

**INCLUSION OF LGBTQ RIGHTS INTO THE  
BILL OF RIGHTS IN KENYA – A PRO-GAY  
APPROACH**

**AD101997  
NICHOLAS K. MUTUNGA**

**A DISSERTATION SUBMITTED IN PARTIAL FULFILMENT  
OF THE REQUIREMENTS OF BACHELOR OF LAWS, RIARA LAW  
SCHOOL, RIARA UNIVERSITY**

**FEBRUARY 2021**

## **DECLARATION**

I, Nicholas K. Mutunga, declare that “INCLUSION OF LGBTQ RIGHT INTO THE BILL OF RIGHTS – A PRO GAY APPROACH (Decriminalization of same sex marriages)” is my own work, that it has not been submitted for any degree or examination in any other university or institution, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Signature: \_\_\_\_\_

Name: NICHOLAS K. MUTUNGA

Date: \_\_\_\_\_

## **ABSTRACT**

The human rights of LGBTQ individuals are often ignored by law and often face discrimination from the same society that they reside. This research paper explores LGBTQ rights and the need to provide legal protection. The area of study shall be highlighting laws that are anti-gay in Kenya and shine a light at discrimination that LGBTQ people face in Kenya either at school, work places, sporting centres, hospital etc. This research paper looks at the attitude Africans have towards LGBTQ and what shapes their school of thought. The idea of separation of church and state is brought up in this paper. Religious mind-set and views towards homosexuals have shaped the harsh attitude towards the LGBTQ community. A comparative analysis of legislative framework of Botswana, South Africa, Canada, United States of America and Kenya is carried out. International law on human rights is looked into and suggested to be incorporated in Kenya since Kenya has signed and ratified such law. This research paper suggests that Kenya should adopt progressive legislations from other nations of legislate a better bill of rights that will protect all people liberty and rights. This research exposed police and civilian brutality targeting LGBTQ persons which to the extreme has caused death. This research paper suggest the laws criminalisation same sex marriage to be struck out as it is against protection of individual liberty. Court processes and petitions to declare section The 162 of the penal code unconstitutional is reviewed. This paper reviews such cases and offers opinions as to the need to protect individual liberty and appreciate our differentiation in whish this courts would have applied to promote equality and offer legal protection to this group of people. This research paper offer recommendations to the protection of LGBTQ rights as human rights.

**TABLE OF ABBREVIATION**

LGBTQ – Lesbians, Gay, Bisexuals, Transsexuals and Queer

UN – United Nations

UDHR – Universal Declaration of Human Rights

## **TABLE OF CASES**

COI & another v Chief Magistrate Ukunda Law Courts & 4 others [2018] eKLR.

Richard Muasya v the Hon. Attorney General [2010], Petition no. 705 of 2007.

R. v. Morgentaler, (1988) 1 S.C.R.

Republic v Kenya National Examinations Council & another Ex-Parte Audrey Mbugua Ithibu [2014] eKLR (Audrey Mbugua Case).

National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998)

Toonen v. Australia, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

## **TABLE OF LEGAL INSTRUMENT**

The Constitution of Kenya 2010.

The Constitution of South Africa.

The Constitution of Botswana.

The Canadian Charter of Rights and Freedoms.

Penal Code cap 63.

Marriage Act.

Children Act chapter 141 of Kenya.

Universal Declaration of Human Rights.

## **TABLE OF CONTENTS**

<b>DECLARATION</b> .....	ii
<b>ABSTRACT</b> .....	iii
<b>TABLE OF ABBREVIATION</b> .....	iv
<b>TABLE OF CASES</b> .....	v
<b>TABLE OF LEGAL INSTRUMENT</b> .....	vi
<b>1.0. CHAPTER ONE</b> .....	1
<b>1.1. INTRODUCTION</b> .....	1
<b>1.2. BACKGROUND OF THE STUDY</b> .....	2
<b>1.3. LITERATURE REVIEW</b> .....	3
<b>1.4. PROBLEM STATEMENT</b> .....	5
<b>1.5. THEORETICAL FRAMEWORK</b> .....	5
<b>1.5.1. NATURAL LAW</b> .....	5
<b>1.5.2. THE PURE THEORY OF LAW</b> .....	6
<b>1.5.3. SOCIAL CONTRACT THEORY</b> .....	8
<b>1.6. RESEARCH QUESTIONS</b> .....	9
<b>1.7. RESEARCH OBJECTIVES</b> .....	9
<b>1.8. JUSTIFICATION</b> .....	9
<b>1.9. HYPOTHESES/ ASSUMPTIONS</b> .....	10
<b>1.10. RESEARCH METHODOLOGY</b> .....	10
<b>1.11. LIMITATIONS</b> .....	11
<b>1.12. CHAPTER BREAKDOWN</b> .....	12
<b>2.0. CHAPTER TWO</b> .....	13
<b>THE LEGAL FRAMEWORK THAT FORM THE BASE OF THIS RESEARCH</b> .....	13
<b>2.1. INTRODUCTION</b> .....	13
<b>2.2. ANTI-GAY LAWS IN KENYA</b> .....	15
<b>2.2.1. Article 2</b> .....	16
<b>2.2.2. Article 10</b> .....	16
<b>2.3. STATUTES</b> .....	17
<b>2.3.1. The Kenyan Penal Code</b> .....	17
<b>2.4. LGBTQ RIGHTS IN THE INTERNATIONAL SPHERE</b> .....	18
<b>2.5. CONCLUSION</b> .....	22
<b>2.5.1. The Unconstitutionality of Kenya’s Anti-Sodomy Laws</b> .....	22
<b>3.0. CHAPTER THREE</b> .....	25
<b>3.1. PROBLEMS FACED BY LGBTQ PEOPLE IN KENYA</b> .....	25

3.1.1. Violence and Discrimination against LGBT Kenyans: Cultural Attitudes and Kenya’s Penal Code .....	25
3.2. THE UNCONSTITUTIONALITY OF KENYA’S ANTI-SODOMY LAWS .....	26
(Kenya’s Anti-gay Laws Directly Violate the spirit of the Constitution’s Bill of Rights) .....	26
3.3. ANTI-GAY LAWS IN KENYA VIOLATE THE VALUES OF INTERNATIONAL LAW AND INTERNATIONAL AGREEMENTS TO WHICH KENYA IS BOUND.....	28
3.4 CONCLUSION .....	29
4.0. CHAPTER FOUR.....	31
4.1. COMPARATIVE ANALYSIS.....	31
4.2. SOUTH AFRICA .....	31
4.2.1. The Marriages Act v The Civil Unions Act of South Africa .....	32
4.3. BOTSWANA .....	33
4.3.1. Botswana decriminalized homosexuality in a landmark ruling .....	34
4.4. CANADA.....	35
4.5. KENYA.....	35
4.6. CONCLUSION .....	41
5.0. CHAPTER FIVE .....	42
5.1. INTRODUCTION.....	42
5.2. WHY SUPPORT SAME SEX MARRIAGE? .....	43
5.3. COMBATTING DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY .....	43
5.4. THE PLACE OF EQUITY IN KENYAS LEGAL SYSTEM.....	44
5.4.1. The New Constitution.....	45
5.5. RIGHTS AT STAKE .....	49
5.6. CONCLUSION .....	50
5.7. RECOMMENDATION .....	51
BIBLIOGRAPHY .....	52
ARTICLES.....	52
BOOKS .....	52



## **1.0. CHAPTER ONE**

### **1.1. INTRODUCTION**

LGBTQ rights are human rights that advocate for equality to people of different sexual orientation and preference. LGBTQ rights address injustices against members of the LGBQ society by prohibiting discrimination and violence, requiring legislative modifications in fields such as access to health, education, government advantages, and recognition of distinct kinds of relationships and families. LGBTQ rights highlights unfairness that member of LGBTQ community faces through a systematic discrimination and violence of both the state and civilians requiring for a progressive realization change to achieve equality, protection of individual liberty and recognizing same sex marriage. Unfortunately, unlike many countries in the last five decades, Kenya has not yet updated its laws governing sexual relationships. Homosexuality is still commonly regarded as a controversial topic and many Kenyans take the view that being anything but 'normal' is 'un-African,' frequently reinforced by the Kenyan press. This is given the fact that there tend to be as common differences in gender roles and sexual preferences in Kenya as in any other society.<sup>1</sup>

The same-sex marriage debate gives us a unique opportunity to study legislations in Africa. First, Africans have remained relatively consistent in their opposition and hostility towards same-sex marriage. Second, their views appear to have been shaped by the churches they belong to in their roles as the social and political leadership in Africa. Kenya like many parts of Africa is largely shaped by homophobic attitude and homosexuality is seen as this evil attempt of trying to westernize Africa. This to this research is ironical as African communities such as the kikuyu, Kamba practiced same sex marriage to allow were a wife who does bear children as a result of been barren woman was able to marry another woman to bare for her children. This is evident that non-heterosexual unions were practiced in Africa and this blanket criminalization of homosexuality is based on the wrong premise of being 'un-African.'<sup>2</sup> This research aim at addressing issues discrimination by law against persons of different sexual orientation and offers recommendations to those findings to achieve equal treatment and protection of all by the law.

---

<sup>1</sup> Lucas B (18 May 2010), "Kenya gay demand recognition", Saturday Nation Accessed on 4 October 2019.

<sup>2</sup> <https://africasacountry.com/2019/06/african-homophobia-and-the-colonial-intervention-of-african-conservatism> accessed on 18 October 2019.

## 1.2. BACKGROUND OF THE STUDY

The 2010 Kenya Constitution established an elaborate Bill of Rights that provides all persons with constitutional protection from discrimination as seen in front of them except people of different sexual orientation, intersex and queer. Article 27 of the constitution of Kenya states, “The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, dress, language or birth.” On the contrary the Constitution recognizes marriage unions of persons of opposite sex under Article 45 of the constitution, which states that “every adult has the right to marry a person of the opposite sex, based on the free consent of the parties.”<sup>3</sup> Furthermore, Section 158 of the Children’s Act of Kenya expressly prohibits adoption of children by people of the same sex union. Kenya’s legislation are generally hostile to gays, lesbians, bisexuals and queer persons. The law does not offer a footprint to the protection of gay rights. In the fight to ensure LGBTQ rights are protected Kenya has faced a number of land mark cases that were meant to champion for gay rights some have succeeded and most have failed example of this was the application to declare section 162 of the penal code unconstitutional,<sup>4</sup> but failed. Some ruling have extended protection to homosexuals against unconstitutional anal examination which inflicted on people liberty and privacy.

In *COI & another v Chief Magistrate Ukunda Law Courts & 4 others [2018] eKLR*<sup>5</sup> in this case two male persons were charged under Section 162 (a) and (c) of the penal code of Kenya in Kwale County, in the coast of Kenya (Republic v COI & GMN). The defendants were subjected to compulsory anal examination, HIV, and Hepatitis B examinations during the investigation into the alleged crime. "There was no other way of obtaining evidence to ascertain that they are gay without carrying out analyzes." The National Gay and Lesbian Human Rights Commission, which defended the men, sued on their behalf, alleging that the practice of forced medical exams was unconstitutional. On appeal the court found unconstitutional forced anal exams and infringed medical ethics. The Kenya Medical Association, the largest professional body for physicians, passed a resolution in September 2017 opposing the use of compulsory anal exams, "except in the

---

<sup>3</sup>The Constitution of Kenya 2010.

<sup>4</sup> <https://www.youtube.com/watch?v=izFwa0Lq6wE> accessed on 18 October 2019, accessed on 12 October 2018

<sup>5</sup> Kenyalaw.org

name of detecting crimes." The association issued an additional press release advising medical practitioners to adhere to the association's Code of Ethics and Professional Conduct, even when dealing with patients in police custody. Security from corporal punishment for heinous offences was part of general disciplinary reforms and changes aimed at aligning Kenya 's laws with global torture and barbaric, degrading or inhumane treatment and punishment obligations.<sup>6</sup> The fight to champion for an all-inclusive bill of rights is still on progress in Kenya.

### **1.3. LITERATURE REVIEW**

There is an extensive lecture on gay rights in Africa and in this case Kenya. The question of gay rights have been raised by scholars, religious leaders and sheik, sympathizer, human rights activist Politian's, etc. On this research reviews various books by esteemed authors. Gerber P, states that in many areas of the world individuals face serious violations of human rights because of their sexual orientation or gender identity. Men caught in homosexual behavior can be jailed or even sentenced to death in many nations around the world and LGBT people are still subject to extensive violence and on a daily basis legally punished discrimination, his article critically analyses the work of the Human Rights Committee over a ten-year period to determine what it has done to protect the rights of sexual minorities, and whether there is more it could do to enhance this protection of the LGBT rights. He suggests what measures can be taken to ensure LGBTQ rights are protected. Saleem K. Literature breaks the stereotype that same-sex love was an idea of Western culture and that it is against the Indian norm. He proves that homosexuality has been a part of India since as long as India has existed from this reading one ought to understand that same sex-love has been an inherent part of Indian norm since ancient times. This literature proves that homosexuality has been part of Indian culture.<sup>7</sup> He provided historical proof that same sex marriage was practiced in early India.

