

**ANALYSIS OF ANTI-HOMOSEXUALITY LAWS IN KENYA: THE DEBATE ON
CONSTITUTIONALITY AND PROSPECTS OF DECRIMINALISATION**

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DEDICATION

I dedicate this research paper to the Almighty God, for granting me His wisdom, grace and patience without which I would not have been successful. I would also like to dedicate this project to my loving family whose support and motivation during this project, has been invaluable. I hope that this work makes them proud.

ABSTRACT

In the last couple of years, the LGBTIQ community has been vocal about their rights and against discrimination that they suffer as a result of the criminalisation of homosexuality in Kenya. On a global basis, more countries, including a select few African states, have begun to recognise the human rights importance in decriminalising anti-homosexual laws and further securing the rights of LGBTIQ individuals in their National laws. In the wake of this, members of the LGBTIQ community filed petitions in court challenging the constitutionality of those laws, albeit unsuccessfully. This study has undertaken to establish the court's rationale for upholding these anti-homosexuality laws in Kenya, some of the prospects of decriminalising same sex conduct constitutionally, some of the challenges that this exercise may face as well as the implications of decriminalising homosexuality in the event Kenya were to venture in that direction in light of the international human rights position on anti-homosexuality laws.

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CHAPTER ONE

1.1.INTRODUCTION

“No two leaves are alike, and yet there is no antagonism between them or between the branches on which they grow.” – M.K. Gandhi

‘Homosexuality’ is defined as the sexual attraction to individuals of the same sex. The term gay is often used as a synonym for the term homosexual; while females who are attracted to members of the same sex are referred to as lesbians.¹ ‘Same-sex unions’ are defined as legally or socially recognized marriage between two persons of the same biological sex or social gender². This study shall focus on anti-homosexuality laws and the prospects of decriminalisation of same-sex unions while highlighting certain elements of the term homosexuality in order to fortify the findings herein.

In the 21st century, the question of the morality of homosexuality and unions of the same sex became quite prevalent. It is a common belief among several Western cultures that marriage of the same sex is morally defensible and thus should be permissible.³ People have engineered the globalization of this phenomenon using human right reasoning and political power. Most of the "developing" nations and select religious denominations opposed this move. Such groups' counter-argument is that marriage of the same sex is unethical, sinful and ungodly.⁴

Homosexual behaviour has inspired different reactions from different cultures at various timelines. These cultures have approved the lifestyle, tolerated, reprimanded and even prohibited it. From a historic perspective, it was not unusual to find homosexual conduct occurring in Greece and Rome and more recently, such relationships between adults and teenagers has become the focus of Western egalitarians.⁵ Homosexual behaviour has traditionally been viewed by both Judeo-Christian and Muslim communities as immoral. Nevertheless, religious leaders from the Jewish and Christian faiths have adamantly expressed their intolerance for homosexual inclination or orientation. Others, including Protestants, have advocated the full acceptance of homosexuals and

¹ -<<https://www.britannica.com/topic/homosexuality>> on 10 December 2019.

² -<<https://medical-dictionary.thefreedictionary.com/Same-sex+union>> on 10 December 2019.

³ Akpan C O, ‘The morality of same sex marriage: How not to globalize a cultural anomie. *Online Journal of Health Ethics*, 2017, 13(1)-<<http://dx.doi.org/10.18785/ojhe.1301.02>> on 10 December 2019.

⁴ Akpan C O, ‘The morality of same sex marriage’

⁵ Tully CT, ‘Lesbians, gays, & the empowerment perspective’ *Columbia University Press*, 2000.

their relationships. In some religions, the debate has threatened to trigger outright schisms.⁶ Homosexual attitudes are generally fluctuating, partly as a result of increased political activism and efforts by homosexuals to be recognised as different from what society would consider 'normal' as opposed to unusual and despicable personalities on the premise of their sexual orientation. Homosexuality's conflicting views remain an issue in most 21st century societies, however they have generally been resolved in developed states, with many societies accepting its legitimacy.

1.2.BACKGROUND TO THE STUDY

Private, same-sex unions between consenting adults are still considered illegal in several African states, including Kenya. Individuals who identify as homosexual are still treated as criminals, with approximately 38 African countries having criminalized same-sex activity between adults.⁷ These relationships have increasingly become a topic of public controversy, political and judicial debate, in the recent past.⁸

There has been an uproar on issues affecting the LGBTIQ community not only here in Kenya and the African region, but throughout the world, provoking different reactions from those in favour and against the recognition of same-sex couple rights. The fulcra on which homosexuality loathe has been anchored is religion, traditions and culture.⁹ These are used to arrest, discriminate, and punish people who accepted their sexuality freely and openly.¹⁰ The Bible has been used as a weapon to admonish individuals based on sexual orientation. Sodom and Gomorrah being the bomb that detonates at the mention of these issues.¹¹ Homosexuality is also considered 'un-African' by a majority.¹²

⁶ -<<https://www.britannica.com/topic/homosexuality>> on 10 December 2019.

⁷ Human Rights Watch, 'This alien legacy the origin of sodomy laws in British colonialism' 2008, 4.

⁸ EY Ako, 'The debate on sexual minority rights in Africa: A comparative analysis of the situation in South Africa, Uganda, Malawi and Botswana, published, LLM Thesis University of Pretoria, 2010, 32.

⁹ Walsh F & Pryce J, 'The spiritual dimension of family life' *Normal family processes: Growing diversity and complexity* 2003, 337-372.

¹⁰ <<https://www.aclu.org/other/rights-lesbian-gay-bisexual-and-transgender-people>> on 3 April 2020

¹¹ Locke K A, 'The Bible on homosexuality: Exploring its meaning and authority' *Journal of Homosexuality* 48.2, 2005, 125-156.

¹² Nderu W, 'Homosexuality: Human rights, identity versus penal sanctions: -Reality of perception? Constitutionality of sections 162(a)(c), 163 and 165 of the penal code' 2018, -< <https://icj-kenya.org/jdownloads/Legal%20Opinions/Same%20Sex%20Relations%20and%20the%20Kenyan%20Constitution.pdf>> on 10 December 2019.

The anti-homosexuality laws of Kenya are a colonial antiquity that was first imposed in 1897 by the British colonizers. Kenya's Penal Code criminalizes "carnal knowledge against the order of nature," which in layman's terms is the outlaw of homosexual activity, and anyone found guilty of such an offense may face up to 14 years ' imprisonment.¹³

There have been significant efforts made by human rights groups and LGBTIQ rights activists over the last few years to change Kenya's view on and interpretation of homosexuality and anti-homosexuality laws. In 2016, LGBTIQ activists looking for a way to curb discrimination began targeting the laws that criminalized homosexuality.¹⁴ A comprehensive Bill of Rights was introduced with the implementation of Kenya's 2010 Constitution, which gave the LGBTIQ community a basis for challenging the country's existing anti-homosexuality laws through recent court petitions, albeit unsuccessfully, with the courts maintaining that the existing statutes are not in fact unconstitutional.

1.3.STATEMENT OF PROBLEM

Anti-homosexuality laws are used as a method to punish people on the basis their sexual orientation, whether actual or perceived, and serve as a justification for discrimination against sexual minorities. Despite the fact that these anti-homosexuality laws are not often enforced through legal avenues, LGBTIQ individuals are often subjected to hate speech, physical violence, police harassment, social stigma, unwarranted arrests and even murder as a result of the existence of these laws.¹⁵ The ramifications of these laws go beyond their direct application in the criminal justice system.¹⁶ Their existence in statute gives legitimacy to anti-homosexual campaigns and encourages violence and discrimination against sexual minorities perpetrated by both government officials and private individuals, from community to family members.¹⁷

¹³ Penal Code, Cap 63 of the Laws of Kenya, S. 162 (a).

¹⁴ Kushner J, 'The gay-rights activists hoping for a legal victory in Kenya' *The New Yorker*, 3 March 2019, -< <https://www.newyorker.com/news/news-desk/the-gay-rights-activists-hoping-for-a-legal-victory-in-kenya>> on 10 December 2019.

¹⁵ 'Teen beaten to death for being a lesbian' *Sunday Times*, 6 February 2006.

¹⁶ Cameroon E, 'Sexual orientation and the constitution: A test case for human rights' 110 *South African Law Journal*, 1993, 450

¹⁷ Kenya Human Rights Commission, 'The outlawed amongst us: A study of the lgbti community's search for equality and non-discrimination in Kenya', 2011, <<https://www.khrc.or.ke/mobile-publications/equality-and-anti-discrimination/70-the-outlawed-amongst-us/file.html>> on 3 April 2020.

Kenyan courts have made significant strides in demonstrating their judicial independence by making significant rulings that uphold and defend the human rights of Kenyans and protect against the unconstitutionality of certain laws and policies.¹⁸ However, as recent events have shown, petitions challenging the unconstitutionality of anti-gay laws have failed to move the judicial system and they remain enforceable, much to the disappointment of human rights and LGBTIQ activist groups. The President of Kenya, His Excellency Uhuru Kenyatta, also recently made it clear in a joint press statement issued at the State House, that the issue of gay relationships and homosexuality remain a “non-issue” in the National development agenda moving forward, which could be interpreted as the State’s general view on the issue.¹⁹

The discrimination and marginalization of homosexual individuals in Africa, and in the case of this research, Kenya, has raised pertinent questions regarding the Constitutionality of the laws criminalising same-sex conduct in light of the fundamental freedom from discrimination, the right to privacy, the right to human dignity as well as international human rights standards. Where do we draw the line between preserving our African-ness, respect for the rule of law and the human rights of the LGBTIQ individuals?

This study aims to evaluate whether indeed the anti-homosexuality legislations in Kenya are constitutional in the light of recent judgements of the Kenyan High Court; the conceivable inclusion of sexual orientation as a comparable ground in the list of prohibited grounds for discrimination; and the overall ramifications of the decriminalization of the same-sex unions.

1.4.OBJECTIVES OF THE STUDY

The objectives of the study are as follows:

1.4.1. General Objectives

To establish the legal prospects of decriminalising same-sex unions in Kenya.

1.4.2. Specific Objectives

- i. To discuss the legal framework on criminalization of same-sex unions in Kenya;

¹⁸ Shiundu A, ‘Long road to independence’ 12 December 2018, < <https://www.dandc.eu/en/article/kenya-has-made-progress-towards-judicial-independence-new-constitution-promises>> on 3 April 2020

¹⁹ YHEPP, ‘Ten reasons why Kenya should decriminalize homosexuality, -< http://www.hirschfeld-eddy-stiftung.de/fileadmin/images/projekte/Kenya_should_decriminalize_homosexuality.pdf> on 10 December 2019

- ii. To discuss the constitutionality of anti-homosexuality in Kenya in light of the recent High Court rulings;
- iii. To investigate the prospects of decriminalising homosexuality in Kenya;
- iv. To explore the Constitutional approaches to the decriminalization of same-sex unions in Kenya;
- v. To compare regional and international approaches to homosexuality and same-sex unions to that of Kenya.

1.5.RESEARCH QUESTIONS

This study aims to answer the following questions:

- a. What are the justifications for criminalizing same-sex unions in Kenya?
- b. What are the judicial arguments for upholding anti-homosexuality laws in Kenya?
- c. To what extent can the Constitution be interpreted and applied to advance a case for decriminalization of same-sex unions?
- d. What are some of the challenges facing decriminalization of anti-homosexuality laws in Kenya?
- e. What are some of the potential effects of legalizing same-sex unions in Kenya?
- f. What lessons can Kenya learn from other jurisdictions that have decriminalized same-sex unions?

1.6.RESEARCH HYPOTHESIS

This study is based on the following assumptions:

- a) That the anti-homosexuality laws in Kenya are unconstitutional in relation to international principles of human rights and that there is an opportunity at decriminalizing same sex unions in the country.

- b) That decriminalizing of same-sex unions would have more legal benefits than detrimental effects.

1.7.SIGNIFICANCE OF THE STUDY

This study focuses on the constitutionality of anti-homosexuality laws in Kenya and a constitutional, legislative and ethical approach towards decriminalizing same-sex unions. Judicial decisions of the High Court of Kenya on petitions challenging the constitutionality of these laws shall also be discussed to examine the court's rationale for upholding these anti-homosexuality laws. The approach taken by selected regional and international jurisdictions that have decriminalized same-sex unions shall also be discussed to identify potential ethical and legal implications of legalizing the same in Kenya. This study aims to inform legislators, policy makers, the Police, the Courts, LGBTIQ and human rights activists in a bid to promote a more unified approach towards homosexuality issues.

1.8.SCOPE OF THE STUDY

The scope of this study will be the constitutional provisions pertaining to and statutes criminalizing same-sex unions in Kenya. It will also highlight some regional and international legislation on the same. Authorities shall also be incorporated in order to aid this research.

1.9. RESEARCH METHODOLOGY

The findings of this study shall be a combination of library and internet research. These sources shall enable me to get an in-depth understanding of the area of research, interrogate the legal frameworks in place in the various jurisdictions within the scope of this study, judicial decisions resulting from litigation on the issue and scholarly publications on the issue of same-sex unions.

1.10. THEORETICAL FRAMEWORK

It is important for the purpose of this research, to understand the dynamics that shape the opinions and approaches on matters of homosexuality and same-sex relationships and activity. Therefore, this study is premised on and discusses the theories of natural law, theories of discrimination, social movement theory and modernization theory.

1.10.1. The Natural Law Theory

The Natural law theory is a legal theory that recognizes law and morality as being intimately connected. Morality relates to what is right and wrong; good and bad. Natural law theorists believe that human laws are defined by morality and thus we are guided by human nature to determine these laws.²⁰

The Natural law is mostly associated with conservative perceptions especially on matters of morality. John Finnis, one of the main proponents of this theory, has been a major exponent of the line of thought that homosexuality and same-sex unions are something immoral.²¹ Finnis represents a group of new natural law theorists who argue that while homosexual conduct should not be criminalized, it should be discouraged.²² Fundamentally, there are some basic human goods that persuade reasonable action on the part of individuals, families, communities, and governments, and delineate the role and scope of government. Finnis believes that homosexuality is a distraction from some of these basic human goods and harmful for the individuals who participate in it. Finnis argues that his position is based on a perception of sexual activity that is compatible with human rights and the individual's benefit. Although he argues that homosexual behavior should be discouraged (and refused any recognition as a legitimate option for human activity), it is unjustifiable to criminalize these activities or those involved in them.²³ In essence, this means that Finnis believes that acts of homosexual behavior performed in private should not be considered within the scope of the law, but that public endorsements and legal validation of this behavior should be subject to the law across positions such as formally recognized marriages and treated differently as heterosexual unions and actions.

Thomas Aquinas made the most influential formulation of the theory of natural law in the thirteenth century. Aquinas stressed the central nature of certain human goods, including marriage.²⁴ While Aquinas did not write much about some aspects of sexuality, such as same-sex

²⁰ 'Natural law theory: Definition, ethics & examples' -< <https://study.com/academy/lesson/natural-law-theory-definition-ethics-examples.html>> on 10 December 2019.

²¹ Marcin RB, 'Natural law, homosexual conduct, and the public policy exception', CUA Law Scholarship Repository (The Catholic University of America, Columbus School of Law), 1998.

²² Finnis J, 'Natural law and natural rights', Clarendon Press, Oxford, 1980, 18.

²³ Coleman BB, 'On the Stephen Macedo and John Finnis exchange: natural law, liberalism, and homosexuality: A critical assessment', Georgia State University, 31 July 2006.

