

## Review Article

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## Equality Advocacy Brief

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### Purpose of this Equality Advocacy Brief (EAB)

This EAB is designed to share with key stakeholders such as the media, legislators, and politicians, religious and traditional leaders their role in guaranteeing equality for all through the law and pursuant to law. It is a call to action for all leaders and shapers of public opinion. We call on all law makers and influencers of law makers to end discrimination in Zambia and guarantee equality to all regardless of their gender, gender identity and sexual orientation or any other social status.

### Equality in Law

The Constitution of the Republic of Zambia, the highest law of the land, guarantees freedom from discrimination in Article 23. It provides:

- (1) Subject to clauses (4), (5) and (7), a law shall not make any provision that is discriminatory either of itself or in its effect.
- (2) Subject to clauses (6), (7) and (8), a person shall not be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.
- (3) In this Article the expression “discriminatory” means affording different treatment to different persons attributable, wholly or mainly to their respective descriptions by race, tribe, sex, place of origin, marital status, political opinions, color or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.
- (4) Clause (1) shall not apply to any law so far as that law makes provision
  - (a) for the appropriation of the general revenues of the Republic;
  - (b) With respect to persons who are not citizens of Zambia;
  - (c) With respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;
  - (d) for the application in the case of members of a particular race or tribe, of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons; or
  - (e) whereby persons of any such description as is mentioned in clause (3) may be subjected to any disability or restriction or

may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description is reasonably justifiable in a democratic society.

- (4) Nothing contained in any law shall be held to be inconsistent with or in contravention of clause (1) to the extent that it is shown that it makes reasonable provision with respect to qualifications for service as a public officer or as a member of a disciplined force or for the service of a local government authority or a body corporate established directly by any law.
- (5) Clause (2) shall not apply to anything which is expressly or by necessary implication authorized to be done by any such provision or law as is referred to in clause (4) or (5).
- (6) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that it is shown that the law in question makes provision whereby persons of any such description as is mentioned in clause (3) may be subjected to any restriction on the rights and freedoms guaranteed by Articles 17, 19, 20, 21 and 22, being such a restriction as is authorized by clause (2) of Article 17, clause (5) of Article 19, clause (2) of Article 20, clause (2) of Article 21 or clause (3) of Article 22, as the case may be.
- (7) Nothing in clause (2) shall affect any discretion relating to the institution, conduct or discontinuance of civil or criminal proceedings in any court that is vested in any person by or under this Constitution or any other law.

Article 23 does not holistically address inequality and discrimination in the Zambian context as many groups are not protected. It does not protect the following groups from discrimination: women, persons of diverse gender identities and sexual orientation, prisoners, sex workers and persons with disabilities. Although article 23 is the anti-discrimination clause of the Constitution, it does not wholly reflect the purpose, values and principles of the Constitution which are stipulated in the Preamble as well as in Article 8 of the Constitution. Further, discrimination against all persons is outlawed by Article 266 as read together with Articles 8 and 9 of the Constitution. Article 266 defines discrimination as:

Directly or indirectly treating a person differently on the basis of that person's birth, race, sex, origin, color, age, disability, religion, conscience, belief, culture, language, tribe, pregnancy, health, or marital, ethnic, social or economic status.

Articles 8 and 9 state:

8. The national values and principles are-

- (a) Morality and ethics;
- (b) Patriotism and national unity;
- (c) Democracy and constitutionalism;
- (d) Human dignity, equity, social justice, equality and non-discrimination;
- (e) Good governance and integrity; and
- (f) Sustainable development.

9. (1) The national values and principles shall apply to the-

- (a) Interpretation of this Constitution;
  - (b) Enactment and interpretation of the law, and
  - (c) Development and implementation of State Policy
- (2) The President shall, once in every year, report to the National Assembly the progress made in the application of the values and principles specified under this Part.

Article 15 of the Constitution also safeguards all persons against inhumane treatment. It provides:

No persons shall be subjected to torture, or to inhuman or degrading punishment or other treatment

Placing human beings in different categories or classes is inhuman. Treating people negatively and unequally solely or mainly on account of personal traits is degrading treatment. Failure of leaders to act to remedy such treatment simply means the leaders endorse inhuman and degrading treatment. Article 15 does not have any exceptions. It is guaranteed in totality thereby signifying the importance of protecting human dignity for all, without exception.

Article 267 of the Constitution requires that when interpreting the Constitution, this should be done in accordance with the Bill of Rights AND in a manner that promotes its purpose, values and principles. Constitutional interpretation should also permit development of the law and contribute to good governance. It is evident that key stakeholders such as media practitioners, legislators, religious and traditional leaders are expected to exercise leadership in the interpretation and application of the Constitution and its values. If this standard is properly applied by all leaders and in all circumstances, the Constitution could afford protection from discrimination for women, persons with diverse gender and sexual identity and orientation, persons with disabilities, sex workers, prisoners and other socially marginalized groups.