---

<sup>6</sup> Criminal Law (Amendment) Act, 2003 (No. 5 of 2003).

<sup>7</sup> Saleem k. "Same – Sex Love in India" (First Ed) Publisher Palgrave Macmillan US [2000].

Dr. Pande Alka, book brings up the idea of tolerance and acceptance. It highlights the idea of coexistence between straight persons and homosexuals. He suggest that the Government should seek to ensure social and economic protection to all citizens. The idea of progressive realization that is to be undertaken by the government is brought up. He looks at what shapes legislators mind (external and internal forces for example personal bias and religious outlook) in discussions of same sex marriages. William N. in his book asks whether it is possible for the state to honor the parallel claims of LGBT and faith communities to as Professor Douglas Laycock urges, not interfere with conduct essential to each community's identity and if so, when the state should do so. Religious Freedom, LGBT Rights and the prospect for common ground explores the deeply contested questions respect for the lesbian, gay, bisexual and transgender and faith communities can be reconciled at law. This book seeks to find a common ground between LGBT and faith. The need for tolerance is suggested.<sup>8</sup> Carlos A. Literature looks at land mark cases that have shaped the history of LGBTQ rights. The merits used to reach this decisions in court are looked into. The reasons given by the court are also review in this literature. Five landmark cases that have shaped fight for LGBTQ rights are discussed.<sup>9</sup> The said cases have led to mass protest championing for gay rights. The mission statement by the Mattachine demonstrated both the need for community and the willingness to educate the larger society about homosexuals ' requirements. The declaration on the mission outlined this need "to unify" homosexuals "isolated of their own kind and unable to adjust to the dominant culture. "to educate" and improve "weepingly meager and inconclusive" information about homosexuality and "to lead" ... the whole mass of social deviates "in order to achieve the missions of unification of rights. Timmons proposed that during this time regulations, as well as cultural customs, were extremely anti-homosexual – most countries kept any sexual act except the missionary position between a heterosexual pair as a crime punishable by a jail term of up to 20 years.

---

<sup>8</sup> William N. Eskridge Jr, (ed) Religious Freedom, LGBT Rights, and the Prospects for Common grounds (First published in 2019) pg 102-138.

<sup>9</sup> Carlos A. *'From the Closet to the Courtroom: Five LGBT Rights Lawsuits That Have Changed Our Nation'* Volume 4 of *Queer Ideas/Queer Action Series Published by Beacon Press, 2011.*

#### **1.4. PROBLEM STATEMENT**

The constitution of Kenya 2010 under chapter 4 provides for the bill of rights in article 19 (2) it states that the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individual and communities and to promote social justice and the realization of the potential of all human beings.<sup>10</sup> In Kenya all human rights and individual liberty has not been achieved. LGBTQ persons in Kenya face hardships and discrimination not experienced by straight persons. Unnatural offences as stated in Section 162 of the Kenyan Penal Code, is punishable by 14 year's imprisonment.<sup>11</sup> Also parental rights are denied to people in same sex unions, Section 158 of the Children's Act of Kenya explicitly prohibits adoption of children to same sex marriage union. This enforces the constitutional requirements that all marriage unions in Kenya should be between two consenting adults of the opposite sex. This denies people within a same sex marriage setup parental rights.

LGBTQ persons in Kenya have continued to face systematic discrimination in the hands of the police through unwarranted arrest and subjection to inhumane conditions in the remand cells. The LGBTQ community have continued to be denied the right to health care especially those already infected with HIV/AIDS. Gay students have been suspended and to the extreme expelled from their various schools (especially in missionary schools). Kenyans are highly religious or seem to be and conservative a large majority of them hold negative perception towards LGBTQ individuals. This research seeks to address this conflicts in laws in Kenya successful while others are fruitless.

#### **1.5. THEORETICAL FRAMEWORK**

This research looks into three relevant theories, that is: - natural law, the pure theory of law and the social contract theory

##### **1.5.1. NATURAL LAW**

---

<sup>10</sup> The constitution of Kenya 2010.

<sup>11</sup> <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%2063> accessed on 27 July, 2020

Aquinas writes that all laws are derived from what he refers to as eternal law. The "eternal law" relates to God's providential ordering to their correct end of all created items. We are involved in that divine order because God generates in us both a desire and capacity to discern what is good (he calls this capacity "the light of natural reason").<sup>12</sup> According to Aquinas, "it is this participation in the eternal law by the rational creature that is called the natural law". In reference to this Natural legislation is, in this perspective, but an expansion of eternal law.<sup>13</sup> For it is by implanting in us both a general knowledge of and inclination for goodness that God orders us to ultimate happiness. Note here that natural law is not an internal authority source. It is not a particular deontic norm that is inferred from more particular precepts. The natural law, as Aquinas knows it, is essential.<sup>14</sup> Two philosophers (Aquinas and Aristotle) that are essential to the theory have distinct opinions about the position of God in nature, which confuses the problem, particularly when attempting to decipher whether the theory is based on God's presence.<sup>15</sup> For animals, the inherent nature of beings as it pertains to creating behavioral legislation may not be the same, which introduces problems within the theory. Since Natural law is God's law according to Aquinas then the enforcer of such law should be God. Humans should not assume the role to play God and try to enforce such law. What is morally right should be left to be determined by God<sup>16</sup> Legislators in Kenya should not deny people their right to marry people of their choice on the ground that it is unholy. It is in this research opinion that God should be the enforcer of what is good and that which is evil. When dealing with matters of human rights legislatures should apply the law with a liberal mind-set so that no one's right is denied.

### **1.5.2. THE PURE THEORY OF LAW**

Hans Kelsen advocated this theory, the theory is 'pure' as it distinguishes jurisprudence from other fields such as ethics, politics, and psychology. This is crucial because distinct disciplines have distinct methodologies, so when it's all blended with other things, it's difficult to analyse

---

<sup>12</sup>Jules L, "On the Relationship Between Law and Morality," *Ratio Juris*, vol. 2, no. 1 (1989), Pg. 66-78

<sup>13</sup> Crowe, Jonathan, 2019, *Natural Law and the Nature of Law*, Cambridge & New York, Cambridge University Press.

<sup>14</sup> Lon L, *The Morality of Law*, Revised Edition (New Haven: Yale University Press, 1964) Pg. 102-156

<sup>15</sup> Southwood N. *Contractualism and the Foundations of Morality*, New York: Oxford University Press Pg. 106-134

<sup>16</sup> Robert P. George, *Natural Law Theory: Contemporary Essays* (Oxford: Clarendon Press, 1992) Pg. 32-105

legislation. Kelsen's approach assumes or is based on the perspective that there is a sharp division between them: - that is, what 'law is' and what law 'ought to be.'<sup>17</sup> The Pure Theory aims simply to raise to the level of consciousness what all jurists do (mostly unwittingly) when they understand the positive law as a valid system, that is, as a norm, and not merely as factual contingencies of motivation, in conceptualizing their object of inquiry. Law 'is' intended to tackle problems that arise in society.<sup>18</sup> Kelsen toys with the concept that the fundamental standards of municipal legal schemes may change legally from the fundamental standard of government international law. It is a fundamental principle of international law that state sovereignty is determined by real territorial / population control.<sup>19</sup> More hesitantly, the concept is introduced in particular, some commentators claim that Kelsen took the concept of a universal legal order to achieve social equality.<sup>20</sup> A second contribution of Kelsen's theory is that it offers a concept of law that involves the jurisprudence of judicial and administrative tribunals as well as the legislative norms of legislatures, administrative bodies and even tribunals (as regards judicial proceedings).<sup>21</sup> The Pure Theory considers that legal norms have two tasks: to confer authority on subordinate authorities to establish subordinate legal norms, and to specify the content of those norms, at least in part.<sup>22</sup> Kelsen's theory is intended to trace to the supreme power of the state's initial constitution the validity of each official law.

Although constitutions have not been expressly modelled on Kelsen's hypothesis, it seems to me that a helpful assessment is presented for most written constitutions and that it is less helpful for a country like the United Kingdom that has no written constitution. Kelsen's theory of the legal order serves to illustrate and partially resolve that ancient paradox of jurisprudence: the law must be stable, yet it cannot stand still. Law stability does not consist solely of laws and values that prescribe lay behaviour and are guidelines for judicial or administrative choices, but also of officials' powers to alter the law and constraints on those powers.<sup>23</sup>

---

<sup>17</sup>Kelsen's Theory of the Basic Norm' in Raz, *The Authority of Law*, Oxford: Oxford University Press. Pg. 122-145

<sup>18</sup> Hart, H.L.A., 1961, *The Concept of Law*, chapter 3, Oxford: Clarendon Press, "Kelsen's Doctrine of the Unity of Law", in H.E. Kiefer and M.K. Munitz (eds), *Ethics and Social Justice*, pp. 171-199, New York: State University of New York Press.

<sup>19</sup>Paulson, *Introduction to Kelsen's Introduction to the Problems of Legal Theory*, p. xvii, Oxford: Clarendon Press.

<sup>20</sup> Kelsen's Theory of the Basic Norm' in Raz, *The Authority of Law*, Oxford: Oxford University Press pg. 122-145

<sup>21</sup> Tur, R.H. & Twining, W. (eds), 1986, *Essays on Kelsen*, Oxford: Clarendon Press.

<sup>22</sup> Kelsen's Theory of the Basic Norm' in Raz, *The Authority of Law*, pp. 122-145, Oxford: Oxford University Press.

<sup>23</sup> Tur, R.H. & Twining, W. (eds), 1986, *Essays on Kelsen*, Oxford: Clarendon Press.

What is a norm should continue to develop with the society. What was unacceptable can be accommodated into law as the society continues to reinvent itself. Laws that did not allow Saudi women to drive have been found to be outdated and repugnant to social equality. Consideration of LGBTQ rights should be a subject of interest by legislators.<sup>24</sup> Law is in place to serve the people it should also change with the dynamic of the society. Laws in Kenya should be changed to incorporate to offer protection to people who are coming out as gay.

### 1.5.3. SOCIAL CONTRACT THEORY

This theory propounds that Man has a natural desire for security and order.<sup>25</sup> In order to secure self-protection and self-preservation, and to avoid misery and pain, man entered into a contract. This notion of self-preservation and self-protection are inherent in man's nature and in order to achieve this, man voluntarily surrendered all their rights and freedoms to the sovereign by this contract who must command obedience.<sup>26</sup> Subjects had no rights against the absolute authority or the sovereign and he is to be obeyed in all situations however bad or unworthy he might be. However, Hobbes placed moral obligations on the sovereign who shall be bound by natural law.<sup>27</sup> Hobbes social contract subjects to surrender all their rights and vest all liberties in the sovereign for preservation of peace, life and prosperity of the subjects. It is in this way the natural law became a moral guide or directive to the sovereign for preservation of the natural rights of the subjects. The aim of the social contract that man entered into was so has to offer protection in large scale by the sovereign to its subjects and by cutting out a particular group of people seems to be a breach of the contract. LGBTQ individuals are part of this social contract and their rights should be protected by state legislation, failure to this realization has led to emergence of gay activists and LGBTQ movements to advocate for their rights.<sup>28</sup>

---

<sup>24</sup> A 'Justified Normativity' Thesis in Hans Kelsen's Pure Theory of Law? Rejoinders to Robert Alexy and Joseph Raz". In Matthias Klatt (ed.), *Institutionalized Reason: The Jurisprudence of Robert Alexy*, pp. 61–111. Oxford: Oxford University Press.

<sup>25</sup> Hobbes, Thomas, *Leviathan* (3 volumes), Noel Malcolm, (ed.), Oxford: Oxford University Press [1651]

<sup>26</sup> Smith, Vernon L. "The Principle of Unanimity and Voluntary Consent in Social Choice," *Journal of Political Economy*, 85(6): 1125–1139.

<sup>27</sup> Hampton J, *Hobbes and the Social Contract Tradition*, Cambridge: Cambridge University Press pg. 45-98.

<sup>28</sup> Thoma, Johanna, 2015. "Bargaining and the Impartiality of the Social Contract," *Philosophical Studies*, 172(12): pg 33–55.



## **1.6.RESEARCH QUESTIONS**

1. Why is it that the constitution of Kenya does not comprehensively offer protection to the LGBTQ community in Kenya?
2. What influences legislators not to pass laws or subsequent legislations that are meant to offer protection to LGBTQ community?
3. How are the current anti-gay legislations justified and what reasons are have been provided by the courts for not granting constitutional protection to the LGBTQ community?
4. What are the consequences faced by LGBTQ persons for failure to conform to the law?
5. Where else in comparison with Kenya, are LGBTQ rights have been protected?

## **1.7.RESEARCH OBJECTIVES**

1. Trying to change the attitude towards LGBTQ people.
2. Trying to push for an all-inclusive human rights.
3. Seeking to incorporate this discussions into a wider national debate about sexual diversity and tolerance in the modern world.
4. Trying to spark this thought in a highly conservative state.
5. To identify, the social identical development awareness among the general public and LGBTQ community.