²⁴ Finnis J, "Is natural law compatible with limited government?" in Robert PG, 'Natural law, liberalism, and morality, ed. Clarendon Press, Oxford, 1996.

sexual relations, he did write at length about various sex acts as sins. For Aquinas, sexuality that was well within the boundaries of marriage and which helped to advance what he saw as the distinguishable goods of marriage, particularly love, intimacy and legitimate children, was acceptable as well as good.²⁵ Therefore, all sex outside the marriage boundaries, whether pre-marital or extra-marital, is immoral. By contrast, romantic, uncontracepted vaginal intercourse within a marriage is not simply permissible, it is pleasurable in itself, even apart from the pleasure and intimacy that it affords. "Conjugal acts" are thus just sex, where "just" in its moral sense is meant. Aquinas did not argue that procreation was a necessary part of moral or just sex; married couples could enjoy sex without the motive of having children, and sex in marriages where one or both partners is sterile²⁶ is also potentially just (given a motive of expressing love). It is interesting to note that there is no need to exclude homosexual sex from the viewpoint of Aquinas. One may embrace marriage of the same sex and then extend the same reasoning, simply by seeing the couple as a reproductively sterile, yet totally loving and companionate union.²⁷ This research notes that although the context Aquinas desired to put across does not necessarily embrace homosexuality, some of his underlying arguments can be used as a justification for decriminalization of homosexuality.

Many natural law theorists who are pro-homosexual freedoms contend that the very foundations of natural law values may lead to a different view of morality possibly a new more progressive agenda for same-sex marriages and unions.²⁸ It is often difficult to ascertain whether natural law accepts, precludes or forbids same-sex unions because it applies to a number of legal and ethical positions, of which natural law scholars are not completely committed to one specific position.²⁹ Various theorists do indeed claim that Natural law precludes same-sex marriages on grounds of moral impermissibility³⁰, however, there has been uncertainty in the past on the actual position of certain other practices such as interracial marriages and nonprocreative sex which raises the question of whether the same lack of consensus would be expected with regard to same-sex unions,

²⁵ Finnis J, 'Natural law and natural rights', 18.

²⁶ Finnis J, 'Natural law and natural rights', 22.

²⁷ Coleman BB, 'On the Stephen Macedo and John Finnis exchange: natural law, liberalism, and homosexuality'.

²⁸ Marcin RB, 'Natural law, homosexual conduct, and the public policy exception', 1998.

²⁹ Fuller LL, 'Positivism and fidelity to law-A reply to professor Hart, 71 (630) *Harvard Law Review*, 1958, 644-45.

³⁰ Hoevermill JW, 'A conflict of laws and morals: the choice of law implications of Hawaii's recognition of same-sex marriages, 53 (450) *MD Law Review*, 1994, 482-83.

and thus more objectivity and flexibility given when determining the moral propriety or impropriety of the phenomenon.

This theory informs this study by recognizing the different approaches to the issue of morality and the permissibility of same-sex unions in Kenya as a fundamental and natural right to live their life as long as it does not cause any detrimental harm to others in society.

1.10.2. The Theories of Discrimination

Moral theories of discrimination make clear the mixed reactions that people, including judicial officers, have when there are significant differences among populations and governments when formulating social policy.³¹ These moral reactions often play a huge role in shaping the legal reasoning.³² The discussion on same-sex unions and conduct is a particularly appropriate when addressing moral theory and discrimination because it illustrates how the judicial system views marriage discrimination against same-sex couples.³³ There are three main theories of discrimination that could be used to inform this study in relations to the constitutionality and morality of anti-homosexuality laws in Kenya which include: result-based; process-based; and expressive based.

1.10.2.1. Outcome-Based Theories

The outcome-based theories focus on the effect of the discriminating act.³⁴ Outcome-based theorists focus on how legislation affects societies.³⁵ Discrimination can have extraordinary effects. It can generate feelings of inferiority; a psychological or emotional effects in a selected group; a stigma, in which the discriminating act contributes to a corruption of the target's identity based on race, sex, sexual orientation, or economic class.³⁶

Professor Cass Sunstein's "anti-caste principle" is a prime example of outcome-based theories.³⁷ He argues that any legal or social practices that use certain differences to contribute to the creation of second-class citizenship should not be tolerated,³⁸ however his position is that criminalisation

³¹ Farra A, 'Theories of discrimination & gay marriage' 2010, 69 *MD Law Review* endnotes, 1.

³² Wright RG, 'The role of intuition in judicial decision making', 2006, 42 (1381) *HOUS Law Review*, 1420–21.

³³ Wright RG, 'The role of intuition in judicial decision making' 1421.

³⁴ Sunstein CR, 'The Anti-caste principle', 92 (2410) *Michigan Law Review*, 1994, 2417.

³⁵ Deborah Hellman, 'When is discrimination wrong?' 2008, 4.

³⁶ Koppelman A, 'Anti-discrimination law and social equality', 1996.

³⁷ Sunstein CR, 'The Anti-caste principle' 2417.

³⁸ Sunstein CR, 'The Anti-caste principle' 2455.

of homosexual unions and conduct creates a caste system based on gender and not necessarily based on sexual orientation.³⁹ He argues that criminalisation of legally recognised same-sex unions, attempts to reinforce the natural differences between women and men⁴⁰ specifically, the role that men and women have in sexual activity where the man penetrates and the woman is penetrated.⁴¹ Thus, Sunstein argues that caste-like treatment towards women on the basis of patriarchal misconceptions of gender roles is the main cause of the intolerance of same-sex conduct and unions.⁴²

1.10.2.2. Process-Based Theories

Following the conceptualisation of discrimination on a continuum, process-based hypotheses concentrate on the start of the timeline or the phase leading to the enforcement of the discriminatory act.⁴³ The flaw is the inclusion of some contaminating factors, almost invariably, such as prejudice against a particular group, a desire for harm, animus, or an irrational generalisation.⁴⁴ Professors Joseph Tussman and Jacobus tenBroek have argued that a law generally has one of two purposes: achieving some public good; or eliminating an evil.⁴⁵ In the end, according to this theory, the prohibition against discriminatory legislation focuses on the legislator's intent.⁴⁶ If the motive is rooted in hatred, bigotry, vengeance, aggression, or arbitrariness, then it is void in law.⁴⁷

The result for sexual orientation discrimination is fairly clear. Constitutional or statutory provisions designed to ban homosexuals from pursuing any constitutional, executive, or legal protection can be sufficiently interpreted as being born of resentment and are therefore invalid for failing to provide equality under the law.

³⁹ Sunstein CR, 'Homosexuality and the constitution', 70 (1) *Indian Legal Journal*, 1994, 21–22.

⁴⁰ Sunstein CR, 'Homosexuality and the constitution' 20-21.

⁴¹ Sunstein CR, 'Homosexuality and the constitution' 21-22.

⁴² Koppelman A, 'The miscegenation analogy: sodomy laws as sex discrimination, 98 (145) *Yale Legal Journal*, 1988, 159 n 86

⁴³ Koppelman A, 'Anti-discrimination law and social equality', 55.

⁴⁴ Koppelman A, 'Anti-discrimination law and social equality', 55.

⁴⁵ Tussman J & tenBroek J, 'Equal protection of the laws', 37(341) *California Law Review*, 1949, 357–58.

⁴⁶ Tussman J et al, 'Equal protection of the laws', 37(361), 358-59.

⁴⁷ Tussman J et al, 'Equal protection of the laws', 37(361), 358-59.

1.10.2.3. Expression-Based Theories

Expressive theories of discrimination forge a kind of intermediate course between process-based and outcome-based theories.⁴⁸ When conceptualizing discrimination as a continuum, the emphasis is on the act at the time of enforcement or the kind of message the act sends.⁴⁹ The question of this principle in the sense of equal protection is whether the meaning or expressiveness of a procedure means that a particular group of people matters less to the legislature or government.⁵⁰

The consequences of following an expressive-based paradigm for discrimination based on sexual orientation remain uncertain. Part of the vagueness is due to the fact that determining what is degrading is an interpretative exercise and there is some unavoidable grey interpretative area as to whether something degrades.⁵¹ A study of various aspects of society and culture could indicate that a particular discriminatory act directed at homosexuals could be demeaning.⁵² In a way unlike discrimination against women or African-Americans, some find discrimination against homosexuals to be widespread across society.⁵³

1.10.3. The Social Movement Theories

Progressive movements are characterized as networks of informal interactions based on common interests and collective identities between a heterogeneity of individuals, groups and/or associations involved in political or cultural controversies.⁵⁴ Another example of such social movements is the LGBTIQ activist groups. In understanding why social movements are conceived and evolve, it is necessary to consider the following theories which attempt to explain the roots of progressive movements: theory of deprivation; theory of resource mobilization; and new theories of social movement.⁵⁵

⁴⁸ Hellman D, 'When is discrimination wrong?' 2008, 2.

⁴⁹ Hellman D, 'When is discrimination wrong?' 2008, 1-3.

⁵⁰ Anderson ES & Pildes RH, 'Expressive theories of law: A general restatement', 148 *University of Pennsylvania Law Review*, 2000, 1503, 1525

⁵¹ Hellman D, 'When is discrimination wrong?', 48.

⁵² Hellman D 'When is discrimination wrong?', 59.

⁵³ Koppelman A, 'Anti-discrimination law and social equality', 148-149.

⁵⁴ Cohen JL, 'Strategy and identity: New theoretical paradigms and contemporary social movements', 52 *Social Research*, 1985, 663-716.

⁵⁵ Anindya Sen & Ömer Avci, 'Why social movements occur: theories of social movements', 11(1) *The Journal of Knowledge Economy & Knowledge Management*, 2016, 125-130.

1.10.3.1. The Deprivation Theory

Many social movements are initiated, according to the adherents of the deprivation theory, when certain individuals or certain sections of society feel deprived of a particular commodity, service, or resource.⁵⁶ The theory of deprivation apparently affords a powerful reason for the birth of some social movements. It doesn't justify why poverty doesn't spark the birth of a social movement in some situations, though. This ultimately leads to the presumption that while the presence of poverty may be a prerequisite for the emergence of a social movement, but may not be a sufficient condition for it. In other words, for a social movement to be born, deprivation needs to be present along with other factors in order for a social movement to be born. In spite of the above difficulty, it seems that the deprivation theory may provide a partial explanation as to why a social movement is born. In relation to this study, one can argue that the LGBTIQ movement was born by the deprivation of social and legal equality as well as continuous discrimination.

1.10.3.2. The Resource Mobilization Theory

The resource mobilisation theory supplicates the significance of adequate resources being available at the conception of a social movement. This theory therefore says that when some people in a society have certain grievances, they may rally the necessary resources to do something to relieve those grievances. In this context, the word resources applies to things like capital, labour, social status, information, media support and political class.⁵⁷ The theory is relevant to this study because the campaign in Kenya seeking to decriminalize anti-homosexuality legislation has gained increased attention due to the efforts of the LGBTIQ community and the movement's supporters, allowing them to continue to pursue legal mechanisms to challenge those laws.

1.10.3.3. The New Social Movement Theories

The new theories of social movement emerged during the 1960s, mostly in several various countries of Western Europe. Such theories originated as a reaction to the deficiencies of classical

⁵⁶ McCarthy JD & Zald MN, 'Resource mobilization and social movements: A partial theory', 82 *American Journal of Sociology*, 1977, 1212-1241.

⁵⁷ McCarthy JD et al, 'Resource mobilization and social movements: A partial theory', 1212-1241.

Marxist theories for collective action interpretation, but have since shifted away from the typical Marxist paradigm of collective action,⁵⁸ but have since shifted away from the typical Marxist paradigm of collective action assessment from a purely economic perspective. Such ideas then look to other motivators of collective action rooted in politics, philosophy and culture.⁵⁹

Such studies also focus on new definers of collective identity, such as race, gender and sexuality, in order to understand the causal factors of collective action.⁶⁰ Naturally Classical Marxism found socio-economic class the main definer of collective identity. Nevertheless, new theories of social movement try to create ideas that can explain the actions of contemporary societies, where a considerable amount of the population is trained and informed.

In addition, new theories of the social movement function in a dogmatic context constructed by issues relating to individual rights in relation to the rights of the state over its citizens. These theories suggest that this tension between individual rights and the rights of the state takes place in the context of contemporary societal values based on a desire for community, self-realization and personal gratification.⁶¹ In a nutshell, classical theories of social movement (many of which were founded on Marxist ideology) focused on issues mainly related to the oppression of one social class by another; on the other hand, New Social Revolution Theories addressed issues related to individual citizens, aimed at explaining the actions of recent political movements such as the women's liberation movement, the environmental movement, and the anti-corporate and LGBTIQ rights movement.⁶²

One of NSMT's main criticisms is that it tends to understate the tensions between different socio-economic classes of society; however, different socio-economic classes do exist even in a modernist society, and they encounter frictions with each other. Another condemnation is that NSMT tends to treat movements as belonging to the same variety, although clearly these ideologies are quite similar.⁶³

⁵⁸ Buechler SM, 'New social movements and new social movement theory', *The Wiley-Blackwell Encyclopedia of Social and Political Movements*, 2013.

⁵⁹ Anindya Sen & Ömer Avci, 'Why social movements occur: theories of social movements', 125-130.

⁶⁰ Buechler SM, 'New social movements and new social movement theory'.

⁶¹ McCarthy JD et al, 'Resource mobilization and social movements: A partial theory', 1212-1241.

⁶² Tilly, C, 'Social movements', Boulder, CO: Paradigm Publishers 2004, 1768-2004.

⁶³ Tilly, C, 'Social movements', 1768-2004.

1.10.4. The Modernization Theory

The theory of modernisation is a theory used to explain a state's process of modernisation as it pivots from a traditional society to a modern one. The theory has not been linked to any individual; rather, its development is attributed to American social scientists in the 1950s.⁶⁴

As several analyses have shown, gays and lesbians enjoy more rights in countries with a higher degree of modernisation.⁶⁵ This is because, as authors usually contend, that as modernization progresses, a change of values can be observed that includes growing tolerance for alternative lifestyles. Frank and McEneaney (1999) provide an alternative explanation of the effect of modernisation. They consider modernisation to be part of the opportunity structure that determines the success or failure of social movements. Economic development, educational expansion, and urbanisation have led to the development of predominantly urban, middle-class social movements advocating the emancipation of discriminated groups.⁶⁶ Further, this theory propounds that, the tolerance that comes with modernization of a society also has an effect on the legislation and policies of said society.⁶⁷

This theory is therefore relevant to this study because it illustrates that with Kenya being a developing country that has seemingly been modernized over the last few decades, there is a possibility that tolerance may be a result of this modernization in relation to homosexual and same-sex activity, with particular regard to legislation, social policies and homosexual rights.

1.11. LITERATURE REVIEW

Homosexual rights have caused significant controversy in Africa. Numerous papers were published on the rights of gays and lesbians in South Africa.⁶⁸ This is linked to the fact that South Africa is known internationally as the vanguard of homosexual rights by being the first state to

⁶⁴ 'Modernization theory: Definition, development & claims', - <https://study.com/academy/lesson/modernization-theory-definition-development-claims.html> on 12 December 2019

⁶⁵ Hildebrandt A Dr, Trüdinger E-M Dr & Wyss D, 'The missing link? Modernisation, tolerance, and legislation on homosexuality', University of Stuttgart Institute for Social Sciences.

⁶⁶ Hildebrandt A Dr et al, 'The missing link?'

