems in the world. Actually, though, I do. The world is my problem, you might say.
>
> My problem is that from my teenagehood, from age twelve or thirteen, I always felt attracted to other girls. If I would go in a changing room, whenever I saw another female naked, I would feel turned on. And then I would start fantasizing about holding that person. But you see, according to our African tradition, when you finish school you must get married and so on. So I got married. I had three sons.
>
> But my relations with my husband were so difficult that, from the beginning of last year, I have not been sleeping with him. Each time he released his semen, I felt like vomiting. I had to shut my eyes and pretend that I was with another woman.
>
> So I finally told him I had no feelings for him. It was hurting me to have sex with him. I told him I had to use petroleum jelly and facilitate it, because I had no feelings.
>
> He started believing I had spirits in me, and maybe the spirit I had in me was male. And that spirit did not want me to have sex with another man. He never thought it had anything to do with my having sexual desires for women, with my lesbianship. He wanted me to go to the rural areas, he would give me over to my father, and do what must be done: kill a beast, appease the spirit, drink African beer.
>
> Well, I didn't want that. I opened the phone directory, found GALZ, and called. Poliyana [Mangwiro] gave me directions, and I came over.
>
> I went to a party GALZ had. There were a few women there and they were attracted to me, but I was not attracted to them. Then came a certain girl, and we were attracted to each other from her arrival. We have been communicating, but there is a problem. She is committed

to a certain man. I don't want to hush up anything. I want to have someone with whom I can be me.

It is a bit difficult putting the message across to my husband. The first day, he followed me here [to the GALZ Center]. He saw some gay guys about. I had told him this was a branch of Amnesty International. Well, he knows I am very interested in human rights, he always says, you should have been a lawyer by profession. I told him I had to come to see how they do things: human rights, you know, for women who are abused by their husbands.

Well, he was very slow about it. He just didn't get what was going on. The girl I was interested in, she even took me and my husband to her place. He watched me punch her number in my cellphone. And he still didn't know. He drove me here many times. But he kept asking, "What do you do there?" I told him I assisted with computers. Then, at the [2000] Book Fair, I insisted I wanted to go to the GALZ stand. He didn't want me to go to the Fair: he said, "You want to become a writer or what?" I went, and I got pamphlets on lesbians and gays, books on people's feelings, and such. I got home and threw them on his bed. I knew he would go through each one that evening. And I went in the kitchen and started cooking.

He came to me and said: "What is this stuff?"

I said: "This is the life certain people live."

He said: "Why are you so interested?"

I said: "Why are gay and lesbian people treated as outsiders?"

He said: "Because what they do is inhuman. Their practices are a disgrace to God and all men."

I said: "I see nothing wrong with it. It is difficult to change people's desires." And I said, "How do you think people get to the stage of deciding they will have a same-sex partner? When they realize they can't have feelings for the opposite sex."

He said, "Don't you find it embarrassing?"

I said: "No."

He kept quiet.

Just yesterday I came here and got more GALZ publications, and left them at home. He said then: "Why are you really, really interested in this stuff?"

For the first time I confessed. I told him: "I am part of them."

And finally we talked.

He asked, "Do you have a girlfriend? Do you sleep around?"

I said, "No, I have one girl I have a crush on. And we have no sex. She has a man."

He said: "I know you are seeing somebody. Are you going to continue with this lesbianship?" And he asked me how long I had had it in me.

I told him about everything, about my teenage fantasies. Well, I was afraid he might grow violent. But he did not. But he said I must not tell the kids.

This morning I put on a GALZ T-shirt. I had got it yesterday. He got angry: he said, "It is bad for the public as a whole." He said, "People will assault you, shout at you."

And I said, "If it is an offence, I'll appear before a court of law. I want to know if human rights exist in this country."

He wouldn't take me to the Center, so I had to use public transport. I wore the T-shirt and carried my jacket in my hands. People stared at me, some in interest, some with that kind of eye which says, "At least you've got the guts."

And I felt proud.

> My husband doesn't want a divorce. He doesn't want his relatives and friends to know. He has a girlfriend. So he lets me go without sex.
>
> I think I could support myself without my husband. I have been working for [a Harare NGO] part-time for years. But I need to get a job which is not just working for money, but one which will satisfy my inner soul at the end of the day.
>
> A lot of people are gay or lesbian and are shy to come out of their shells. If Magistrate's Court could reveal how many marriages end after one or two years because of "sexual differences"! People marry to please their parents, but they are gay and have to pretend all their lives. If I had five of those T-shirts I would put them on from Monday to Friday. I just feel that I should be free.
>
> I have the wish that all African women can stop pretending and being afraid. They should be adults, not afraid of their extended families, their mothers and fathers, or their husbands.
>
> I wish I could go to the rural areas trying to make people realize who they are. I wish I could let them know they are not the only ones, and it is not just an "unnatural offence." In law, maybe, but not in reality.
>
> We don't encourage women to break their marriages. But we should encourage them to discover who they are and make their choices. Before she dies she should find out, and live a few years as herself.
>
> So let's go to rural areas! Let's talk to the women![598]

[598] IGLHRC interview by Scott Long with Heather, Harare, Zimbabwe, August 12, 2000.

APPENDIX

Before the law: Criminalizing sexual conduct in colonial and post-colonial southern African societies

By Scott Long

There is no reason to suppose that white colonists brought same-sex sexual behavior to Africa for the first time. What they did bring, though, was the criminal categorization of that behavior. The acts were indigenous. The name and crime were imported.

The paradox is crucial: the laws that some politicians now defend as bulwarks of independence and authenticity are themselves colonial impositions. The law that criminalizes homosexual conduct in Zambia or Botswana is not a local phenomenon. It has its exact counterpart in similar laws in other former (and present) British colonies, including India and the English-speaking Caribbean; and all derive from metropolitan models enacted in Victorian times. Moreover, these laws are deeply rooted in European Christian culture, in particular in a medieval, theological fear of non-procreative sex, which sought to ban acts anathematized with Biblical sweep and imprecision. The presence of these provisions in Africa is a historical accident—or, more exactly, the product of a historical injustice: colonial rule.

None of the laws in Africa that criminalize consensual, adult same-sex relations actually mention "homosexuality." (The term "homosexual" itself was invented in Europe in 1869, by a medical doctor, and took a long time to move from medical to legal discourse.) Indeed, what is most striking about all those laws is their vagueness—referring as they do to "unnatural offenses," or "carnal knowledge against the order of nature," or "gross indecency." Their history is mostly one of legal, political, and social attempts to fill in those vacuous, umbrella terms with specific acts—with a content constantly shifting, according to alterable understandings of what "nature," or social mores, would actually allow.

Laws criminalizing so broad and ill-specified a range of behaviors are clearly not ones that allow individuals to say with certainty whether a particular act is permitted. Two U.S. legal authorities have written, of sex laws in that country, that "When law tracks the moral beliefs held by all or at least the vast majority of the members of a society, as is true of the laws prohibiting murder and theft, people do not have to 'know' the law in order to comply with it; they have only to follow their conscience. Given the diversity of moral opinion regarding sex in the United States, conscience is not a sure guide to legality any more."[599]

If one changes "opinion" to "behavior," the statement might hold true of most societies across the world and across history. No society, however monolithic, can impose uniformity in sexual practice, much less desire. Nor is the law likely even to be cognizant of the diversity of practices and desires its subjects experience, so shrouded are many of them likely to be in stigma, secrecy, and silence. A sweeping prohibition of "crimes against nature" serves not only a punitive but a preceptive purpose. Its function is less to specify despised acts than to outline a positive vision of sex as employed in the service of procreation. Yet in so doing it abandons the regulative garment of law in order to wear a prophetic mantle, and exhort in the name of its own particular Utopia.

This Appendix will examine the history of criminal penalties for same-sex behavior in colonial, and post-colonial, southern African societies. It will show two legal systems intersecting, each with its own religious animus toward such behavior—and each with its own terminology. From the south came Roman-Dutch common law, the law brought by settlers from the Netherlands: a version of codified Roman law, interpreted by Renaissance classicists in the Low Countries, who read it in the light of Germanic common law. This legal tradition spoke of "sodomy." From the north came English common law and British penal codes, with a history of criminalizing "buggery" and "gross indecency." The two legal systems met somewhere along the Zambezi and entered into a confusing interrelationship, which generated the multiple meanings of sexual offenses in all these countries today.

It is important, however, to remember that colonial law is not a self-contained system to be studied in the abstract. It did not arise from the undisturbed development of a political and social order; rather, it was a prop for disruption and invasion. It represented a set of foreign principles of justice imported into a new, deeply unjust situation, and recruited to maintain it.

Colonial law functioned differently according to who its subjects were. For whites, it served to regulate their own community; for the larger society, it served to differentiate peoples so that no "community" could possibly exist. For whites, it was an affirmation of their own "civilizing" mission; for others under its sway, it was an instrument of separation, stigmatization, and control.

In looking at sex laws in such segmented and striated societies, therefore, one must remember their different effects on different populations—as well as

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[599] Richard A. Posner and Katherine B. Silbaugh, *A Guide to America's Sex Laws* (Chicago: University of Chicago, 1996), p. 2.

their role in supporting not only moral beliefs but the concrete workings of the colonial system. Particularly in South Africa, apartheid employed sexual puritanism, and the regulation of sexual behavior, to maintain segregation and to justify surveillance. But throughout the region, these laws operated in conjunction with other legal provisions that made it possible to marginalize and control stigmatized groups, and gave the state immense power over social life. Most of these provisions remain in effect, long after colonialism proper has passed away.

Finally, the law that whites wrote was itself segregated. Colonial law oversaw the creation of another system that both supplemented it and confirmed its primacy: white rulers also codified "native" or "customary law" that would govern the daily lives of much of the population. In so doing, they rewrote those customary rules, either in their own images or in the image of what they believed the "native" should be.

This Appendix will therefore examine the changing definitions of forbidden sexuality in the laws the Europeans brought to Africa. It will then look at other laws surviving from the colonial period that furnish states with means to persecute or discriminate against sexually stigmatized groups. Finally, it will suggest how the codification of customary law may have changed the place of sexuality in African societies—as well as the understanding of "custom" itself.

A. Criminalizing Homosexual Conduct

1. Sodomy and Roman-Dutch law

Roman-Dutch common law was an interpretation of Roman law codes in the light of Dutch and Germanic practice, as synthesized by humanist scholars in the Low Countries in the Renaissance. This hybrid was brought to the Cape of Good Hope by settlers from the Netherlands in 1652.[600] As long as the colony

[600] Legal systems derived ultimately from Roman law are generally known, of course, as "civil law" systems, and distinguished from systems deriving from English common law by giving judges only limited power to establish legal precedents. Hence the name "Roman-Dutch common law" is on the face of it confusing. In fact, the Roman, "civil law" component of this particular legal tradition is relatively small. The great Netherlands jurist Hugo Grotius (1583-1645), its key figure and authoritative compiler, in his *Inleiding tot de Hollandsche Rechsgeleertheyt* (1631) largely drew on Germanic custom and practice, and used Roman law (as one commentator says) "only when it supplied omissions and deficiencies in the latter." (See *Wille's Principles of South African Law,* 8th Edition [Cape Town: Juta, 1991], pp. 21-25.) In South Africa, however, Roman-Dutch law has migrated still further from the usual methodology of civil-law

was under Dutch rule, its legal system continued to follow the evolution of the law in the colonists' home country.[601] During the Napoleonic wars, the colony was occupied by Great Britain, and in 1806 it was formally annexed to the British Empire. Rather than impose English common law, however, the new occupiers decided for convenience's sake to preserve the existing Roman-Dutch system.