## **1.8.JUSTIFICATION**

The notion whether or not the legislation regulating homosexual rights in Kenya is sufficient is spurred by the reality that original study stated that LGBTQ is the most vulnerable in society as it is not completely protected by legislation. This means that reforms need to be put in place to fill in the loopholes as originally described in current legislation. Gay rights are not adequately protected in Kenya when it comes to adoption law, criminalization of same sex marriages expressly in the constitution, discrimination in work places leading to dismissal without merit. We have all witnessed unfair persecution of LGBTQ individuals this research aims to reach a balance for the protection of LGBTQ individuals by the law.

This research intends to spark a debate for the recognition of LGBTQ rights. In short, the legal system in Kenya is usually hostile to gays, lesbians, bisexuals, and queer individuals. The law is also vague, and offers little or no protection on the ground of sexual orientation and gender identity discrimination. There is no extensive or specific legislation on equality to ensure protection from discrimination of sexual orientation and gender identity, especially in adoption laws, provision of health care, unfair employment practices.<sup>29</sup>

### **1.9.HYPOTHESES/ ASSUMPTIONS**

1. The idea of separation of church and state has not yet been achieved in Kenya. Though the constitution of Kenya (2010) under article 8 states that there shall be no state religion the practice by the state seems religious for examples in every first parliamentary proceeding religious leaders from different dominions are invited in parliament to officiate the proceeding by offering prayers. For this reason debates on gay rights in parliament are carried out from a religious stand point.
2. This research presents religion as the main inhibitor to the realisation of gay rights in Kenya.<sup>30</sup> When determining a fair balance between two conflicting claims of religious freedom and gay equality, the religious nature of a claim for accommodation is outweighed by the imperative to promote the equality of homosexuals.
3. This research makes assumptions that Kenyans have an already predetermined hard core feeling towards their attitude on LGBTQ individuals and that this research could spite more division and even fuel more hate between LGBTQ community and the society at larges

### **1.10. RESEARCH METHODOLOGY**

This research uses desktop methodology because there are plenty of online materials on the same and also due to limited resources to other methods such as questionnaire or interviews. The desktop research methodology is use to get access to online information and databases such as Dialog Data

---

<sup>29</sup> Read more at: <https://features/2019/02/28/criminalising-homosexuality-in-kenya> Kenya accessed on 17 October 2019

<sup>30</sup> <https://www.youtube.com/watch?v=XxXHgGZzojU> accessed on 17 October 2019

Star or Reuters for articles, reports and Jstor<sup>31</sup> This research uses OPAC search engine in the library to determine the literature on fictional, nonfiction and biographies published on LGBTQ themes. I used the following topic headings to define the titles: "homosexuality," "queer" "gay people," "lesbians," and "transsexuals." I registered the author, title, company publisher and edition for each item discovered. A number of textbooks, projects, papers, scholarly papers, legal newspapers, scholarly papers were recorded. Information relating history, development and current legal information on gay rights in Kenya was looked into and a comparative analysis is carried out between Kenya's legal framework with that of Botswana, Canada and South Africa their legislation is also be viewed in order to find out their position on the law in relation to gay rights and the constitutional protection legislated to safe guard their liberty and the need to ensure equal treatment to all citizens.

Observation on the current unrest relating to gay rights since Pride month (June) rallies were held though out different cities around the world were made. Parliamentary proceeding have too been heated trying to debate on this matter. I also watched a YouTube video, an interview that the president of Kenya said to a CNN anchor, that ‘’ gay rights are of no importance’’<sup>32</sup> This research makes observations that being gay in Kenya can land one in jail since its being criminalised in Kenya or led to ones death in its extreme. The stated above methods have been used to obtain relevant information to aid in this research and to reach into its conclusion.

### **1.11. LIMITATIONS**

Limited data

Online material relevant for this research require internet to be accessed. This research relied mainly on online material, expensive data bundle and Wi-Fi connectivity limited this research. In the extreme internet connection was unavailable.

---

<sup>31</sup> Walliman N “*Research methods, the basics*” (2011) university press Pg. 13-17

<sup>32</sup><https://www.youtube.com/watch?v=IwTgU-RZLHQ> accessed on 21 October 2019

## 1.12. CHAPTER BREAKDOWN

This research paper is divided into five chapters: that is-

**Chapter one** deals with the preliminary subjects that is :- the introduction of the research topic and the background of the study, Statement of the problem, research questions, research methodology, theoretical framework, literature Review, justification of the study, hypothesis and limitations to the study

**Chapter two** shall be the legal framework that forms the base of this research. It highlights the rights that are denied in present legal framework in Kenya with reference to international law

**Chapter three** is the case study section. This is the focus of the entire work. Here the research applies the research question practically. This section of the research looks at the legislations that are in place in Kenya that are anti-gay. This chapter shall look at anti-gay laws in Kenya. With regards to starting a family; the Children's Act no. 8 of 2001 of Kenya Cap 141 outlaws legal adoption of children by a homosexual. The constitution of Kenya does not offer a comprehensive protection to LGBTQ community.

**Chapter four** shall be a comparative analysis to legislations in South Africa, Canada, Botswana and the United States of America.

**Chapter five** shall be the conclusion of the study and recommendation to the findings of the study: - that is inferences from the comparative analysis between Kenya, South Africa, Canada and United States of America this research makes the following recommendation.

## **2.0.CHAPTER TWO**

### **THE LEGAL FRAMEWORK THAT FORM THE BASE OF THIS RESEARCH**

This chapter takes a dive into law in Kenya that appear intentionally or non-intentionally with sexually bias to LGBTQ community. Kenya's laws has homophobic aspects that deny LGBTQ community human rights as stipulated in the constitution. The rights denied include – failure by the constitution to recognize same sex marriage,<sup>33</sup> shortlisting same sex couples from adopting children,<sup>34</sup> denial from receiving education due to institutional discrimination, subjection to inhuman arrest by police officers and public persecution. Reference to international requirement for universal human rights is drawn in this chapter. It will highlight how Kenya has not achieved this requirement by not ratifying or adopting this international standards into its domestic laws.

#### **2.1.INTRODUCTION**

Despite the more inclusive position of the new constitution, not all Kenyans will enjoy the freedoms that are granted under its provisions. Lesbian, gay, bisexual and transgender (LGBTQ) Kenyans in particular tend to be the targets of verbal and physical abuse, sexual harassment, and social marginalization.<sup>35</sup> Additionally, they are subject to imprisonment on the basis of their sexual orientation. Under the Penal Code of Kenya, engaging in same-sex sexual intercourse, called "a person's carnal awareness against the order of nature," is defined as a "unnatural crime" and is a felony punishable by up to 14 years in jail. While the laws are rarely enforced, some laws still convict and detain LGBT Kenyans. In addition, the laws codify and legitimize a general attitude of homophobia that exists within the country and thus lead to the routine violations of human rights

---

<sup>33</sup> The constitution article 45

<sup>34</sup> Children act

<sup>35</sup>The Kenya Human Rights Commission conducted a series of interviews with 474 LGBT Kenyans aged eighteen to sixty-five to document their experiences of homophobia within the country. KENYA HUMAN RIGHTS COMMISSION, THE OUTLAWED AMONGST US: A STUDY OF THE LGBTI COMMUNITY'S SEARCH FOR EQUALITY AND NON-DISCRIMINATION IN KENYA 19 (2011) [hereinafter THE OUTLAWED AMONGST US

that LGBTQ Kenyans suffer. As such, the laws instill terror, make violence easier and discourage LGBTQ Kenyans from obtaining the equality to which they are legally entitled.<sup>36</sup>

Beyond Kenya, there has been a growing consensus in the international community that discrimination on the basis of sexual orientation and gender identity runs contrary to fundamental human rights principles and international law.<sup>37</sup> Most notably, the United Nations (U.N.) High Commissioner for Human Rights issued a report at the request of the General Assembly entitled, *Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on Their Sexual Orientation and Gender Identity*. In the report, the Commissioner asserts, “The fact that someone is lesbian, gay, bisexual or transgender does not limit their entitlement to enjoy the full range of human rights” and enumerates obligations that states have toward LGBTQ citizens under international human rights law. Additionally, the Commissioner makes it clear that “the criminalization of private consensual homosexual acts violates an individual’s right to privacy and to non-discrimination and constitutes a breach of international human rights law.” As Kenya’s new Constitution provides a detailed Bill of Rights for persons under Kenya’s jurisdiction and integrates international law into Kenya’s constitutional law, the growing recognition of the rights of sexual minorities as human rights has significant implications for the constitutionality of Kenya’s anti-sodomy laws. This Note examines the incompatibility of international human rights norms with anti-sodomy laws, and argues that Kenya’s new Constitution renders its anti-sodomy laws unconstitutional under Kenya’s own domestic laws.

Violations of human rights include governmental transgressions of rights guaranteed by national , regional and international human rights law, and acts and omissions directly attributable to the State involving failure to implement legal obligations derived from standards of human rights. Violations arise when a statute, policy or procedure contravenes or violates obligations maintained by the State involved, or when the State fails to meet the level of conduct or result necessary.

---

<sup>36</sup> The penal code cap 63

<sup>37</sup> See U.N. High Commissioner for Human Rights, *Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on Their Sexual Orientation and Gender Identity*, 15– 19, U.N. Doc. A/HRC/19/41 (Nov. 17, 2011) (enumerating the obligations that States have to prevent violence and discrimination based on sexual orientation and gender identity under “various international human rights instruments”).

Government position as provided for by 'The Star', a Kenyan every day paper, in its article dated 20 April 2018 'Gay rights is non-issue in Kenya, Uhuru says during CNN meet', expressed: 'President Uhuru Kenyatta ... said Kenya doesn't think about gay rights significant as it conflicts with the social convictions of Kenyans. In a way suggestive of his reaction to previous US President Barack Obama in 2015, Uhuru said Kenya's social convictions don't look at homosexuality as a human right. "I need to be exceptionally clear, I won't take part in any subject that isn't of any significant significance to individuals and the Republic of Kenya. This isn't an issue of basic liberties, this is an issue of society, of our own base as a culture as a people paying little mind to which society you come from. This isn't worthy, this isn't pleasant," he said. 'Uhuru said his remain on gay rights was not a closely-held conviction but instead the voice of Kenyans as illustrated in the Kenyan Constitution. "After a few a long time, I have unmistakably expressed that this is definitely not a subject that we are able to participate in,"... 'In a meeting with CNN... Uhuru emphasized the stand saying he works under the Supreme Law of Kenya which is the Constitution... Uhuru said under the common laws, he can't permit same-sex exercises to be endured except if, in future days, the law is canceled to permit it. "Perhaps our general public will have arrived at a phase where those are issues that individuals are willing unreservedly and open to talk about. I must be straightforward with also, that is a position we have consistently kept up," Uhuru said. "Those are the laws that we have and those are the laws that are 100 for every penny upheld by 99 percent of Kenyans paying little heed to where they come from," he added. "The head of state, be that as it may, said he doesn't advocate for the infringement or separation of the LGBT people group in any capacity as they are additionally essential for the society whose rights as Kenyans is accommodated by the Constitution. "In any case, they likewise should perceive that their opportunity should likewise be taken into the whole setting of the general public that they live in light of the fact that this isn't an issue of the public authority tolerating or not tolerating. This is an issue of society," he said.<sup>38</sup>

## **2.2.ANTI-GAY LAWS IN KENYA**

In 2010 Kenya promulgated a constitution hailed as one of the most progressive and liberal among democratic nations in the world. The Constitution aims to guarantee all people rights, justice,

---

<sup>38</sup> The Star, 'Gay rights is non-issue in Kenya, Uhuru says during CNN interview', 20 April 2018

equality and fraternity. In particular, its provisions safeguard economic, social, and cultural rights. These are stipulated in the Bill of Rights, and hence are an integral part of Kenya's democratic structure. The aim of protecting and maintaining human rights and fundamental freedoms is to protect the dignity of individuals and communities, and to foster social justice and human potential. Such rights would therefore form the basis for social, economic, and cultural policies, but in practice this is not always the case with constitutional procedure. The Constitution, adopted in August 2010, forbids discrimination on a variety of grounds but does not include gender or sexual orientation.<sup>39</sup>

### **2.2.1. Article 2**

Article 2 of Kenya's Constitution provides, in paragraph (5), that "the general rules of international law shall form part of Kenya's law" and, in paragraph (6), that "any treaty or convention ratified by Kenya shall form part of Kenya's law under this Constitution.' In paragraph (4), the Constitution states that "to the extent of the inconsistency, any law, including customary law which is inconsistent with the Constitution, is void, and any act or omission in contravention of the Constitution is invalid."