⁶⁷ Burstein P, "Policy Domains." *17 Annual Review of Sociology*, 1991, 327-350.

⁶⁸ Cameron E, 'Constitutional; protection of sexual orientation and African concepts of humanity', 118 *South African Law Journal*, 2001, 642.

incorporate sexual orientation into its national constitution.⁶⁹ De Vos published several articles on homosexual rights in South Africa. His research puts strong emphasis on the legal protection of gay and lesbian rights.⁷⁰ He recognises the legislation as a tool that gays and lesbians should use to achieve equality.⁷¹ This research is in keeping with that approach. De Vos does not really look at other African countries except South Africa, however. He does not explicitly address the issue of decriminalizing same-sex unions or conduct that this study aims to address in relation to the jurisdiction of Kenya.

One research dealt with the potential role of the judiciary in protecting homosexuals in Kenya in light of the Kenyan constitution.⁷² Upon updating the provisions of the Penal Code criminalizing consensual homosexual sexual acts, Nyarang'o focused on decriminalizing homosexual behaviour in Kenya as a tactic to reform law and the police. He proposed that judges play a key role in ensuring that homosexuality is decriminalised.⁷³ She proposed that a robust and restructured judiciary make progressive extrapolation of the Kenyan constitution with the aim of standing up for the rights of sexual minorities in Kenya.⁷⁴ Her dissertation, however, does not evaluate the constitutional rights of equality, human dignity and privacy guaranteed in the constitution as an avenue to be examined in the decriminalization of the same-sex unions of Kenya. She also fails to address the opportunities which the Kenyan judiciary might borrow from other jurisdictions. However, this study will evaluate how sexual identity can be read into the list of prohibited grounds under Article 27(4) of the Constitution of Kenya. It further explores perspectives from South Africa, Canada, the United States and India pertinent to safeguarding homosexual rights in Kenya.

Oloka-Onyango⁷⁵ has examined the current situation of the legal struggles surrounding the situation of sexual minorities in the East African countries such as Kenya. He studied the use of law and legal measures in combating discrimination on the basis of sexual orientation and gender

⁶⁹ P De Vos, 'The inevitability of same sex marriage in South Africa's post-apartheid state', 23 *South Africa Journal on Human Rights*, 2007, 432-465.

⁷⁰ P De Vos, 'On the legal construction of gay and lesbian identity in South Africa's transitional constitution', 322 *South Africa Journal on Human Rights*, 1996, 265.

⁷¹ P De Vos, 'On the legal construction of gay and lesbian identity in South Africa's transitional constitution' 265.

⁷² Nyarang'o IIK, 'The role of judiciary in the protection of sexual minorities in Kenya', LLM thesis University of Pretoria, 2011, 1.

⁷³ Nyarang'o IIK, 'The role of judiciary in the protection of sexual minorities in Kenya', 35.

⁷⁴ Nyarang'o IIK, 'The role of judiciary in the protection of sexual minorities in Kenya', 36.

⁷⁵ Oloka OJ, 'Debating love, human rights and identity policies in East Africa: The case of Uganda and Kenya', 15 *African Human Rights Law Journal*, 2015, 28.

identity. He has explored some of the conceptual aspects that shape legal frameworks in Kenya. He went on to analyse the legal framework for intersex and transgender people, including court decisions. His article does not explore how to build a constitutional argument in favour of decriminalizing same-sex unions based on the rights to equality, human dignity and privacy as protected by the Kenyan Constitution, and this study wishes to fill the gaps in those fields.

Rudman in his article explores two issues.⁷⁶ Firstly, he discusses how, when it comes to sexual orientation, the rights to dignity, equality and non-discrimination should generally be interpreted and applied within the regional African human rights system. He draws on the definition of these freedoms in line with international human rights law, as well as the jurisprudence of the European Court of Human Rights and its Inter-American Court of Human Rights. Second, he analyses the procedural or other challenges that might stand in the way of bringing to the African Commission on Human and People's Rights or the African Court on Human and People's Rights a claim for discrimination based on sexual orientation. In this respect, he considers specifically the general restrictions placed on individuals and NGOs in bringing complaints to the courts and the real ones.

The article addresses these questions by analysing some key developments by the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. The main objective is to use these institutions' approach to examine all legal avenues under the Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court of Human and People's Rights and the rights and obligations under the African Charter open to anyone who wishes to question any domestic law that criminalizes consensual acts of the same sex. His research is oriented towards the national human rights framework. This study will, however, focus more on the national constitution and the statues of same-sex unions in an effort to build an argument for possible decriminalization of the same in Kenya.

1.12. CHAPTER BREAKDOWN

This study is divided into five chapters. **Chapter one** is the introduction to the research and identifies the background of the study, the statement of problem, the research objectives, the

⁷⁶ Rudman A, 'The protection against discrimination based on sexual orientation under the African human rights system', 15 *African Human Rights Law Journal*, 2015, 1.

research questions, the research hypothesis, the significance of the study, the research methodology, the theoretical framework and the literature review adopted by the research.

Chapter two examines the Kenyan understanding of homosexuality and same-sex unions as concepts focusing on the religious, cultural and political discussions. It also provides a history of and justifications for criminalization of same-sex activity in the country together with Kenya's current legislative and judicial position on the issue.

Chapter three discusses the international and regional position on decriminalization of same-sex unions and conduct by analysing both international and regional human rights instruments, institutions and jurisprudence. Further, this chapter gives an analysis of the challenges of decriminalizing same-sex unions in Kenya.

Chapter four contains a comparative study of the position of decriminalization of same-sex unions in South Africa and Angola vis-à-vis Kenya in order to identify variations and differences among those jurisdictions pertaining to the phenomenon, and to establish the best practices and lessons that can be learned moving forward.

Finally, **Chapter five** concludes the study by consolidating the major findings of the research, giving the conclusions drawn from those findings and lastly providing recommendations aimed at protecting the rights of gays and lesbians involved in same-sex relationships in Kenya.

CHAPTER TWO

UNDERSTANDING THE CONCEPT OF HOMOSEXUALITY, THE LEGISLATIVE FRAMEWORK ON CRIMINALIZATION OF SAME-SEX UNIONS AND THE JUDICIAL POSITION ON THE CONSTITUTIONALITY OF ANTI-HOMOSEXUALITY LAWS IN KENYA

2.1. INTRODUCTION

This chapter analyses the concepts of homosexuality and same-sex unions in Kenya, the evolution of the concept, a concise history about how the current anti-homosexuality laws came to be, some of the religious, cultural and political factors that moulds Kenya's position on same-sex unions and the pro and anti-decriminalization of anti-homosexuality laws arguments. Further, this section of the study shall analyse Kenya's legislation that criminalizes same-sex unions as well as the judicial position of Kenyan courts on the constitutionality of anti-homosexuality laws.

2.2. UNDERSTANDING HOMOSEXUALITY IN KENYA

To further the research objectives of this study, it is important to understand Kenya's position on homosexuality and same-sex unions and a history of how the current anti-homosexuality laws came to be.

2.2.1. Homosexuality as a Concept

Homosexuality speaks both to identity and behaviour as a concept. It is classified as the sexual want, desire and responsiveness attraction towards people of the same sex.⁷⁷ The person does not actually need to have sexual relationships to fit in with this definition, but the pure desire for sexual relationships with another person of the same sex is necessary in this definition to be identified.

Notwithstanding some jurisdictions, such as South Africa, claiming that homosexual behaviour is an articulation of homosexual identity and is therefore indiscernible, it is important to distinguish

⁷⁷ Masango M, 'Homosexuality: A challenge to African churches', 58 *HTS Theological Studies*, 2002, 958.

homosexuality in terms of identity and behaviour since it is in fact the behaviour itself that is explicitly criminalized in Kenya and not the identity per se.⁷⁸

2.2.2. Evolution of the Concept of Homosexuality

A Hungarian writer Karoly Maria Kertbeny coined the term "homosexuality"⁷⁹ in the 19th Century. Nevertheless, it is unfeasible to use the term to describe all people who express the same sexual desire because sexual identity has become a source of social, geographical and even political commitment, all in a unique and individualistic way. This means that it would be unjustified to classify all gays and lesbians into one general definition.⁸⁰

Sexual practices were regulated by three explicit codes before the wake of the 18th century: canon law; pastoral Christian law; and civil law. The distinction between infidelity breaches of marriage laws and sexual activity was vague and would often overlap.⁸¹ Although many scholars and historians have discussed the existence of the same sexual relations since ancient times, it was only during the drastic social and economic changes witnessed in Western culture in the late 19th century that certain individuals started to be classified as homosexuals.⁸² This categorization implied a pervasive quality of homosexual activity.

According to Michael Foucault⁸³, homosexuality is a social construct and not a natural category.⁸⁴ Overtime it became apparent that homosexuality is more than just a physical attraction to the same sex, but a life-long penchant for same sex and romantic relationships.⁸⁵ Homosexuality's most widely acknowledged theory of evolution is that propounded by E.O Wilson between 1975 and 1978. This theory holds that early homosexuals enabled close family members and friends to reproduce more effectively, either actively or passively, thereby transmitting homosexual genes,

⁷⁸ Wekesa SM, 'A constitutional approach to decriminalisation of homosexuality in Africa: A comparison of Kenya, South Africa and Uganda', LLD Thesis University of Pretoria, 2016.

⁷⁹ Pickett B, 'Homosexuality', *The Stanford Encyclopedia of Philosophy*, 2011, 50. - <http://plato.stanford.edu/archives/spr2011/entries/homosexuality/> on 12 December 2019.

⁸⁰ Caplan P, 'The cultural construction of sexuality', 1987, 30.

⁸¹ Foucault M, 'The history of sexuality: An introduction', 1978, 37-38.

⁸² Foucault M, 'The history of sexuality: An introduction', 43.

⁸³ Foucault M, 'The history of sexuality: An introduction', 43.

⁸⁴ Foucault M, 'The history of sexuality: An introduction', 43.

⁸⁵ Thorp J, 'The social construction of homosexuality', 46 *Phoenix*, 1992, 54-61.

either directly or indirectly.⁸⁶ Nevertheless, this hypothesis was strongly questioned as, according to evolutionary psychology, homosexual behaviour has no intrinsic meaning and therefore would not have prevailed and therefore, even from a scientific point of view, there is no simple biological or genetic justification to support this theory.⁸⁷

Same-sex relationships between women have occurred with women coming together to support each other in terms of child care and companionship in times of economic hardship when men had to leave their families in search of work and economic gain.⁸⁸ Such partnerships also extended to sexual intercourse, with older women teaching sex and child care to their younger counterparts using a more practical approach.⁸⁹ These interactions form a life-long bond between these women.

There is evidence of same-sex relationships in Africa before the advent of colonialism.⁹⁰ An example of this would be the Azande community in Northern Congo where younger males would act as temporary wives to older males.⁹¹ Further, Bantu speaking Pouhain community, which is the modern day Gabon and Cameroon, engaged in wealth creating rituals which involved same-sex activity between men⁹², while lesbianism was ascribed to women who were seeking to become chief diviners called *isanuses* among the Cape Bantus.⁹³ According to Cameroonian anthropologist Severin Cecile Abega, Negro-Africans usually assimilated homosexuality with a kind of witchcraft.⁹⁴ In the collective imagination of African cultures, Achille Mbembe advances the theory of "initial repression" of homosexual activity and its connection with supernatural influence.⁹⁵ Since, several studies have shown that sexuality in Africa was complex and varied at

⁸⁶ Muscarella F, 'The evolution of homoerotic behavior in humans', *Journal of Homosexuality*, 2000, 52.

⁸⁷ Muscarella F, 'The evolution of homoerotic behavior in humans', 52.

⁸⁸ Muscarella F, 'The evolution of homoerotic behavior in humans', 66.

⁸⁹ Wekesa SM, 'A constitutional approach to decriminalisation of homosexuality in Africa'.

⁹⁰ Epprecht M, 'Sexuality and social justice in Africa: Rethinking homophobia and forgoing resistance', 2013.

⁹¹ Sexual Minorities Uganda, 'Expanded criminalisation of homosexuality in Uganda: A flawed narrative', - <http://sexualminoritiesuganda.com/images/expanded%20criminalisation%20homosexuality%20in%20Uganda-%20january%202014.pdf>, 9, on 12 December 2019.

⁹² Murray S, 'Homosexuality in 'traditional' sub-Saharan Africa and contemporary South Africa', - http://semgai.free.fr/doc_et_pdf/africa_A4.pdf on 12 December 2019.

⁹³ Stewart C, '21 varieties of traditional African homosexuality', -<http://76crimes.com/2014/01/30/21-varieties-of-traditional-african-homosexuality/> on 12 December 2019.

⁹⁴ Abega S C, 'Introduction à l'Anthropologie sociale et culturelle' Paris: Afrédit; 2007.

⁹⁵ Mbembe A, 'De la postcolonie' Paris: Karthala; 2000.

all times and at all times as it was elsewhere in the world,⁹⁶ heterosexual interactions and same-sex sexual activities coexisted.

The term “gay” then emerged in the 1970s, as an alternative description of homosexual lifestyle.⁹⁷ This term was used by the homosexual community as a means of self-definition of both males and females who had same-sex attractions.⁹⁸ The word gay has, however, become more widely used in recent times to identify homosexual males. The colonial masters introduced sodomy laws in Africa and targeted same-sex acts and specified that the offense to be committed had to be penetrated.⁹⁹ Subsequently, these laws evolved to include indecent assault and crimes against nature rules that do not amount to penetration, criminalizing aspects of homosexual identity.

2.2.3. History of Anti-Homosexuality laws in Kenya

The anti-sodomy laws were kept by the post-independence government under Jomo Kenyatta, who, according to Wanjira Kiama¹⁰⁰:

“[...]once claimed that there is no African word for homosexuality. This proves, he argues, that homosexuality is foreign and totally un-African. According to President Moi, "Kenya has no room or time for homosexuals and lesbians. Homosexuality is against African norms and traditions, and even in religion it is considered a great sin".¹⁰¹

The views of Kenyatta and Moi represent a rejection of men who have sex with men who run large and deep inside Kenyan society. This animosity continued under Daniel arap Moi's presidency, even as HIV / AIDS took a heavy toll on the Kenyan population across borders of sexual orientation.¹⁰²

⁹⁶ Epprecht, ‘The Making of ‘African Sexuality: Early Sources, Current Debates’ *Sexual Diversity in Africa: Politics, Theory, and Citizenship*. McGill-Queen’s University Press, 2013.

⁹⁷ Sutton TH, ‘The emergence of a male global gay identity: A contentious and contemporary movement’, 15 *Totem, The University of Western Ontario Journal of Anthropology*, 2011, 7.

⁹⁸ Sutton TH, ‘The emergence of a male global gay identity: A contentious and contemporary movement’, 8.

⁹⁹ Wekesa SM, ‘A constitutional approach to decriminalisation of homosexuality in Africa’, 56.

¹⁰⁰ Kiama W, "Homosexuality takes root in Kenya" *Daily Nation*, 1998.

¹⁰¹ Kiama W, "Homosexuality takes root in Kenya" *Daily Nation*, 1998.