Roman-Dutch law thus was carried by whites from the Cape Colony over the rest of what became South Africa—brought by the Afrikaner *Voortrekkers* to the new domains they established beyond the Orange River, and by the British to the lands they extorted or annexed from their native inhabitants. It was taken to what became Zimbabwe when that territory (as the colony of Southern Rhodesia) was occupied by Cecil Rhodes' British South Africa Company. It spread to what is now Namibia when, after the First World War, the former German colony of South West Africa was "mandated" to South Africa's repressive care by the League of Nations. It also became the common law of the British colony of Bechuanaland, which after independence became Botswana.

Early Roman-Dutch law contained an offense, or a complex of offenses, variously termed *sodomie, onkuisheid tegen de natuur* (lewdness against nature) or, in Latin, *venus monstrosa.* The word *sodomie* came to supersume or include the other two: it was, however, broadly defined. As a 1987 Zimbabwean High Court decision declared, reflecting on the development of the term:

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systems. Under the influence of British rule (since the United Kingdom occupied the Cape Colony in 1806), and in the absence of any conclusive metropolitan codification (since Roman-Dutch law almost immediately afterward—in 1809—became defunct at its origin in the Netherlands, which adopted the Napoleonic Code) it has become more reliant on jurisprudential precedent to establish legal norms, essentially adopting the practice of other common-law systems. The rule of *stare decisis* is in effect, and "judge-made" law is recognized.

[601] In fact, the situation is slightly more complicated: a South African decision in *R v Harrison & Dryburgh,* 1922, determined that laws enacted in the Netherlands prior to the founding of the Cape Colony in 1652 were all applicable in South Africa; however, those enacted in the homeland between 1652 and 1806—during the colonial period—were binding only if they had been formally promulgated in the Cape Colony. A search ensued for evidence that many quotidian laws—taken for granted in daily life—had been publicly pronounced, rather than passively accepted, while the Dutch ruled. No such quest was called for in the case of the law against "sodomy." It was an old Dutch law in any case: and the fact that executions for sodomy had taken place under Table Mountain until the nineteenth century served as sanguinary proof of promulgation.

> … the word used in early Roman-Dutch law was "sodomy" and this term, at that time, encompassed virtually any form of aberrant sexual behaviour. The crimes now known as sodomy and bestiality were included under this term, and some authorities also included acts such as self-masturbation, oral intercourse, lesbianism, and many other such practices. Some jurists even regarded normal coitus between a Jew and Christian as "sodomy."[602]

A selection of early definitions from Dutch legal scholars displays both the breadth and the bloodthirstiness of early European law. Joost Damhouder (1507-81) divided sodomy into three categories—self-masturbation, unnatural sexual acts between two humans, and bestiality—and stated, "When someone has committed sodomy with other people, whether with his own or opposite sex, the same are usually capitally punished with fire."[603] Matthaeus (1601-1654) wrote, "*Venus monstrosa* occurs whenever it perverts a man or a woman. Of this type are sodomites, catamites, tribadists [women having sex with women], masturbators, practitioners of fellatio, those who submit to fellatio, and whoever exercises vile desire with beasts. All these are to receive the highest penalty since they have transgressed the boundaries of nature and in this way cheat the future of mankind."[604] Carpzovius (1595-1666) wrote that "He who wastes the sexual act when copulating with men against nature, having abandoned the use of nature, has his head cut off… for example, when a man makes love to a woman in the wrong way, deliberately not inserting his member into her organ or not doing it in the correct manner."[605] Some defintions were narrower. U. Huber (1636-94), a Frisian judge, maintained that only bestiality and unnatural intercourse between human beings (not masturbation) were punishable; Simon van Leeuwen (1626-82) further excluded unnatural acts between females, or between males and females—leaving only male-male acts and bestiality as criminal offenses.[606] These shifts reflected not an increasing precision in

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602 *S v Chikore*, 1987 (2) Zimbabwe Law Reports 48 (High Court) at p. 50.

603 *Praeelectiones,* ad D 48.5. nn. 12 and 13, cited in *S v Kampher*, 1997, High Court of South Africa (Cape of Good Hope Provincial Division), case no. 232/92, HCR no. 001377/97, and in Peter Propotkin, "Getting to the Bottom of Sodomy in Zimbabwe" (unpublished paper).

604 *Com. De Criminibus Digestorum* ad Lib. (48.3, 6.8), emphasis added; cited in Propotkin, "Getting to the Bottom of Sodomy in Zimbabwe," translation slightly amended.

605 *Rer. Crim.* Pars 2, Quaest. 76 Obs. 3, cited in Propotkin, "Getting to the Bottom of Sodomy in Zimbabwe."

606 Cited in *S v Kampher* at 17.

jurisprudence but continuing contests over an elastic terrain of known and unknown, described and unmentionable, sexual acts. Two things, though, are clear:

- The common law responded to a belief rooted in Christian theology: that sexual acts were only permissible when aimed at childbearing. As South African jurist Edwin Cameron writes, in Roman-Dutch law "only male/female sexual acts that were directed to procreation were permitted. All other sexual acts … were cruelly punished."[607]

- The very stigma attached to these acts prevented an effective definition. A Dutch jurist stated in 1806 that "the turpitude of this unspeakable crime is so great that it ought, it seems, to be passed over in silence rather than to be expounded to the ears of the chaste, and hence many commentators on the criminal law too have merely touched on it with very few words."[608]

Both the profound moral value attached to the legal promotion of procreation, and the vagueness bred by silence, would remain consistent factors in the strange career of "sodomy" in southern Africa.

England's annexation of the Cape of Good Hope had peculiar consequences for the common law: it preserved the system, but ensured that it would develop independently of whatever happened in its homeland. Ironically, three years afterward, the Netherlands—now part of the French Empire—saw the introduction of the Napoleonic Code, which abolished Roman-Dutch law altogether and decriminalized all same-sex sexual acts. This repeal had no impact at the Cape. The British conquest ensured that a lopped and frozen form of Roman-Dutch law, and the crime of "sodomy," remained in place at the tip of Africa. Dead at the root, a graft of the medieval law survived in its remote colonial branches.

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[607] Edwin Cameron, "Unapprehended Felons: Gays and Lesbians and the Law in South Africa," in Cameron and Mark Gevisser, eds., *Defiant Desire: Gay and Lesbian Lives in South Africa* (Johannesburg: Ravan Press, 1994), p. 91.

[608] Van der Keesel, *Praelectiones in libros XLVII et XLVIII Digestorum* ad D 48.5.29, cited in Applicants' Heads of Arguments, *National Coalition for Gay and Lesbian Equality et. al. v Minister of Justice et. al.,* High Court of South Africa (Witwatersrand Local Division), case no. 97/203677, at 3.7.

2. South Africa

As late as 1907, a four-volume guide to South African common law noted that "Sodomy and bestiality are punishable with death … although a lesser punishment may be inflicted at the discretion of the court," adding however that in South Africa "it has been the constant practice of our courts to punish the offense otherwise than capitally."[609] (The last known execution for sodomy appears to have been in the Cape Province in 1831.)[610] As late as 1997, a one-year suspended prison sentence was imposed in a case in Western Cape Province.

This 1907 text divided sodomy into "two species," one being bestiality, the other "where one man has carnal intercourse with another man or with a boy," noting, however, that "Masturbation… is also a crime equally with sodomy and bestiality."

With time, the original general crime of "sodomy" gradually became differentiated in South African common law into three separate offenses. Bestiality took its independent place. It was "usual," said an early twentieth-century legal text, "to require proof of penetration" in sodomy cases[611] (although both the active and passive partners were guilty of the same crime), and a 1926 decision indicated that to charge a man with sodomy without evidence of penetration "might have been misleading."[612] These detailed divisions of sexual behaviors took some time to be established in the common law. By mid-century, though, a standard definition of sodomy could be said to exist, which required penetration, did not require seminal emission, and identified both the active and passive partners as criminal practitioners: "Sodomy consists in unlawful and intentional sexual relations *per anum* between two human males."[613]

The ultimate definition of sodomy left over what one legal scholar called "a residual group of proscribed 'unnatural sexual acts' referred to generally as 'an unnatural offence.'"[614] "Unnatural offenses" were still difficult to define: at a minimum, though, they included those sexual acts between men that did not

[609] Manfred Nathan, *Common Law of South Africa* (Cape Town, 1907), v. 4, p. 2595; quoted in Propotkin, "Getting to the Bottom of Sodomy in Zimbabwe."
[610] *S v V* 1967 2 SA 17 (E).
[611] Charles Gardiner and Alfred Lansdown, *South African Criminal Law and Procedure,* v. II, Sixth Edition (Cape Town: Juta & Co., 1957), p. 1227: the language dates from the 1921 edition.
[612] *R v Gough and Narroway*, 1926 CPD 159.
[613] Hunt, *South African Criminal Law and Procedure,* 3rd edition (Johannesburg: 1996), v. 2 by J. R. L. Milton, p. 248.
[614] Hunt, v. 2 at p. 264.

involve anal penetration. In 1967, two men could still be convicted of "unnatural offenses" for mutual masturbation. As will be shown below, these divisions in the original corpus of crimes constituting "sodomy" showed the influence of British occupation. English law by now saw anal sex between men as one crime, and other forms of homosexual sex—"gross indecency"—as another. This categorization had come to inflect Roman-Dutch common law as well.[615]

A still profounder influence on the place of sexuality in society was the apartheid regime. Regulating sex was basic to its power. From the beginning, the National Party campaigned against interracial sex—the very existence of a mixed-race population problematized its project of comprehensive racial categorization. Yet beyond that, the architects of apartheid aimed to create an all-white, all-Christian public sphere in which racial and moral purity would be forcibly conjoined. Thus the Sexual Offences Act of 1957 criminalized interracial sex—but, in the same terms, barred prostitution, solicitation for immoral purposes, and a range of other activities that brought "immorality" into the public gaze.

Finally, moral panics were a tool for the regime to reinforce its position. Kevan Botha and Edwin Cameron have written that "During the apartheid era, key moments of political crisis have coincided with incidents of repression against non-conformist sexuality."[616] Homosexuality soon entered the roster of the regime's public demons. In January 1966, a police raid on a house in the northern suburbs of Johannesburg found

> a party in progress, the likes of which has never been seen in the Republic of South Africa. There were approximately 300 male persons present who were all obviously homosexuals … Males were dancing with males to the strains of music, kissing and cuddling each other in the most vulgar fashion imaginable. They also paired off and continued their love-making in the garden of the residence and in

[615] Propotkin's unpublished paper argues that this inflection is particular to Rhodesia/Zimbabwe, where judges of English background and training read Roman-Dutch law through English spectacles. It seems likely, though, that sodomy in South Africa was reinterpreted under the same unacknowledged influence.

[616] Kevan Botha and Edwin Cameron, "South Africa," in D.J. West and Richard Green, eds., "Sociolegal Control of Homosexuality: A Multi-Nation Comparison" (New York: Plenum, 1997), p. 22.

> motor cars in the streets, engaging in the most indecent acts imaginable with each other.[617]

The ensuing scandal led to an extended panic over the threat homosexuality posed to the society. The central office of the South African police sent a circular throughout the country instructing officers to use informers to infiltrate homosexual gatherings. The minister of justice told Parliament,

> History has given us a clear warning, and we should not allow ourselves to be deceived into thinking that we may casually dispose of this viper in our midst by regarding it as innocent fun. It is a proven fact that sooner or later homosexual instincts make their effects felt on a community if they are permitted to run riot … Therefore we should be on the alert and do what there is to do lest we be saddled later with a problem which will be the utter ruin of our spiritual and moral fibre.[618]

A Parliamentary Select Committee was formed to recommend new legislation. Their report predictably saw homosexuality as a problem for, and within, the white community—non-whites appeared only in the context of possible interracial relationships. The overriding concern of the report was that homosexuality was moving out of the private into the public sphere. With the declared aim to "stamp out homosexual gatherings," Parliament amended the Sexual Offences Act to punish "A male person who commits with another male person *at a party* any act which is calculated to stimulate sexual passion or to give sexual gratification," defining a party as "any occasion where more than two persons are present" (emphasis added). While the racial provisions of the Sexual Offences Act were repealed in 1985, this amendment survived. One historian writes:

> The immediate consequences of the legislation have never been fully documented, but there is evidence of a clampdown on outdoor cruising places and routine police surveillance of clubs, bars, and parties during the 1970s. So as to remind gay people of the law,

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[617] Quoted in Glen Retief, "Keeping Sodom Out of the Lager," in Cameron and Gevisser, eds. *Defiant Desire,* p. 101.