### **2.2.2. Article 10**

Article 10(2)(b) of the Constitution of Kenya provides that, 'The national values and principles of governance shall include — human dignity, fairness, social justice, inclusiveness, equality, human rights, non-discrimination and the protection of the oppressed.' With regard to this section, 'There is a solid ground right there for one to argue against the infringement of the dignity of their 'LGBTQ' persons. There is firm ground to contest for inclusion, non-discrimination and equality too".<sup>40</sup>

---

<sup>39</sup> Article 27 of the constitution of Kenya

<sup>40</sup> Kenya: Gay Kenyans must join the civil society, interview with Mugambi Kiai, International Lesbian, Gay, Bisexual, Trans and Intersex Association.



Article 45 of the Kenyan Constitution is not included when attempting to guarantee the right of each person to start a family, LGBTQ and other non-conforming Kenyans.<sup>41</sup>

I. The family is the normal and fundamental unit of society and the essential pillar of social order, and is recognized and protected by the State

II. Every adult shall have the freedom to marry a person of the opposite sex, on the basis of the parties' free consent.

### **2.3.STATUTES**

As for starting a family; Kenya's Children's Act No. 8 of 2001 Cap 141 prohibits the legal adoption of children by a homosexual partner. In Vitro Fertilization (IVF) and Artificial Insemination (AI) services are offered at astronomical costs in only a few high-profile medical centers which render them inaccessible to most LBQ women. Although several of the participants shared a desire to become parents, their lived life leaves them with only the option to participate in sex with a male donor / partner.

#### **2.3.1. The Kenyan Penal Code**

Section 162. Unnatural offenses.

Any person who –

- (a) Has carnal knowledge of any person against the order of nature; or
- (b) 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:

Provided that, in the case of an offence under paragraph (a), the offender shall be liable to imprisonment for twenty-one years if –

- (i) The offence was committed without the consent of the person who was carnally known; or

---

<sup>41</sup> The constitution of kenya 2010

(ii) The offence was committed with that person's consent but the consent was obtained by force or by means of threats or intimidation of some kind, or by fear of bodily harm, or by means of false representations as to the nature of the act.

Section 163 of the penal code states that, any person who attempts to commit any of the offences specified in section 162<sup>42</sup> is guilty of a felony and is liable to imprisonment for seven years. Further Section 165 states that, “Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony and is liable to imprisonment for five years.”<sup>43</sup>

## **2.4. LGBTQ RIGHTS IN THE INTERNATIONAL SPHERE**

The international community has started to acknowledge the heightened risk of human rights violations faced by sexual minorities in recent years and has increasingly concentrated on their need for protection. As a result, under various human rights treaties, general concepts of equality and universality under international law are now being extended to sexual minorities, so that states have expanded their jurisdictional responsibilities against LGBTQ persons. The newfound focus on international law LGBTQ rights has significant implications for the constitutionality of Kenya’s anti-sodomy laws, as Kenya is a member of the U.N. And a state party to many of those treaties.

### **2.4.1. The Universal Declaration of Human Rights**

Though not legally binding, the UDHR has provided the basis for legally binding treaties such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Moreover, many of its provisions are binding on States as the rule of international law.<sup>44</sup> While the UDHR does not specifically list sexual orientation or

---

<sup>42</sup> The penal code cap 63S

<sup>43</sup> The penal code cap 63

<sup>44</sup> O’CONNELL ET AL., supra note 59, at 439; Narayan, supra note 59, at 328.

gender identity as a protected category, the addition of "other status" provides LGBTQ individuals with protections. Specifically U.N. The word 'other status' has explicitly been used to include LGBTQ anti-discrimination legislation and the Human Rights Council has affirmatively confirmed that the definition of 'other status' requires sexual minorities.

Human rights are characterized by their being universal, indivisible, interdependent and interrelated. This means that all human rights should be viewed fairly and equally, not as a hierarchy under which certain rights are deemed to be more significant than others. For LGBTQ human rights activists the task is to create awareness and recognition at the national level that the security and promotion being promoted does not apply to new rights – the rights are already enshrined in established treaties , conventions, resolutions and other agreements – but to their universal application. As human rights discourse becomes more widely embedded in societies, so does the understanding of human rights standards as applied to various settings and populations. The realization or denial of these rights acts as a measure of democratization, rule of law and, verified through monitoring mechanisms, the measure of freedom of citizens to live without discrimination.

The UDHR is not only aspirate – most of the rights are customary, generally applicable law. While there is consistency in its words, there has been opposition to its application and, unfortunately, 60 years later, we still have to face the reality that while it applies to all, it does not do the same thing: it is not reasonable the ageless cliché that everybody is equal because some are more equal than others. Regardless of their alleged sexual orientation or gender identity, no human being should be denied their civil rights. No human being should be discriminated against, violent, criminal or abusive simply because of his perceived sexual orientation or gender identity

## 2.4.2. The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) entered into force in 1976 and creates a legally binding obligation on states parties to observe its provisions.<sup>45</sup> The ICCPR explicitly guarantees the right to individual self-determination, dignity, and freedom and protection. States Parties shall, without distinction of any kind such as race, color, sex, language, religion, political or other opinion, national or social origin, land, birth or other status, guarantee certain rights for all persons within their territories and subject to their jurisdictions.

The ICCPR has also set up the Human Rights Committee which serves as its judicial oversight body. In *Toonen v. Australia* that the term "sex" encompasses sexual orientation for ICCPR purposes and that laws criminalizing homosexual sodomy in Tasmania breached privacy rights and non-discrimination irrespective of how they were actually enforced.<sup>46</sup> In *Toonen*, the plaintiff alleged that the very existence of anti-sodomy laws in Tasmania violated his rights in the following way:

The laws clashed with his private life by encouraging police officers to examine personal details of his sexual conduct with other men, chilling his sexuality's public speech. And by "creating the conditions for job discrimination, persistent stigmatization, vilification, threats of physical abuse and violation of fundamental democratic rights."<sup>47</sup>

The Committee agreed with the plaintiff's allegations and further held that "moral issues" are not exclusively a matter of domestic concern, as this would interfere with the Committee's ability to scrutinize "a potentially large number of statutes interfering with privacy." The Committee has subsequently urged states to "guarantee equal rights to all individuals, as established in the

---

<sup>45</sup> International Covenant on Civil and Political Rights,

<sup>46</sup> See *Toonen v. Australia*, Communication No. 488 of 1992.

<sup>47</sup> Laurence R. Helfer & Alice M. Miller, *Sexual Orientation and Human Rights: Toward a United States and Transnational Jurisprudence*, pg 45) (citing *Toonen*, U.N. Doc. CCPR/C/50/D/488/1992,)

Covenant, regardless of their sexual orientation” and has welcomed legislation that prohibits discrimination on the basis of sexual orientation. Although Kenya has not submitted itself to the Committee’s jurisdiction, because it acceded to the ICCPR it is legally bound to adhere to the ICCPR’s provisions, which the Committee has the power to interpret<sup>48</sup>

### **2.4.3. The African Charter on Human and Peoples’ Rights**

The African Charter on the Rights of Persons and Peoples (Charter) provides many of the same legal, political, social, and economic rights secured by the ICCPR and ICESCR. Kenya has ratified the Charter, and hence is bound by its terms. The Charter also created the African Commission on Human and Peoples' Rights (African Commission) to ensure the Charter's protection of human and peoples ' rights, and to interpret all the provisions of the Charter. In the *Social and Economic Rights Action Center v. Nigeria*,<sup>49</sup> the African Commission held that states have four types of human rights responsibilities with regard to social and economic (as well as civil and political) rights: "namely, the responsibility to respect, protect, promote and enforce those rights." The African Commission noted that these duties place a constructive obligation on states parties to gradually uphold these rights. Importantly, this affirmative duty in respect of its Bill of Rights is echoed in Kenya's new Constitution.

Similar to other human rights instruments, the Charter does not mention sexual orientation as a protected category for purposes of non-discrimination,<sup>50</sup> and the issue of sexual orientation has remained largely outside of the African Commission’s consideration. The Charter does, however, include “other status,” which other U.N. bodies have interpreted as including LGBT individuals, and the African Commission has expressed concern about “intolerance towards sexual minorities.

This strengthens the case for arguing that the Charter’s provisions should extend to them as well. Furthermore, although the Charter states that rights must be exercised “with due regard to the rights

---

<sup>48</sup> Vienna Convention on the Law of Treaties arts. 2 § 1(b), 15, May 23, 1969, 1155 U.N.T.S. 331.

<sup>49</sup> *Social and Economic Rights Action Center & the Center for Economic and Social Rights v. Nigeria* (Communication No. 155/96)

<sup>50</sup> African Charter on Human and Peoples’ Rights, *supra* note 101, art. 2.

of . . . collective morality,” the African Commission has held that these “limitations must be strictly proportionate with and absolutely necessary for the advantages that are to be obtained.”<sup>51</sup> As such, the principle set forth in Social and Economic Rights Action Center, along with the open-ended anti-discriminatory language in the Charter, provides a strong basis for concluding that sexual minorities are protected.

#### **2.4.4. The Incorporation of International Law into Domestic Law**

The new Constitution integrates international law into its domestic law by means of Article 2(5) which provides that "the general rules of international law shall form part of Kenya's law;"<sup>178</sup> and Article 2(6) which provides that " any treaty or convention ratified by Kenya shall form part of Kenya 's law under that constitution."<sup>52</sup> Finally, the new Constitution specifies that the State must “enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.”

### **2.5.CONCLUSION**

#### **2.5.1. The Unconstitutionality of Kenya’s Anti-Sodomy Laws**

Anti-Sodomy laws in Kenya explicitly infringe the Bill of Rights of the New Constitution. In Kenya, sexual minorities suffer frequent abuses of their civil rights as illustrated in the Bill of Rights. LGBTQ Kenyans face systematic harassment and prejudice as a result of their sexual orientation or gender identity: they are regularly assaulted by police officers, often in their own homes; detained on false charges for extended periods of time, physically abused and killed; expelled from school, targeted for hate speech and generally stigmatized and discriminated against by society at large; As a result, LGBTQ Kenyans are currently stripped of their guaranteed rights to human freedom and protection, privacy, access to justice, the right to life, education, freedom

---

<sup>51</sup> African Commission on Human and Peoples’ Rights, Concluding Observations and Recommendations on the Periodic Report of the Republic of Cameroon, pg 14, ACHPR,

<sup>52</sup> The constitution of kenya

from discrimination and, fundamentally, their human dignity. In such abuses the anti-sodomy laws of Kenya play a crucial role. They create conditions that make it easier for the violence to occur and directly violate the rights to equality and non-discrimination by sending out a general message that LGBTQ individuals in Kenyan society are not equal to heterosexual people.

Since the new Constitution places an affirmative responsibility on State institutions and public officials to protect and uphold human rights, it follows that Kenyan authorities have a duty to revoke laws that conflict with those rights. This heightened responsibility contradicts any claim that officials in Kenya will avoid the real violence and discrimination that is taking place but have no obligation to amend the Penal Code anti-sodomy laws. The obligation to protect human rights means that Kenya needs to take radical steps to eliminate conditions that lead to Bill of Rights abuses. Kenya cannot fulfill its obligation to uphold human rights and at the same time leave those laws in its Penal Code, due to the fundamentally discriminatory nature of anti-gay laws and their relation to constitutional abuses against Kenyans on the basis of sexual orientation.