¹⁰² <https://en.wikipedia.org/wiki/LGBT_history_in_Kenya>

A number of LGBTIQ groups were formed in the late 1990s and 2000s, with the Gay and Lesbian Coalition of Kenya (GALK) being the largest group in 2006, following a spike in violent anti-LGBT rhetoric. On 26 June 2012, the U.S. embassy in Nairobi hosted what was considered to be Kenya's first ever LGBT pride event. A public affairs officer at the embassy said, "For his part, the U.S. government has made it clear that promoting human rights for LGBT people is essential to our human rights policies around the world and our foreign policy priorities are being realized." Similar events took place around the world at other US embassies.¹⁰³

What is now known as Kenya began in 1896 as the British East Africa Protectorate, according to legal historians. The protectorate was governed by British law; no formal legal structure existed prior to that period. In fact, the name Kenya did not exist until it was founded in 1920 as a colony and in 1963 as an independent country. Around 1897 and 1902, when the British colonial government introduced the Indian Penal Code drafted by the British, which criminalised same-sex relations, the criminalisation of same-sex relations in Kenya dates back to that. The Indian Penal Code was a modern colonization initiative intended to regulate British protectorates and colonies overseas using British values and common law legislation. Dr. Nancy Baraza's work characterizes the context and logic of criminalizing homosexuality as part of the strategy of civilizing "natives," and promoting Christianity. She found that it led to social pressure on British moral and Christian religious values which aimed to standardize and easily control and colonize divergent ethnic sexual orientations. Dr Baraza found that these colonial laws governing sexuality and gender were closely linked to Judeo-Christian religious beliefs that gradually displaced African customary laws allowed and permitted coexistence of heterosexual relationships and homosexual cultural practices. Upon Kenya's independence in 1963, the pre-colonial Penal Code was adopted by the post-colonial state without substantive changes, save for the renamed title of the statute to reflect promulgation by the newly created sovereign Parliament of Kenya. Kenya remained therefore among those African countries that impose different penalties for same-sex relationships. In Sudan, Nigeria (12 northern states), Somalia and Mauritania the death penalty is imposed for homosexual sex. Life sentences in Tanzania, Uganda and Sierra Leone are imposed by a penal law. Kenya imposes a sentence of 14 years in prison.¹⁰⁴ To prove the crime of homosexual sex,

¹⁰³ Gogineni R, 'US embassy in Nairobi hosts gay pride event', Voice of America, 2012, -<
<https://www.voanews.com/africa/us-embassy-nairobi-hosts-gay-pride-event>>

¹⁰⁴ Section 165, *Penal Code Cap 63*

forced anal examinations are used to in Tanzania, Cameroon, Egypt, Tunisia and Uganda. Kenya's Court of Appeal banned the practice in 2018.¹⁰⁵

The African Commission on Human and Peoples Rights (ACHPR) noted that people in Africa continue to face violations due to real or imputed sexual orientation and/or identity of gender. According to the ACHPR, common offences include "corrective" rape, physical assaults, torture, assassination, arbitrary arrests, arrests, extrajudicial killings and executions, forced disappearances, extortion and blackmail.¹⁰⁶ In a 2014 resolution against violence on ground of sexual orientation or gender identity in Africa¹⁰⁷, the African Commission called on African states to take preventative actions and redress these violations, including through legal reform. The history of an applied legal system in relation to the criminalisation of same-sex conduct in Kenya was slightly altered by Act No 5 of 2003, when section 162 of the penal code was revised to abolish the corporal punishment that existed as a supplemental penalty to the 14-year imprisonment for homosexual sex.¹⁰⁸ This amendment also distinguished punishment for consensual unnatural offences (14 years) and non-consensual (sodomy) unnatural offences (21 years). Removal of corporal punishment for unnatural offences was part of general penal reforms to align Kenya's laws to international obligations against torture and cruel, degrading or inhumane treatment and punishment.¹⁰⁹

Kenya is vigorously applying the existing laws against homosexual offenses. In 2015, a "Ministerial Declaration on the Non-Enforcement of Anti-Gay Law in Kenya" indicated that 595 cases of homosexuality were prosecuted by the Kenyan police in Kenya between 2010 and 2014.¹¹⁰ The independent due diligence study from this police report found gross inconsistencies and conflation of homosexuality with bestiality allegations and defilement charges. The

¹⁰⁵ -<<https://www.buzzfeednews.com/article/tamerragriffin/kenya-forced-anal-exams-illegal>>

¹⁰⁶ Human Rights Watch, 'African commission on human and peoples' rights resolution 275: protection against violence and other human rights violations against persons on the basis of their real or imputed sexual orientation or gender identity', The African Commission on Human and Peoples' Rights (the African Commission), meeting at its 55th Ordinary Session held in Luanda, Angola, from 28 April to 12 May 2014.

¹⁰⁷ UN Security Council, *Security Council resolution 275 (1969) [Complaint by Guinea]*, 22 December 1969, S/RES/275 (1969), -< <https://www.refworld.org/docid/3b00f20d5c.html>> 16 December 2019.

¹⁰⁸ *Criminal Law (Amendment) Act, 2003 (No. 5 of 2003)*.

¹⁰⁹ 'Speaking truth to power', The Elephant, -<<https://www.theelephant.info/features/2019/02/28/the-gay-debate-decriminalising-homosexuality-in-kenya/>> .

¹¹⁰ Gitari EM, 'The gay debate: Decriminalising homosexuality in Kenya', 28 February 2019, -< <https://www.theelephant.info/features/2019/02/28/the-gay-debate-decriminalising-homosexuality-in-kenya/?print=pdf>> on 20 December 2019.

misrepresentation was either deliberate or intended to increase social opprobrium toward homosexuality (relating with bestiality and defilement to consensual private adult love of the same sex). It could also be due to errors due to poor police record-keeping whose reporting remains largely manual.¹¹¹

Furthermore, civil society groups tend to track violations of human rights based on sexual orientation and gender identity. In 2010 the Kenya Human Rights Commission (KHRC) found that LGBTIQ people in Kenya are regularly harassed by police, evicted from landlord homes, fired from work, refused access to health care and cut off from families, religious groups and social support institutions.¹¹² The National Gay and Lesbian Human Rights Commission (NGLHRC) has since 2012 been responding to and documenting violations against LGBTIQ persons.¹¹³ Annual legal aid reports from NGLHRC indicate that recurrent violations include “corrective” rape, physical assaults, arbitrary arrests, detentions, extrajudicial killings and executions, forced disappearances, extortion and blackmail, entrapment, among others. NGLHRC has been litigating on some of these violations, including challenging the use of forced anal examination to prove sexual orientation, forced evictions by landlords, dismissals from work, denial of government services and documents, etc.¹¹⁴

2.3. RELIGION AND POLITICS ON HOMOSEXUALITY IN KENYA

Kenya's most popular rhetoric against same-sex relations has come from the religious and political establishment, who often interpret homosexuality as contradictory to African culture and biblical teachings. Studies have found that this accusation of homosexuality is exogenous to Africa and aims at eroding the legitimacy of the same sexualities in Africa and claiming a homogeneous “cultural identity”.¹¹⁵ This makes the public dependent on political and religious leaders for "a

¹¹¹ Gitari EM, ‘The gay debate: Decriminalising homosexuality in Kenya’.

¹¹² Kenya Human Rights Commission, ‘The outlawed amongst us: A study of the lgbt community’s search for equality and non-discrimination in Kenya’, 2011, -<https://www.khrc.or.ke/mobile-publications/equality-and-anti-discrimination/70-the-outlawed-amongst-us/file.html> on 20 December 2019.

¹¹³ Kenya Human Rights Commission, ‘The outlawed amongst us: A study of the lgbt community’s search for equality and non-discrimination in Kenya’.

¹¹⁴ Kenya Human Rights Commission, ‘The outlawed amongst us: A study of the lgbt community’s search for equality and non-discrimination in Kenya’.

¹¹⁵ ‘Speaking truth to power’, The Elephant, -<https://www.theelephant.info/features/2019/02/28/the-gay-debate-decriminalising-homosexuality-in-kenya/>.

sense of self in the culture." It assures the public what the government is— that it is in charge, in control and functioning, or that it strives to work for its best interests and survival, including protecting the most vulnerable from "recruitment" and ensuring the nation's future by securing reproduction. Therefore, the law under review becomes a political bait, an attractive instrument for the domestic and international regeneration of political power. This is made possible when arguments over reproduction, marriage and the future intersect with popular religious doctrine and social anxieties.

Public discourse becomes more complicated when homosexuality is politicised with religious doctrines, the essence of which hardly permits debates required for democratic advancement. This politization of religion is linked to social anxieties about reproduction and social security.¹¹⁶ Studies have found that such political rhetoric has given rise to economic inequalities. In this power analysis of law, the inflation of arguments (such as preserving the country's morality) acts to displace desires and shortcomings through society and impose them on abstract minority human objects and whose presence or distinguishing factor (such as sexual orientation, in this case) is not distinctive or new to Kenya. We are a developing country that is struggling with poverty and a high population growth rate. Poverty, religious doctrine that does not require justification or deliberation, and a system of education whose compulsory curriculum teaches homosexuality to be a moral / social deviation can be seen as one of the key social economic factors involved in influencing the public's stance against homosexuality.

Activists argue that the Kenyan state's political capital invested in homophobia is a tactic to divert attention away from pressing economic issues, such as widespread corruption. Studies show that after the end of colonialism, arbitrary governments in most post-colonial African states “latched onto anti-homosexuality laws as ammunition in a battle for power”.¹¹⁷ Such political oratory has also flourished in countries with weak institutions, insufficient basic equality legislation, low participatory rights and social protection laws, growing disparities, rising unemployment among citizens and a general restrictive public civic environment.

¹¹⁶ Casanova J & Phillips A, ‘A debate on the public role of religion and its social and gender implications’, Geneva: United Nations Research Institute for Social Development, 2009.

¹¹⁷ ‘Speaking truth to power’, The Elephant, -<https://www.theelephant.info/features/2019/02/28/the-gay-debate-decriminalising-homosexuality-in-kenya/> .

2.3. JUSTIFICATION FOR CRIMINALIZATION OF SAME-SEX UNIONS IN KENYA

Three main reasons have been put forward to justify the criminalization of same-sex unions in Kenya, and African states in general. The first reason propounded is that homosexuality and same-sex unions are generally un-African since they go against traditional African values and customs. Secondly, it is argued that same-sex unions and activity goes against religious beliefs and practices. Thirdly and lastly is that same-sex unions and homosexuality is described as a personal choice.¹¹⁸

2.3.1. Homosexuality as an Affront to African Culture

Political leaders and some member of the society believe that homosexuality is not a natural concept and is simply an unnatural phenomenon imported from the West to corrupt the African culture.¹¹⁹ However, this argument can easily be disputed using anthropological evidence as previously discussed in this chapter.

The reality of the matter is that this claim is meant to deny homosexual individuals the right to speak as Africans. This would mean that society ignores the existence of openly homosexual people on African soil although, in reality, African gays and lesbians have been and continue to be very vocal.¹²⁰ Popular examples of such people include Simon Nkoli, a South African gay rights activist; David Kato, a Ugandan teacher who was murdered in 2011; and Fanny Ann Eddy, a Sierra Leonean who was murdered in 2004.¹²¹ Further, there are a number of LGBTIQ organizations that exist in various African states, including Kenya, where homosexuality is criminalized, that actively and openly fight for the rights of homosexual individuals. One of these organizations are the National Gay and Lesbian Human Rights Commission in Kenya.¹²² Even by the mere fact that African courts have recognized the existence of, and have convicted individuals for sodomy related crimes, in itself, is evidence that homosexuality does exist in African states.¹²³

To counter this argument, it is important to consider aspects of African societies that accommodate homosexuality.¹²⁴ Hence instead of dismissing the possibility of the African-ness of

¹¹⁸ Wekesa SM, 'A constitutional approach to decriminalisation of homosexuality in Africa', 56.

¹¹⁹ Rukwenza, 'Is homosexuality really un-African', -<<http://www.pambazuka.org/en/category/comment/32974>> on 13 December 2019.

¹²⁰ Wekesa SM, 'A constitutional approach to decriminalisation of homosexuality in Africa', 50.

¹²¹ -<<http://lgbthistorymonth.com/simon-nkoli?tab=biography>> on 13 December 2019.

¹²² -><http://76crimes.com/tag/nationa;-gay-and-lesbian-human-rights-commission/>> on 13 December 2019.

¹²³ *Kanane v The State* (2000) 4 LRC 621.

¹²⁴ Nyarang'o IIK, 'The role of judiciary in the protection of sexual minorities in Kenya', 28.

homosexuality, it would be more prudent to embrace the African culture of inclusiveness with regard to homosexual individuals.¹²⁵ African culture is not an inflexible concept, as it is diverse and constantly evolving, and therefore the principles of diversity, equality and harmony should be at the forefront of how members of society deal with homosexuality.¹²⁶

2.3.2. Homosexuality as an Affront to Religion

Although the formal positions of religions on sexuality and non-conformity between men and women are not necessarily static and continue to be debated and discussed, they serve as critical anchor points for religious leaders.

The formal position of Islam on same-sex sexuality is more outspoken. The Hadiths (reports describing the words, actions, or habits of the Islamic prophet Muhammad) call for execution of persons who engage in same-sex sexuality by way of stoning (e.g., as Abu Dawud 38:4448, Al-Muwatta 41 41.111 and Tirmidhi 1:152) although some of the Hadiths seem to be calling for a lenient admonition on believers to “turn [such people] out of your houses” (e.g., Sahih Bukhari 7:72:774 and 8:82:820). While Protestantism, with a more decentralized system of governance, is based on the Holy Bible as a Catholicism, it holds divergent views on same sexuality. For some, Evangelical Christians' worldviews and the gay and lesbian community are irreconcilable (e.g., Hodge, 2005), whereas some groups, such as Episcopalians, contend that "gay and lesbian individuals are children of God who have a full and equal right to the grace, recognition, and pastoral care and treatment of the Church with all other persons" (General Convention, 2007).¹²⁷ Kenyan religious leaders' formal views on sexuality and nonconformity of gender vary. Nevertheless, as suggested by several press outlets, these points of view are overwhelmingly negative. Churches with historical or administrative ties to churches in the Global North are more likely to have thought about this subject than indigenous ones.

Rev. David Gathanju, the presiding moderator of the Presbyterian Church of East Africa, has been widely reported saying: “We [PCEA] denounce all forms of sins which include, but not limited to

¹²⁵ Nyarang'o IIK, 'The role of judiciary in the protection of sexual minorities in Kenya', 29.

¹²⁶ Gunning IR, 'Arrogant perception world travelling and multi-cultural feminism: The case of female genital surgeries', 23 *Colombia Human Right Law Review*, 1992, 203.

¹²⁷ Persona Humana, 'Declaration on certain questions concerning sexual ethics, sacred congregation doctrine faith', 29 December 1975.

homosexuality and lesbianism and devil worship¹²⁸. With regards to the Seventh Day Adventists, the Executive director for the Coastal region Zachariah Marwa has been reported as saying that “gayism and lesbianism should not be endorsed by anyone”¹²⁹ The Anglican Arch-bishop for Mombasa Diocese preaches that homosexual people are more dangerous than terrorists.¹³⁰

2.3.3. Homosexuality as a Personal Choice

This argument suggests that homosexual individuals choose a same-sex behaviour.¹³¹ It further suggests that there is no scientific evidence to show that homosexuals are born that way. This rationale was used to explain the continued criminalisation of same-sex unions and behaviour, fostering homophobia and negative attitudes against homosexuals in many African states, including Kenya.