We therefore call upon all members of the media as well as political, religious and traditional leaders to respect the Constitution and give effect to its purpose, values and principles which include equality and non-discrimination for all.

We further urge leaders to implement article 9 as read together with article 267 of the Constitution and ensure that the purpose, values, principles of the Constitution are reflected in all relevant laws and in the development and implementation of state policy to guarantee equality and protect fundamental rights for all persons in Zambia.

The Zambian legal framework is also favourable for advancing equality in some respects. The Gender Equity and Equality Act no. 22 of 2015 protects persons from discrimination on account of their sex and promotes gender equity and equality. Further Persons with Disabilities Act, Act no. 6 of 2012 proscribes discrimination

against persons with disabilities, including those with mental disabilities. Whilst the Prisons Act, Chapter 97 of the Laws of Zambia does not specifically provide for prisoners' rights, it contains provisions that partially guarantee protection of privacy, human dignity and rights to health for prisoners.

Leaders MUST use the positive law to guarantee equality against all persons in Zambia!

The Reality of Marginalization by Law in Zambia. The Zambian society has marginalized various groups of people over a long period of time, pre-dating Zambia's independence from colonial rule. Such marginalization has been done is total disregard of people's happiness and fundamental rights. It has created an environment in which some Zambians are appreciated and accepted regardless of their diversities whereas others are rejected, marginalized and abused because of their diversities. This situation has been entrenched in our laws, customs and culture and has thus been accepted as the Zambian way of life. Article 23(4) (d) of the Zambian Constitution permits discrimination in the area of personal law. This is the area where the most human rights violations against women, persons of diverse sexual and gender identity and persons with disabilities experience. Article 23(4) (d) of the Constitution protects negative cultural practices that perpetuate inequality and violate human dignity. Such protection by the Constitution and other forms of law stifles development of law as envisaged in Article 267 of the Constitution. Further failure of the Constitution to protect persons from discrimination on account of sexual orientation and gender identity allows for their exclusion, restriction, maltreatment and abuse in all spheres of their lives on account of these descriptions.

For persons with disabilities the reality of exclusion and maltreatment is not any different. Section 178(b) and (d) of the Penal Code, Chapter 87 of the Laws of Zambia which proscribe idle and disorderly conduct is instructive. It criminalizes poor persons with disabilities for wandering or placing themselves in any public place or wandering abroad and endeavoring by exposure of wounds or deformity to obtain or gather alms. These provisions are often used to institutionalize persons with disabilities and perpetuate societal stigmatization and discrimination against persons with disabilities. The Zambian society has now reached a stage where persons with disabilities are often viewed as objects of charity and not rights holders' entitled to equal treatment and respect. Further the Mental Disorders Act, Chapter 405 of the Laws of Zambia discriminates against persons with mental disabilities by referring to them in derogatory language. Sections 2, 4 and 5 of the Act are instructive of this. The Act further discriminates against persons with mental disabilities in that it denies their right to their legal capacity and fails to recognize their ability to live independently. It emphasizes the medical model of disability which encourages institutionalization of persons with mental disabilities.

Sex workers in Zambia also face inequality in treatment through marginalization and violence. Such violence is experienced at the hands of law enforcers as well as clients and members of the public. They often have little or no recourse in law because the law seemingly criminalizes sex work. Section 178 of the Penal Code contains several provisions that are often used to perpetuate stigma and discrimination against sex workers. The relevant sections provide:

- 178 (a) every common prostitute behaving in a disorderly or indecent manner in a public place;
- (e) Every person who, without lawful excuse, publicly does any indecent act;
- (g) Every person who in any public place solicits for immoral purposes; are deemed idle and disorderly persons, and are

liable to imprisonment for one month or to a fine not exceeding sixty penalty units or to both.

Sex workers are also subjected to inhuman and degrading treatment and violence on the strength of Section 146 of the Penal Code which proscribes living off the earnings of prostitution or persistently soliciting for prostitution. Although the law does not define what “immoral purpose” or “immorality” is, it is often taken to mean conduct perceived to be bad or against cultural and religious practices dictated by the majority. These considerations are therefore often gender biased and thus subjective. Various forms of idle and disorderly conduct are criminalized in Zambia and yet these are petty offences that only make the already overburdened criminal justice system in Zambia ineffective and must be removed from the statute books to ensure social justice and equality of treatment.

Although there are no express provisions criminalizing persons of diverse gender identities, persons of diverse gender identities are often persecuted on assumption that they are either impersonating someone else or are involved in a same sex relationship. The relevant provisions are Section 378 (1) of the Penal Code and Section 155 and 158 of the Penal Code. The most ridiculous provision used to target transgender and intersex persons is section 378(1) which states:

Any person who, with intent to defraud any person, falsely represents himself to be some other person, living or dead, is guilty of a misdemeanor.