Proponents of anti-sodomy laws are likely to combat this point by claiming that LGBTQ Kenyans should legally restrict the Bill of Rights as "all relevant considerations" should be weighed when deciding whether to limit freedoms. They would argue that social values and morality issues justify banning the practice of homosexuality in Kenya which, in effect, legitimizes the anti-sodomy laws. Nevertheless, such a statement does not stand the demands of the new Constitution. First, some fundamental rights, such as freedom from torture and cruel, inhuman and degrading treatment, cannot be limited. Second, any limitation on a right or fundamental freedom must be "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom."<sup>53</sup> Imposing anti-sodomy laws on LGBTQ Kenyans directly counteracts the principles of equality, freedom and human dignity and, therefore, the constitutional test must ultimately fail. Even though morality and traditional values were grounds for limiting the application of the Bill of Rights to

---

<sup>53</sup> That international law takes precedence over customary law is the logical conclusion of Article 2, sections 4– 6 of the Kenyan Constitution. Article 2, sections 5– 6 render general rules of international law and treaties that Kenya has ratified as part of Kenyan law; and Article 2, section 4 states that any law, including customary law, that is inconsistent with the constitution is void to the extent of the inconsistency. CONSTITUTION, article. 2(4– 6)

LGBTQ Kenyans, they certainly could not outweigh the effects of murder, police brutality, false imprisonment, and antisodomy-related discrimination. In short, despite the conditions for restricting freedoms under the new Constitution, claims that the Bill of Rights does not include safeguards for LGBTQ Kenyans and that traditional Kenyan ideals justify anti-sodomy laws are no longer legally viable. Notwithstanding the new Constitution's requirement that the Bill of Rights be extended to all people and that the 'public interest' is not a issue that justifies curtailing such rights, the contention that the new Constitution's Bill of Rights does not extend to LGBTQ Kenyans would be a major obstacle to the abolition of Kenya's anti-sodomy laws due to the homophobic climate in the country



### **3.0.CHAPTER THREE**

#### **3.1.PROBLEMS FACED BY LGBTQ PEOPLE IN KENYA**

According to the Kenya Human Rights Commission, "there is a gang of corrupt police officers who regularly extort and harass LGBTQ people who are threatened with detention and incarceration if they do not give in to such bribes." Similar reports have been provided in Nairobi where security officers detain LGBTQ people for the same reasons as those who do not offer bribes or sexual favors.<sup>54</sup> The Kenya Human Rights Commission further stressed that service providers do not provide services to LGBTQ people: "Many health facilities deliberately refuse to serve LGBTQ people, schools and colleges expel students on the grounds of actual or presumed sexual orientation or gender identity, and police do not investigate and prosecute individuals who commit harassment or violate LGBTQ person's rights".<sup>55</sup>

Further, according to the Kenya Human Rights Commission, the major problems faced by LGBTQ people in Kenya are stigma and discrimination. In most cases this is due to failure to appreciate the diversity of human beings in sexual orientation and gender identity. As noted elsewhere in this report, the failure to address and bring these issues to the attention of the public has resulted in the same treatment as taboo subjects, creating superstitious beliefs on the same subject.<sup>56</sup>

##### **3.1.1. Violence and Discrimination against LGBT Kenyans: Cultural Attitudes and Kenya's Penal Code**

Kenya's anti-gay laws clearly make LGBTQ Kenyans more vulnerable to harassment and violence. The laws instill a fear of incarceration that will dissuade LGBTQ Kenyans from reporting human

---

<sup>54</sup> Kenya human right report

<sup>55</sup> Kenya Human Rights Commission, *The Outlawed Amongst Us: A study of the LGBTI community's search for equality and non-discrimination in Kenya*, Executive Summary, 18 May 2011, [http://www.khrc.or.ke/component/docman/doc\\_details/14-the-outlawed-amongst-us.html](http://www.khrc.or.ke/component/docman/doc_details/14-the-outlawed-amongst-us.html)

<sup>56</sup> Kenya Human Rights Commission, *The Outlawed Amongst Us, A study of the LGBTI community's search for equality and non-discrimination in Kenya*, 2.2. Stigma and Exclusion by Family and Society, 18 May 2011 [http://www.khrc.or.ke/component/docman/doc\\_details/14-the-outlawed-amongst-us.html](http://www.khrc.or.ke/component/docman/doc_details/14-the-outlawed-amongst-us.html)

rights abuses to authorities and thus provide a pretext for the violence to authorities and other individuals.<sup>57</sup>

This connection is most readily demonstrated in targeted police harassment of LGBTQ Kenyans, because officers can legally arrest people for committing "a person's carnal knowledge against nature",<sup>58</sup> In essence, they are the tools for punishing Kenyans on the basis of their sexual orientation or gender. LGBTQ Kenyans have no way of reacting adequately to the violence due to the persistent threat of incarceration or other forms of punishment on the part of bad cops.

Through equating LGBTQ Kenyans with criminals, the laws add to the general climate of discrimination across the region, contributing, in the first instance, to violence against LGBTQ Kenyans. One of the most common reasons used against granting legal equality to LGBTQ individuals in Kenya is that homosexuality is an imported Western term, and that "it was unheard of among the traditional Kenyans. Former President Daniel Arap Moi once stated, "Homosexuality is against African norms and traditions and Kenya has no room for homosexuals and lesbians."<sup>59</sup>

### **3.2.THE UNCONSTITUTIONALITY OF KENYA’S ANTI-SODOMY LAWS**

#### **(Kenya’s Anti-gay Laws Directly Violate the spirit of the Constitution’s Bill of Rights)**

In Kenya, sexual minorities suffer frequent abuses of their civil rights as illustrated in the Bill of Rights. As stated in Chapter 2 LGBTQ Kenyans face systematic harassment and discrimination as a result of their sexual orientation or gender identity: they are regularly harassed by police officers, often at home; detained on false charges for extended periods of time; physically assaulted and

---

<sup>57</sup> The Outlawed among us, pg 44.

<sup>58</sup> The Penal Code, (2009) Cap. 163;

<sup>59</sup> Being Gay in Kenya, NEWS24 (Feb. 22, 2006), <http://www.news24.com/Africa/Features/Being-gay-in-Kenya-> Accessed on 4<sup>th</sup> april 2020; see also KENYA HUMAN RIGHTS INSTITUTE, RETHINKING CONTESTED RIGHTS: CRITICAL PERSPECTIVES ON MINORITY RIGHTS IN KENYA)

killed; expelled from school; targeted for expression of hate; and generally stigmatized and discriminated against.

As a result, LGBTQ Kenyans are currently deprived of their guaranteed rights to freedom and security of person, privacy, access to justice, right to life, education, freedom from discrimination, and, ultimately, their human dignity. Kenya's anti-gay laws play a crucial role in these violations. They create conditions that make it easier for the violence to occur<sup>60</sup> because the new Constitution imposes an affirmative duty on State organs and public officials to respect and promote individual rights,<sup>61</sup> it follows that Kenyan authorities have a duty to repeal laws that interfere with these rights. This heightened responsibility contradicts any claim that officials in Kenya will avoid the real violence and discrimination that is taking place but have no obligation to abolish the anti-gay laws in the Penal Code. The obligation to protect human rights means that Kenya needs to take radical steps to eliminate conditions that lead to Bill of Rights abuses.<sup>62</sup>

Kenya cannot fulfill its obligation to uphold human rights and at the same time leave those laws in its Penal Code, due to the fundamentally discriminatory nature of anti-gay laws and their relation to constitutional abuses against Kenyans on the basis of sexual orientation. Anti-sodomy law advocates are likely to combat this point by claiming that the Bill of Rights should be legally curtailed in relation to LGBTQ Kenyans as "all relevant factors" can be weighed in deciding whether to restrict rights. Traditional values and morality concerns, they would argue, justify limiting the practice of homosexuality in Kenya, which, in turn, legitimizes the anti-sodomy laws. Such an argument, however, does not withstand the new Constitution's demands. First, some fundamental rights, such as freedom from torture and cruel, inhuman and degrading treatment, cannot be limited. Second, any limitation on a right or fundamental freedom must be "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom."

---

<sup>60</sup> THE OUTLAWED AMONGST US, pg 44

<sup>61</sup> See above

<sup>62</sup> The constitution of kenya 2010

Imposing anti-gay legislation on LGBT Kenyans clearly counteracts the values of equality, democracy and human dignity and, hence, the constitutional check will eventually fail. However though morality and social principles were grounds for restricting the application of the Bill of Rights to LGBTQ Kenyans, they clearly did not overshadow the consequences of the anti-gay laws on murder, police brutality, false imprisonment and discrimination. In short, the claims that the Bill of Rights does not offer safeguards to LGBTQ Kenyans and that anti-sodomy laws are justified by traditional Kenyan values are no longer legally feasible, despite the conditions for restricting freedoms under the new Constitution. Notwithstanding the demand of the new Constitution that the Bill of Rights be extended to all persons, and that the "public interest" is not a issue that justifies curtailing those rights, the argument that the Bill of Rights of the new Constitution does not extend to LGBTQ Kenyans would be a major obstacle to abolishing Kenya's anti-sodomy laws because of the homophobic environment of the country. Kenya is inherently in need of domesticating international human rights law, regardless of the view of the majority on sexual and gender minorities in Kenya, the international community has made it clear that LGBTQ individuals are entitled to protection under international law and that anti-sodomy laws violate international law and fundamental rights of sexual minorities.<sup>63</sup>

### **3.3.ANTI-GAY LAWS IN KENYA VIOLATE THE VALUES OF INTERNATIONAL LAW AND INTERNATIONAL AGREEMENTS TO WHICH KENYA IS BOUND**

Since the new Constitution states that any general rules of international law and treaties or conventions ratified by Kenya are part of the constitutional law of Kenya, and that laws which are incompatible with the Constitution are void,<sup>64</sup> Kenya is under a constitutional obligation to repeal anti-sodomy laws if they run afoul of international law. Indeed, because the new Constitution places international law above customary law,<sup>65</sup> if anti-gay laws violate international law, the argument that repealing anti-gay laws contradicts traditional Kenyan beliefs is futile.

---

<sup>63</sup> Section 163 of the penal code cap 63

<sup>64</sup> The constitution of kenya 2010 article 2(6)

<sup>65</sup> See above

The strongest examples of how Kenya's anti-sodomy laws violate international law come from direct statements that anti-sodomy laws violate international human rights law or treaty provisions. For instance, in her report on LGBTQ Human Rights, the U.N. Human Rights Commissioner explicitly stated that anti-gay laws constitute a breach of international human rights law. In making this statement, the Commissioner drew upon the work of monitoring bodies for numerous human rights treaties.<sup>66</sup> As such, the Commissioner's statement reflects a general sentiment in the international legal community regarding anti-sodomy laws.

The Human Rights Committee's interpretation of the ICCPR provides a clearer example. The Committee explicitly held in *Toonen v. Australia* that the anti-sodomy laws violate the right of individuals to privacy under the treaty, regardless of whether the laws are enforced. LGBTQ Kenyans face the same privacy invasion that was lamented in *Toonen*: police officers use the laws to investigate their homes and often harass and abuse them once inside. As such, the supporters of anti-sodomy laws cannot argue that the laws do not have the same implications in Kenyan sense. Since Kenya is a party to the ICCPR, its obligations under the new Constitution form part of Kenya's law. Kenya's anti-sodomy laws therefore constitute a clear violation of the ICCPR and, by implication, of the new Constitution.<sup>67</sup>

### 3.4 CONCLUSION

LGBTQ persons in Kenya have experienced a systematic discrimination from both the government and the society at large. Kenyan leaders are on record inciting citizens not to tolerate any form/shape of sexual queerness. They have fueled people perspective on how to treat the LGBTQ community including extreme mistreatment such as lynching. For every hate crime committed against LGBTQ Kenyans, the police don't show any effort to investigate or bring to book the perpetrators of hate crime. Legislation in Kenya is silent on how to protect hate crime to LGBTQ persons. Sexual preference should not be a ground why someone should lose his life. Kenya needs

---

<sup>66</sup> U.N. High Commissioner for Human Rights

<sup>67</sup> <http://kenyalaw.org/treaties/treaties/159/International-Covenant-on-Civil-and-Political-Rights> Accessed on 29 July, 2020.

to come into terms that this social norm exist into its society and that the is to address the issue and not to remain silent either by law or not talking about the subject at all.

The attitude and mistreatment of LGBTQ persons has led to some Kenyans to be sexual refugee in other nations such as Sweden Switzerland and Canada among others that offer protection to such group of people by law. Kenya is a secular state only that most of its population is religious i.e. with Christians forming the largest part followed by Muslims. Religious perspective and teaching has been the main reason why LGBTQ persons have been denied their rights. Human rights should not be curtailed and the state should ensure that this rights are protected across the board.

In order to ensure that the society lives in harmony the law needs to treat all persons equally after all we all have a social contract to ensure that human rights and liberty are protected by the “leviathan”

## 4.0.CHAPTER FOUR

### 4.1.COMPARATIVE ANALYSIS

This is a comparative analysis on the situation of LGBTQ rights in selected countries: - that is South African, Canada and Kenya.

### 4.2. SOUTH AFRICA

The sodomy charge in the Sexual Offences Act and the Criminal Procedure Act was struck down by the South African Constitutional Court in 1998. South Africa is leading the way in Africa for fair marriage and legal protection against discrimination. Same-sex marriage has become legal in South Africa since the Civil Union Act came into force in 2006.<sup>68</sup> The decision of the Constitutional Court in the case of *Minister of Home Affairs v Fourie* in which a lesbian couple fought to claim their rights in a country where, post-apartheid, we worked towards eliminating identity-based discrimination extended the common-law definition of marriage to include same-sex spouses—as the Constitution of South Africa guarantees equal protection before the law to all citizens regardless of sexual orientation—and gave Parliament one year to rectify the inequality in the marriage statutes.<sup>69</sup> Judge Albie Sachs underlined in the decision of the Constitutional Court the fundamental injustice of denying gays and lesbians the right to formalize their unions.

Section 9(3) of the Constitution of South Africa specifically forbids racial discrimination on the basis of sexual orientation.<sup>70</sup> It states, “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, color, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.” Among other benefits, the new law will allow married same-sex couples to make decisions on each other’s behalf and inherit if a partner dies without a will.

---

<sup>68</sup> Civil Union act 2006

<sup>69</sup>Minister of Home Affairs and Another v. Fourie and Another, with Doctors for Life International (first amicus curiae), John Jackson Smyth (second amicus curiae) and Marriage Alliance of South Africa (third amicus curiae), Case C.C.T. 60/04, decided on 1 December 2005 Lesbian and Gay Equality Project and Eighteen Others v. Minister of Home Affairs and Others, Case C.C.T.10/04, decided on 1 December 2005

<sup>70</sup> <https://www.gov.za/documents/constitution-republic-south-africa-1996>

#### 4.2.1. The Marriages Act v The Civil Unions Act of South Africa

Heterosexual couples who wish to marry in South Africa today can choose to marry in terms of either the Marriages Act or the Civil Unions Act. This begs the question: why do they have two pieces of legislation to govern one union act and what are the implications of choosing one over the other?

