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TRENDS

Lesbian and Gay Rights In Zimbabwe

by Leane Renée*

The first lesbian and gay rights movement is under way in Zimbabwe. Homosexual rights advocates in Zimbabwe are organizing in the midst of President Robert Mugabe's hostile public declarations that lesbians and gays should be tied up and promptly delivered to the police for immediate prosecution. In a country where rights concerning free speech and due process have consistently been denied to gays and lesbians as a class, the opportunity to raise constitutional challenges is staggering.

Gay and lesbian activists in Zimbabwe have numerous legal strategies available to further their cause. The right to privacy and the abolition of anti-homosexual sodomy laws are two areas of the law activists often employ for this purpose. A host of arguments have been made against sexual orientation discrimination in other countries. For example, a relatively new approach in the United

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States is to argue that discrimination on the basis of sexual orientation is sex discrimination. In Zimbabwe, a potentially progressive Constitutional amendment prohibiting "gender-based discrimination" will soon take effect. Although this legislation, amending section 23 of the Zimbabwe Constitution, specifies gender (a matter of identity), which is distinct from sex (a matter of biology), these distinctions are not likely to be raised in initial litigation under the new amendment. Therefore, sex-based classification arguments would result in the greatest legal progress for Zimbabwean gays and lesbians.

International Protections

Zimbabwe has signed the African Charter of Human and People's Rights, the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights (ICCPR).

Under Article 4 of the African Declaration, citizens of Zimbabwe have the "right to respect for life and integrity of the person," which may be construed as a type of privacy right for gays and lesbians. Article 5 of the African Charter may also apply in cases of sexual orien-

Categorizing sexual orientation as an issue of privacy can easily backfire.

tation because it mandates respect for human dignity. The Universal Declaration, Article 12, specifically prohibits "arbitrary interference with privacy" and the ICCPR, Article 17 ensures the "right to privacy and the enjoyment of that right free from arbitrary interference." Perhaps anticipating a trend in litigation similar to that in the United States, the Zimbabwe government amended Section 11 of the Zimbabwe Constitution in 1996, to limit the right to privacy where such a right may "prejudice the public interest." This amendment may be employed by the government to defeat any privacy-based arguments in cases dealing with sexual orientation. The Human Rights Committee of the United Nations, however, ruled in *Toonen v. Australia* that Australia, a party to the ICCPR, violated Article 17 by sustaining statutes which provided criminal sanc-

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tions for homosexual conduct. The *Toonen* decision relied solely on a right to privacy argument, which could support Zimbabwean gay and lesbian privacy arguments.

Before Zimbabwean activists embrace right to privacy arguments, however, an important lesson should be gleaned from U.S. litigation; categorizing sexual

orientation as an issue of privacy can easily backfire. For example, with each case asserting that sexual orientation should be protected under the right to privacy, anti-homosexual activists have seized upon the opportunity to twist the arguments in their favor. They suggest that if sexual orientation is an issue of personal privacy, then lesbians and gays should not express themselves, their views, or their concerns publicly. As a result, loosely arguing that the right to privacy prohibits discrimination against gays and lesbians can actually impede efforts to secure basic human rights for homosexuals.

Finally, the Constitution of Zimbabwe does not inherently provide a right to privacy in issues of sexual orientation. For that reason the issue of anti-homosexual sodomy laws will be addressed in lieu of privacy-based identity arguments.

Sodomy Laws and Equal Protection

In Zimbabwe, sexual acts between people of the same sex are criminal offenses throughout the nation. For example, sodomy is defined as unlawful and intentional sexual relations per anum between males. Zimbabwe also prohibits "unnatural acts" which involve the unlawful and intentional commission of an "unnatural" act by one person with another. If lesbians cannot be charged under the sodomy statute, they can be charged with committing such loosely defined "unnatural acts."