[618] Quoted in Retief, "Keeping Sodom Out of the Lager," in Cameron and Gevisser, eds., *Defiant Desire,* p. 99.

> police would also conduct random raids, bursting into a party or club, grabbing people who were kissing or dancing together, and bundling them into police vans. Photographers would line people up against the wall and snap pictures of as many faces as possible while cops took down the numbers of the cars parked outside… Exposure could have meant unemployment, social isolation and vitriolic abuse wherever one went.[619]

In 1977, the Criminal Procedure Act listed sodomy as a Schedule 1 offense, giving police broad powers to investigate cases and make arrests even without warrants; allowing the state to intercept letters and other private communications in sodomy investigations; and disqualifying people convicted of sodomy—or their dependants—from receiving pensions. A 1987 parliamentary report on youth defined homosexuality as an "acquired behavioural pattern," a "serious social deviation," and an "evil."

The unravelling of the legal and social stigma attached to "sodomy" did not begin until the final passage of the 1996 constitution, with its express inclusion of sexual orientation as a status protected from discrimination. Two years later, the Constitutional Court held that the criminalization of sodomy, as well as Section 20 (A) of the Sexual Offences Act, violated the Equality Clause of the constitution, as well as its protections for privacy and human dignity.

3. Namibia

In 1920, the League of Nations gave the former German colony of South West Africa to South Africa as a mandate territory. After the Second World War, the mandate became one of the most disputed issues in international law: South Africa attempted to incorporate the territory as its fifth province, while both the United Nations and the International Court of Justice at the Hague refused to recognize its continuing occupation. A long war of liberation resulted in the territory's independence as Namibia in 1990.

The South Africans brought Roman-Dutch law into the territory, and after independence it remained the common law of Namibia. Thus the common-law offense of sodomy, and the related crime of "unnatural offenses," remain

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[619] Retief, "Keeping Sodom Out of the Lager," in Cameron and Gevisser, eds., *Defiant Desire,* p. 103; see also Mark Gevisser, "A Different Fight for Freedom: A History of South African Lesbian and Gay Organisation—the 1950s to the 1990s," in the same volume. And see Glen Retief, *Policing the Perverts: an exploratory investigation of the nature and social impact of police action towards gay and bisexual men in South Africa,* research report submitted to the Institute of Criminology at the University of Cape Town and to the Human Sciences Research Council, March 1993.

criminalized in Namibia. The Namibian constitution, unlike the South African, does not offer express protection against discrimination based on sexual orientation—and these laws remain in full force.[620]

However, other apartheid-era legislation directed at homosexual conduct did not apply in Namibia, owing to its formal administrative differentiation from South Africa. South West Africa's puppet legislature did enact a "Combating of Immoral Practices Act" (Act No. 21 of 1980). The act is mainly aimed at heterosexual conduct; however, it defines sexual intercourse between two people who are not partners in a civil or customary marriage as "unlawful carnal intercourse." The constitutionality of the Act is now being challenged in court.

4. Zimbabwe

The lands north of the Limpopo River were colonized in the late 1880s by Cecil Rhodes' British South Africa Company (BSAC), based in Cape Town. Although an agent of the British imperial enterprise, the Company operated under Cape law. The settler government Rhodes inaugurated was dismantled in 1980, but the law he brought remains in force: Section 89 of Zimbabwe's constitution declares that (aside from provision for "African customary law") the law of the country is "the law in force in the colony of the Cape of Good Hope" in 1891—that is, Roman-Dutch common law.

In fact, this solution leaves Zimbabwe's common law in confused condition. There was no codification of Cape law as it stood in 1891; the absence of an ur-text for the law has left judges free to identify common law as they see fit, drawing freely on English principles and South African precedents. One expert observes that Zimbabwe's common law is "English-trained judges applying English common law through a South African lens and calling it Roman-Dutch."[621] It also means that the Zimbabwean common law is free to develop, through precedent, in different directions from its South African source.

A standard Zimbabwean criminal law manual defines sodomy, in terms clearly derived from South African legal texts, as "unlawful sexual relations *per anum* between two human males," going on to specify that penetration is necessary but "emission of semen by the active party" is not.[622] A 1987

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[620] "Legal Position of Gays and Lesbians," unpublished paper prepared by Clinton Light, Legal Assistance Center, Namibia, March 1997; IGLHRC interview by Scott Long with Clinton Light, Windhoek, Namibia, December 16, 1998.

[621] IGLHRC interview by Scott Long with Derek Matyszak, University of Zimbabwe, August 3, 2000.

[622] Clemence Masango, *Criminal Law Manual* (Harare: Juta Zimbabwe, 1995), p. 105.

Zimbabwean High Court decision, dealing with an appeal on a case of bestiality, divides up "unnatural offenses" in a way derived from South African examples:

> There are three categories of offences involving sexual acts contrary to the order of nature: sodomy, bestiality and a third category into which fall certain residual sexually abnormal acts classified generally as unnatural offenses. It is not possible to define with precision what types of sexually deviant acts constitute an unnatural offense, although the nature and number of such acts are more limited than they were. It is an open question whether sexual offenses between females constitute unnatural offenses. [623]

Certain technical differences from the South African law of sodomy are also clear, however. The decision leaves open the possibility that lesbian sexual acts might be punished as "unnatural offenses" in Zimbabwe, a possibility apparently foreclosed in South African common law.[624] The criminal law manual, moreover, also posits that male-male sex without penetration might still be punished as "attempted sodomy."[625]

Law in white-ruled Rhodesia had been somewhat slower than South African law to narrow the definition of sodomy. Only in 1950 did a court hold that sodomy should be confined to cases "in which the accused gained actual

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623 *S v Chikore,* Zimbabwe Law Reports 1987 (2), 48 at E. The sentence was set aside, with Justice Reynolds noting, "This offence is not prevalent in Zimbabwe, and the donkey was not injured."

624 See the South African case *S v Kampher*, 1997, High Court of South Africa (Cape of Good Hope Provincial Division), case no. 232/92, HCR no. 001377/97, at 21: "As far as can be discovered consensual sexual acts between females do not constitute a crime in our common law and probably were not so regarded in the Netherlands at the close of the eighteenth century and possibly earlier. Certainly there is no case reported in our law reports in which a woman or women was or were prosecuted for acts of this kind."

625 Masango, *Criminal Law Manual,* p. 106. The definition of attempt in common law involves "conduct which a) is done or omitted with the object of committing that crime, and b) forms part of a series of acts or omissions which, if carried to completion, would result in the commission of that crime": Masango, p. 56. The assumption that sexual acts intrinsically tend toward penetration reflects, of course, the imposition of a heterosexual and patriarchal model, and teleology, upon behavior and desire. The impulse to subdivide sexual acts into the completed and the attempted—into a "series of acts or omissions"—however, also reflects the growing inclination of the law toward specifying acts and detailing sexual narratives to surround them. Both are essential to predicating identities upon those acts—and both have been intensifying since the general crime of "sodomy" first made its appearance.

physical gratification," as opposed to casual or accidental (non-penetrative and non-sexual) touching.[626] Only in 1968 did a High Court ruling definitely find that consensual anal sex between men and women was no longer a crime, thus narrowing the definition of sodomy to sex between men.[627] In 1975, for the first time, a High Court ruling followed South African precedent in dividing "unnatural offences" into three classes: "sodomy," "bestiality," and "a residual group of proscribed 'unnatural' sexual acts referred to generally as 'an unnatural offence.'" The court left it ambiguous whether mutual masturbation between two males fell into the latter category—although the judge stated that it "cannot be compared with the disgust and abhorrence which other forms of conduct such as sodomy arouse."[628]

It was never exactly clear, then, where Zimbabwe drew the difference between "sodomy" and an "unnatural offence." The hesitancy likely reveals the difficult struggle of a small, rural settler society—still more reticent about sexuality than was comparatively urban South Africa—to adjust an antiquated legal language.

The condition of record-keeping in Zimbabwean (and, previously, in Rhodesian) courts makes a full historical accounting of sodomy convictions almost impossible. Sodomy cases are heard in local, magistrate's courts, the proceedings of which are not published but kept at the courts of origin, or in regional archives. Only cases that are appealed reach the High Court; and only

[626] *Rex v S,* Rhodesian Law Reports 1950, p. 14.

[627] *R v Masuku,* Rhodesian Law Reports 1968, p. 332; seven years earlier, in the case of *R v H,* Rhodesian Law Reports pp. 278-280, the judge declined to answer the question "Can the crime of sodomy be committed with a female," but cited the South African case of *R v N,* decided the same year, as indicating that interpretations of Roman-Dutch law there excluded heterosexual acts from sodomy's ambit. By 1979, in *S v Macheka* Justice Davies held that "it should now be regarded as settled law in this country that the crime of sodomy is not committed when a male has intercourse *per anum* with a female": Rhodesia Law Reports 1979, p. 51.

[628] *S v C,* Rhodesian Law Reports 1976 (1), p. 57; in consequence the judge reduced the initial sodomy sentence of twelve months at hard labor (nine suspended) to a $50 (Rhodesian) fine. The court also conceded that it "seems clear that self-masturbation is not criminal. There are no reported cases dealing with unnatural acts between consenting females. The courts may well incline to treat such conduct as no longer criminal"— a degree of generosity however forgotten by the time of *S v Chikore* in 1987, which found the criminality of lesbian acts still an "open question" (*supra).*

those High or Supreme Court cases that are regarded as legally significant, or precedent-setting, are published in the Zimbabwe Law Reports.[629]

Nonetheless, research in magistrates' courts records from the first three decades of white rule has shown that, of approximately 250 cases of sodomy or "unnatural offenses" (however defined) between 1892 and 1923, only twenty-two involved white men.[630] By contrast, since 1980—though these two sets of figures cannot be taken as comparable— the only four sodomy cases involving consensual, adult sex that reached higher courts, and that have been recorded in law reports, all involved white men.[631] A number of factors underlie this disparity—one of them being that whites are still far more likely to be able to afford legal representation and to undertake the appeal that might end in their case being recorded. There is no reason to think a disproportionate number of those who engage in "sodomy" in Zimbabwe, or of those who suffer the legal consequences, are white.

However, there is also reason to suppose that police and courts in the waning years of colonialism, and in the period of unilaterally-independent white rule (UDI, 1965-80), may have turned the law increasingly against fellow whites. Settler rule had a vested interest in subjecting whites' sexuality to inspection and regulation. Whites' identities as bearers of the "civilizing mission" depended on their adherence to moral codes; whereas "native" sexualities, much as in South Africa, were seen as either irrelevant or so irregular as to be beyond the pale.[632] Yet if it is true that arrests for sodomy

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[629] IGLHRC interview by Scott Long with Derek Matyszak, University of Zimbabwe, Harare, Zimbabwe, August 3, 2000; see also Oliver Phillips, "Zimbabwean Law and the Production of a White Man's Disease," *Social and Legal Studies* Vol 6(4) 471-491.

[630] Mark Epprecht, "'Good God Almighty, What's This!'": Homosexual 'Crime' in Early Colonial Zimbabwe," in Stephen O. Murray and William Roscoe (eds.), *Boy Wives and Female Husbands: Studies in Africa Homosexualities* (New York, 1998); see also Epprecht, "The 'Unsaying' of Indigenous Homosexualities in Zimbabwe: Mapping A Blindspot in an African Masculinity," *Journal of Southern African Studies,* Vol. 24 (4), pp. 631-62.