Historically, the 1961 Marriage Act 25 codified the common law concept of marriage as the legally accepted mutual union between one man and one woman while it lasts to the exclusion of others. *Minister of Home Affairs and Another v Fourie and Another* challenged this legislation on the grounds that, in contravention of section 9(1) of the Constitution, common law and section 30(1) of the Marriage Act denied same-sex couples equal treatment and the benefit of the law.<sup>71</sup> Additionally, these provisions resulted in the State subjecting same-sex couples to unfair discrimination in conflict with section 9(3) of the Constitution. This position needed to be remedied within a constitutional democracy.

The Constitutional Court accepted that the concept of marriage in common law was incompatible with the Constitution and found the provisions of the Marriages Act to be unconstitutional to the degree that it did not require same-sex couples to enjoy the status, privileges and obligations it confers upon heterosexual couples. Instead of amending the Marriages Act which still allows marriage only for heterosexual individuals, the new Civil Unions Act enables any two persons to enter into a marriage relationship. Therefore, married couples may choose to marry pursuant to the Marriages Act or the Civil Unions Act. Homosexual couples are not permitted to marry under the Civil Unions Act.

The criteria and marriage requirements are similar in both pieces of legislation and marital regimes remain unchanged, affording the same rights and responsibilities to the parties. The Civil Unions Act however varies in acknowledging marriages that are not solemnized by marriage. It offers

---

<sup>71</sup> South Africa marriage act



spouses who prefer not to marry the right to reap the advantages that marriage provides to the joint estate in terms of sharing.

In addition, in a country that sees the complete opposite when it comes to handling gays and lesbians, such a radical piece of legislation indicates that the South African people are a culture that has established tolerance of the homosexual orientation. This is ironical because Kenya had copied significantly from the principles and values of South Africa Constitution.<sup>72</sup> There is considerable similarity between the need to protect human rights but in listing human rights in the Kenyan constitution sexual orientation is left out.

### **4.3. BOTSWANA**

Botswana now joins a select group of African countries that recognizes the rights and dignity of its sexual minorities.

Botswana has a long and proud tradition of judicial independence and of the courts taking a stand against the misuse of power.

The current ruling is actually the culmination of an incremental process of legal victories over the past decade, including winning the rights to non-discrimination in places of employment, change gender identity on official documents and form civil society associations. This process of respect for the rule of law is powerful testimony to the strength of Botswana's democratic institutions

Botswana's laws on homosexuality were first introduced by Britain during colonization. They were later incorporated into the country's penal code after it won independence in 1966. Known as Section 164, the legislation prohibited all acts "against the order of nature". In 2018, Letsweletse Motshidiemang, a student at the University of Botswana, filed a petition at the High Court questioning the constitutionality of Section 164 and other provisions of the law. His lawyers argued

---

<sup>72</sup> Ghai, J., & Ghai, Y. (2018). The Contribution of the South African Constitution to Kenya's Constitution. In R. Dixon & T. Roux (Eds.), *Constitutional Triumphs, Constitutional Disappointments: A Critical Assessment of the 1996 South African Constitution's Local and International Influence* (pp. 252-293). Cambridge: Cambridge University Press.

that they were dated, pointing to society’s growing acceptance of same-sex relationships as evidence.<sup>73</sup>

In recent years, Botswana has made a number of strides for LGBT rights. The country has outlawed workplace discrimination based on sexual orientation, and in 2017, the High Court affirmed a transgender woman’s right to be recognized as female.<sup>74</sup> More recently, Botswana’s President Mokgweetsi Masisi voiced his support for the LGBT community, saying: “Just like other citizens, they deserve to have their rights protected.”<sup>75</sup>

### **4.3.1. Botswana decriminalized homosexuality in a landmark ruling**

#### **4.3.1.1. The LEGABIBO case**

Botswana High Court, heard a case challenging the constitutionality of sections 164(a), 164(c) and 167 of the Botswana Penal Code.<sup>76</sup> These provisions criminalize same-sex sexual conduct between consenting adults in Botswana and imposes a maximum sentence of seven years imprisonment. The court confirmed that human rights are universal and that the rights in the constitution applied to every person. The court further held that it is not a crime to be gay.<sup>77</sup>

In Botswana, evidence suggests that criminal laws, and the accompanying stigma, discrimination and rights violations experienced by LGBTQ persons, including within health care facilities, marginalize LGBTQ persons. As this also concerns health care facilities, LGBT people are afraid of accessing and using these services, including HIV prevention, treatment and care. This was recognized by the Botswana government itself. It’s Global AIDS Response Progress Report to the Joint United Nations Programme on HIV/AIDS (UNAIDS) noted that “stigma and discrimination are major constraints to universal access and utilization of HIV and AIDS services.” The recent Legal Environment Assessment found that criminalization impedes access to health services by

---

<sup>73</sup> [https://youtu.be/3w17lgWk\\_IY](https://youtu.be/3w17lgWk_IY)

<sup>74</sup> <https://www.france24.com/en/20190611-botswana-lgbt-disbelief-high-court-strikes-down-laws-criminalising-homosexuality>

<sup>75</sup> <https://www.france24.com/en/20190611-botswana-lgbt-disbelief-high-court-strikes-down-laws-criminalising-homosexuality>

<sup>76</sup> Botswana penal code

<sup>77</sup> Attorney General of Botswana v Rammoge and 19 Others, Botswana Court of Appeal, CACGB-128-14.

“driving vulnerable and marginalized individuals underground and away from public services.” Hence the court’s decision to decriminalize same sex marriages.

#### **4.4.CANADA**

Canada has often been referred to as one of the most gay-friendly countries in the world. Same-sex sexual intercourse has been legal in Canada since June 27, 1969, when the Criminal Law Reform Act (also known as Bill C-150).

The rights of LGBTQ Canadians are now as well secured as those of other Canadians due largely to a series of court rulings under Section 15 of the Canadian Charter of Rights and Liberties<sup>78</sup> that was included in the Constitution of Canada in 1982

The Supreme Court of Canada voted in a court decision in 1988 in the case of R v Morgentaler that section 7 is a protection against threats to health The Canadian Criminal Code expressly bans hate speech against parts of the population characterized by sexual orientation , gender identity or gender expression. In Canada, individuals living in the same marital unions have the legal right to adopt children.<sup>79</sup>

#### **4.5.KENYA**

Kenya is largely a conservative society this means it’s a night mere for people of different sexual orientation to live in.<sup>80</sup> this is even so after the court refused to scrap anti-gay laws. Kenya has had his fair share on the fight to achieve universal human right.

---

<sup>78</sup> Canadian Charter of Rights and Freedoms

<sup>79</sup> "Legislative Assembly of Ontario Bills and Lawmaking Past and Present Bill 5 Amendments Because of the Supreme Court of Canada Decision in M. v. H. Act, 1999". Legislative Assembly of Ontario. Accessed on 13 august, 2019

<sup>80</sup> Muslim and Christian religious leaders united and vowed to stop an alleged gay wedding in Mtwapa “at all costs.”The Council of Imams and Preachers of Kenya (CIPK) and the National Council of Churches of Kenya (NCCK)

*COI & another v Chief Magistrate Ukunda Law Courts & 4 others [2018] eKLR* in this case two male persons were charged under Section 162 (a) and (c) of the penal code of Kenya <sup>81</sup>in Kwale County, in the coast of Kenya (Republic v COI & GMN). During investigations into the alleged crime, the defendants underwent forced anal examination, HIV, and Hepatitis B tests. “There was no other way evidence could have been obtained to ascertain that they are gay without carrying out anal analysis.” The National Gay and Lesbian Human Rights Commission,<sup>82</sup> which defended the men, sued on their behalf, alleging that the practice of forced medical exams was unconstitutional. On appeal the court ruled that forced anal examinations were unlawful and violated medical ethics<sup>83</sup>

In September 2017, the Kenya Medical Association,<sup>84</sup> the leading professional body for doctors, passed a resolution condemning the use of forced anal exams, “even in the guise of discovering crimes.” The association issued an additional press release advising medical practitioners to adhere to the association’s Code of Ethics and Professional Conduct, even when dealing with patients in police custody.<sup>85</sup>

Persons whose gender identity does not conform to the sex (transsexuals and the queer) they were assigned at birth face significant challenges when it comes to the legal recognition of their gender identity. In Kenya, there are legislative disparities in the areas of equality and non-discrimination, documentation and legal status, as well as adequate and affirming transgender, intersex, and gender non-conforming individual health care. The Births and Deaths Registration Act, the Registration of Persons Act and the Citizenship and Immigration Act, the main legislation which provides for the issuance of birth certificates, does not adequately provide for intersex persons as well as persons who wish to change their gender marker in government-issued documentation.

**In Richard Muasya v the Hon. Attorney General [2010], Petition 705 of 2007**-Popularly known as the Richard Muasya Case, the Court for the first time dealt with the legal recognition of intersex

---

<sup>81</sup> Section 162 (a) and (c) of the penal code of Kenya

<sup>82</sup> <https://www.nglhrc.com/who-we-are>

<sup>83</sup> *COI & another v Chief Magistrate Ukunda Law Courts & 4 others [2018] eKLR*

<sup>84</sup> <https://www.kma.co.ke/>

<sup>85</sup> <https://www.metroweekly.com/2018/03/kenyan-court-appeals-rules-forced-anal-exams-unlawful>

people. In this case, the Court rejected the Petitioner's argument that he had endured a loss of legal recognition for not being registered under the Births and Deaths Registration Act. The Court concluded that by relying on their dominant sex characteristics, intersex individuals may be classified as either male or female. In addition, the Court rejected the petitioners arguing that the definition of 'sex' under Kenya's Constitution included 'intersex,' restricting itself to a strict gender/sex binary.<sup>86</sup>

In *Republic v Kenya National Examinations Council & another Ex-Parte Audrey Mbugua Ithibu [2014] eKLR (Audrey Mbugua Case)*, The High Court held that a transgender person was entitled to the government issuing documents bearing his preferred name (in the case where a person had legally changed his name) and removing the gender marker. In reaching this decision, the Court considered Article 10 of the Constitution which lists the national values and principles of Kenya and Article 28 on the right to dignity.<sup>87</sup>

Although Article 27(4) of the Kenya Constitution (2010) does not specifically apply to gender identity as a protected category, the precedent set out in the Audrey Mbugua Case can be read as implying that transsexual, intersex, and gender non-conforming persons are entitled to human rights provisions that are unique to their experiences. Nevertheless, lack of explicit non-discrimination laws on the basis of gender identity open up unequal care of transsexual, intersex, and gender non-conforming persons.

Documentation of identities in Kenyan society is an important element of public life and a key determinant of access: persons without valid identification may face arbitrary arrest and detention by law enforcement; deprivation of services such as health care, banking, education, employment and travel. Persons seeking to have their gender marker changed in identification documents or other documents conferring legal status are faced with difficulty due to the lack of legislation regulating this procedure. Although the Audrey Mbugua Case set a major precedent in allowing for the alteration of gender markers in government issued documents, the legal grounding was limited to instances where the law did not explicitly provide for the requirement that a gender

---

<sup>86</sup> Richard Muasya v the Hon. Attorney General [2010], Petition 705 of 2007

<sup>87</sup> Republic v Kenya National Examinations Council & another Ex-Parte Audrey Mbugua Ithibu [2014] eKLR (Audrey Mbugua Case),

marker be included in the document (in this case, Ms Audrey Mbugua’s academic certificate). In cases where the law requires a gender marker in a document (such as a birth certificate,<sup>88</sup> passport,<sup>89</sup> or national identity card ID,<sup>90</sup>) persons wishing to have their gender marker amended have few, if any, options. Transgender persons in Kenya also face challenges when seeking to legally change their name, even though this process is governed by law.<sup>91</sup>

In line with constitutional principles of equality and non-discrimination, the Kenya Health Policy emphasizes the importance of inclusiveness, non-discrimination, social accountability and gender equality in the provision of health services.<sup>8</sup> However, members of the LGBTI community still face obstacles to enjoying their constitutional right to the highest attainable standard of healthcare.<sup>92</sup>

In Kenya, transgender and gender non-conforming people face abuse and prejudice while seeking health care facilities, abuses that result in part from gender identity prejudice and speech that do not adhere to gender norms in Kenyan society. Transsexual, intersex, and gender non-conforming people experience a disproportionate lack of appropriate and affirming health care. In particular, people seeking to undergo medical procedures to adapt their physical features to their gender identity are faced with a legal and policy framework that does not take their needs into account. Currently, there exist no guidelines on the diagnosis and treatment of gender identity disorders (GID). The lack of clear policies and guidelines is both a cause and effect of the violence and discrimination that transgender and intersex persons experience. For example, court documents in Audrey Mbugua Case indicate that the claimant was forced to provide evidence demonstrating that they were diagnosed with a gender identity condition before the gender marker could be modified in the academic certificate. Nonetheless, this should not have been achieved without specific

---

<sup>88</sup>Under Section 2 of the Births and Deaths Registration Act, the prescribed particulars of a birth certificate mean— “as to any birth, the name, sex, date and place of birth, and the names, residence, occupations and nationality of the parents.