On the contrary, there is indeed scientific evidence to indicate that homosexuality is not a personal choice but rather that it may be as a result of biological make up.¹³² The most recent of these research reviews is the special issue journal *Frontiers of Neuroendocrinology* published in 2011 by the International Neuroendocrine Federation in collaboration with the American Neuroendocrine Society.¹³³ There is also psychological evidence to suggest that homosexual individuals do not necessarily have a choice on what sexual orientation to have. This is a popular opinion especially in light of the fact that several clinical experiments aimed at converting or changing people’s sexual orientation have been ineffective and furthermore have proved to be more detrimental to their physical and psychological well-being.¹³⁴

¹²⁸ East African Standard, ‘PCEA kicks out David Githii after Nairobi expose’, 2014 - <http://www.standardmedia.co.ke/entertainment/m/?articleID=4921&story_title=pcea-kicks-out-david-githii-after-naïrobian-expose&pageNo=1> on 13 December 2019.

¹²⁹ Lorna K, The Star, 2013 -<<http://www.the-star.co.ke/news/article-126183/sda-pastor-preaches-against-homosexuality>>

¹³⁰ Beja P Bishop, ‘Gays dangerous than terrorists’, Standard Digital, 23 July 2012 - <<http://www.standardmedia.co.ke/?articleID=2000062448>> on 13 December 2019.

¹³¹ ‘Ugandan president signs antigay bill’, *New York Times*, 24 February 2014. - http://www.nytimes.com/2014/02/25/world/africa/ugandan-president-to-sign-antigay-law.html?_r=0 on 13 December 2019.

¹³² Gloucester J, ‘Homosexual relationships’, 1979, 13.

¹³³ Special Issue, ‘Sexual differentiation of sexual behaviour and its orientation’, *Frontiers in Neuroendocrinology*, 32.

¹³⁴ Special Issue, ‘Sexual differentiation of sexual behaviour and its orientation’, 32.

2.4. JUSTIFICATIONS FOR DECRIMINALISATION OF SAME-SEX UNIONS

Based on their known and/or perceived sexual orientation, gay and lesbian people in Kenya continue to be victims of violence and bias. Gay people in Kenyan communities continue to lag behind in social development and access to social services, supported by homophobic people and the larger system. It is therefore vital to discuss some of the positive implications that may come from decriminalising same-sex conduct so as to further the objectives of this study.

2.4.1. Improved Access to and Appreciation for Education.

Many gay people grow up thinking they must conceal their sexual identity or face rejection and retribution. The ingrained stigma spreads to social spheres where many gay people are afraid to participate in social spaces and certain social centres.¹³⁵ Some gay people are afraid of attending college or university because they may find it hard to hide their sexual orientation and some of their social features. Experiences from co-workers and skewed sex education in Nairobi have made some gay people wary of attending college. Decriminalizing homosexual acts among consenting adults would give courage to those gay people who do not even want to go to college when they can afford it. It will also help shape learning institutions ' policies to protect every student regardless of sexual orientation and ensure detailed academic syllabus.¹³⁶

2.4.2. Advancement of Social Development of Homosexual Individuals.

In Nairobi, social stigma, internalised stigma and persistent homophobia made contributions to the poor development of individual gays and lesbians. There is legitimate fear of coming out, accepting one self, and pursuing activities such as entrepreneurship and civil activism.¹³⁷ Some gay people assume (some from experience) that if they start a micro-enterprise or start an organized group that discusses their problems, they may become victims of racist bigotry, bullying or violence by individuals or public officials. This apprehension is strongly supported by the fact that there is still an anti-gay rights law in place and that gay people are not the best in the eye of the wider homophobic communities. Consequently, homosexuals have not established their social agency to pursue happiness. Changing the anti-gay law would boost self-driven confidence of

¹³⁵ King M, et al, "A systematic review of mental disorder, suicide, and deliberate self harm in lesbian, gay and bisexual people." 8 1 *BMC psychiatry*, 2008, 70.

¹³⁶ YHEPP, 'Ten reasons why Kenya should decriminalize homosexuality'.

¹³⁷ YHEPP, 'Ten reasons why Kenya should decriminalize homosexuality'.

homosexual individuals, giving them a safer space to organize themselves and start self-help projects. Decriminalising homosexuality will be a great reliever of stress for many homosexuals who are uncertain about the day they might be attacked or arrested on suspicion of same sex activity.

2.4.3. Boost Local Economy.

Some organized groups and businesses are still reluctant to make major investment decisions in Kenya, especially those with inclusive investment policies and companies owned by gay couples or individuals. Although there is no currency labelled 'gay capital,' including investors and gay investments in Kenya will open up employment opportunities for vulnerable groups and the less vulnerable.¹³⁸ Today's economy in Kenya is awarding higher education than ever. Some public job advertisements require more than 10 years of experience and as a result the bureaucracy cuts out a lot of people. Inclusive investors and gay couples planning to invest in Kenya will provide better opportunities for individuals outside their reach who have such challenges. Gay people with business goals will have the courage to approach investors and start businesses without fear of legal stigma. Gay businessmen or leaders are also going to look inward and invest in local businesses as opposed to saving their money in offshore accounts due to lack of security at home.

2.4.4. Strengthen Families and Communities.

The family is Kenya's basic social unit. Yet for most gay people who insist on being their true self, the family has been the biggest source of anxiety. Many families remain suspicious of sexuality diversity and gender identity issues. Indeed, for most families, it is difficult to believe that men who marry women and have children might also be gay. As a result, some gay individuals commit suicide due to family pressure to conform and/or marry someone of a gender they do not prefer. Several gay people flee their homes and go to live on the streets. Anti-homosexuality has made families live in denial and some siblings are usually perceived as better than others. Decriminalisation of homosexuality in Kenya would provide an opportunity to educate families about their children's diversity and how to rightfully nurture these individuals.

¹³⁸ Badgett MVL et al, 'The relationship between LGBT inclusion and economic development: An analysis of emerging economies', 2014.

2.4.5. Improve Access to Social Justice.

Gay people are deeply fearful of seeking assistance from officials in the event of sexual violence because of prejudice. It is impossible for a gay person to contact the police and narrate an unpleasant experience with specifics of canal knowledge because gay people are already discriminated against, stigmatized and the law has severe penalties for homosexual conduct.¹³⁹ Most of the time, cases of violence against gay people never make it through the legal process due to fear of prejudice. Many police and concerned people do not take violence against homosexuals as seriously as those relating to other social groups. In fact according to PEMA Kenya's report on violence, the police in Kenya make a substantial contribution to the total organized and random violence against gay people annually.¹⁴⁰ In addition to 'corrective rape' of lesbian / bisexual women, basic rights and the right to choose remain at risk as long as there is a law prohibiting sexual activity between consenting adults. A change on the penal code 162-165 of Kenya would adjust police operation policies and control homophobic harassment and arbitrary arrests amongst gay individuals and male sex workers. Gay individuals will be free to choose their partners and live in their communities without the constant fear of breaking the law and spending 14 years of their individuals lives in jail.

2.4.6. Improve Peace and Relations Between Law Enforcement and Individuals

Most gay people are afraid of law enforcement because of their history of violence and bias. There is a possibility of these prejudiced individuals to become radicalized and despise their own police and officials in the judiciary. It is the duty of the police to protect all individuals. It is also the responsibility of the judicial servants to ensure fairness for every person. In fact, one of the safest refuge points for gay people should be the police and the judiciary as a whole.¹⁴¹ After decriminalizing consented sexual acts of gay adults, civil movements will have a better chance to educate the law enforcement on sexual and gender diversity.

2.4.7. Open Minority Groups to Research and Social Studies.

¹³⁹ Ghoshal N, 'LGBTQ Kenyans' patience has gone unrewarded', FP, 24 February 2019, -<
<https://foreignpolicy.com/2019/02/24/lgbt-kenyans-patience-has-gone-unrewarded/> on 20 December 2019.

¹⁴⁰ YHEPP, 'Ten reasons why Kenya should decriminalize homosexuality'.

¹⁴¹ Ghoshal N, 'LGBTQ Kenyans' patience has gone unrewarded', FP, 24 February 2019, -<
<https://foreignpolicy.com/2019/02/24/lgbt-kenyans-patience-has-gone-unrewarded/> on 20 December 2019.

The gay community has serious personal and social challenges. From health to safety and psychosocial problems. Many psychosocial problems (stigma, depression, PTSD, self-confidence, skills, etc.) and health (abortion, HIV/AIDS, STDs, etc.) may include a short-term and long-term scientific approach.¹⁴² Because of the difficulties involved in working with gay people on sexual issues in a country where even voluntary gay sex is criminalized, researchers or institutions researching cultural problems for the better do not have adequate access to and the trust of homosexual individuals. The vacuum left homosexuals facing severe mental challenges, challenges related to the prevention of HIV / AIDS among other health issues. Changing sexual legislation may allow study bodies to feel safe while looking at gay individuals' attitudes and actions that can be used to defend them. The change will also make gay individuals be more confident and willing to participate in studies based on their sexual orientation (and its activities) without fear of legal or social implications.¹⁴³

2.4.10. Encourage patriotism.

After decriminalisation, gay individuals will put their efforts towards educating each person about diversity. It will remind everyone that Kenya, the constitution and Kenya's national anthem are essentially inclusive, ready to listen and willing to commit to their words of harmony, tolerance and equality.¹⁴⁴ It will be a wonderful day for Kenyans to know that their country is going to climb higher in the Freedom ladder and that our image in the Community of Nations is going to improve. Our government will owe us direct responsibility to stand up and protect everyone regardless of their sexual orientation and will enhance our image as a beacon of justice in the Region.

¹⁴² Raifman J et al, "Difference-in-differences analysis of the association between state same-sex marriage policies and adolescent suicide attempts." 171.4 *JAMA pediatrics*, 2017, 350-356.

¹⁴³ Raifman J et al, "Difference-in-differences analysis of the association between state same-sex marriage policies and adolescent suicide attempts."

¹⁴⁴ Hackimer L & Proctor SL, "Considering the community influence for lesbian, gay, bisexual, and transgender youth." 18.3 *Journal of Youth Studies*, 2015, 277-290.

2.5. LEGISLATIVE FRAMEWORKS ON CRIMINALIZATION OF SAME-SEX UNIONS IN KENYA

2.5.1. What does the Constitution say?

The Constitution talks about the right to privacy, dignity and freedom from discrimination. The Constitution further stipulates in Article 45(2) that marriages and unions between the opposite sex are expressly authorized¹⁴⁵. However, the Constitution remains silent on the criminalization of same-sex unions.

2.5.2. The Penal Code

The Statute that criminalizes homosexuality is the Penal Code.¹⁴⁶ Sections 162¹⁴⁷, 163¹⁴⁸ and 165¹⁴⁹ of the statute encapsulate the anti-sodomy laws in Kenya. Section 162 of the Penal Code states that every person who possesses carnal knowledge of any female against nature or permits a male to have carnal knowledge of him or her against nature is guilty of a crime and is liable to 14 years imprisonment.¹⁵⁰ Section 163 provides that any person who attempts to commit any of the offences stipulated in section 162 shall be guilty of a felony as well and shall be liable to imprisonment for 7 years.¹⁵¹ Finally, section 165 outlaws committing, encouraging or attempting ‘acts of gross indecency’ between males and imposes a penalty of up to 5 years imprisonment.¹⁵²

These provisions criminalize same-sex conduct in Kenya which it characterizes as an unnatural offence.¹⁵³ Although the laws do not expressly criminalize same-sex conduct, the courts have interpreted carnal knowledge to include anal and oral sex and sometimes other non-procreative sexual acts.¹⁵⁴ These provisions are not often enforced by the courts due to the fact that it is the act itself that is criminalized and is therefore difficult for authorities to catch the individuals in the act, however a few accused persons have been convicted in Kenya for committing these offences. For

¹⁴⁵ Article 45(2), *Constitution of Kenya* (2010).

¹⁴⁶ *Penal Code Cap 63*

¹⁴⁷ Section 162, *Penal Code Cap 63*

¹⁴⁸ Section 163, *Penal Code Cap 63*

¹⁴⁹ Article 165, *Penal Code Cap 63*

¹⁵⁰ Section 162, *Penal Code Cap 63*

¹⁵¹ Section 162 & 163, *Penal Code Cap 63*

¹⁵² Section 165, *Penal Code Cap 63*

¹⁵³ Mute L, ‘Rethinking contested rights: Critical perspective on minority rights in Kenya’, 2011, 14.

¹⁵⁴ Misra G, ‘Decriminalizing homosexuality in India’, 17 *Reproductive Health Matters*, 21.

instance, in the case of *Francis Odingi v. Republic*¹⁵⁵, the accused was sentenced to 6 years in jail in 2006 for engaging in same-sex activity.¹⁵⁶

2.6. RECENT JUDICIAL DECISIONS IN KENYAN COURTS

There have been two iconic petitions challenging the Constitutionality of anti-homosexuality laws in Kenya in the recent past. These two cases were consolidated into one petition due to the fact that they were based on similar arguments. It is vital for the purpose of the study to analyse this consolidated petition so as to establish the courts justification for upholding the constitutionality of these laws.

2.6.1. Petition 150 & 234 of 2016 (Consolidated)

The common thread between these two petitions is that they both challenge the Constitutionality of Section 162(a)(c) and 165 of the Penal Code and were consolidated on the 18th January 2018¹⁵⁷. The Petitioners in both petitions were members of the LGBTIQ community in various capacities and professions. Petition 150 challenges these provisions on the basis of their vagueness and uncertainty, while Petition 234 seeks to declare that sexual and gender minorities are entitled to the right to attainable standards, more specifically the right to health care services as guaranteed in Article 43 of the Constitution¹⁵⁸, and that the state should develop policies that prohibit discrimination on grounds of sexual orientation and gender identity.

The Affidavits filed by the Petitioners jointly and severally alleged that they experienced occasions of discrimination in various locations, more specifically in health care institutions, while professionals who were Petitioners deposed actual statistics and expert findings on the occurrences and effects of discrimination based on sexual orientation. Petition 150 & 234 oppose the Constitutionality of the state attempting to regulate intimate and private conducts of Kenyans because it violates Article 27 (equality and freedom from discrimination)¹⁵⁹; Article 28 (human

¹⁵⁵ *Francis Odingi v Republic* (2011) eKLR.

¹⁵⁶ *Francis Odingi v Republic* (2011) eKLR.

¹⁵⁷ *EG & 7 others v Attorney General; DKM & 9 others (Interested Parties)* (2016) eKLR; *Katiba Institute & another (Amicus Curiae)* (2016) eKLR; *Petition 150 & 234 (Consolidated)*.

¹⁵⁸ Article 43, *Constitution of Kenya* (2010)

¹⁵⁹ Article 27, *Constitution of Kenya* (2010)

dignity)¹⁶⁰; Article 29 (freedom and security discrimination)¹⁶¹; Article 31 (privacy)¹⁶²; Article 43 (economic and social rights)¹⁶³; the fundamental human rights guaranteed by international law such as the Universal Declaration of Human Rights (UDHR); and principles of governance established by Article 10 and fair hearing established by Article 50¹⁶⁴. Lastly the Petitioners clarified that the petition was not intended to legalise same-sex marriage but to challenge criminalization and severe criminal sanctions that are imposed on these offenders.