[631] IGLHRC interview by Scott Long with Derek Matyszak, University of Zimbabwe, Harare, Zimbabwe, August 3, 2000; and Oliver Phillips, "Zimbabwean Law and the Production of a White Man's Disease," *Social and Legal Studies* Vol 6(4) 471-491.

[632] *See* Peter Godwin and Ian Hancock, *Rhodesians Never Die: The Impact of War and Political Change on White Rhodesia, 1970-1980* (Harare: Baobab, 1993), for a treatment of the conservative, puritanical morality which constituted the identity of the "independent" white Rhodesian State; and Ibbo Mandaza, *Race, Colour and Class in Southern Africa* (Harare, 1997) for an extended study of sex across racial lines in colonial Rhodesia, which (unlike apartheid South Africa) adopted a strategy of moral marginalization rather than criminalization to address the "problem."

under white rule grew to target whites especially closely, that may have contributed to a popular impression that sodomy was the "white man's disease." A white regime desperate to ensure that no white man *could* engage in "perversion" lent ammunition to post-independence politicians eager to prove that only a white man *would.*

There is also reason to believe that sentences for sodomy have gradually decreased. *S v Roffey,* the last case to reach the Zimbabwean Law Reports, saw a Z$300 fine levied. [633] One attorney believes that a fine of Z$300-500 is now a standard sentence for sodomy in magistrate's courts.[634]

However, magistrate's courts have discretion to impose sentences of up to seven years' imprisonment, and sentences of up to six months are not subject to automatic review by higher courts. Other authorities believe that sentences of at least several months' imprisonment almost certainly occur.[635] Moreover, as discussed below, a new "Sexual Offences Act" in Zimbabwe makes an HIV-positive man committing sodomy liable to a draconian sentence.

5. "Buggery" and British law in Botswana and Zambia

A complex of criminal classifications deriving from "sodomy" entered Africa from the south, with Roman-Dutch law. A different complex of sexual offenses came from the north, deriving more or less from the English common law offense of "buggery."

"Buggery"[636] in English law was a term almost as flexible as "sodomy" to the south, but generally referred either to bestiality or to anal sex between men. It had been made a capital crime in the fifteenth century, and remained so until 1861, when Parliament reduced the sentence to imprisonment for ten years to life.

In 1885, the British House of Commons debated a bill to raise the age of consent for heterosexual intercourse from 13 to 16. One MP, Henry Labouchere, successfully proposed an amendment to punish "Any male person

[633] *S v Roffey,* Zimbabwean Law Reports 1991 (2), p. 47. At the time this would have been a substantial sum.

[634] IGLHRC interview by Scott Long with Derek Matyszak, University of Zimbabwe, August 3, 2000. This would have been equivalent to U.S.$10-15 at the time, and still a significant sum for most Zimbabweans. Whether court fines keep pace with the severe, recent inflationary pressures in Zimbabwe is not clear.

[635] Oliver Phillips, "Zimbabwean Law and the Production of a White Man's Disease" *Social and Legal Studies* Vol 6(4) 471-491; also e-mail communication from Keith Goddard to Scott Long, IGLHRC, August 23, 2002.

[636] The name, a corruption of "Bulgars," apparently derived from an early medieval heresy centered in the Balkans, and believed to condone homosexual conduct.

who, in public or in private, commits, or is a party to the commission of, or procures, or attempts to procure the commission by any male person, of any act of gross indecency." The sentence was up to two years in prison. (Under this law, known as the Labouchere Amendment, Oscar Wilde was convicted in 1896.) Labouchere's law completed the criminalization of all male-male consensual sexual contact in Great Britain: common-law "buggery" covered anal sex, and "gross indecency" embraced the rest.

It was this distinction that infiltrated its way into Roman-Dutch interpretations in South Africa, as a line between penetrative "sodomy" and other "unnatural offenses." Under somewhat different terms (with the less vehement "carnal knowledge against the order of nature" substituting for "buggery") it was carried directly into the penal codes of future Botswana and Zambia.

British Bechuanaland (the future Botswana), as a colony settled by the BSAC from the Cape, received Roman-Dutch common law. Northern Rhodesia (the future Zambia) when it passed from BSAC administration to direct British Government rule in 1911, adopted English common law. Both colonies, however, received colonial penal codes—and these superseded the common law for criminal offenses.

Both codes contain almost exactly the same provisions—penalizing, on the one hand, a complex of offenses deriving from buggery; and, on the other hand, the same "gross indecency" that was the undoing of Oscar Wilde.

Northern Rhodesia's white rulers adopted its Penal Code in 1930; new provisions on sexual offenses, Section 155-58, were added by Act in 1933.[637] All passed seamlessly into the Penal Code of independent Zambia in the 1960s, and remain in force. Section 155 reads:

> 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.

[637] Sydney Malupande, *Human Rights in Zambia: Freedom of Sexual Orientation, Homosexual Law Reform,* thesis submitted in partial fulfilment of the requirements for the LLB degree, University of Zambia School of Law, April 2000.

Attempt at these offenses is criminalized in Section 156, and is punished with seven years' imprisonment. Section 158 reads—in language borrowed almost exactly from the Labouchere Amendment:

> Any male person who, whether in public or private, commits any act of gross indecency with another 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.

Botswana's Penal Code is similarly a colonial inheritance, and its sexual offenses provisions are almost identical, though the penalties entailed are somewhat lighter. Section 164 reads:

> 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 any other person to have carnal knowledge of him or her against the order of nature;
> is guilty of an offence and is liable to imprisonment for a term not exceeding seven years.

Attempt is criminalized in Section 165, with five years' imprisonment. Section 167 reads:

> Any person who, whether in public or private, commits any act of gross indecency with another person, or procures another person to commit any act of gross indecency with him or her, or attempts to procure the commission of any such act by any person with himself or herself, with another person whether in public or private, is guilty of an offence.

In contemporary Zambia and Botswana, the vagueness of these provisions remains a serious concern. Colonel C. Musemba, Superintendent of Crime of the Zambian National Police, told our researcher in 2000 that "there is no doubt that these so-called gays and lesbians are the people at issue in this law [Section 155]"—although in fact paragraph c) of the law seems directed at heterosexual sodomy as well.[638] And Gideon Duma Boko, a lecturer in law at the University of Botswana, argues that the breadth of the Botswanan provisions violates the fair-trial protections of the constitution: "The Penal Code does not provide any definition of 'order of nature'… The sections are extremely vague and embarassing in law. The conduct they seek to proscribe is so unclearly defined, if at all, that the ordinary citizen and society must keep guessing at their meaning and differ as to their application."[639] (Indeed, the U.K. itself, through the Sexual Offences Act of 1956, long ago replaced the term "carnal knowledge" with "sexual intercourse" in the interests of precision.)

What is clear is that, in Botswana, the language and interpretation of the law have both shifted. Section 164 and 167 were changed in the Penal Code Amendment Act of 1998. Whereas both had originally penalized acts committed by "male persons," this was replaced by gender-neutral language—ostensibly as part of a comprehensive program to eliminate gender-discriminatory terms from Botswana's legislation. As a result, for the first time sexual acts between women are clearly criminalized in Botswanan law.

This doubtful triumph for women's equality was in fact designed to preserve the legal inequality of lesbians and gays, Gideon Duma Boko argued. At the time we interviewed him (as explained in Chapter III.C above), a case of two persons arrested under these provisions was being heard in court, and was expected to lead to a constitutional challenge to the laws. Boko explained,

> One of the arguments that the attorney who originally handled the case raised was the very fact that the provisions were gender discriminatory. At that moment, carnal knowledge—if that's the way you want to put it—between females would not have been an offense: it was the male sexual union that would have passed as an offense under the provisions. So he raised the discrimination argument in that context, that this discriminates: as between females it is permissible, as between males it is not, and that is in violation of the constitution in light of the Unity Dow case [a landmark gender-discrimination case in Botswana] and subsequent to the cases that followed hers. When we did argue the case this year, that argument

[638] IGLHRC interview by Scott Long with Colonel C. Musemba, Superintendent of Crime, Zambian National Police, Lusaka, Zambia, July 24, 2000.

[639] Gideon Duma Boko, "The Case For Decriminalization of Voluntary Homosexual Conduct in Botswana," Paper presented at the Conference on Human Rights and Democracy in Botswana, November 17-19, 1998. Section 10 (8) of Botswana's Constitution requires that "No person shall be convicted of a criminal offence unless that offence is defined and the penalty therefor is prescribed in a written law."

> was obviously not available to us because now the provisions had been made gender neutral.[640]

The change in the Penal Code, Boko says, "was conscious." He also argues that an accompanying shift has expanded the understanding of "carnal knowledge" in the Penal Code:

> The definition now of carnal knowledge has been broadened to include any sort of penetration of any orifice. It doesn't have to be the private parts as such, but any orifice. The purpose of such penetration must be to obtain sexual gratification. So it is much broader now.[641]

The broadening does not diminish the fact—made evident by the homophobic statements of politicians and officials—that male homosexual conduct remains the main target of the law. Such reinterpretations, rather, show the lengths to which the state will go to cling to a provision imposed on it by its former colonial occupiers. The laws remain on the books in Botswana; in March, 2002, the High Court at Francistown rejected the constitutional challenge to the Penal Code provisions, holding that "public morals or moral values" justified the restriction of other constitutional rights for men who have sex with men. A further challenge to the provisions is underway at the Court of Appeal.

B. Other Laws Affecting Sexual Experience and Sexual or Gender Expression

So-called sodomy laws provide a means to harass, arrest, and in some cases imprison individuals. Yet they also single out a class of people as subject to still more comprehensive discrimination and denial of rights. They move from punishing acts toward defining, and marginalizing, identities and groups based on those acts. A mere fine of a few hundred Zimbabwean dollars may not seem much punishment for consensual "sodomy"—though to an unemployed laborer it may be a great deal. More serious, though, is the social shame, almost

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640 IGLHRC interview by Kagendo with Gideon Duma Boko, Gaborone, Botswana, November 9, 1998. For information on the Unity Dow case, see Unity Dow, ed., *The Citizenship Case: Court Documents, Judgments, Cases and Materials* (Gaborone: Lentswe La Lesedi, 1995).

641 IGLHRC interview by Kagendo with Gideon Duma Boko, Gaborone, Botswana, November 9, 1998.

amounting to social death, created by entering into a class of "sodomites" whom the country's leader has called "worse than dogs and pigs."

People facing discrimination for their sexual desires, sexual conduct, or gender identity or expression are therefore likely to confront more than one law, or kind of law, confirming their marginalization and exclusion. The "sodomy" laws that define them only make them more vulnerable to other kinds of legal repression. Vaguely written laws that target "obscenity," or "indecency," or broadly aimed penalizations of "scandalous" or "offensive" public behavior, will find these identities and communities a ready and convenient target.

1. Laws on obscenity and censorship

Most countries in the region continue to give their governments substantial powers of censorship, at least on paper. Only in South Africa have the censorship mechanisms established under white rule been significantly rolled back.

Section 54 (1) of Zambia's Penal Code gives the executive broad censorship powers: "If the President is of the opinion that there is in any publication or series of publications published within or without Zambia by any person or association of persons matter which is contrary to the public interest, he may, in his absolute discretion," declare "that that publication, or any publications published by the same person or association or persons, "shall be a prohibited publication." Section 55 also punishes persons in possession of prohibited publications who do not immediately deliver them to the nearest police station with a fine or imprisonment of up to one year.