<sup>89</sup> Under Rule 13 (d) of the Kenya Citizenship and Immigration Regulations, 2012, all passports issued under the authority of the Government of Kenya must bear the sex of the passport holder.

<sup>90</sup>Under Section 5(1) of the Registration of Persons Act, the Principal Registrar is mandated to maintain a register of all registered persons and to record the particulars in respect of such persons which include the sex of the person.

<sup>91</sup> <http://justicenow.co.ke/2017/02/15/court-orders-state-to-alter-names-in-ids-for-fivetransgender-kenyans/> (Accessed on august 13,2019)

<sup>92</sup>Kenya Health Policy 2014 – 2030: Towards Attaining the Highest Standards of Health, (2014) Government of Kenya, [https://www.afidep.org/?wpfb\\_dl=80](https://www.afidep.org/?wpfb_dl=80) (accessed on august 13, 2019).

guidance on the treatment of a gender identity disorder because, if it had been, such a treatment may have had dubious legal validity. Intersex individuals also suffer from the lack of clear guidelines on adequate healthcare, including sex reassignment operations. Yes, many intersex people run the risk of unnecessary and intrusive medical procedures that constitute torture and other barbaric, inhuman and degrading care and punishment.<sup>93</sup>

## Analysis

The state is actively failing to protect sexual minorities from prejudice both in policy and in law. While the Minister of Justice, National Cohesion and Constitutional Affairs has reiterated Kenya's commitment to enhancing equality and non-discrimination for all Kenyans, including the significant legal and political action of sexual minorities, to qualify.<sup>94</sup> Despite extensive domestic and international studies showing the detrimental correlation of criminalizing homosexual activity and HIV health programmes, the State has still refused to decriminalize consensual same sexual behavior.<sup>95</sup>

Kenyan law and practice acknowledges only the male and female gender, there is no acceptance of intersex, because of the country's apparent binary standard. There is no legal structure that allows or makes it easier for Transgender and Intersex individuals to choose their gender and have it recognized by law; most intersex individuals undergo needless corrective surgery when they are born or simply assigned a gender role and raised as such without being given the opportunity to choose their gender or undergo sex correction surgery when they are of a sexual nature.

---

<sup>93</sup> See, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. A/HRC/22/53, February 1, 2013. Also see, "Pathologization – Being lesbian, gay, bisexual and/or trans is not an illness" For International Day against Homophobia, Transphobia and Biphobia, Office of the High Commissioner for Human Rights, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19956#sthash.TMc6sSgk.dpuf> (accessed August 13 2019).

<sup>94</sup> Hon. Mutula Kilonzo addressing the 8th session of the Human Rights Council during Kenya's Universal Periodic Review in Geneva on 6th May 2010 affirmed the commitment of the Government of Kenya to protect its sexual minorities from discrimination. KHRC however notes that no substantive progress has been made. Further to this is a statement by the same Minister at the same session stating that the government of Kenya is unwilling to decriminalize consensual homosexual conduct. See Draft report of the Working Group on the Universal Periodic Review by the UN Human Rights Council available at [http://lib.ohchr.org/HRBodies/UPR/Documents/Session8/KE/A\\_HRC\\_WG.6\\_8\\_L.7\\_Kenya.pdf](http://lib.ohchr.org/HRBodies/UPR/Documents/Session8/KE/A_HRC_WG.6_8_L.7_Kenya.pdf) last accessed on 31 July September 2020

<sup>95</sup> Onyango-Ouma, et al, Understanding the HIV/STI Risks and Prevention Needs of Men Who have Sex with Men In Nairobi, Kenya, 2005

The transgender persons suffer lack of legal recognition and are largely bound to a gender they do not want to identify with. This is a violation of their freedom of expression. The government's persistent failure to address and make cognizance of the falsity of the gender binary norms have resulted in State sanctioned homophobia.<sup>96</sup> Intersex persons feel obliged to abide by the law by requiring them to choose between the male or female gender in order to get legal documents. This is because most public and government documents compulsorily require one to fill in their gender as either male or female.<sup>97</sup>

The intersex children are raised in unsupportive environments where they are hardly given information on their conditions. They grow up in a society that treats them as 'freaks' of nature, uses derogatory terms such as 'hermaphrodites' to refer to them and are forced to identify with a gender that is not of their choice.

In cases of intersex births, the Ministry of Health lacks guidelines directing families and medical practitioners on how to facilitate a child's genuinely informed consent. Such guidelines ensure the child's body is not irreversibly altered by medical procedure in an attempt to impose a gender at a time of birth. There is generally a low level of awareness on LGBTI issues by key service providers especially the health care practitioners and the police. As noted earlier, some doctors have no idea how to treat a transsexual person and often view them as sinners in need of rebuke and counseling. These two providers regularly interact with LGBTI persons and are essential in our realization of equal access to quality service for all Kenyans.

Criminal sanctions increase vulnerability of lesbians, gays and bisexuals persons to blackmail and extortion. The vulnerability is driven by the need to hide one's sexuality from family, friends, work colleagues or the general public. Public stigmatization or internalized homophobia particularly

---

<sup>96</sup> Homophobia is the irrational hatred or fear of LGBTI persons. It also encompasses a range of negative attitudes such as antipathy, contempt, prejudice and aversion.. Homophobia is observable in critical and hostile behavior such as discrimination and violence on the basis of a perceived non-heterosexual orientation. For example, by the publication of this report, the Prime Minister Raila Odinga had ordered the arrest of all gays and lesbians in Kenya. See [www.capitalfm.co.ke/.../Arrest-gays,-Kenyan-PM-orders-10670.html](http://www.capitalfm.co.ke/.../Arrest-gays,-Kenyan-PM-orders-10670.html), last accessed on 31 July 2020

<sup>97</sup> The Registration of Persons Act Cap 105 of the Laws of Kenya, Section 5 (1) (c) which requires the registrar of persons to enter details of one's sex before issuing them with a legal document to identify as Kenyan. Sex is one of the requirements but there is no statutory definition of sex. The practice, custom and usage in Kenya do not recognize any other sex beside the dichotomy of male and female. Other entries would be invalid



forces one to remain secretive about their sexuality. Unfortunately, this deeply felt need for taciturn, even while affording reduced public censure of one's sexuality creates a fault-line for blackmailing and extortion to thrive.

The Penal Code (sections 162-165) provides a justification for individuals and groups opposed to sexual minorities to deny services, visit on them acts of physical violence, verbal abuse, blackmail and extortion, with impunity.<sup>98</sup> The Gay and Lesbian Coalition of Kenya – GALCK, has documented several cases where sexual minorities are denied health care services.

#### **4.6.CONCLUSION**

The world is moving towards the realization of human rights protection and kenya should join the band wagon. It is in my opinion that “there is no freedom until we are all equal.” For equality to be achieved parliament need to pass laws that offer universal human rights protection, civil education on LGBTQ need to be carried out to educate the society to be more tolerant to LGBTQ persons furthermore the constitution of Kenya is committed to nurturing and protecting the well-being of the individual, the family, communities and the nation. It also recognize the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.

---

<sup>98</sup> The penal code

## 5.0.CHAPTER FIVE

### 5.1.INTRODUCTION

Same-sex sexual relations between men are condemned under the punitive code with a most extreme punishment of 21 years in jail.<sup>99</sup> Being gay it isn't illicit, and same-sex connections between ladies are not alluded to in enactment. The constitution accommodates independence from separation yet doesn't expressly do as such based on sexual direction and sex personality or articulation. There is no arrangement in law for same-sex marriage or common association, and same-sex couples are not capable to embrace. There is no lawful sex acknowledgment for Tran's people. The law secures intersex people's privileges to sympathetic and stately treatment in authority and the public authority has recognized the administrative changes fundamental to follow the 2014 High Court judgment which found that intersex people in Kenya reserve the option to be perceived as people under the watchful eye of the law.<sup>100</sup>

There have been various effective legitimate difficulties in Kenyan courts against government rehearses. On 22 March 2018 the Court of Appeal dominated that constrained butt-centric assessments of those blamed for same-sex relations is illicit, toppling a 2016 High Court case which had maintained the specialists' practice.<sup>101</sup> On 22 March 2019 the Court of Appeal decided that the public authority couldn't utilize the criminalization of same-sex sexual relations to forestall the enlistment of a LGBTQ rights NGO.<sup>102</sup>

'A Court of Appeal in Mombasa, Kenya, managed on March 22, 2018, that leading constrained butt-centric assessments on individuals who are blamed for same sex relations is unlawful... It was a resonating triumph for LGBTQ rights activists in Kenya and past. The decision turned around a 2016 High Court choice that had maintained the Kenyan specialists' utilization of constrained butt-centric tests to endeavor to give proof of gay direct. The National Gay and Lesbian Human Rights Commission (NGLHRC), a nongovernmental association situated in Nairobi,

---

<sup>99</sup> Penal Code

<sup>100</sup> R.M v ATTORNEY GENERAL & 4 others [2010] eKLR

<sup>101</sup> Anal examinations - Court of Appeal ruling, 22 March 2018

<sup>102</sup> Civil appeal 56 of 2016

documented a sacred test after police captured two men in Kwale County in February 2015 on charges of homosexuality, and exposed them to constrained butt-centric tests, HIV tests, and Hepatitis B tests at Mombasa's Madaraka Medical clinic. "The decision that constrained butt-centric tests abuse Kenya's constitution is of huge importance," said Neela Ghoshal, senior LGBTQ rights analyst at Human Rights Watch. "The decision attests the poise of the two Kenyan men who were exposed to these awful tests, and it fortifies the agreement that the constitution applies to all Kenyans, paying little mind to their sexual direction or sex personality... " "With this decision, the appointed authorities are saying that we as a whole have the right to be treated with poise and managed the cost of our essential rights, as revered in the Kenyan Constitution," Njeri Gateru, head of Legal Affairs at NGLHRC, said in a articulation.. "This milestone administering places Kenya's courts at the vanguard in insisting that the public authority can't deny LGBT individuals their essential rights," Ghoshal said.<sup>103</sup>

## **5.2. WHY SUPPORT SAME SEX MARRIAGE?**

Denying the right of wedding to lesbian and gay couples not only deprives them of the social and spiritual value of marriage, but also has significant, sometimes devastating, practical implications. Because they cannot marry, in times of crisis, lesbian and gay spouses are not next of kin; they are not consulted on important medical decisions; marital status is also the basis on which employers extend health care, pension and other benefits. I assume that, because we have added such immense social implications to marriage, it violates equal protection of the law in denying the right to marry to lesbian and gay couples.

## **5.3. COMBATTING DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY**

Deeply-embedded homophobic and transphobic attitudes, often combined with a lack of adequate legal protection against discrimination on grounds of sexual orientation and gender identity, expose many lesbian, gay, bisexual and transgender (LGBTQ) people of all ages and in all regions of the world to egregious violations of their human rights. They are discriminated against in the

---

<sup>103</sup> <https://www.hrw.org/news/2018/03/22/kenya-court-finds-forced-anal-exams-unconstitutional>

labour market, in schools and in hospitals, mistreated and disowned by their own families.<sup>104</sup> They are singled out for physical attack – beaten, sexually assaulted, tortured and killed.<sup>105</sup> Laws banning cross dressing are used in many countries to prosecute transgender people on the basis of their gender identity and language. Protecting LGBTQ people from violence and discrimination does not require that a new set of LGBTQ-specific rights be developed, nor does it require that new international human rights standards be defined. States' legal responsibilities to protect LGBTQ people's human rights are well founded in international human rights law, based on the Universal Declaration of Human Rights and subsequently negotiated international human rights treaties. All people, regardless of sex, sexual orientation or gender identity, have the right to enjoy the safeguards offered by international human rights law, including rights to life, personal security and privacy, the right to be free from violence, arbitrary arrest and detention, the right to be free from discrimination and the right to freedom of speech, association and peace

States' fundamental legal responsibilities as regards upholding LGBTQ people's human rights include responsibilities to:

- To defend people from homophobic and transphobic violence.
- Avoid violence and abuse which is barbaric, inhuman and degrading;
- The abolition of laws that criminalize homosexuality and the transgender.
- Ban discrimination based on gender identity and sexual orientation;
- Ensure freedom of expression, association and peaceful assembly for all LGBTQ people;

#### **5.4.THE PLACE OF EQUITY IN KENYAS LEGAL SYSTEM**

There have been a number of significant changes in Kenya's legal and policy system in recent years as regards discrimination. This is welcome to adopt a new Constitution in 2010, with a clear emphasis on equality, a much strengthened right to non-discrimination and special provisions on the protection of rights for groups vulnerable to discrimination. In the Constitution, too, there is the number of steps intended to resolve the long-standing ethno-regional disadvantage problems.

