

**GIVING RIGHTS TO THE OUTLAWED AMONG US:
DECRIMINALISING KENYA'S ANTI-SODOMY LAWS**

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By

ANGELA WANGARI MUKORA

076946

Prepared under the supervision of

DR. JOHN OSOGO AMBANI

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DECLARATION

I, ANGELA WANGARI MUKORA, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date:

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:

DR. JOHN OSOGO AMBANI

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DEDICATION

This study is dedicated to the thousands of LGBTIQ Kenyans currently living their lives as second-class citizens, in a system built up against them. May this study be a small step towards alleviating your suffering and may you one day, see the other side of the rainbow.

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LIST OF ABBREVIATIONS

CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CESCR	Committee on Economic, Social and Cultural Rights
CIC	Commission for Implementation of the Constitution
HIV/AIDS	Human Immuno-Deficiency Virus/Acquired Immune Deficiency Syndrome
HRC	Human Rights Council
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
KEMRI	Kenya Medical Research Institute
KHRC	Kenya Human Rights Commission
KLRC	Kenya Law Reform Commission
KNEC	Kenya National Examinations Council
LGBTIQ	Lesbian, Gay, Bisexual, Transgender, Intersex and Queer.
MSM	Men who have sex with men
NGLHRC	National Gay and Lesbian Human Rights Commission
SOGI	Sexual Orientation and Gender Identity
STIs	Sexually Transmitted Illnesses
TEA	Transgender Education and Advocacy
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees

WGAD Working Group on Arbitrary Detention

WHO World Health Organisation

LIST OF CASES

Baby 'A' & another v. Attorney General & 6 others [2014] eKLR.

Dudgeon v United Kingdom, ECtHR, Judgment of 22 October 1981.

Eric Gitari v Non- Governmental Organisations Co-ordination Board & 4 others [2015] eKLR.

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Francois Ayissi et al. v Cameroon, U.N. Working Group on Arbitrary Detention, U.N. Doc. No. A/HRC/4/40/Add. 1 (2 Feb 2007).

Karua vs. Radio Africa Limited T/A Kiss FM Station and Others Nairobi HCCC No. 288 Of 2004 [2006] 2 EA 117; [2006] 2 KLR 375.

Media R. Agenda v. Nigeria, ACmHPR Comm. No. 105/93, 12 Annual Activity Report (1998).

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Obergefell v. Hodges, 576 U.S. ____ (2015).

Prof. J Oloka-Onyango, Hon. Fox Odoi-Oywelowo, Andrew Mujuni Mwenda, Prof. Morris Ogenga Latigo, Dr. Paul Nsubuga Semugoma, Jacqueline Kasha Nabagesera, Julian Pepe Onziema, Frank Mugisha, Human Rights Awareness & Promotion Forum (HRAPF) And Centre for Health, Human Rights & Development (CEHURD) v Attorney General of Uganda, Petition No. 008 of 2014.

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

Republic v. Non-Governmental Organizations Co-ordination Board & another ex parte Transgender Education and Advocacy & 3 others [2014] eKLR.

S v Makwanyane and Another (CCT3/94) [1995] ZACC 3.

Severine Luyali v Ministry of Foreign Affairs & International Trade & 3 others [2014] eKLR.

Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v Nigeria, ACmHPR Comm. 155/96, 15 Activity Report (2001).

Toonen v. Australia, CCPR Comm. No. 488/1992 (31 March 1994).

X v Colombia, CCPR Comm. No. 1361/2005 (30 March 2007).

Yasser Mohamed Salah et al v Egypt, Working Group on Arbitrary Detention, UN Doc E/CN.4/2003/8/Add (24 January 2003).

Zimbabwe Human Rights NGO Forum v. Zimbabwe, ACmHPR Communication 245/2002, 21 Activity Report (2006).

ABSTRACT

Kenya's Penal Code, imported from our colonial master, has, since it came into force, contained provisions prohibiting same-sex activity as an unnatural offence, punishable to up to 14 years' imprisonment. The result of these anti-sodomy provisions is that they legitimise the prevalent homophobic attitude in Kenya, leaving LGBTIQ Kenyans vulnerable to various human rights violations; at the same time widening the gap between the LGBTIQ community and their access to justice.

Through a qualitative research, this study reveals that there is something in the water. A shifting consensus in the international community towards supporting equal rights for LGBTIQ persons, reinforced by Kenya's own current Constitution, which underscores these rights in the Bill of Rights, and incorporates international law into domestic law. This study argues that Kenya's anti-sodomy laws are incompatible with these human rights standards, and in fact, incompatible with the ideals of universality of human rights, natural and social justice. Further to this, this study recommends that these laws be repealed, in order to conform to both constitutional and international demands.