Still more specifically, Section 177 of the Code (in the Chapter on "Nuisances and Offences Against Health and Convenience") imposes five years in prison or a substantial fine on any person who:

> a) makes, produces, or has in his possession any one or more obscene writings, drawings, prints, paintings, printed matter, pictures, posters, emblems, photographs, cinematograph films or any other object tending to corrupt morals; or
> b) imports, conveys or exports, or causes to be imported conveyed or exported, any such matters or things, or in any manner whatsoever puts any of them in circulation;
> c) carries on or takes part in any business, whether public or private, concerned with any such matters or things, or deals in any such matters or things in any manner whatsoever, or distributes any of them, or exhibits any of them publicly, or makes a business of lending any of them; or

> d) advertises or makes known by any means whatsoever with a view to assisting the circulation of, or traffic in, any such matters or things, that a person is engaged in any of the acts referred to in this section, or advertises or makes known how, or from whom, any such matters or things can be procured either directly or indirectly; publicly exhibits any indecent show or performance or any show or performance tending to corrupt morals.

Similar provisions exist in the Botswana penal code. The extensive powers given government to regulate public expression in both countries give existing enforcement agencies—particularly the police—ample scope to intimidate, confiscate and silence.

A censorship council and an elaborate system for judging public expression already exist in Zimbabwe, a relic of the puritanical policies of the white regime. Zimbabwe's Censorship and Entertainments Control Act dates back to 1967 Rhodesia. That Act established a Board of Censors appointed by the hinister of home affairs, with power to ban any film or "publication, picture, statue, or record" which

> a) depicts any matter that is indecent or obscene or is offensive or harmful to public morals;
> b) is likely to be contrary to the interests of defence, public safety, public order, the economic interests of the state or public health; or
> c) depicts any matter in a manner that is indecent or obscene or is offensive or harmful to public morals.

Section 33 of the Act offers a definition of "what is indecent or obscene or offensive or harmful to pubic [*sic*] morals":

> For the purposes of this Act a matter or thing, or the manner in which any matter or thing is depicted, as the case may be, shall be deemed to be indecent or obscene if—
> a) it has the tendency to deprave or corrupt the minds of persons who are likely to be exposed to the effect or influence thereof or it is in any way subversive of morality;
> b) whether or not related to any sexual content, it unduly exploits horror, cruelty, or violence, whether pictorial or otherwise;
> c) offensive to public morals if it is likely to be outrageous or disgustful to persons who are likely to read, hear or see it;

d) harmful to public morals if it deals in an improper or offensive manner with criminal or immoral behaviour.

Petition to an Appeals Board for review is possible, but the minister has the option of making that Board's proceedings secret. It was under this law that the Zimbabwe International Book Fair was banned from hosting GALZ in 1995 and 1996.

In several countries in the region, recent years have seen attempts to increase state powers of censorship by instituting media regulatory bodies. As the Mugabe regime broadened its repression in 2001, it passed a media law requiring the registration of publications, and the accreditation of local as well as foreign journalists, with an extensively empowered state commission.[642] Similar legislation, however, has been also proposed in democratic Botswana.[643] Such mechanisms extend the state's means to stifle expressions of unpopular opinion.

2. Laws criminalizing behavior in public

Colonial rule required extensive regulation of public behavior—to police the behavior of whites and mold a morally and socially cohesive community, but also to ensure that the proximity of non-whites would be conditional and highly controlled. The laws that spun that supporting web of rules were directed at restricting movement and suppressing non-conforming expression and dress. They were written broadly, so as to give authorities maximum scope to wield them against any even potentially disruptive conduct. Most of those laws are still in place.

Section 172 of the Zambian Penal Code illustrates the coercive expansiveness of such laws: "Any person who does an act not authorised by law or omits to discharge a legal duty and thereby causes any common injury, or danger or annoyance, or obstructs or causes inconvenience to the public in the exercise of common rights, commits the misdemeanour termed a 'common nuisance' and is liable to imprisonment for one year." Section 172 (2) adds: "It is immaterial that the act or omission complained of is convenient to a larger number of the public than it inconveniences."

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[642] See Media Institute of Southern Africa (MISA), "Draconian Media Bill Passed," December 3, 2001, at http://www.misanet.org, retrieved October 6, 2002.

[643] Media Institute of Southern Africa (MISA), "Botswana Media Bill Raises Concerns,' and "MISA Appeal on Draft Botswana Media Bill," December 4, 2001, at http://www.misanet.org, retrieved October 6, 2002.

Other laws allow Zambian authorities to attach a permanent label to persons unwanted in public space. Section 178 of the Penal Code offers a catchall definition of "idle and disorderly persons," including "every person who, without lawful excuse, publicly does any indecent act." Any person so designated is liable to one month in prison. Section 181 (a) provides that more than one conviction under 178 can cause one to "be deemed to be a rogue and vagabond," liable to three months' imprisonment for the first offense and one year for each offense thereafter. "Rogues and vagabonds" also include "every person found wandering in or upon or near any premises or in any road or highway or any place adjacent thereto or in any public place at such time and under such circumstances as to lead to the conclusion that such person is there for an illegal or disorderly purpose." Botswana's Code contains similar terms.

Zimbabwe's Miscellaneous Offences Act is yet another relic of white rule, dating to 1964. It punishes "any person who appears in any public place" without "such articles of clothing as decency, custom or circumstances require"—a provision which could be (and apparently has been[644]) interpreted to criminalize gender non-conformity in dress. It also punishes—with a fine or imprisonment of up to six months—any person who uses "obscene" language "in a public place," who "writes or draws any indecent or obscene word, figure, or representation in the view of the public," or who "commits any nuisance in any street or within view of any dwelling-house whereby public decency may be offended." The law also defines a public place as including (but not necessarily restricted to) any

> a) road, street, thoroughfare, lane, footpath, or bridge to which the public has access;
> b) building, part of a building, police station, police camp, stream, river, lake, dam, swimming pool, garden, park, race course, open space, open air theatre, drive-in theatre, aerodrome, sports ground, recreation ground, show ground, parade ground or other ground, whether enclosed or not, to which the public or any section of the public has access or is permitted to have access, whether on payment or otherwise and whether or not the right of admission thereto is reserved.

The sweep of this definition shows the long arm of social regulation. Read as a product of 1964 Rhodesia, however, it also reveals the difficulty colonial law had in coming up with a coherent definition of the "public." The ordinary

[644] See, for example, the case of Kuda Kwashe, Chapter III *supra.*

opposition between "public" and "private property," for example, took on a different meaning in a legal regime where "natives" were legally barred from private ownership of land. The above definition notably defines "public" in terms of access to property, not rights over it. Yet even defining a "public sphere" as a space of open entry was a mockery in countries where the vast majority of the population had no political rights and minimal freedom of movement.

Ultimately these laws show a domesticization, even "privatization," of the public sphere—in which (as in Zambia's Section 171.2) the "inconvenience" or susceptibility to offence of even a small segment of the "public" can override the "convenience" of a larger; or in which (as in Zimbabwe's law) the "view from any dwelling-house" should exclude any sights likely to give offence. This suited the concerns of an embattled minority, who wanted the state to keep their lawns and vistas clear. These vestigial laws, though, now serve the purposes of authorities anxious to keep stigmatized people from exercising their rights to assembly, association, and expression.

3. Laws against prostitution

States that wish to control the public expression of sexuality, or aim to suppress association and expression based on sexual experience or desire, almost always have a convenient instrument on hand: existing laws against prostitution.

Human Rights Watch has elsewhere described how the legal regulation of homosexuality can find models in the legal regulation of sex work. In country after country, "'sexual inversion' and its constituent behaviors [have been] analogized to prostitution, conceived of as less relation than transaction, and stigmatized as a mode of togetherness impermissible in the public sphere."[645] And when homosexual association, or homosexual activism, begins to take public form, the accusation of prostitution is a ready means to discredit it.

All five southern African countries surveyed here effectively criminalize prostitution, under a variety of different laws and terms—some of which allow further sweeping restrictions on public conduct and expression. In South Africa, the apartheid-era Sexual Offences Act (still awaiting the uncertain result of

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[645] See *Public Scandals: Sexual Orientation and Criminal Law in Romania* (New York: Human Rights Watch and IGLHRC, 1998), p. 10. In Egypt, for example, consensual (and non-commercial) homosexual conduct is criminalized in law through the expansive interpretation of provisions originally targeting prostitution. Police roundups and criminal prosecutions of people accused of homosexual acts have taken place—in growing numbers—under a provision of a 1961 law on prostitution, which penalizes consensual sexual conduct between males as "debauchery."

Parliamentary revision) criminalizes prostitutes directly: it penalizes selling sex as well as profiting from the sale of sex or maintaining a brothel. (The only aspect of sex work that it does not penalize is the act of purchase.) A debate about the future legal fate of prostitution—and the different routes of continued repression, complete decriminalization, or legal regulation—has only begun there.[646] One sex workers' advocacy organization in South Africa says,

> The Sexual Offences Act effectively deters sex workers from laying charges of assault, rape or labour exploitation against offenders. The criminalisation of sex work affects sex workers' ability to practice safer sex. The continued criminalisation of sex work enables clients, police, managers and members of the public to perpetrate physical, sexual, verbal and economic abuse against sex workers.[647]

Sections 140-49 of the Zambian Penal Code, and 149-58 of the Botswanan, punish procurers, brothel-keepers, and any "male person living on [the] earnings of prostitution." However, the Zambian code also allows "every common prostitute behaving in a disorderly or indecent manner in any public place" to be jailed for a month as an "idle and disorderly person" (Section 178.a); the Botswanan code contains similar language (Section 179.a). Under the same Sections both codes punish anyone who "in any public place solicits for immoral purposes"—language that may be directed at pimps, but could also be used against gay cruising.

Zimbabwe's Miscellaneous Offences Act provides (section 4.1) that "Any person loitering in a public place for the purposes of prostitution or solicitation" is liable to a fine or six months' imprisonment on the first offence, and a fine and/or one year's imprisonment on the second offence. The court can also order the person not to "loiter in any road, street, thoroughfare, lane, footpath, sidewalk or pavement" between 6:00 p.m. and 6:00 a.m. for a period of three years. A new "Sexual Offences Act" passed in 2001 does not criminalize the act of prostitution itself, but displays its general aim and identifies its target in the chapter heading, "Suppression of Prostitution."

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[646] In *S v Jordan* (Constitutional Court of South Africa, Case CCT 31/01), decided late in 2002, the Constitutional Court upheld the prohibition of commercial sex work, rejecting the contention that the relevant provisions of the Sexual Offences Act violated constitutional protections for human dignity, freedom of the person, privacy, and economic activity.

[647] Sex Worker Education and Advocacy Taskforce, fact sheet, "The reality of working in a criminalised industry," at http://www.sweat.org.za, retrieved August 22, 2002.

The laws enable police to extend the effective criminalization of prostitution to eliminate other forms of conduct and speech. As written, they furnish a general framework for close surveillance and control of spaces and behaviors. They do not define the limits of state power: they enable its extension and intrusion.

4. Laws on rape

Laws against rape are a major social and political issue in southern Africa, amid the burgeoning incidence of sexual violence in the region. Colonial law gave successor states a heritage of laws with inexact definitions and inappropriate scope, which have provided only limited tools to counter the crisis.

The problems southern African legal systems face in addressing rape are manifold. They include attitudes and practices deeply ingrained in the police, justice, and health systems.[648] Legal reform itself is only one step toward a solution. However, achieving adequate definitions is more than mere toying with terminology. It means ensuring that laws against rape and violence cover all people, and combat rather than perpetuate inequality and discrimination.

In this light, many existing laws fall dangerously short. In brief, the British-inspired penal codes inherited by Zambia and Botswana defined rape as "unlawful carnal knowledge" by a man of a woman or girl, without consent or with consent by force or fraud.[649] Roman-Dutch common law as it developed in South Africa, Namibia, and Zimbabwe defined rape as "unlawful sexual

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[648] See, for an overview of such impediments, Human Rights Watch's reports *Violence Against Women in South Africa: State Response to Domestic Violence and Rape* (New York: Human Rights Watch, 1995), and *Scared at School: Sexual Violence against Girls in South African Schools* (New York: Human Rights Watch, 2001).