---

<sup>104</sup> Kenya National Aids Strategic Plan 2009/10 – 2012/13, Nairobi 2009 pg, 6.

<sup>105</sup> Mungiki is a politico-religious group and a banned organization in Kenya. See Mutuma Ruteere., 2008. Dilemmas of Crime, Human Rights and the Politics of Mungiki Violence in Kenya. Kenya Human Rights Institute, 2008

Similarly, the passage of two separate anti-discrimination acts (on disability and race) in the last ten years and an Employment Act with fairly inclusive equity requirements mean that legal protection against discrimination has been significantly strengthened.<sup>106</sup> LGBTQ bunches exist and are by and large ready to capacity and direct exercises without state obstruction. The Court of Appeal administering in March 2019 dominated that the public authority couldn't utilize the criminalization of same-sex sexual relations to forestall the enrollment of a LGBTQ rights NGO.<sup>107</sup> This maintained the 2015 High Court's choice that sexual minorities were qualified for the equivalent rights as any remaining Kenyans, including the option to relate. Kenya's first 'Pride' occasion was held in Kakuma exile camp in June 2018 without government limitation.<sup>108</sup>

#### **5.4.1. The New Constitution**

The preamble to the Constitution lists equality as one of six basic principles on which to base government. This definition of concept is granted legal force in Article 10, which includes human dignity, fairness, social justice, inclusiveness, equality, non-discrimination and security of the oppressed among the national values and principles of governance to be used in the implementation and interpretation of the Constitution and other laws, and in policy decisions being made or enforced. It is further stressed in Article 20(4) (a) which identifies equality and justice as principles to be upheld in the reading of the Bill of Rights, and Article 21(3) which imposes a obligation on state actors to meet the needs of "vulnerable groups" in society. Chapter Four – the Bill of Rights – states that the rights and fundamental freedoms contained in the Bill of Rights belong to each individual and that each person shall enjoy the rights and fundamental freedoms contained in the Bill of Rights to the greatest extent in accordance with the existence of the right or fundamental freedom<sup>109</sup>

---

<sup>106</sup> The employment act

<sup>107</sup> LGBTI organisations allowed to register as NGOs  
- Court of Appeal ruling, 22 March 2019, and LGBTI groups, civil society and human rights NGOs)

<sup>108</sup> USSD, 'USSD report 2019' (section 6), 11 March 2020,

<sup>109</sup> The constitution of kenya 2010

Article 27, which provides for equality and freedom from discrimination under the Bill of Rights, states:

- 1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
- 2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
- 3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
- 4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
- 5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).
- 6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.
- 7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.
- 8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender

The new constitutional order does not out-rightly refer to the doctrine of equity as a source of law in Kenya. Article 2(5) refers to the general principles of international law forming part of Kenyan law.

Kenya's constitution sets out different standards and principles that direct the government's behaviour and, to a large degree, culture. Kenyans grasp the definition of equality with ease, but not so that of justice. Equity as a concept is closely related to justice, which is a way of ensuring real equality. It may mean favourable treatment to those who are disadvantaged. It is a comment on the deep inequalities in Kenya that to secure equality we sometimes have to make major adjustments in the allocation of resources so that the most disadvantaged groups are given preference in access to basic needs, including education, employment and electoral representation.

Such categories include disabled persons, women, children, teenagers, minority or disadvantaged community members, and members of different racial, religious or cultural communities. Such special steps are temporary ("with respect to prevailing circumstances") until all these classes have reached a level playing field with the more advantaged. For example, Article 43 gives everybody the right to the highest attainable health standards, sufficient accommodation, fair sanitation standards, and freedom from poverty, and sufficient quantities of clean and healthy water, social security and education. We know there are significant gaps in access to such services among various classes.

In allocating resources for Article 43<sup>110</sup> entitlements, the state must have regard to “prevailing circumstances, including the vulnerability of particular groups or individuals” (Article 20). Kenya’s international obligations in respect of equality extend not only to eliminating discrimination, but also require it to take measures to promote substantive equality through positive action (in Kenya referred to as “affirmative action”)<sup>111</sup>. The UN HRC has stated that the “principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant”<sup>112</sup>, while CESCR has stated that “states parties may be, and in some cases are, under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate

---

<sup>110</sup> The constitution of Kenya 2010

<sup>111</sup> See International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), 1966, Article 2(2); Committee on Economic, Social and Cultural Rights, General Comment 20: Non-discrimination in economic, social and cultural rights, UN Doc. E/C.12/GC/20, 2009, Para 9; see also Committee on the Elimination of Discrimination

<sup>112</sup> Human Rights Committee, General Comment 18: Non-discrimination, 1989, Para 10.

discrimination<sup>113</sup>". It is, therefore, particularly welcome that Article 27(6) creates a duty of affirmative action, a concept which is defined in Article 260 as including "any measure designed to overcome or ameliorate an inequity or the systemic denial or infringement of a right or fundamental freedom".

However, Article 56 offers special provisions for "minorities and disadvantaged groups," a term that covers all those vulnerable to discrimination. The word 'minority' is not specified in the Constitution, but Article 260 defines 'marginalized groups' as all those discriminated against on one or more grounds under Article 27(4).<sup>114</sup> The article provides for the State to take steps – including affirmative action – to ensure that these communities engage in government, education and jobs, have access to water, health care and facilities, and to strengthen their cultural values, languages and practices. As such, the article guarantees significant additional rights on all grounds and may form a useful guide to the interpretation of Article 27(6).<sup>115</sup>

A section on women's rights is noticeably absent from the Bill of Rights, Part 3, but this may be due to the unique position that gender equality occupies elsewhere in the current Constitution. Article 27(3)<sup>116</sup> provides for a broad guarantee of fair treatment for women and men 'including the right to fair opportunities in political, economic, cultural and social work.' Gender equality is a prominent feature elsewhere of the Constitution: equal rights for men and women are guaranteed at marriage and at dissolution; equality between male and female parents and partners is guaranteed at birth and marriage when citizenship is acquired.

Lesbians, gays and bisexuals do not claim any 'special' or 'additional rights' but the observance of the same rights as those of heterosexual persons.

---

<sup>113</sup> Committee on Economic, Social and Cultural Rights, General Comment 20: Non-discrimination in economic, social and cultural rights,

<sup>114</sup> The constitution of Kenya 2010

<sup>115</sup> The constitution of Kenya 2010

<sup>116</sup> The constitution of Kenya 2010



## **5.5. RIGHTS AT STAKE**

LGBTQ people are denied basic cultural, political, social and economic rights-either by statute or by practice. In all parts of the world the following violations were documented:

In anti-discrimination legislation, statutory clauses or their implementation, the right to non-discrimination and to be protected from abuse and harassment is generally denied by omitting sexual orientation.

The right to life is infringed in States where sodomy is subject to the death penalty.

The right to be free from torture or cruel, inhuman or degrading treatment is abused by police procedures, in investigations or in the case of detention of homosexuals, gays and bisexuals.

Arbitrary detention takes place in a variety of countries, including individuals accused of having a homo / bisexual identity.

Bi-national couples are denied freedom of movement because they don't accept their same sex partnership.

The right to a fair jury is often influenced by judicial and other law enforcement biases.

The right to privacy is breached by the introduction of lesbian, gay, and bisexual 'sodomy rules,' even though the consenting adults have a private relationship.

Freedom of speech and free association rights may either be expressly restricted by legislation or homosexuals, gays and bisexuals cannot enjoy them due to the homophobic environment in which they reside.

The practice of religion is generally restricted for lesbians, gays and bisexuals, especially for churches that advocate against them.

The right to work is the most affected among economic freedoms, with many lesbians, gays and bisexuals being dismissed or discriminated against in job policies and procedures because of their sexual orientation or.

The rights to social security, help and compensation and from here-the standard of life-are affected, for instance when they have to reveal their spouse's identity.

The right to physical and mental health clashes with discriminatory policies and procedures, the discrimination of certain doctors, the lack of proper instruction by health care professionals on matters by sexual identity or the general presumption that patients are heterosexuals.

Governments restrict the right to create a family by not acknowledging same-sex couples and restricting the State's otherwise given rights to heterosexual families who have not obtained legal recognition but nevertheless enjoy certain freedoms. Children can also be denied protection against parental separation, depending on the sexual orientation of a parent. Lesbians, gay and bisexual couples and people are forbidden from adopting a child, except in the case of their same sex partner's child.

Lesbian, gay, and bisexual students may not have the right to education due to an unsafe environment created by peers or school educators.

## **5.6. CONCLUSION**

It is evident that the LGBTQ community face a lot of persecution in Kenya from police brutality and a systematic discrimination by law and the society at large. The law does not recognize same sex union in Kenya under article 45 of the constitution of Kenya with perpetrators to this law likelihood to face up to 14 years imprisonment.

In consideration of the fact that more and more Kenyans are coming out as gay, lesbian, bisexual, transsexual, and queer the current law in Kenya need to be amend to accommodate this group of people.

## 5.7. RECOMMENDATION

From inferences from the comparative analysis between Kenya, South Africa, Canada and United State of America this research makes the following recommendation.

- I. I. To revoke Sections 162(a) and (c), and 165 of the Penal Code immediately.
- II. To pass and enforce immediately a law implementing Article 27(4) of the Constitution, with provisions banning discrimination on grounds of sexual orientation, gender identity, and speech in line with the commitment of the Government of Kenya during the 2015 Universal Periodic Review.
- III. To immediately pass and enact laws affirming the rights of transgender and intersex people, particularly as regards the right to change one's gender marker in all documentation provided by government. However, to ensure that these laws are compatible with international best practices aimed at protecting the legal status of non-conforming people who are transgender, intersex and gender.
- IV. Instantly enact and enforce legislation affirming the right to the highest attainable health requirements when they apply to transsexual, intersex, and nonconforming people like gender reassignment surgery, HIV / AIDS services, and mental wellbeing.
- V. The passage of legislation criminalizes speech of hatred and incitement to violence based on sexual orientation and gender identity and expression.
- VI. To withdraw all appeals in cases where the High Court ruled in favor of LGBTQ rights.
- VII. To remove all criminal proceedings against persons charged pursuant to Section 162(a) and (c) and Section 165 of the Penal Code or, more generally, persons prosecuted for sexual, consensual, and private conduct of the same sex.
- VIII. To immediately forbid coercive anal exams as a means of collecting evidence against individuals accused of engaging in same-sex conduct in legal, consensual and private life.
- IX. To prosecute all individuals accused of committing acts of violence, including incitement to violence on grounds of sexual orientation, gender identity and speech, to the fullest extent of the law

## **BIBLIOGRAPHY**

### **ARTICLES**

Prince, g. (2019). *Gay Rights and the Mormon Church: Intended Actions, Unintended Consequences*. [Online] Amazon.com. Available at <https://www.amazon.com/Gay-Rights-Mormon-Church-Consequences/dp/1607816636> [Accessed on 16 June 2019].

Marvel, f. (2018). *Global Gay* by Frederic Martel (eBook). [Online] Ebooks.com. Available at: <https://www.ebooks.com/en-us/209523226/global-gay/fr-d-ric-martel-michael-bronski-patsy-baudoin/> [Accessed on 16 June 2019].

Gershon, l. (2019). *Why Naming Anti-Gay Violence Matters* | JSTOR Daily. [Online] JSTOR Daily. Available at: <https://daily.jstor.org/why-naming-anti-gay-violence-matters/> [Accessed on 16 June 2019].

Schoenfeld, W. (2019). *Separation of power*, [online] Internet Archive. Available at: <https://archive.org/details/jstor-25106351> [Accessed on 16 Jun. 2019].

Vance, Kim, et al. “*The Rise of SOGI: Human Rights for LGBT People at the United Nations.*” *Envisioning Global LGBT Human Rights: (Neo) Colonialism, Neoliberalism, Resistance and Hope*, edited by Nick J. Mule et al., School of Advanced Study, University of London, London, 2018, pp. 223–246. JSTOR, [www.jstor.org/stable/j.ctv5132j6.16](http://www.jstor.org/stable/j.ctv5132j6.16) accessed on 17 June 2019

### **BOOKS**

Alexander Matthews,” *Gay rights in Africa: ‘one step forwards, one step back’* [2019]

Eric Braun, *the Gay Rights Movement (Movements That Matter)* Lerner Publications TM (August 1, 2018)

GERBER P, *Human Rights Law Review*, (Volume 14, Issue 3, September 2014,)

Wald, K. Button, J. and Rienzo, B. (1996). *The Politics of Gay Rights in American Communities: Explaining Antidiscrimination Ordinances and Policies*. *American Journal of Political Science*, 40(4), p.115-138.

William N. Eskridge Jr, (ed) *Religious Freedom, LGBT Rights, and the Prospects for Common grounds* (First published in 2019)