CHAPTER ONE: INTRODUCTION

1.1 Background

The current Constitution of Kenya that was promulgated in 2010 was heralded as ‘the birth of a second nation’ with progressive provisions that serve to protect Kenyans by providing an extensive framework of protected rights.¹ The Bill of Rights, is one of the big highlights of this Constitution, which enunciated the rights of every Kenyan in a way that was previously not as formally asserted. The Bill guarantees all Kenyans fundamental rights and freedoms; these include, among others, the right to life,² equality and freedom from discrimination,³ human dignity,⁴ privacy,⁵ and freedom of expression.⁶

However, even with these progressive provisions, there exists a vacuum in protection of rights of the Lesbian, Gay, Bisexual, Transsexual, Intersex and Queer (**LGBTIQ**) community in Kenya, with laws that explicitly prohibit homosexual activity. Homosexual acts in Kenya, according to the Penal Code, termed as ‘carnal knowledge against the order of nature’ are punishable to up to 14 years in prison.⁷

Because of these provisions that criminalise homosexual activity, the members of the LGBTIQ community live their lives as second class citizens, contrary to the constitutionally guaranteed right of equality and freedom from discrimination in the Constitution.⁸ These provisions serve to potentially prosecute and even imprison even those that engage in this activity privately and consensually, consequently contravening the right these citizens have to privacy.⁹ In addition,

¹ Sihanya B, *Constitutional Implementation in Kenya, 2010-2015: Challenges and Prospects*, Friedrich Ebert Stiftung (FES) and University of Nairobi’s Department of Political Science & Public Administration, Occasional Paper Series (2012), 3.

² Article 26, *Constitution of Kenya* (2010).

³ Article 27, *Constitution of Kenya*.

⁴ Article 28, *Constitution of Kenya*.

⁵ Article 31, *Constitution of Kenya*.

⁶ Article 33, *Constitution of Kenya*.

⁷ Section 162, *Penal Code* (Act No. 14 of 2014).

⁸ Finerty CE, ‘Being Gay in Kenya: The Implications of Kenya’s New Constitution for its Anti-Sodomy Laws’ *45 Cornell Law Journal* (2012), 433.

⁹ In *Francis Odingi v R* [2014] eKLR, the defendant was charged and convicted of the offence of ‘carnal knowledge against the order of nature, and was subsequently sentenced to a 6-year imprisonment. See also: Recently, Judge Matthew Emukule at the High Court of Mombasa ruled that there were sufficient grounds in Kenya law for using anal examinations to gather medical evidence of crimes including rape

criminalisation of homosexuality legitimises the general homophobic attitude of the majority of Kenyans, and marginalises the LGBTIQ community, also putting them at risk for mob violence and other social threats.¹⁰

Moreover, criminalisation of homosexual activity, even when private and consensual, places homosexual individuals at a precarious position particularly with corrupt law enforcement officials who exploit this by blackmailing these individuals with the threat of arrest and/or imprisonment.¹¹ There have been reported cases of police and other law enforcement officials subjecting LGBTIQ individuals to degrading treatment e.g. forced anal testing as well as abject violation of their rights to fair procedure.¹²

While these violations to the human rights of LGBTIQ individuals occur frequently, there is little political goodwill to decriminalise homosexuality in Kenya. Many political leaders perpetuate the homophobic attitude among Kenyans and use anti-gay agendas to bolster their popularity.¹³ Even for those that do not aggressively propose anti-gay agendas, many are reluctant to openly support LGBTIQ rights which would inevitably hurt their political careers in the predominantly homophobic climate existent in Kenya.¹⁴

This dominant homophobic attitude has been evident even in Kenya's participation on the issue at the international realms, where Kenya has been a notable state for rejecting resolutions at the United Nations level that attempt to internationalise the requirement to protect sexual minority rights.¹⁵ For example, in 2014, the Human Rights Council adopted a resolution against anti-LGBTIQ violence and discrimination to which Kenya opposed.¹⁶ Another occasion was in 2010,

and sodomy. The case in question involved two consenting males (C.O.I. and G.M.N.) that had been arrested under Section 162 of the Penal Code and subjected to anal testing against their will.

¹⁰ Kenya Human Rights Commission Report, *The Outlawed Among Us: A Study of the LGBTI Community's Search for Equality and Non-Discrimination in Kenya*, 2011, at 27.