Current sodomy statutes may be compared with anti-miscegenation statutes. The analogy as described by Andrew Koppelman in *The Miscegenation Analogy: Sodomy Law as Sex*, is strikingly basic. Beyond the immediate harm they inflict upon their victims, their purpose is to support a regime of caste that locks some people into inferior social positions at birth. Miscegenation laws discriminated on the basis of race, and they did so in order to maintain white supremacy. Similarly, sodomy laws discriminate on the basis of sex B for example, permitting men, but not women, to have sex with women B in order to impose traditional sex roles."

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Although race and sexual orientation are not identical constructs and do not have the same analytical status, the structure of the equal protection arguments in each case is basically the same. Zimbabwe will soon amend its Constitution to provide equal protection on the basis of gender. Therefore, a sex-based claim for equal protection may provide a key perspective for an attack on anti-homosexual sodomy statutes.

Sexual Orientation and Sex Discrimination

A sex-based argument would make two key points. First, the sex of the person who chooses to engage in sodomy should not factor into the definition of the conduct being proscribed. With respect to sodomy, for example, if we remove the choosing person's sex from the definition and look only at the possible sex of the chosen partner, the nature of the choice is clear. The choice is between sexual activity with a woman and sexual activity with a man. As Robert Wintemute stated in *Sexual Orientation and Human Rights*, "it is immediately clear on what basis the choice is restricted: a woman, but not a man, may choose [sexual activity] with a man; a man, but not a woman, may choose

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[sexual activity] with a woman." Hence, one could argue that a woman, A, cannot choose to engage in sex with another woman, B, because A is a woman B thus, anti-homosexual sodomy laws discriminate on the basis of sex. Therefore, Wintemute continues, "[d]iscrimination between private same-sex sexual activity, public same-sex kissing or same-sex marriage and the equivalent opposite-sex conduct, allegedly

without regard to sex, actually constitutes discrimination on the basis of sex as to who may choose to engage in sexual activity with a man in private, to kiss a man in public or to marry a man, and who may choose the equivalent conduct with a woman."

While counter arguments could be made, suggesting that a woman's choice of same-sex emotional/sexual conduct with a woman and a man's choice of same-sex emotional/sexual conduct with a man are biologically different acts when compared with opposite-sex emotional/sexual conduct. This assertion is inaccurate, however. Wintemute summarizes the flaw as it "relies entirely on the difference in the choosing person's sex and cannot point to any significant >biological difference= between the conduct chosen by a man and that chosen by a woman." For example, no particular "biological difference" exists between a woman performing oral sex on a woman and a man performing oral sex on a woman, and vice versa.

Once the hidden sex-based distinctions behind all forms of sexual orientation discrimination are exposed, the next step according to Wintemute is "to challenge the argument that these distinctions do not constitute sex discrimination, and do not need to be justified, because they are made 'symmetrically,' in the sense that the choices of both men and women are restricted." That is, even though we may have established that an individual is treated differently because of her/his sex, we must further refute the claim that both sexes are treated the same, or are subject to the same restrictions. The claim that the treatment is the same, in reality, asserts that the treatment is somehow "different but equivalent, in the sense that all individuals of both sexes are denied one option and no one is permitted to choose a person of their own sex", according to Wintemute. This logic is flawed because it attempts to justify one type of discrimination (against lesbians and gays) by invoking another related discrimination (on the basis of sex).

Clearly, the choices available to both sexes are not the same. The choices are



Author with Romeo Tschuma and Chipo Machida, leaders of the Black Outreach Project at the Gays and Lesbians of Zimbabwe (GALZ).

Photo courtesy of Leanne Renée

unequal because a woman may legally have sexual contact with a man, but a man cannot; a man may legally have sexual contact with a woman, but a woman cannot. True symmetry would look the same on both sides, but that is not the case with anti-homosexual sodomy laws. Instead, these laws discriminate on the basis of sex.

Potential for Success in Zimbabwe

In Zimbabwe, legal practitioners will soon enjoy the benefit of a Constitutional amendment protecting citizens against gender discrimination, but the courts' interpretation of the amendment has yet to be established.