Transgender and intersex persons are often said to be impersonating someone else and are thus harassed and abused pursuant to section 378 aforementioned. On the other hand, gay and lesbian persons are subjected to violence, extortion and humiliation pursuant to section 155, 156 and 158 aforementioned, irrespective of the fact that their sexual acts are done in private and between consenting adults. Section 155 states:

### **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;

Commits a felony and liable, upon conviction, to imprisonment for a term not less than fifteen years and may be liable to imprisonment for life:

Provided that where a person-

- a) has carnal knowledge of a child against the order of nature;
- b) causes a child to have carnal knowledge of an animal; or
- c) permits a male person to have carnal knowledge of a male or female child against the order of nature;

That person commits an offence and is liable, upon conviction, to imprisonment for not less than twenty-five years and may be liable to imprisonment for life.

### **Section 156**

Any person who attempts to commit any of the offences specified in section one hundred and fifty-five commits a felony and is liable, upon conviction of not less than seven years but not exceeding fourteen years.

### **Section 158**

1. Any male who, whether in public or private, commits any act of gross indecency with a male child or person, or procures a male child or 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 child or person, whether in public or private, commits a felony and is liable, upon conviction, to imprisonment for a term of not less than seven years and not exceeding fourteen years.
2. Any female who, whether in public or private, commits any act of gross indecency with a female child or person, or procures a female child or person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any female person with himself or with another female child or person, whether in public or private, commits a felony and is liable, upon conviction, to imprisonment for a term of not less than seven years and not exceeding fourteen years.

The effect of such laws is to entrench inequality and perpetuate inhuman and degrading treatment in Zambia. This is evident from the negative media coverage of sexual and gender diversity, gender-related issues, and issues affecting prisoners, sex workers and persons with disabilities, especially those with mental disabilities. It is also evident from the many reports of maltreatment of the aforementioned groups by law enforcement agents and members of the public, with not mitigating actions from leaders-political or other. This way of life is an affront to human rights as promulgated in national and international laws, and an affront to good conscious and justice as it places persons in different classes and labels them as accepted or rejected. No person must ever be made to feel rejected!

We call upon the media, leaders and other influential people in society to recognize that marginalization of persons through law is one of the worst forms of a country's maltreatment and human rights violations against people in its jurisdiction; It further urges leaders to acknowledge that this way of life in Zambia is “unZambian” and thus not acceptable or desirable in a modern, civilized and democratic society; and To denounce this way of life that puts persons in Zambia in different classes and violates human dignity as protected in Article 15 of the Zambian Constitution and the International Covenant on Civil and Political Rights.

### **Eliminating Marginalization by Law in Zambia**

Leaders and media practitioners in Zambia must ACT NOW to prevent this terrible situation of inequality and dehumanizing treatment of key populations from deteriorating by ENDING INEQUALITY AND HUMAN RIGHTS VIOLATIONS.

### **Leaders Must**

Give effect to the Constitution and International human rights standards and repeal all laws that perpetuate unjustifiable discrimination and inequality among people in Zambia and by enacting favourable laws that guarantee equality through:

1. Prohibiting all forms of harassment, victimization and harmful social, cultural and religious practices and eliminating all forms of discrimination including on account of one's gender, gender and sexual identity, disability and social status;
2. Punishing all sources of hate speech and other like activities that perpetuate inequality against women, persons of divergent gender and sexual identity, persons with disabilities, sex workers and prisoners; including bad and discriminatory reporting from media houses and users of social media.
3. Imposing measures and requiring strategic decisions in all spheres of life in order to ensure gender and social equity,

- equality for all irrespective of one's gender or sexual identity, disability or any other social status such as that of sex workers and prisoners;
4. Creating institutions and enhancing the powers of existing institutions charged with investigating cases of inequality amongst vulnerable and marginalized groups and ensure adequate remedies are available to these groups for any inequality and human rights violations they experience;
  5. Implementing information, education and communication activities that raise awareness on:
    - a) the evils of discrimination,
    - b) the proscription of discrimination, violence and abuse by law; and
    - c) The imposition of responsible reporting standards on media houses and any person who uses all forms of media.

(6) Achieving equality by giving effect to international and regional human rights instruments such as the International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, Convention on the Elimination of All Forms of Discrimination Against Women, Protocol to the African Charter on Human and Peoples' Rights on Rights of Women in Africa, SADC protocol on Gender and Development, United Nations Convention on the Rights of Persons with Disabilities and its Protocol and the United Nations Standard Minimum Rules for the Treatment of Prisoners [1-17].

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