¹¹ Kenya Human Rights Commission Report, *The Outlawed Among Us: A Study of the LGBTI Community's Search for Equality and Non-Discrimination in Kenya*, 2011, at 21.

¹² Human Rights Watch, 'Kenya: Court Upholds Forced Anal Tests', 16 June 2016.

¹³ Human Dignity Trust report, *Criminalisation of Homosexuality*, 25 October 2015, 1-3.

¹⁴ Earlier this year, Uhuru Kenyatta when asked about Gay rights termed the subject a non-issue in Kenya.

¹⁵ Economic and Social Council, *Brazilian Resolution on Human Rights and Sexual Orientation*, UN E/CN.4/2003/L.92, 25 April 2003.

¹⁶ United Nations Human Rights Council, *Human Rights, Sexual Orientation and Gender Identity*, Doc. A/HRC/27/32, 2 October 2014.

where the UN Human Rights Committee¹⁷ in its list of issues recommended for review in its reporting mechanism (**The Universal Periodic Review**) that Kenya decriminalise homosexuality and undertake purposive measures towards ensuring the LGBTIQ community is respected and protected.¹⁸ Kenya rejected this recommendation, citing the fact that such a move would be received with much opposition from the public.¹⁹

There has been a growing consensus internationally that discrimination based on sexual orientation and gender identity contravenes fundamental human rights particularly visible through the emergence of soft law on the subject.²⁰ The UN High Commissioner for Human Rights issued a document enumerating the obligations that States have to prevent violence and discrimination based on sexual orientation and gender identity.²¹ In this document, the Commissioner enunciates that criminalisation of private consensual homosexual acts violates an individual's right to privacy and to non-discrimination and constitutes a breach of international human rights law.²² While this document only has the status of soft law in the international realm,²³ the issuance of this document shows a general positive movement of jurisprudence in the protection of LGBTIQ rights, and reflects a more inclusive approach in the international community to do with this.

Binding international human rights instruments have also been interpreted in a way to favour the protection of sexual minority rights. For example, in the revolutionary *Toonen v Australia*²⁴ the UN Human Rights Committee made a profound ruling that transformed the sexual rights lobby. In finding in favour of the plaintiff, the Committee ruled that Australia's anti-sodomy laws were in contravention with the right to privacy guaranteed under the International Convention for Civil

¹⁷ The UN Human Rights Committee is the human rights body at the UN level mandated with monitoring the ICCPR rights enforcement and compliance.

¹⁸ UN Human Rights Committee, *Third periodic report of state parties (Kenya)*, CCPR/C/KEN/3, 19 August 2010.

¹⁹ UN Human Rights Committee, *Replies from the Government of Kenya to the list of issues to be taken up in connection with the consideration of its third periodic report*, CCPR/C/KEN/Q/3/Add.1, 30 May 2012.

²⁰ *The Yogyakarta principles on the application of international human rights law in relation to sexual orientation and gender identity* (March 2007).

²¹ UNGA, *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, UN A/HRC/19/41, 17 November 2011, 15–19.

²² UNGA, *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, 15 – 19.

²³ Soft law is not binding and has the effect of only making a recommendation.

²⁴ *Toonen v. Australia*, CCPR Comm. No. 488/1992 (31 March 1994).

and Political Rights (ICCPR).²⁵

The Committee on Economic, Social and Cultural Rights (CESCR) has also issued general comments favouring the interpretation of the International Convention on Economic, Social and Cultural Rights (ICESCR) to include the protection of sexual minorities.²⁶ In its twentieth general comment, for example, the CESCR posits that the non-discrimination clause of the ICESCR was to be interpreted in such a broad way as is possible, since the nature and extent of discrimination may vary and evolve over time.²⁷

A good number of states internationally have followed suit to secure sexual minority rights in their domestic law. The United States of America (USA) more recently in 2015 granted the right to marry to homosexuals, through the landmark case of *Obergefell v Hodges*.²⁸ This decision has had the effect of raising conversation around the globe surrounding this issue, and inspiring LGBTIQ movements to intensify demands for the respect of their rights.

Regionally, Africa has generally been reluctant to embrace homosexuality as an accepted practice. As a result, with the exception of South Africa which recognises same-sex marriage, LGBTIQ rights in Africa are very limited in comparison to other parts of the world.²⁹ A majority of African countries, like Kenya, criminalise homosexuality.³⁰ Uganda, for example, had its president sign in The Anti-Homosexuality Act in 2014,³¹ which while it was consequently ruled unconstitutional in

²⁵ *Toonen v. Australia*, CCPR, para. 8.5.