[649] In both Zambia and Botswana rape appears under the Penal Code as an "offence against morality"—not against the person of the victim. Section 132 of Zambia's Code represents the core, colonial text: "Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force of means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representations as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of the felony termed 'rape.'" Sections 133 and 134 make both rape and attempted rape punishable by life imprisonment; 137 punishes "indecent assault" on a woman or girl, with consent no defense if the girl is under twelve. Section 138 establishes an age of consent for women only: "Any person who unlawfully and carnally knows any girl under the age of sixteen years is guilty of a felony and is liable to imprisonment for life." Botswana's provisions were virtually identical until the 1998 Penal Code (Amendment) Act rendered them gender-neutral.

intercourse with a woman without her consent." Both these definitions presented a shared set of problems:

- Marital rape was expressly exempted from criminal penalties.

- Both offered definitions of what sexual acts could constitute rape which were unspecific and subject to differing interpretations, while restricting rape to acts committed by a man against a woman.

- Particularly in the last light, the limitations of the rape laws intersected with ill-written laws penalizing homosexual conduct to create a legal maze: in it, homosexual rape could receive an a lesser penalty than heterosexual rape, or go unpunished altogether—or could see the victim punished, for engaging in "unnatural offences" or "sodomy."

Each of these shortcomings deserves separate treatment.

a. Marital rape

In Namibia, South Africa, and Zimbabwe, rape by a marital partner has at last been criminalized—in South Africa, by the Prevention of Family Violence Act, passed in 1993;[650] in Namibia, by the Combatting of Rape Act, a comprehensive revision and expansion of existing laws on rape that was passed in 2000. Zimbabwe moved most recently and most reluctantly: as late as 1997, a report (aimed at achieving more effective criminal penalties against pedophilia) by the Law Development Commission of Zimbabwe recommended, ambivalently, that "if it is felt that [the rule excluding marital rape from criminal penalties] is no longer applicable or should no longer apply, it would certainly be desirable to clarify the position clearly by legislation."[651] Marital rape in Zimbabwe was finally criminalized by the Sexual Offences Act, passed in 2001. More on that Act will follow below. [652]

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[650] Section 5 of the Act reads, "Notwithstanding anything to the contrary contained in any law or in the common law, a husband may be convicted for the rape of his wife."

[651] Law Development Commission, Zimbabwe, *Report No. 63: December 1997,* p. 8.

[652] "Sexual Offences Act," Act 8/2001, at http://www.kubatana.net/docs-/legislation/sexoff010817.pdf, retrieved August 10, 2002.

b. Definitions of rape

A Zimbabwean criminal law manual from the mid-1990s offers a detailed account of what may be called the then common-law understanding of rape:

a) There must be penetration, but it is sufficient if the male organ is in the slightest degree within the female's body.
b) It should not be necessary in the case of a virgin that the hymen should be ruptured.
c) In any case it is unnecessary that semen should be emitted.
d) If there is no penetration there is no rape, even though semen is emitted and pregnancy results.
e) A man cannot be raped, and a woman cannot commit rape.[653]

In Zimbabwe, at last, this has now changed. Zimbabwe has joined Namibia in recognizing that rape can be committed *by* men or women *against* men or women. Namibia did so in the Combatting of Rape Act (2000); Botswana did so in the 1998 Penal Code (Amendment) Act, which attempted to make the Code's language comprehensively gender-neutral. Zimbabwe, last again, followed suit in the 2001 Sexual Offences Act—which followed four years of debate on a 1997 proposal to that effect by Zimbabwe's Law Development Commission that this be replaced by a gender-neutral definition, which would cover anal and oral rape as well.[654]

[653] Clemence Masango, *Criminal Law Manual* (Harare: Juta Zimbabwe, 1995), p. 137.

[654] Law Development Commission, Zimbabwe, *Report No. 63: December 1997,* p. 13. The exact proposal reads:

> *Definition of Rape.* Any person who
> —without the consent of the woman concerned—
> - penetrates any part of the body of the female by means of the male organ;
> - penetrates the genitalia or anus of the female by means of any object, other than male organ;
> - engages in cunnilingus or fellatio with the female;
>
> —without the consent of the male concerned—
> - penetrates any part of the body of the male by means of the male organ;
> - penetrates the anus of the male by means of any object, other than the male organ;
> - performs fellatio with the male;
>
> shall be guilty of rape and liable for imprisonment for life.

However, definitions of rape that are either unacceptably limited or unacceptably vague persist. Botswana's law reform, for instance, kept the definition of rape as "unlawful carnal knowledge" intact. Before the amendment, the term was understood to mean vaginal penetration. Changing the law without changing this language leaves no clear consensus on what sexual acts the term now covers.[655]

Zambia and South Africa, on the other hand, continue to understand rape to mean vaginal penetration only. In South Africa and Zimbabwe, other forms of penetration, whether directed against women or men, carry the significantly lesser penalty of "indecent assault." (The Zambian Penal Code, on the other hand, only recognizes "indecent assault" against females, not males.[656])

The final provision passed in 2001 read:

> 1. Any person who, whether or not married to the other person, without the consent of that person—
>   a. with the male organ, penetrates any part of the other person's body; or
>   b. with any object other than the male organ, penetrates the other person's genitalia or anus; or
>   c. engages in fellatio or cunnilingus with the other person;
>
> shall be guilty of an offence and liable, subject to section *sixteen*, to the penalties provided by law for rape.
>
> 2. Penetration to any degree shall be sufficient for the purpose of paragraphs (a) and (b) of subsection (1).

The difference shows a progressively expanding understanding of rape: the criminalization of marital rape is made explicit in the final version. What differs significantly is the reference to "section sixteen"—which provides additional penalties for the transmission of HIV.

[655] The Botswanan human rights organization Ditshwanelo points out that, even before the reform, the meaning of the term in the rape provisions of the Penal Code conflicted with its meaning in Section 164 (the provision penalizing homosexual acts), where it was generally taken to mean anal penetration. The new law expands the meaning of "carnal knowledge" implicitly but still offers nothing to define it. Ditshwanelo observes, "There is generally a lack of clear definition of the various sexual offences due to the fact that terms with vague meaning such as 'carnal knowledge' and 'carnal connexion' are used to describe these offences." From "Ditshwanelo Discussion Document on the Penal Code (Amendment) Act No. 5 of 1998," unpublished; IGLHRC interview by Scott Long with Alice Mogwe, Ditshwanelo, Gaborone, Botswana, December 21, 1998.

[656] Section 137, Zambian Penal Code. It carries a sentence of fourteen years' imprisonment, as opposed to life imprisonment for rape.

In 1999, the South African Law Commission made similar recommendations in a detailed report on sexual offenses laws:

> The Commission proposes the repeal of the common law offence of rape and its replacement with a new gender-neutral statutory offence. The essence of the Commission's proposal on rape centres around "unlawful sexual penetration." The Commission says sexual penetration is unlawful *per se* when it occurs under coercive circumstances. Coercive circumstances include the application of force, threats, the abuse of power or authority, the use of drugs, etc. Sexual penetration is defined very broadly by the Commission to include the penetration "to any extent whatsoever" by a penis, any object or part of the body of one person, or any part of the body of an animal into the vagina, anus, or mouth of another person. Simulated sexual intercourse is also included under the Commission's definition of "sexual penetration."[657]

Three years later, amid an explosion of reported rape and sexual violence, these have not yet been enacted.

c. Unequal protection: impunity for homosexual rape, and the persistence of "sodomy"

In recommending in 1997 that rape of men by men be criminalized, the Zimbabwean Law Commission posed one possible objection: the effect this might have on the existing penalties for sodomy.

It has been argued however that by amending the law so that Rape will in future include any male victim, the issue of consent would cause a problem. It is an essential of the crime of rape that the victim does not consent. If men were to be included in the new crime of Rape the consent of the male victim would be a complete defence. However sex between males is by tradition regarded as objectionable by the majority in Zimbabwe. Yet if a male were charged under any proposed new law with committing rape upon another male and lack of consent could not be established, *the accused would be acquitted.* This, it is said, would run counter to traditional standards or values. It would send out the wrong message.

In answer to this however the Commission points out that in such a case (i.e. where the complainant has consented or where lack of consent cannot be

[657] South African Law Commission, Project 107, (Sexual Offences), *Sexual Offences: The Substantive Law,* 12 August 1999, p. vi.

proved) the accused would still be guilty of sodomy (where consent is not relevant). *Indeed the law should be amended so that sodomy becomes a competent alternative verdict on a charge of rape.*[658]

The implications are worth observing. If a man accused of male rape could alternatively be charged with sodomy, so (if consent could be established) could his accuser. Thus if the accuser in a rape case failed to prove his own lack of consent, he could immediately face conviction for consensual sodomy—and his own complaint could then be used against him. The Commission did not notice that this quandary might (even if homosexual rape were formally criminalized) discourage complaints.

Inadvertently, the Commission had stumbled on a major inequality in sexual offenses laws. In Zimbabwe, under the old common law, male-male sexual contact was criminalized—either as "sodomy" for anal sex, or "unnatural offences" for other forms of contact. Yet *consent was irrelevant to the crime*—and no crime expressly covered non-consensual homosexual sex. Nor did the law make a distinction between "sodomy" between adults, and "sodomy" practiced on a minor. Victims of male-male rape, or of male-male child abuse, were thus left without equal protection by the law.

This has now changed in Zimbabwe, under the terms of the Sexual Offences Act of 2001, which creates a gender-neutral definition of rape. It has not changed in South Africa, astonishingly. There, when setting aside the common-law offense of sodomy, the South African Constitutional Court was at pains to declare it was

> not aware of any jurisdiction which, when decriminalising private consensual sex between adult males, has not retained or simultaneously created an offence which continues to criminalise sexual relations *per anum* even when they occur in private, where such occur without consent or where one partner is under the age of consent.[659]

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[658] Law Development Commission, Zimbabwe, *Report No. 63: December 1997,* p. 6 (emphasis added). The Commission indeed went out of its way to defend the criminalization of sodomy. South African authorities, they admit (p. 18), "remark that the view that sodomy is morally wrong no longer enjoys universal support and there is increasingly recognition for the view that sodomy between consenting adults ought to be decriminalized. This however is apparently not the view of the majority of the population in Zimbabwe … Retention of the crime as part of our common law is therefore recommended by the Commission."

[659] *National Coalition for Gay and Lesbian Equality et. al. v Minister of Justice et. al,* Constitutional Court of South Africa, Case CCT 11/98, at 66.

The Court held that male-male rape would still be criminalized by common law, either as indecent assault or assault with intent to do grievous bodily harm.

Yet the Court, committed to equality, apparently paid little attention to the precise situation underlying its words. Those legal protections are still inadequate: they offer lesser penalties than rape, and thus the solution fails to acknowledge that male-male rape is indistinguishable from other forms of rape. It deserves the same classification, and demands the same consequences. Treating it otherwise means perpetuating discrimination.

The provisions also, whether intentionally or not, place the victims of male-male rape under the same penumbra of benign indifference (at best) and malign stigma (at worst) with which the law long regarded "sodomy." This point is worth expanding upon, and in order to do so one must return to the situation as it was in Zimbabwe before the Sexual Offences Act was passed.

There, the inequalities in sentencing between men who raped women, and men who raped men or boys, long remained acute. In one 1987 case of forcible sodomy by a twenty-eight-year-old man upon a ten-year old boy, a sentence of ten months' imprisonment was imposed—consistent, it appears, with general sentencing practices for consensual sodomy. When the case was reviewed by the High Court, the judge indeed held that

> Where an accused forcibly commits sodomy on a complainant it is no different from rape. In a matter like this, the offence is aggravated by the fact that the complainant was a very young and therefore helpless boy. I consider the act perpetrated on the young complainant in this case is as much degrading as an act of rape upon a young girl.[660]

Nonetheless, the judge recommended only a three-year sentence—as opposed to sentences of seven to ten years that were customary for the rape of a minor female.[661]

Meanwhile, the rape of an adult male by an adult male could fall under a number of different criminal categories. The defendant could be charged with sodomy; he could also be charged with "indecent assault"—which a criminal law manual defined tautologically: "Indecent assault consists of an assault which

[660] *S v Ngwenya,* High Court, Bulawayo, 179/87.