Litigation in Zimbabwe will probably begin slowly, chipping away at traditional forms of sex-based discrimination in

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order to discern which arguments will prevail and which will be rejected. That is not to say, however, that a sex discrimination claim will not succeed in Zimbabwe. Success may even be on the horizon, though the methods of reaching

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this goal are different than those employed in other regions of the world.

Rather than relying on judicial precedents and previous litigation strategies, Zimbabwe lawyers may need to focus more on statutory interpretation. For example, if legal practitioners can establish a *prima facie* case for sex-based discrimination, in violation of amended Section 23 of the Constitution, any justifications restricting same-sex, but not opposite-sex conduct could be raised under Section 11. Section 23(2) of the Zimbabwe Constitution, including the amended gender clause, states in per-

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tinent part that, "a law shall be regarded as making a provision that is discriminatory and a person shall be regarded as having been treated in a discriminatory manner if, as a result of that law or treatment, persons of a particular description by race, tribe, place of origin, political opinions, colour, creed or gender are prejudiced B(a) by being subjected to a condition, restriction, or disability to which other persons of another such description are not made subject; or (b) by the according to persons of another such description of a privilege or advantage which is not accorded to persons of the first-mentioned description."

The argument as explained above, would draw out the hidden distinctions in anti-homosexual laws that discriminate on the basis of sex, which is unconstitutional in Zimbabwe. The State may, however, attempt to justify this violation by asserting that such discrimination is warranted in the interest of public welfare, as specified in amended Section 11 of the Constitution which reads, "[T]he provisions of this chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations on that protection as are contained herein, being limitations designed to ensure that the enjoyment of the said rights and freedoms of any person does not prejudice the public interest or the rights and freedoms of other persons." (Emphasis added.)

Arguments that might be made under the purview of "public interest" include assertions documented by Winemute that "same-sex sexual activity is immoral, unnatural, or offensive, lacks procreative potential or potential for penile-vaginal intercourse; same-sex couple relationships are inherently unstable, are not financially interdependent or require assistance with procreation." That is, but for the sex of one of the persons involved, a lesbian or gay plaintiff would move from Section 23 into an argument against proscriptions inferred from Section 11.

The arguments readily available to challenge justifications under Section 11 can be made legally, though the social implications of such assertions require caution. To refute claims that homosexual sexual conduct is unnatural or immoral, a lesbian or gay plaintiff could establish that the similarities with opposite-sexual activity goes beyond form into substance. One could argue that, for example, the feelings arising from same-sex conduct are qualitatively the same as those arising from opposite-sex conduct and that being in love, making

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love, holding hands in public and establishing a home with a partner have the same significance and value regardless of the sexes of the partners. These arguments could be set forth to counter justifications proposed under Section 11.

One obvious, major shortcoming of such an analogy, however, is that it attempts to stress similarities between homosexual and heterosexual couples, using heterosexuals as the measuring stick for what is acceptable. With that caveat in mind, legal practitioners should structure counter arguments to Section 11 carefully. Of course, advocating for acceptance of differences should appear on the agenda of human rights litigation in any country.

Conclusion

Zimbabwe gay and lesbian rights may advance with a leap if they can succeed in making a sex discrimination argu-

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ment in the courts based on new legislation. In the United States, similar battles are taking place in a piecemeal fashion—state-by-state. The Zimbabwe Constitution, on the other hand, now protects citizens nationwide against sex discrimination.

It is an interesting comment on how legal progress is relative. Outsider groups in the United States can fight for decades to chip away at every angle of oppressive laws and still not find equal treatment. Another venue is found in South Africa, where sexual orientation discrimination can be prohibited altogether via one equal protection clause prohibiting discrimination on the basis of sexual orientation in the nation's Constitution. Or, in a country like Zimbabwe, a piece of legislation *may* exist which could provide for the perfect premise on which to build arguments against impervious forms of discrimination.

That is not to say that the social and political lives of homosexuals will be safe or carefree if sexual orientation is

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successfully argued as sex-based discrimination. The end of legally sanctioned discrimination and anti-homosexual-sodomy laws does not mean the end of outsider status and oppression for homosexuals in Zimbabwe, but would be a good beginning. ☺

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