While deciding the petition, the court had two issues to determine: whether the anti-sodomy laws in the Penal Code are unconstitutional on grounds of their vagueness and uncertainty; and whether the impugned provisions are unconstitutional for violating the Constitution. In the first regard, the court held that although the Penal Code does not define the phrases ‘unnatural offences’ and ‘against the order of nature’, the Constitution requires the courts to examine the purpose of the Act when interpreting the meaning of provisions, and thus the court in this petition refused to declare the anti-sodomy provisions unconstitutional on grounds of vagueness or uncertainty.

With regard to the second issue for determination, the court held that although it does agree that discrimination against a specific group may constitute a violation of Constitutional rights, the anti-sodomy laws clearly uses the terms ‘any person’ and ‘any male person’ and therefore does not target male or female persons of a particular sexual orientation. Still on this issue, the court further held that the petitioners did not present sufficient evidence to show that their rights to health care as stipulated in Article 43(1)¹⁶⁵ of the Constitution had been violated. Ultimately the court upheld the validity and constitutionality of Section 162(a)(c)¹⁶⁶ and 165¹⁶⁷ criminalizing same-sex activity/unions, much to the disappointment of the LGBTIQ activists and supporters.

2.7. CONCLUSION

This chapter has extensively analysed homosexuality as a concept, the history of anti-homosexuality laws in Kenya and Kenya’s current position on the same. As always, there are a

¹⁶⁰ Article 28, *Constitution of Kenya* (2010)

¹⁶¹ Article 29, *Constitution of Kenya* (2010)

¹⁶² Article 31, *Constitution of Kenya* (2010)

¹⁶³ Article 43, *Constitution of Kenya* (2010)

¹⁶⁴ Article 50, *Constitution of Kenya* (2010)

¹⁶⁵ Article 43(1), *Constitution of Kenya* (2010)

¹⁶⁶ Section 162(a)(c), *Penal Code Cap 63*

¹⁶⁷ Section 164, *Penal Code Cap 63*

cocktail of justifications for and arguments against the criminalization of any actions or activity, and this chapter discussed this with regard to same-sex unions and homosexuality. Lastly, the legislative framework criminalizing same-sex unions has also been analysed together with a concise analysis on the courts take on the constitutionality of anti-homosexuality laws in Kenya.

CHAPTER THREE

THE INTERNATIONAL POSITION ON DECRIMINALIZATION OF HOMOSEXUALITY, THE PROSPECTS & CHALLENGES OF DECRIMINALIZING SAME-SEX UNIONS IN KENYA

3.1. INTRODUCTION

In this chapter, the study intends to discuss the position of the international community on the decriminalization of homosexuality by analysing the general principles of international law as well as examining the provisions in international instruments pertaining to the phenomenon. Finally, this chapter seeks to discuss the challenges that Kenya is facing or may face in her attempt to decriminalize same-sex activity.

3.2. INTERNATIONAL POSITION ON DECRIMINALIZATION OF HOMOSEXUALITY

A variety of constitutionally guaranteed human rights are violated by laws that criminalize sexual same-sex activity and non-normative gender identities. Punitive laws prevent LGBTIQ people from living their lives openly and with dignity by criminalizing or otherwise restricting the expression of sexual orientation and/or gender identity.¹⁶⁸

Then in 2011, U.S. State Secretary Hillary Rodham Clinton launched the era of American promotion of LGBT rights internationally during a landmark UN address in Geneva, saying that "sexual rights are human rights, and human rights are gay rights." This frame serves as the thesis of LGBT rights promotion.¹⁶⁹ Soon afterwards, when South Africa endorsed Resolution 17/19 to the United Nations Human Rights Council (UNHRC), demanding a report on discrimination and sexual orientation, the international community first discussed LGBT rights. The resolution expressed "grave concern at acts of violence and discrimination, in all regions of the world,

¹⁶⁸ Amnesty International 'Making love a crime: Criminalization of same-sex conduct in sub-Saharan Africa' *Africa LGBT Report*, -< https://www.amnestyusa.org/files/making_love_a_crime_-_africa_lgbti_report_emb_6.24.13_0.pdf> on 15 December 2019.

¹⁶⁹Rohrich K, "D&D 14 - human rights diplomacy amidst 'world war lgbt': Re-examining western promotion of lgbt rights in light of the 'traditional values' discourse" (*Humanity in Action*)- https://www.humanityinaction.org/knowledge_detail/human-rights-diplomacy-amidst-world-war-lgbt-re-examining-western-promotion-of-lgbt-rights-in-light-of-the-traditional-values-discourse/ on 15 December 2019.

committed against individuals because of their sexual orientation and gender identity.”¹⁷⁰ UNHRC adopted Resolution 17/19 by a narrow and polarized margin of 23-19-3, with countries voting primarily in regional blocs.¹⁷¹ After this, the recognition of the importance for the promotion of LGBTIQ rights started to gain momentum. According to the UN Office of the High Commissioner in 2012:

*“The protection of people on the basis of sexual orientation and gender identity does not require the creation of new rights or special rights for LGBTI people. Rather, it requires enforcement of the universally applicable guarantee of non-discrimination in the enjoyment of all rights... (T)he principle of non-discrimination is cross-cutting and the obligation on the part of States is immediate. Simply put, people may not be discriminated against in the enjoyment of rights on the basis of sexual orientation or gender identity. As the High Commissioner has stated, ‘The principle of universality admits no exception. Human rights truly are the birth right of all human beings.’”*¹⁷²

This chapter will discuss the international position on decriminalization of homosexuality on the basis of the practice, application and interpretation on provisions in pertinent instruments and international principles. To do so, this section shall analyse this under three five areas of discussion: the right to non-discrimination; the right to privacy; the right to security of the person; the right to marry and found a family; the right to a fair trial; and the rule of law.

3.2.1. The Right to Non-discrimination

Laws criminalizing sexual orientation and gender identity violate the right to non-discrimination¹⁷³, a fundamental principle of all international human rights treaties¹⁷⁴, including regional treaties such as the African Charter on Human and Peoples’ Rights.¹⁷⁵ Such laws also violate the right to equality before the law.¹⁷⁶ The list of discrimination categories in all human

¹⁷⁰ ‘UNHCR, ‘Human rights, sexual orientation and gender identity’, Resolution, A/HRC/RES/17/19, 14 July 2011, [-http://www.refworld.org/docid/512f0bd22.html](http://www.refworld.org/docid/512f0bd22.html). on 15 December 2019.

¹⁷¹ Rohrich K, “D&D 14 - human rights diplomacy amidst ‘world war lgbt’.

¹⁷² UN Office of the High Commission, ‘Born free and equal: Sexual orientation and gender identity in international human rights law’, 2012, 10-11 [-http://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf](http://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf) on 15 December 2019.

¹⁷³ ‘Concluding observations of the Human Rights Committee: United States of America, UN Doc. CCPR/C/79/Add.50, (3/10/95), para. 287.

¹⁷⁴ Article 1(3) & Article 55, *Charter of the United Nations*, 26 June 1945, 1 UNTS 14

¹⁷⁵ Article 2, *African (Banjul) Charter on Human and Peoples’ Rights*, 27 June 1981, CAB/LEG/67/3.

¹⁷⁶ Article 7, *Universal Declaration of Human Rights*, 217 (III) A (Paris, 1948).

rights treaties is not exhaustive and the inclusion of 'other status' allows sexual orientation and gender identity to be included as prohibited grounds.

The Human Rights Committee has affirmed that the discrimination provisions of the ICCPR include sexual orientation.¹⁷⁷ So too has the Committee on Economic, Social and Cultural Rights confirmed that the ICESCR prohibits discrimination on the ground of sexual orientation.¹⁷⁸ In addition, sexual orientation has been recognized as a prohibited ground of discrimination by the Committee Against Torture¹⁷⁹ and by the Committee on the Rights of the Child.¹⁸⁰ Where states enforce or enact criminal laws and other punitive measures to prevent sexual conduct between the same sex, states may eliminate or change them. These include laws and policies which are technically applicable to all citizens but which are applied in fact only against LGBTI people. (E.g., sexual activity, such as anal intercourse, which is defined as "against nature" and used as synonymous with sex between two men).

3.2.2. The Right to Privacy

Laws which criminalize consensual adult same-sex activity violate the right to private life.¹⁸¹ All people are entitled to respect for their private and family life, and to enjoy that right without fear and discrimination, including the fear of blackmail and non-consensual disclosure¹⁸² of their sexual orientation. States ought to abolish or change laws that prevent this privilege from being enjoyed. States also have an obligation under international human rights law to guarantee the right which includes the obligation to refrain from interfering with private life and the obligation to prevent non-state actors from attacking private life.¹⁸³ The right to private life includes: "home, body and family dignity, self-personality determination and growth, personal identity and interpersonal

¹⁷⁷ [-http://www.unhcr.org/refworld/docid/48298b8d2.html](http://www.unhcr.org/refworld/docid/48298b8d2.html)

¹⁷⁸ Article 12, *International Covenant on Economic, Social and Cultural Rights*, 11 August 2000, E/C.12/2000/4, para. 18, [-http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.2000.4.En](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En), on 16 December 2019.

¹⁷⁹ 'Committee Against Torture, General Comment No 2. 'Implementation of Article 2 by State parties', paras. 21 and 22.

¹⁸⁰ Committee on the Rights of the Child, General Comment No 4, 'Adolescent health', para. 6 and General Comment No 3, 'HIV/AIDS and the rights of the child', para. 8.

¹⁸¹ '*Concluding observations of the Human Rights Committee*', Chile, CCPR/C/79/Add.104, 30 March 1999.

¹⁸² Article 17, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

¹⁸³ ICJ, 'Sexual orientation, gender identity and international human rights law: Practitioners guide no 4', 2009, 47, 67 [-http://icj.wpengine.netdna-cdn.com/wpcontent/uploads/2009/07/sexual-orientation-international-law-Practitioners-Guide-2009-eng.pdf](http://icj.wpengine.netdna-cdn.com/wpcontent/uploads/2009/07/sexual-orientation-international-law-Practitioners-Guide-2009-eng.pdf) on 15 December 2019.

relationships. The right is violated if the privacy of a person is interfered with unlawfully or legally but arbitrarily.”¹⁸⁴

3.2.3. The Right to Security of the Person

In their daily lives and relationships, LGBTI people have the right to feel safe and secure. Their safety and security are regularly undermined where criminal laws support and perpetuate discrimination towards LGBTI and non-gender conforming persons. States have an obligation to protect LGBTI people from violence, abuse and harassment by adopting and enforcing laws that prohibit such violence and abuse.¹⁸⁵ States also have no obligation to establish or perpetuate gender stereotypes which substantially justify violence against individuals by reason of sexual orientation or gender identity.¹⁸⁶ Concrete examples of shortcomings in this area include the inability to bring LGBTI extortionists to justice and the failure to adequately investigate and prosecute allegations of sexual violence against women who do not conform to or are not believed to adhere to the prevailing definitions of appropriate femininity.¹⁸⁷ The failure of states, and in particular law enforcement agencies, respond to violent crimes against LGBTI people amounts to a violation of survivors’ rights. It is a violation because the failure to effectively prevent violence and bring offenders to justice means that not only in the constitutions of many African states, but also in the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples’ Rights, protection of the person is not guaranteed. All people, regardless of their sexual orientation or gender identity, have the right to live their lives safe and secure, free from fear, violence and intimidation.

3.2.4. The Right to Marry and have a Family

Article 16 of the UDHR and Article 23 of the ICCPR laid down the right of marriage and founding a family. Article 2 of the ICCPR stipulates that there can be no discrimination in respect of the rights listed in the Covenant which would include the right to marry and to have a family founded. It has already been established that sexual orientation is part of ‘other status’ in the ICCPR.

¹⁸⁴ ICJ, ‘Sexual orientation, gender identity and international human rights law: Practitioners guide no 4’, 47.

¹⁸⁵ Committee against Torture, ‘Conclusions and recommendations of the committee against torture: Poland, CAT/C/POL/CO/4, 25 July 2007, para. 20.

¹⁸⁶ Article 5, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13.

¹⁸⁷ Coomaraswamy R, ‘HRC, report of the special rapporteur on violence against women, its causes and consequences’.

Amnesty International is therefore of the opinion that laws that prevent same-sex couples from marrying or founding families through adoption or assisted procreation infringe international human rights law.¹⁸⁸

3.2.5. The Right to a Fair Trial

International human rights law protects, without prejudice of any kind, the right to procedural protections and other fair trial provisions. Where LGBTI individuals are brought to trial on criminal charges related to their sexual orientation or gender identity, they have the right to a fair trial.¹⁸⁹ This means that country and its agents (judges, prosecutors, police officers) have a responsibility to ensure that predominant prejudices about the sexual orientation (or gender identity) of a complainant do not result in discrimination against him or her.¹⁹⁰ It also ensures that it is not necessary to use the sexual orientation of witnesses, judges, lawyers and supporters to tarnish their reputation or professionalism.

3.2.6. The Rule of Law

Democratic system, human rights and the rule of law are the three interlocking sections of the organizational system which guarantee equal respect for human dignity in any society. Democracy requires representative government. But even a legitimately elected government should not be allowed to breach an individual's human rights. The rule of law allows access to those rights through fair trials before independent courts. However, the rule of law still does more work by requiring equal application of the law, and the law itself should not be applied arbitrarily or arbitrarily. The perspective of the rule of law highlights how to make homosexuality a crime as a pillar of a fair and accountable society.¹⁹¹

The criminalisation of consensual intimacy of the same sex offends the rule of law. From a legal point of view, criminalisation means that rights granted to all people are disappplied to the lesbian, gay, bisexual and transgender (LGBT) community in national constitutions, domestic laws and

¹⁸⁸Amnesty International 'Making love a crime: Criminalization of same-sex conduct in sub-Saharan Africa'

¹⁸⁹ 'Basic principles on the independence of the judiciary', adopted by the *Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders*, Milan, Italy, 1985, endorsed by *UN General Assembly resolutions* 40/32 of 29/11/85 and 40/146 of 13/12/85.

¹⁹⁰ Human Rights Committee, 'Concluding observations of the HRC, Chile', 18 May 2007, CCPR/C/CHL/CO/5, para. 16.

¹⁹¹ Laverack P, 'Criminalising homosexuality and the rule of law', *Human Dignity Trust*, 2015, 5.

through international treaty obligations. From a theoretical point of view, criminalization is incompatible with the human rights that should be present in a well-functioning domestic framework and covered by the international system based on freedoms. Where the rule of law is really in place, criminalisation will cease. Criminalization is both a symptom of failure to comply with a rule of law and an indicator of failure to take root in attempts to instill substantive rule of law. Combating the criminalization of homosexuality is an integral part of broader efforts to establish and uphold the rule of law, promote democracy and preserve the universally recognized rights of people.¹⁹²

3.3. CONSTITUTIONAL PROSPECTS OF DECRIMINALIZING SAME-SEX UNIONS IN KENYA

In 2003 during the initial stages of Kenya's constitutional review, the drafters specifically excluded 'sexual orientation' from the Bill of Rights, as a protected ground under the freedom from discrimination provision.¹⁹³ It is argued that this was to ensure that the Constitution did not protect gay rights.¹⁹⁴ While the efforts to constitutionally allow the inclusion of sexual orientation as a prohibited ground against discrimination under Article 27 of the Constitution failed, the Constitution of Kenya 2010 incorporates four elements that have significant implications for the legality of anti-homosexuality laws in Kenya.¹⁹⁵

3.3.1. Equality and Non-discrimination

Article 27 of the Constitution expressly provides for the right to equality and non-discrimination¹⁹⁶, prohibiting discrimination on enumerated grounds.¹⁹⁷ Though the Constitution does not list sexual orientation as one of those grounds, the list is not exhaustive; rather the list is indicative with the operating words being "on any ground including". This allows persons who are suffering discrimination on grounds other than those indicated to seek redress.¹⁹⁸ This argument is

¹⁹² Laverack P, 'Criminalising homosexuality and the rule of law', 5.