[661] Peter Propotkin, "Getting to the Bottom of Sodomy in Zimbabwe," unpublished paper, p. 22. Propotkin also cites *S v Magwenzi,* High Court, Harare, 59/94, where the justice affirmed that forcible sodomy resembles rape. Yet the sentence ultimately imposed—eighteen months' imprisonment at hard labor, with six months suspended—accorded with consensual sodomy sentences, not rape sentences.

is itself of an indecent character."[662] If the assault did not involve anal penetration, the situation would be still less clear. One Zimbabwean observer held that "a non-consensual homosexual sexual act which falls short of sodomy is usually charged as indecent assault, [but] there is no legal rule that this is so."[663]

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[662] Clemence Masango, *Criminal Law Manual* (Harare: Juta Zimbabwe, 1995), p. 156.

[663] Propotkin, unpublished paper, p. 23, One famous case illustrates many of these ambiguities. On February 24, 1997 a man named Jefta Dube was convicted of murdering a policeman in Harare. He claimed he had been taunted by his victim, accused of being "Banana's wife"—a reference to Canaan Banana, the first post-independence president of Zimbabwe. Dube alleged he had been subjected to repeated sexual abuse by Banana over a three-year period.

Police began investigating Banana, and at least nine other alleged victims came forward. Eventually—in a case that scandalized the country and the region—Banana was tried and convicted in the High Court in Harare. He appealed his case to the Supreme Court, which upheld his conviction on one count of sodomy; seven counts of indecent assault against various persons; one account of committing "numerous unnatural sexual offences" upon Jefta Dube; and two counts of assault.

The sentences on the sexual-offences counts are instructive.

- The count of sodomy entailed an act of anal sex, which the courts believed consensual (the courts disbelieved the complainant's assertion that he "did not consent to such acts, but submitted through fear"; on the other hand, the courts also disbelieved the assertion that he was the active partner, while Banana was passive). Banana was sentenced to one month's imprisonment, suspended.

- The counts of indecent assault entailed acts committed against seven different people. In six cases the pattern is uniform: the complainant was invited to Banana's office; Banana began playing music and invited the person to dance; "[Banana]'s penis became erect": the complainant them "broke away and left the office." In one other case, where Banana allegedly actually ejaculated between the complainant's legs, the charge was initially attempted sodomy, but Banana was convicted of indecent assault in the end. For all these counts, Banana received a total of two years' imprisonment, one of which was suspended.

- The count of "numerous unnatural sexual offences" against Jefta Dube had originated as charges of sodomy and attempted sodomy, on which Banana was convicted by the High Court; the Supreme Court reduced the sodomy conviction to one for attempt (and the attempted sodomy conviction to "indecent assault"). The facts revealed how confused legal professionals are about their terminologies for sexual acts—and how

The gender-neutral provisions of the Sexual Offences Act of 2001 in Zimbabwe seem to have cleared up this confusion. Yet the Act expressly did not eliminate the criminalization of consensual sodomy: it explicitly states (Section 20) that "Nothing in this Act shall be taken as limiting any offence at common law." Nor did it counteract one grim aftereffect of the long legal limbo: the association in the popular mind between "sodomy" and non-consensual sex between men.

Keith Goddard notes that cases of consensual sodomy in Zimbabwe are still publicized, with the name of the "offender," in the state-run press—and that "The angle of these articles is always… as far as possible, to suggest that abuse was involved."[664] This practice persists even after "sodomy" has ceased to be a rubric covering non-consensual acts as well.

And the association of sodomy with rape is retained in the language of the law. The Sexual Offences Act of 2001 also contains, controversially, provisions

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> doubly confusing laymen find the words. Jefta Dube, untrained in Roman-Dutch law, had insisted he was "sodomised" by Banana, but the court found that Banana had actually ejaculated between his thighs, and that "the complainant [erroneously] believed that the latter acts amounted to sodomy." Five years' imprisonment was imposed on Banana, of which four were suspended, and a substantial fine was levied.

The case generally exhibits the painful difficulty of Zimbabwean law in coming up with a consistent legal categorization of sexual acts. Is non-penetrative homosexual sex an attempt at sodomy, or is it an "unnatural offence," or "indecent assault?" More than that, though, the case shows how the rough existing categorization made consent effectively an irrelevant issue in evaluating male-male sexual acts. Consent was only considered in judging the one sodomy count—and even there was presumably only weighed in sentencing, as under existing law it could not have affected the determination of a crime. In the remaining counts, although all the defendants charged abuse, the question of consent was formally moot, was disregarded by the High Court, and was considered by the Supreme Court only implicitly in changing "attempted sodomy" to "indecent assault." (That "attempted sodomy" should bring a higher penalty than sodomy itself indicates the inability of the law to come to terms with issues of consent. It is worth noting as well that, prior to the 2001 criminalization of marital rape, a wife could not see her husband charged with rape after forced penetrative intercourse—but could charge him with indecent assault after unwanted, non-penetrative touching. *R v Gumede,* 1946, cited in Clemence Masango, *Criminal Law Manual,* pp. 156-7.) In the end, with his several sentences imposed concurrently, Banana received only one year in prison. See *Canaan Sodindo Banaan v the State,* Judgment No. SC 41/2000, Crim. Appeal No. 12/99.

[664] E-mail communication from Keith Goddard to Scott Long, IGLHRC, August 23, 2002.

criminalizing "deliberate" transmission of HIV.[665] The provisions also radically increase the sentence for "sexual offences" if the convicted person was "infected with HIV, *whether or not he was aware of his infection"* [Section 16; emphasis added].[666]

The list of "sexual offences" includes "rape or sodomy"; "sodomy" is listed twice in the law in a roster next to rape. The language obviously demonstrates how far the Act is from contemplating a lessening of strictures against sodomy. It shows as well that the association between sodomy and rape continues to be vivid, even in a law partly meant to decouple them.

But the law's terms also mean that a person living with HIV/AIDS who engages in consensual "sodomy" (even if he does not transmit HIV in the

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[665] Section 15 of the law imposes a twenty-year prison term on

> (1) Any person who, having actual knowledge that he is infected with HIV, intentionally does anything or permits the doing of anything which he knows or ought reasonably to know:
> a. will infect another person with HIV; or
> b. is likely to lead to another person becoming infected with HIV; shall be guilty of an offence, whether or not he is married to that other person, and shall be liable to imprisonment for a period not exceeding twenty years.

The provision does allow as a defence evidence "that the other person concerned

> a. knew that the person charged was infected with HIV; and
> b. consented to the act in question, appreciating the nature of HIV and the possibility of his becoming infected with it."

However, the provision does not indicate whether taking safer-sex precautions legally mitigates the "likelihood" of transmission. Moreover, it criminalizes any act which *might* lead to transmission, whether or not it does, and imposes the same penalty upon it. Derek Matyszak, of the University of Zimbabwe, has pointed out that the twenty-year sentence is largely symbolic: most HIV-positive persons, jailed without treatment, would die long before the sentence was served.

[666] Section 16, "Sentence for certain offences where offender is infected with HIV," reads in part:

> Where a person is convicted of
> a. rape or 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.

process) could be sentenced, not to the several months' incarceration that a sodomy charge might usually bring—but to twenty years. Other provisions reinforce the discriminatory effect. The law also allows HIV testing of people charged with "sexual offences"—stating that "any medical practitioner or designated person … may use such force as is reasonably necessary in order to take the sample or samples" (Section 17). These results may be introduced at a public trial, with the result that even if the accused is acquitted, his serostatus is public knowledge. (The law specifies [Section 18] that "if it is proved that a person was infected with HIV within thirty days after committing an offence … it shall be presumed, unless the contrary is shown, that he was infected with HIV when he committed the offence.") And the state as well as the persons taking samples are exempted from damages in most cases if "detention, injury or loss" results from the testing—including unjust imprisonment if the test results err, as well as damages to reputation.

Thus a man believed to be living with HIV/AIDS who has consensual sex (even safer sex) with another man will face forcible testing, public disclosure of his serostatus, and two decades in prison—and enjoy no claim to redress if the test produced a false positive result. The new law, widely hailed as progressive in its protections for children and married women, nonetheless deprives gay men living with HIV of any remaining shred of the right to a sexual existence.

C. The Realm of the Customary

"Customary law" in Africa developed as settler societies came to terms with the existence of the large, subject but never completely subjugated societies around them. Assimilating all "natives" to colonial civil law would have met resistance—from whites as well as natives, for it would have meant moving indigenous peoples closer to formal legal equality. One response of colonial authorities was to allow those societies to decide daily life within their communities by a version of their traditional rules—contingent, however, on white supervision, revision, and veto.

Customary law is less a codification of custom than a travel-writer's redaction of it, and less a system of law than a playbook for a spectator sport. The players were the "natives," the spectators—and writers—were the whites. The fact that custom in all African societies was complex, sometimes contradictory, and almost always unwritten gave whites the privilege of writing it. The codes they developed blended observed and actual practice with settlers' additions, improvisations and deletions.

That disputes would be resolved by a version of native rules did not mean they would be resolved by "natives" themselves. The British policy of "indirect rule" had limits to its indirection. As courts were systematized, the colonial executive generally expropriated the role of the Great Chief, and his administrators intervened to settle tribal and communal issues.[667] In assuming community tasks of conflict resolution, colonial officials often turned even those traditional customs that they understood from flexible principles to rigid rules.

Two systems of law thus developed: colonial civil and criminal law on the one hand, and customary law on the other. The former, as the rulers' law, had primacy, the latter only a circumscribed jurisdiction. Customary law was largely relegated to addressing disputes over the allocation of "native" land—the small percentages of territory left to the indigenous peoples after colonial expropriation.[668] Private property in "native" land (the capacity of an individual "owner" to alienate or sell it) was not recognized. This meant that allocation of communal land was governed by kinship rules—as interpreted by white administrators.

In turn, this meant that marriage would lie at the heart of customary law. As one South African authority wrote, "The [customary] law of persons or status is, for the most part, bound up either directly or indirectly with the question of marriage, and deals with capacity; marriage, its consummation, consequences, and dissolution; children, their minority, tutelage, and emancipation; and succession.…" Customary law had other aspects, but "Since Native law deals mostly with rights flowing from status, there is not much left over."[669]

"Native" marriage was thus given over to the colonizers to codify. White settler societies were almost unanimous in their disapproval of two aspects of native marriage: polygyny and the practice of *lobola,* the exchange of bridewealth.

Images of the un-Christian polygynous family were used to discredit all "native" marriages not performed before state or religious authorities, and relegate them to inferior legal status.[670] Bridewealth presented more complex problems. Communities clung closely to the practice of the groom's family giving goods in exchange for the bride, as a key way of reallocating wealth.

In the end, most colonies reached a compromise: customary law was recognized, but customs were subjected to a morals test. For instance, South

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[667] Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton: Princeton University Press, 2000).

[668] This amounted to 47 percent of the land of Rhodesia, by the Land Apportionment Act of 1930; a mere 13 percent of the land of South Africa was left to "Bantu" by the Natives Land Act of 1913.

[669] S. M. Seymour, *Native Law in South Africa* (Cape Town: Juta, 1953), pp. 17-22.

[670] In fact, polygyny may have been in decline in most Southern African societies even before colonial occupation; and the encroachments of a cash economy under colonialism certainly ensured that few African men would be able to afford multiple wives.

Africa's Native Administration Act of 1927 stated that Courts of Native Commissioners had discretion to decide questions "according to the Native law… provided that such Native law shall not be opposed to the principles of public policy or natural justice."[671] *Lobola* almost always passed the test . Polygyny was recognized in some jurisdictions, only silently tolerated in others.

The morals test allowed settlers to mold custom in the simulacrum of their own ideals. Native marriage was so far as possible re-imagined. No longer, in this vision, an instrument for integrating extended kinship units, it would be forcibly pruned into a nuclear and exclusive union that then would stand at the center of "traditional" law and culture: in the Victorian phrase, "The voluntary union for life of one man and one woman to the exclusion of all others."[672] Many women lost rights and status, as patriarchal domesticity was packaged for export from the metropolis to the colonies.[673]

It is naïve to romanticize "authentic" lineaments of custom anterior to colonialism; it is sensible only to recognize their unrecoverability, the impossibility of fully deciphering traditional cultures beneath their codified, reified versions. However, given the moral preoccupations of the codifiers, putatively reconstructing customary relationships around a nuclear model also entailed eliminating any possible alternatives.[674] The morals test implicitly meant the Christianization of custom. In the process, any residual place for gender or sexual nonconformity which customary practice might once have accorded was inevitably, in the new enactments, expunged. Moreover, the arguably-intensified subjection of women made it doubly difficult for them to

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[671] Seymour, *Native Law in South Africa,* p. 15. This was only a very late formulation of a long-standing colonial principle. Natal, the first province to recognize customary law, declared in 1849 that it did so "so far as it was not repugnant to the general principles of humanity observed throughout the civilized world": T. W. Bennett, *Application of Customary Law in Southern Africa (*Cape Town: Juta, 1985), p. 43. Similarly, the 1889 Charter of the British South Africa Company (which became the first charter law of Southern Rhodesia) stated that "native law" should apply in civil disputes between natives, but only if that law was "not repugnant to natural justice or morality": see Oliver Phillips, "Zimbabwean Law and the Production of a White Man's Disease," *Social and Legal Studies* Vol. 6 (4), 471-91.

[672] Lord Penzance, *Hyde v Hyde & another* (1866), cited in Bennett, *Application of Customary Law in Southern Africa,* p. 138.

[673] South African customary law, for instance—in large part importing from Roman-Dutch law the concept that a married woman lay under her husband's wardship—made women in customary marriages perpetual minors.

[674] See Oliver Phillips, "Zimbabwean Law and the Production of a White Man's Disease," *Social and Legal Studies* Vol. 6 (4), 471-91.

form affective relationships, or enter into roles in the community, outside heterosexual marriage.

As white rule ended, fledgling states faced a quandary. The distinction between civil and customary law replicated that between settler rulers and subordinate natives. One set of pressures demanded that customary law be rescued from its inferior juridical position. Yet another demanded it be harmonized or joined with civil law, to ensure legal equality across the board.

Governments have addressed this in varying ways. In Zambia, for instance, customary courts were given little support.[675] In some other states, they have been strengthened—with mixed results. In Zimbabwe and Botswana such courts have reportedly bolstered public confidence in the justice system, perhaps owing more to their relative accessibility than to the supposed familiarity of the versions of custom they enforce. However, lines increasingly blur between customary and other courts, with customary judges often deciding on penal code cases that ordinarily would be referred to Magistrate's Courts. [676]

A 1997 newspaper report in Botswana indicated that a customary court in Mahalapye had ruled in at least two separate case of homosexual sex between prison inmates. In one such case, one of the prisoners received "four lashes and an additional four months on his custodial term"; the other received an additional eighteen months.[677] While the last known arrest for "unnatural offences" to reach a magistrate's court in Botswana was in 1994, the article implies that cases may be relatively common in customary courts. In the

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[675] See AfroNet report, "The Dilemma of Local Courts in Zambia: A Question of Colonial Legal Continuity
or Deliberate Customary Law Marginalisation?" (Afronet: Lusaka, 1998).

[676] In Botswana, by some estimates, 70-80 percent of legal cases are heard in customary courts: see International Development Research Centre, "Traditional Leaders and the Botswana Judiciary," August 2001. See also Jennifer Widmer, "Courts and Democracy in Post-Conflict Transitions: A Social Scientist's Perspective on the African Case," *American Journal of International Law,* Vol. 95, pp. 64-75. For the Zimbabwean situation, see C. R. Cutshall, *Justice for the People: Community Courts and Legal Transformation in Zimbabwe* (Harare: University of Zimbabwe,1991).

[677] Bashi Letsididi, "Prison 'Lovers' Found Guilty of Illegal Sex," *The Reporter,* December 19-23, 1997. In the most recent case described, two prisoners had been engaging in what the article calls a "blissful… behind-bars romance"; one was unfaithful, and the other retaliated by assaulting him. The peculiar language of the article actually suggests, however, that the case may have reached customary courts because the lovers saw themselves as married. "A measure of comfort for the lovers is that the Mahalapye customary court did not consider spousal abuse… and adultery… but stuck to the legal charge of engaging in unnatural offences."

following year, amid debates about decriminalizing homosexual conduct, several of Botswana's traditional leaders were polled: one declared,

> It should remain illegal because it is against our morals and, should I find one in the tribe, he would be publicly flogged at the *kgotla* [courtyard] in full view of tribespeople, just as witches of yore were punished.[678]

The response suggests the atmosphere surrounding cases of sexual non-conformity before customary courts.

Efforts at harmonizing or joining customary and civil law have also had mixed results. In South Africa, the Customary Marriages Act of 1998 tried to balance the gender equality provisions of the constitution with the practice of customary marriage.[679] It finally ended the minor status of women in customary unions, giving them full legal and property rights. In the process, the law also recognized polygamous marriages,[680] and required state registration of customary unions. In Zimbabwe, the Legal Age of Majority Act of 1982 declared all persons, regardless or race or sex, legal adults at eighteen. Yet a Supreme Court decision in *Magaya v Magaya* in 1999 still denied equal inheritance rights to women in customary unions—arguing that customary law took precedence over anti-discrimination protections in Zimbabwe's constitution. Such disturbing developments are possible in part because many

[678] Kgosi Christopher Masunga, quoted in Billy Kokorwe, "Whip Them or Jail Them: Kgosi Seepapitso's View on Homosexuals," *Midweek Sun,* Botswana, June 17, 1998. One of the four traditional leaders "polled" by the newspaper urged that homosexuals' rights be recognized, however.

[679] For a critique of the compromise with "culture" in the 1998 Act, see Thandabantu Nhlapo, "The African Customary Law of Marriage and the Rights Conundrum," in Mahmood Mamdani, ed., *Beyond Rights Talk and Culture Talk: Essays in the Comparative Politics of Rights and Culture* (Cape Town: Palgrave Macmillan, 2000), pp. 136-148.

[680] At the same time, the State continued to indicate its disapproval of polygyny: the Deputy Minister of Justice and Constitutional Development was quoting as saying the Act acceded to polygyny because "the ban would be almost impossible to enforce and that the popularity of the practice seems to be waning." Quoted in Bohadi Nkomo, "South Africa: New Customary Marriages Act Sees Women as Equal Partners," *WOZA,* November 17, 2000.

constitutions in the region explicitly exempt customary law from the equality protections they offer.[681]

That fact in turn points to, as it reinforces, another dilemma: the gathering tendency, in African politics, to pit "rights" against "custom." Again and again human rights and civic freedoms are accused of promoting disruptive individualism, of tearing people away from their roots, their inherited social roles, their communities and forebears. That discourse and dilemma are central to the issues raised by this report, and the state rhetoric it describes. The dynamics of colonial division in large part underlie it.

In many colonial regimes, the realm of the "customary" was opposed to the realm where citizens enjoyed "rights." Entry into the latter, thought sometimes feasible for the native, carried a fearsome price. "Custom" gave the "native" a share in communal ownership of whatever lands were left in native hands. To have "rights," though, meant entering the settler's world of cash economy and private property—and surrendering the stake in communal property. For the native, this dispossession was a devil's bargain. The world of civil law and "rights" came to be seen not merely as the antithesis of the traditional, but as a threat to integration and belonging.[682]

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[681] Article 23(3) of Zimbabwe's post-independence constitution, for example, specifically excludes from the reach of its anti-discrimination provisions the areas (among others) of: "(a) adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law; (b) the application of African customary law." A similar provision exists in article 23 of Zambia's 1991 constitution.

By contrast, Namibia's constitution (article 66) recognizes customary law and customary marriages but does not exempt the former from anti-discrimination protections. South Africa's 1996 constitution does not formally recognize customary law. Sections 30 protects the right of everyone "to participate in the cultural life of their choice," and Section 31 protects the right of everyone belonging to a "cultural, religious or linguistic community" to "enjoy their culture." Section 15(3) specifically allows (but does not require) legislation recognising

"i)marriage concluded under any tradition or a system or religious, personal, or family law; or

ii)systems of personal and family law under any tradition or adhered to by persons professing a particular religion."

The provisions stipulate that such participation, enjoyment, and recognition must be consistent with the Bill of Rights.

[682] For a detailed treatment of these processes and perceptions, see Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton: Princeton University Press, 2000). Mamdani's formulations are derived from studies of British colonial practice, however, and should not be reified (as Mamdani

The colonial reconstruction of "custom" around an exclusionary ideal of heterosexual marriage combined in dangerous ways with this value attached to the "customary" as the authentic antidote to "rights." Exactly the realms that some constitutions exempt from equality protections—the personal and familial—came to appear the preserve of genuine traditional belonging, regardless of the way colonialism had recast them. Modern inequality was projected onto the past; versions of contemporary, compulsory heterosexuality came to dominate nationalist discourse, as an ideology of unsullied culture. The spread of homophobia in Southern Africa, and its identification with "authentic" indigenous values, has much to do with the injustices buried in the history of customary law.

himelf sometimes tends to do) into generalizations about "colonialism" as a universal category.

METHODOLOGY

Human Rights Watch and the International Gay and Lesbian Human Rights Commission conducted research for this report from November 1998 through December 2001, with additional documentary research carried on afterward. Human Rights Watch conducted a mission to South Africa and Namibia in 2001. IGLHRC visited Botswana, Namibia, Zambia, and Zimbabwe in 1998; returned to Zambia and Zimbabwe in 2000; and conducted additional missions to Botswana, Namibia, and South Africa in 2001. Human Rights Watch staff also cooperated with IGLHRC in organizing a human rights workshop for regional activists in South Africa in 1999, at which the conceptual outlines of this report were discussed in detail. We worked closely with many nongovernmental organizations to identify and interview lesbians, gay men, bisexuals, and transgender people, as well as other victims of abuse or discrimination based on their sexual conduct, many of whom were reluctant to speak with us until we assured them that we would protect their identity. We agreed to protect the identity of many of the people we interviewed, and in appropriate cases have used pseudonyms and withheld any other identifying information. Cases where pseudonyms are used are identified in the footnotes. In some other cases, at the request of the interviewee, we have used only his or her first name. We also interviewed human rights activists, including women's rights activists, lawyers, HIV/AIDS peer educators and organizers, academics, journalists, and government officials.

The vast majority of people we interviewed in South Africa were of African descent; approximately twenty percent were white, coloured, or Indian. In other countries, a still larger proportion of those interviewed were of African descent. In Botswana, we interviewed men and women in Gaborone. In Namibia, we interviewed men and women living in Windhoek and in surrounding townships. In South Africa, we interviewed men and women living in urban areas, townships and rural areas, mostly in Gauteng, KwaZulu-Natal, and Eastern and Western Cape provinces. In Zambia, we interviewed men and women living in Lusaka and surrounding high-density areas, as well as visiting a penitentiary and court in Kabwe. In Zimbabwe, we interviewed men and women living in Harare, Mutare, Bulawayo, and Masvingo, as well as high-density suburbs and rural areas.