¹⁹³ Constitution of Kenya Review Commission (CKRC), 'National constitutional conference verbatim report of the technical working committee B (TWC B) chapter 4 and 5 on citizenship and the bill of rights held in tent number 2 at bomas of Kenya on 19 September 2003', 37-39.

¹⁹⁴ Constitution of Kenya Review Commission (CKRC), 'National constitutional conference verbatim report', 37-39.

¹⁹⁵ Article 45, *Constitution of Kenya* (2010).

¹⁹⁶ Article 27, *Constitution of Kenya* (2010).

¹⁹⁷ Article 27(4), *Constitution of Kenya* (2010).

¹⁹⁸ Fitzgerald J, 'the road to equality? The right to equality in Kenya's new constitution', 2010, 58.

further strengthened by Article 259(4)(b), which speaks on the construing of the Constitution, which states that the word ‘includes’ means ‘includes but not limited to’.¹⁹⁹ This approach gives Kenyan judges the discretion to extend the list to grounds that are not covered in Article 27(4) particularly in light of the rampant discrimination and violence against homosexual individuals in the country.

3.3.2. Human Dignity

Article 28 of the Constitution provides that every person has an inherent right to dignity and requires this right to be respected and protected.²⁰⁰ Human dignity is an expression of the respect and value attributed to each human being on account of his or her humanity.²⁰¹ There is an implicit connection between equal citizenship and human dignity, and this is important because it stresses that human beings should be treated as human beings irrespective of their characteristics or preferences. This argument can be used as a tool for the inclusion of sexual orientation and homosexual rights in Kenya.²⁰² In south Africa, human dignity was used as a tool to include the gays and lesbians to enjoy the full benefits of citizenship.²⁰³ As both the Constitution of Kenya and the Constitution of South Africa include both the defense of human dignity as a fundamental right and the fact that the language of Article 28 of the Constitution of Kenya and Section 10 of the Constitution of South Africa is almost identical in terms of human dignity, it only seems to suggest that a similar interpretation should award to all persons full benefit of citizenship, including homosexual individuals, should be the same.²⁰⁴

3.3.3. Right to Privacy

The right to privacy is enshrined in Article 31 of the Constitution. State interference with privacy is morally acceptable in protecting its citizens from damage, insofar as the interference is directly proportional to the harm caused.²⁰⁵ Interference with consensual, private behavior of the same sex

¹⁹⁹ Article 259(4)(b), *Constitution of Kenya* (2010).

²⁰⁰ Article 28, *Constitution of Kenya* (2010).

²⁰¹ Lorraine E, ‘Human dignity as a right-protecting principle’, 17 *National Journal of Constitutional Law*, 2004, 325.

²⁰² Wekesa SM, ‘A constitutional approach to decriminalisation of homosexuality in Africa’, 179.

²⁰³ Cameron E, ‘Constitutional; protection of sexual orientation and African concepts of humanity’, 118 *South African Law Journal*, 2001, 473.

²⁰⁴ Article 28, *Constitution of Kenya* (2010).

²⁰⁵ Commonwealth human rights initiative, ‘The impact of criminalizing same-sex sexual conduct in commonwealth’, 2011, 60.

does not, however, protect any citizen from harm and can be perceived as reinforcing certain prejudices.²⁰⁶ This argument based on the right to privacy implies that criminalising consensual same-sex conduct is unfair particularly since consensual heterosexual conduct is not prohibited.²⁰⁷ However, this argument must be considered hand in hand with the equality argument in order to be sustainable. The weakness of this argument is that it could reinforce the idea that homosexual behaviour is shameful and inappropriate, which can only be tolerated when confined to the bedroom and should not be approved outside the bedroom.. Therefore, the privacy argument for the constitutional protection of homosexuals on its own is not enough as a standalone argument as it would have more damaging effects in terms of the stigmatisation based on sexual orientation.

3.3.5. Incorporation of International Law into Domestic Law

Articles 2(5) and 2(6) of the Constitution incorporate domestic legislation into international law. Article 2(5) provides that, in Kenya, general rules of international law form part of the law,²⁰⁸ while Article 2(6) states that any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution.²⁰⁹ Furthermore, the Constitution guarantees that the State must adopt and incorporate legislation to fulfill its international commitments with regard to human rights and fundamental freedoms.²¹⁰ The international position on anti-homosexuality laws is that they are a violation of the right to non-discrimination and privacy which are guaranteed in international human rights instruments.²¹¹ By this argument alone it is clear that Sections 162, 163 and 165 of the Penal Code of Kenya that criminalise same-sex conduct is a violation of international human rights and inconsistent with the constitution.

²⁰⁶ Commonwealth human rights initiative, 'The impact of criminalizing same-sex sexual conduct in commonwealth', 61.

²⁰⁷ Kane D, 'Homosexuality and the European convention on human rights: What rights', 11 *Hastings Comparative and International Law Review*, 447.

²⁰⁸ Article 2(5), *Constitution of Kenya* (2010).

²⁰⁹ Article 2(6), *Constitution of Kenya* (2010).

²¹⁰ Ndulo M, 'African customary law and women's rights', 18 *International Journal Global Legal Studies*, 2011, 99.

²¹¹ *Toonen v Australia*, Communication No 488/1992, UN Human Rights Committee, 31 March 1994, UN Doc. CCPR/C50/D/488/1992. IIRR 97.

3.4. CHALLENGES OF DECRIMINALIZING SAME-SEX UNIONS IN KENYA

3.3.1. The State's Reluctance to Decriminalize

Key developments in human rights have taken place internationally, but international human rights law cannot be complied with separately from those countries that have ratified international treaties. However, states are often reluctant to give away their sovereignty and can slow down the process on both international and domestic levels and they can be reluctant to protect those rights on the ground, or can create various administrative and other obstacles, which impede the goal of international human rights law.²¹²

Several African leaders feel that gay rights are contrary to the grain of their systems of cultural and religious value. They also believe that they have a sovereign right to reject what is perceived as an imposition by mainly Western nations that seeks to affect national sentiment through aid.²¹³ Government officials, including the Honourable President Uhuru Kenyatta openly stated to the world that Kenya does not believe that decriminalization of homosexuality is an issue that needs to be addressed and that more pertinent issues anticipated in the national sustainable goals, should be prioritized.

It is the responsibility of the political class to influence society to decriminalise homosexuality. The state cannot actually change the law, but the duty to uphold and ratify international human rights treaties can also be conveyed to its citizens. Fear of political, social and religious backlash, however, undermines Kenya's political will to defend gay rights.²¹⁴

3.3.2. Continuous Violations of Kenya's Obligation under International laws and Treaties

Kenya's obligation falls under a number of laws and treaties. First is the international law and treaties on LGBT rights of 1994. Secondly is the United Nations Human Rights Council (UNHRC).²¹⁵ This treaty outlaws criminalizing consensual same-sex activity violates both the right to privacy and the right to equality before the law without any discrimination.²¹⁶,

²¹² Murigu EM, 'Challenges of normalizing and implementing gay rights as part of the international human rights: Case study of Kenya', Institute of Diplomacy and International Studies University of Nairobi, 2014.

²¹³ Shryock R, "Gambian president says no to aid money tied to gay rights", Voice of America, 22 April 2012.

²¹⁴ Murigu EM, 'Challenges of normalizing and implementing gay rights as part of the international human rights'.

²¹⁵ Article 17, *International Covenant on Civil and Political Rights*, 16 December 1966, *United Nations, Treaty Series*, vol. 999.

²¹⁶ Murigu EM, 'Challenges of normalizing and implementing gay rights as part of the international human rights'.

consequently, UNHRC has on many instances reiterated this position by urging countries to repeal laws that criminalize consensual same-sex activity and thereby bring their legislation into line with the Treaty.²¹⁷ Kenya is a party to the Covenant, and the country's laws about same-sex sexual activity are a continuing violation of its obligations under the Covenant.

In 2006, in the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, countries' international obligations to respect the human rights of all persons, regardless of sexual orientation and gender identity were articulated.²¹⁸ A group of human rights experts developed and unanimously adopted these principles. Principle 2 "Rights to equality and non-discrimination" states that everyone has the right to enjoy all human rights on the basis of sexual orientation or gender identity without discrimination and expressly obliges countries to do so by:-, repealing criminal and other legal provisions that prohibit or are, in effect, employed to prohibit consensual sexual activity among people of the same sex who are over the age of consent, and ensure that an equal age of consent applies to both same-sex and different-sex sexual activity. Unfortunately, Kenya is yet to repeal the penal code.

3.3.3. Religion and the Legal System

Many Christians agree that it is necessary to admit homosexuals to the church and to protect their civil rights. Other churches, on the contrary, claim that homosexual performance and acts are serious crimes. For centuries, religion and homophobia have been linked together. The stronger the powers of religious institutions are in the state, the more the rights of homosexuals are suppressed. The Religious Right's hostility toward LGBT in Kenya is well known.

3.4. CONCLUSION

Chapter three aimed to discuss the international and regional positions on the decriminalisation of homosexuality illustrating that various instruments and treaties, some of which Kenya is a party to, reject the justification of criminalisation of anti-sodomy laws as they contravene international covenants and violates principles of human rights. Finally, this chapter highlighted the challenges faced by Kenya in the decriminalisation of same-sex unions, key of them being the reluctance of

²¹⁷ Status of the International Covenant on Civil and Political Rights, United Nations Treaty Collection, 19 May 2012

²¹⁸ Murigu EM, 'Challenges of normalizing and implementing gay rights as part of the international human rights'.

the state and state officials to relinquish their outdated views on homosexuality and its sovereignty to international obligations. Continuous violations of international obligations and religious influences also pose a challenge to decriminalisation of same-sex unions.

CHAPTER FOUR

A COMPARATIVE STUDY; DECRIMINALISING HOMOSEXUALITY IN SOUTH AFRICA & ANGOLA

4.1. INTRODUCTION

This chapter focuses on the discrimination of same-sex conduct in both South Africa and Angola. It discusses the history of sodomy laws in both jurisdictions together with the political context and influences that led to the paradigm shift in homosexuality laws. Such a discussion is important to this study to highlight some of the lessons that Kenya can take away especially in light of the fact that South Africa and Angola are African states that have undergone similar socio-political evolutions as Kenya.

4.2. DECRIMINALISING HOMOSEXUALITY IN SOUTH AFRICA

Prior to colonisation, there were cases where older women, or widows, married younger girls so that they could raise children for inheritance purposes in South Africa.²¹⁹ Common law was introduced in South Africa in the 17th Century²²⁰ and it criminalised a number of sexual acts between adults that were not intended for procreation.²²¹ Such crimes, contrary to nature, included sexual behaviour among men, sexual behaviour among women, bestiality, masturbation and heterosexual sodomy.²²² These crimes were all considered as crimes of sodomy and were punishable by death.²²³

Following nearly 200 years of colonisation by the Dutch, South Africa was conquered by British troops in 1795 and by 1806, South Africa eventually became one of its territories.²²⁴ The British proceeded to introduce laws that criminalised various forms of same-sex conduct, but limiting

²¹⁹ Wieringa S, 'Women Marriages and Other Same-sex Practices: Historical Reflections on African Women's Same-sex Relations' In: *Boys T, Men L, and, editors. Ancestral Wives: Female Same-sex Practices in Africa. Johannesburg: South Africa: Jacana Media, 2005, 281–308.*

²²⁰ P De Vos, 'On the legal construction of gay and lesbian identity in South Africa's transitional constitution', 322 *South Africa Journal on Human Rights*, 1996, 274.

²²¹ Cameron E, 'Unapprehend felons': Gay and lesbians and the law in South Africa', Gevisser M & Cameron E, 'Defiant desire: Gay and lesbian lives in South Africa', 1994, 89-98.

²²² P De Vos, 'On the legal construction of gay and lesbian identity in South Africa's transitional constitution', 274.

²²³ *R v. Gough & Narroway* (1926) CPD 159, 161.

²²⁴ Biruk C, "'Aid for gays': the moral and the material in 'African homophobia in post-2009 Malawi.'" *The Journal of Modern African Studies* 52 3, 2014, 447-473.

them only to those between men.²²⁵ Section 5 of the Transvaal Act 16 of 1908, for example, stated that any male person who in public or privates aids or is a party to the commission of any male person of any act of gross indecency with another male shall be guilty of an offence. Further, Section 10 of the Natal Act 22 of 1908 further declared that any male person who in public or in private commits or is a party to the commission of or procures or attempts to procure the commission of nay male person of any act of gross indecency with another male person shall be guilty of a crime.²²⁶ Section 121 of the Transkei Penal Code also supported this position.²²⁷ These laws are very similar to the laws currently criminalising same-sex conduct in Kenya.

South Africa is however an exception among African states when it comes to sexual rights.²²⁸ South Africa was the world's first country to explicitly include sexual orientation in its constitution's list of prohibited grounds for discrimination.²²⁹ The introduction of such a framework is deeply rooted in South Africa's revolutionary environment in the early 1990s.²³⁰ The campaign for sexual rights in the country began during the apartheid period where inter-racial relationships were criminalised.²³¹ Homosexuality in South Africa gained prominence through the attempts to control relationships between these various ethnic groups, which attracted the attention of the National Party, which perceived homosexuality as a challenge to the culture of South Africa.²³² To counter this, the National Party, imposed a major repression of homosexuality in the Immorality Amendment Act 1988.

It is only during the reforms promoted by President P.W. Botha in the 1980s that homosexual movements began to emerge.²³³ The Gay Association of South Africa (GASA) was established in 1982. Throughout 1987 and 1990, gay rights campaigns grew and were able to place gay issues both in South Africa and internationally on the forefront of the anti-apartheid struggle.²³⁴ Through

²²⁵ Section 5, *Transvaal Act* (No. 16 of 1908) South Africa.

²²⁶ *R v. Gough & Narroway* (1926) CPD 159, 161.

²²⁷ Section 121, *Trasnskei Penal Code* (Act 24 of 1886) South Africa.

²²⁸ Biruk C, 'Aid for gays': the moral and the material in 'African homophobia in post-2009 Malawi', 447-473.

²²⁹ Cork J, 'Engendering gay and lesbian rights: The equality clause in South African constitution', 26 *Women's Studies International Forum*, 2003, 35.

²³⁰ Santos GG, 'Decriminalizing homosexuality in Africa: Lessons learned from the South Africa experience', 2011, 40.

²³¹ Biruk C, 'Aid for gays': the moral and the material in 'African homophobia in post-2009 Malawi', 447-473.

²³² Retief G, 'Keeping Sodom out of the laager: state repression of homosexuality in apartheid South Africa', in Gevisser M and Cameron E (eds.) 'Defiant desire: Gay and lesbian lives in South Africa (New York, Routledge), (1995), 99-113.

²³³ Thompson L, 'A History of South Africa', 3rd edn (New Haven, CT: Yale University Press), 2001.

²³⁴ Cock J, 'Engendering gay and lesbian rights: The equality clause in the South Africa constitution', 56.

an expanded concept of liberation, they led the connection between gay rights and the fight against apartheid.²³⁵

Sexual orientation as a forbidden basis for discrimination was adopted as Section 2(8) in the 1993 rules on equality of the interim constitution.²³⁶ After public participation forums and lobbying, the clause was retained in the final Constitution.²³⁷ The key drivers that promoted the inclusion of sexual orientation provisions in the South African Constitution were: the historic metamorphosis of political leadership and the growing gay rights movements; the acknowledgement of international legal precedents set by international human rights treaty bodies; emancipation and non-discrimination dogmas; a constraint and sequential ;constitutional drafting process.²³⁸ Nevertheless, the success of decriminalization is credited to the court decision made in favor of gay and lesbian people, which formed the basis for other sexual rights decisions for homosexuals. The biggest problem facing homosexuals in South Africa, however, is transforming legal achievements into social equality and inclusion.²³⁹

4.3. DECRIMINALISING HOMOSEXUALITY IN ANGOLA

In Angola, sodomy was practiced by people in the ethnic group Quibanda, and those participating in these activities were called: Quimbandas. They were men who covered themselves like women. The high priest called Ganga-Ya-Chibanda was the most prominent figure in this community who kept his female clothes even during religious ceremonies.²⁴⁰ With the expansion of the erstwhile Portuguese colony, Angola, came the expansion of Christianity into the region and therefore the Christian morality that strongly condemned homosexual acts also spread.²⁴¹ Angola inherited an ancient colonial statute dating back to 1886, that criminalised ‘indecent acts’ and persons habitually engaging in ‘acts against nature’.²⁴² These formulations have widely been interpreted to mean a ban on homosexual conduct and were expressly stated in Articles 70 and 71 of the Penal

²³⁵ Wekesa SM, ‘A constitutional approach to decriminalisation of homosexuality in Africa’.

²³⁶ Santos GG, ‘Decriminalizing homosexuality in Africa: Lessons learned from the South Africa experience’, 40.

²³⁷ Constitutional Assembly annual report 1995-1996, -<http://constitution.org.za> on 21 December 2019.

²³⁸ Wekesa SM, ‘A constitutional approach to decriminalisation of homosexuality in Africa’.

²³⁹ Wekesa SM, ‘A constitutional approach to decriminalisation of homosexuality in Africa’.

²⁴⁰ Wekesa SM, ‘A constitutional approach to decriminalisation of homosexuality in Africa’.

²⁴¹ Carroll A & Mendos LR, ‘State-sponsored homophobia a world survey of sexual orientation laws: Criminalisation, protection and recognition’, ILGA, May 2017.

²⁴² Carroll A & Mendos LR, ‘State-sponsored homophobia a world survey of sexual orientation laws’.

Code of 1886.²⁴³ These offences under the Penal Code were punishable upon conviction by confinement in an asylum for the mentally insane, jail sentence with hard labour or disqualification from practicing in your profession.²⁴⁴ Angola carried these provisions with it even after gaining independence from the Portuguese in 1975.

While there have been no known prosecutions under the law, these provisions continued to curtail the rights and freedoms of the LGBTIQ individuals in Angola, subjecting their most intimate lives to unwarranted scrutiny.²⁴⁵ Further, homosexuality was still largely considered taboo by Angola's conservative government, largely due to the powerful influence of the Catholic Church which many scholars are of the opinion, is the reason why the anti-homosexuality laws were not changed earlier.²⁴⁶

Portugal abolished anti-sodomy laws in 1983 and implemented constitutional protections against discrimination on the basis of sexual orientation; and despite being more than thirty decades behind schedule, its former colony Angola finally followed suit.²⁴⁷ In 2006, Angola mooted the first draft of a new Penal Code, and a final draft was submitted to Cabinet in 2014. The Angolan parliament witnessed the first process of adoption of this edition in late February 2017.²⁴⁸ The National Assembly voted 155 to 1 to abolish the provision criminalising homosexual relationships on the 23rd of January 2019.²⁴⁹ It went further, making a criminal act against another person because of their sexual orientation an aggravating factor in sentencing.²⁵⁰ The Penal Code in Article 214(1) also made discrimination against people on the basis of sexual orientation an offence, with a punishment of up to two years imprisonment.²⁵¹

²⁴³ Carroll A & Mendos LR, 'State-sponsored homophobia a world survey of sexual orientation laws'.

²⁴⁴ 'Abolition of Angola's anti-gay laws may pave the way for regional reform', The Conversation, 14 February 2019 -< <https://theconversation.com/abolition-of-angolas-anti-gay-laws-may-pave-the-way-for-regional-reform-111432>> on 20 December 2019.

²⁴⁵ 'Abolition of Angola's anti-gay laws may pave the way for regional reform'.

²⁴⁶ 'Abolition of Angola's anti-gay laws may pave the way for regional reform'.

²⁴⁷ 'Abolition of Angola's anti-gay laws may pave the way for regional reform', The Conversation, 14 February 2019 -< <https://theconversation.com/abolition-of-angolas-anti-gay-laws-may-pave-the-way-for-regional-reform-111432>> on 20 December 2019.

²⁴⁸ Carroll A & Mendos LR, 'State-sponsored homophobia a world survey of sexual orientation laws'.

²⁴⁹ 'Members of parliament approve new Angolan criminal code', ANGOP, 23 January 2019, -< http://www.angop.ao/angola/en_us/noticias/politica/2019/0/4/Members-Parliament-approve-new-Angolan-Criminal-Code.462e956d-0b3f-4a1d-8f9b-ee9b5b81ae1e.html> on 21 December 2019.

²⁵⁰ Carroll A & Mendos LR, 'State-sponsored homophobia a world survey of sexual orientation laws'.

²⁵¹ ²⁵¹ 'Abolition of Angola's anti-gay laws may pave the way for regional reform'.

Various factors contributed to the decriminalisation of homosexuality in Angola. The most important one was the change in the political leadership in September 2017 which inspired political will to take on the issue of homosexuality.²⁵² Angola's new President Joao Lourenco has illustrated that he is willing to practice inclusive politics. Another factor, was Angola's organised civil society, and more so Iris Angola, its first ever LGBTIQ organisation that was registered in 2013.²⁵³ Finally, Angola's close relationship with other Lusophone states such as Brazil played an important role. Brazil has a high level of acceptance for sexual minorities and has motivated Angola along its path to securing and protecting gay and lesbian rights.

4.4. CONCLUSION

South Africa, Angola and Kenya were all previously colonised and due to the colonial imposition of laws, homosexuality was criminalised, which was change from the former cultural practices where heterosexual relationships and homosexual practices coexisted. This coupled with the cultural ideologies that shun same-sex conduct. In this chapter, it has been discussed that while South Africa's gay rights activism was inspired by the fight for non-discrimination and equality during the apartheid struggle, Angola's progressive political growth and regional support greatly influenced the move to decriminalisation of anti-homosexuality. Both the jurisdictions analysed in this chapter have some aspects in common with Kenya and through the findings in this chapter it is clear to identify that there is an opportunity for Kenya to decriminalise homosexuality. The lessons learned from this chapter shall be highlighted in the next.

²⁵² 'Abolition of Angola's anti-gay laws may pave the way for regional reform'.

²⁵³ 'Abolition of Angola's anti-gay laws may pave the way for regional reform', The Conversation, 14 February 2019 -< <https://theconversation.com/abolition-of-angolas-anti-gay-laws-may-pave-the-way-for-regional-reform-111432>> on 20 December 2019.

CHAPTER FIVE

CONCLUSION & RECOMMENDATIONS

5.1. INTRODUCTION

This chapter presents the summary of the findings of this study in relation to the prospects of decriminalising same-sex unions in Kenya. It further represents the conclusion drawn by the researcher from these findings which further inspired some of the recommendations on how to mitigate the challenges faced in the face of decriminalising homosexual conduct in Kenya.

5.2. CONCLUSION

This study was carried out with the intention that the information herein would be used to inform policy regarding decriminalisation of homosexuality in Kenya. It was guided by six research questions which this study has undertaken to systematically answer through critical analysis of various aspects of the anti-homosexuality position in Kenya. In order to understand the basis of the conclusions drawn by the study, the findings to each of the research questions are discussed below.

a. What are the justifications for criminalizing same-sex unions and conduct in Kenya?

In Kenya and across several states in Africa, there continues to be this misconception that homosexuality is a western concept that has come to pose a threat to the indigenous cultural ways and traditions of its citizens. However, there is evidence to show that homosexual practices were common during the precolonial period among several communities such as the young among the Bafia of Cameroon²⁵⁴, among women in Lesotho²⁵⁵ and several other African communities.

This is one of the main reasons decriminalisation of anti-sodomy laws has been so greatly opposed. This study has however found, that anthropological research identifies homosexual practices and conduct even in traditional, precolonial communities all across the African continent. Another argument that is used to justify the criminalisation of same-sex conduct is that it is an affront to

²⁵⁴ Murray S W R, 'Boy-wives and Female husbands: Studies in African Homosexualities' *New York: Palgrave*, 1998.

²⁵⁵ Kendall K, 'When a Woman loves a Woman in Lesotho: Love, Sex, and the (Western) Construction of Homophobia' in *Murray and Roscoe, Boys-Wives and Females Husbands*, 1998.

religion and the dictates of morality. Kenya is a country with religious diversity and often religious leaders who are against homosexuality often use their political and social influences to prevent and oppose the protection and equal treatment of the LGBTIQ community in Kenya. However, not all religious individuals or institutions castigate homosexual members of society and even embrace them into their places of worship. Finally, the theory that homosexuality is a personal choice encourages people from accepting same-sex unions or relationships on the premise that it is simply an outlandish expression of rebellion against the natural order when indeed there are several psychological research findings to show that this is far from a personal choice and perhaps a physiological, neurological or genetic disposition.

b. What are the judicial arguments for upholding anti-homosexuality laws in Kenya?

The consolidated Petition 150 & 234 of 2016 in the High Court of Kenya was an iconic judicial development for Kenya in the fight for LGBTIQ rights. The petition challenged the constitutionality of the provisions of the Penal Code that criminalise same-sex conduct on the grounds that those laws violate various constitutional rights including the right to non-discrimination, the right to privacy and economic and social rights. Despite various petitioners submitting their affidavits in support of the petition, the court upheld the validity and constitutionality of the anti-homosexuality laws, arguing that the laws in the Penal Code are not vague but that the purpose of the Act must be taken into account when interpreting the provisions; and that since these anti-sodomy laws do not expressly target any particular sexual orientation (as the wording states ‘any person’ and ‘any male person’), it does not amount to discrimination and thus is not unconstitutional.

c. To what extent can the Constitution be interpreted and applied to advance a case for decriminalization of same-sex conduct?

Based on the international position established by international instruments, treaties and covenants to which Kenya is a party to, anti-homosexuality laws constitute a violation of international human rights and human rights to non-discrimination, privacy, security of person, the right to marry and found a family and a further violation of the rule of law which allows access to these rights. The Kenyan Constitution itself has implemented elements that could be used to make a case in favour of the decriminalisation of same-sex conduct. Article 27 ensures the protection of the right to

equality and non-discrimination; Article 28 protects the right to human dignity; Article 31 protects the right to privacy; and Articles 2(5) and 2(6) which incorporate international law and treaties into domestic law, create an obligation on the state to ensure that it fulfils its international human rights obligations as well as ensure that the country's legislation does not contravene these human rights principles and protections. That alone would warrant such legislation unconstitutional.

d. What are some of the challenges facing decriminalization of anti-homosexuality laws in Kenya?

This study established that there are three main challenges that Kenya faces with regard to decriminalisation of homosexuality. First, the state is reluctant to relinquish its sovereignty to comply with international obligations believing that the National law should be the sovereign and thus should not be issued with ultimatums, especially those that may compromise the traditional and cultural integrity of the Kenyan people. Because of this, the state fails to recognise the importance of protecting the human rights of all its citizens who may continue to suffer from these inadequacies, the same people they are sworn to protect. Second, there are continuous violations by Kenya to fulfil its legal obligations to the international community with regard to human rights protection especially regarding non-discrimination and implementing legislation that protects against discrimination on the grounds of sexual orientation. Finally, religion and religious groups/organisations have incredible influence over the political and legal systems which hinders progression towards the realisation of LGBTIQ rights in Kenya on the outdated premise of morality.

e. What are some of the potential implications of decriminalising same-sex unions in Kenya?

As this study has established, there are more positive effects, than harm that can come from decriminalising same-sex conducts. Some of the implications of this include: improving access to education since homosexual individuals would no longer be afraid to attend school or universities for fear of being stigmatised; it would improve the social development of young gay men and women who would openly be willing and eager to engage in entrepreneurship without fear of stigmatisation; potential investors and corporations owned by homosexual individuals or couples

would not shy away from investing in Kenya out of fear of the consequences, this helping to both the local economy; it would strengthen families and communities; be an avenue for social justice to the gay and lesbian community; it would improve relations between the gay individuals and law enforcement which at this point remains volatile and hostile; it would open these sexual minorities to research to allow the government adequately tackle some of the social challenges faces by the gay community in order to promote harmony and overall social development in the country; and lastly it would encourage patriotism from the LGBTIQ community and citizens as a whole when nobody feels discriminated against or unappreciated in their own country.

f. What lessons can Kenya learn from other jurisdictions that have decriminalized same-sex unions?

Chapter four of this study entailed a comparative study of South Africa and Angola with regard to the decriminalisation of homosexuality laws. From the findings in that chapter, there are a few lessons that Kenya can learn. These are: the importance of progressive and inclusive governance/leadership; non-politicising of necessary social and policy developments; the importance of an active and aggressive civil society and social justice movements; the importance of a constraint and sequential constitutional process; and the importance of a county fulfilling its obligation under international treaties and instruments to which it are a party.

5.3. RECOMMENDATIONS

5.3.1. Creating Awareness

It is vital to create awareness and conduct large-scale education to the public on constitutional, legislative and international human rights laws and obligations that each person is supposed to fulfil, in order to dislodge the citizens from the belief that homosexuals are not entitled to equal rights.

5.3.2. Challenging the Anti-Homosexuality Laws

Continuously challenging the constitutionality of the sodomy laws in Kenya and not allowing the recently decided petitions to fade into memory is crucial. That, combined with increased strategic public interest litigation challenging these laws and violations against the LGBTIQ community

will bring matters concerning equal rights for all citizens to the forefront. The aim of these litigations is not necessarily to win the case, but to create awareness on the existing human rights, constitutional and legal issues pertaining to homosexuality laws.

5.3.3. Adequate Legislation

Parliament should strive to pass a comprehensive equality and non-discrimination law that expands prohibited grounds of discrimination to include sexual orientation so as to offer the homosexual community adequate protection under the law.

5.3.4. Unbiased Politics

Politicians have a tremendous influence over the citizens of Kenya as has been witnessed over the years. In order to remove stereotypes and prejudices that exist among their supporters, political leaders should engage in decisive and unbiased sensitisation of people rather than instigate them to oppose decriminalisation of same-sex conduct.

5.3.5. Government's Obligation to International Standards

The government should strive to fulfil all its international obligations pertaining to international human rights protection of the homosexual community and not shy away from their duty to comply with the constitution which expressly includes those international laws into the laws of Kenya.

5.3.6. Increased Efforts by Civil Society Organisation

Civil Society Organisations in Kenya especially the LGBTIQ organisations, should play an increased and active role in submitting reports to human rights treaty bodies on the violations of human rights of homosexual individuals. This would create international pressure on the state which ultimately may encourage possible reforms with regard to the protection of homosexual rights and decriminalisation of anti-homosexuality laws in the country.

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