²⁶ CESCR, *General Comment No. 14, The Right to the Highest Attainable Standard of Health (Art. 12)*, UN Doc. E/C. 12/2000/4, 11 August 2000, 18; See also: *General Comment No. 15, The Right to Water (Arts. 11 and 12 of the Covenant)*, UN E/C. 12/2002/11, 20 January 2003, 13; and generally: *General Comment 20, Non-Discrimination in Economic, Social and Cultural Rights*, UN E/C. 12/GC/20, 10 June 2009.

²⁷ CESCR, *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights*, UN E/C. 12/GC/20, 10 June 2009.

²⁸ *Obergefell v. Hodges*, 576 U.S. ____ (2015) where the United States Supreme Court case held in a 5–4 decision that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

²⁹ LGBT rights in South Africa are formally protected under *Section 9 of the Constitution*, which forbids discrimination on the basis of *sex, gender or sexual orientation*, and applies to the government and to private parties. The Constitutional Court extends the interpretation of this section to transgender people as well.

³⁰ Library of Congress Report, *Criminal Laws on Homosexuality in African Nations*, February 2014.

³¹ Popularly known as the ‘Kill the Gays bill’ in western media outlets due to the death penalty provision in the act that was subsequently substituted for life imprisonment.

the Ugandan Constitutional Court based on procedural grounds,³² only served to exacerbate homophobia in the country, and fuel violence towards homosexuals in the country.³³

The African Charter on Human and People's Rights (**the African Charter**) secures the right to human dignity, equality and non-discrimination.³⁴ As was seen in *Social and Economic Rights Action Centre v. Nigeria*,³⁵ the African Commission on Human and People's Rights (**the Commission**) also imposes a positive obligation on states in the realisation of these rights.³⁶ However, like most international instruments, the Charter does not include sexual orientation as a category of non-discrimination.³⁷ The Charter, however, includes 'other status' which U.N. bodies and other human rights organisations have interpreted to include sexual orientation.³⁸ In *Zimbabwe Human Rights NGO Forum v. Zimbabwe* for example, the Commission held that 'sexual orientation' was a category that warranted protection under the African Charter – specifically under the equal protection clause.³⁹ Moreover, the Commission has issued opinions and recommendations supporting the protection of fundamental human rights of sexual minorities.⁴⁰

With the above in mind, it could be inferred that there is a shift in perspective happening in the world now, and a conversation on the protection of the rights of LGBTIQ persons is more relevant now than ever. The discussion undertaken in this study is not one from a morality standpoint- on whether homosexual activity is right or wrong, since the researcher recognises that this standpoint is fickle and often subject to change. Moreover, the morality standpoint is often a subjective one, which has limited purview in legal arguments. The study therefore flows from a legal standpoint

³² Prof. J Oloka-Onyango, Hon. Fox Odoi-Oywelowo, Andrew Mujuni Mwenda, Prof. Morris Ogenga Latigo, Dr. Paul Nsubuga Semugoma, Jacqueline Kasha Nabagesera, Julian Pepe Onziema, Frank Mugisha, Human Rights Awareness & Promotion Forum (HRAPF) And Centre for Health, Human Rights & Development (CEHURD) v Attorney General of Uganda, Petition No. 008 of 2014.

³³ For example, David Kato, a prominent gay activist in Uganda was found bludgeoned to death in 2011.

³⁴ Kenya acceded to the Charter in 1992.

³⁵ *Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v Nigeria*, ACmHPR Comm. 155/96, 15 Activity Report (2001).

³⁶ Article 43, Constitution of Kenya imposes such an obligation on the state on Economic and Social Rights.

³⁷ Article 2, *African Charter on Human and People's Rights* (1981).

³⁸ CESCR, *General Comment No. 20*, 32.

³⁹ *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, ACmHPR Communication 245/2002, 21 Activity Report (2006).

⁴⁰ ACmHPR, *Concluding Observations and Recommendations on the Periodic Report of the Republic of Cameroon*, 39 Ordinary Session, 11-25 May 2005, 14.

on the entitlement of LGBTIQ individuals to their inherent human rights and protection thereof.

1.2 Statement of the Problem

Ideally, all human beings should have their fundamental human rights secured and protected. Criminalisation of homosexuality in the Penal code makes it such that homosexual Kenyans live their lives as second class citizens, and at risk for violence and social threats - legitimised by these anti-sodomy provisions in the Kenyan Penal Code.⁴¹ Moreover, it would appear that these provisions clash with both constitutional and international provisions on right to equality and non-discrimination to every Kenyan as well as the right to privacy.

1.3 Justification of the study

Section 162 of the Penal Code, which criminalises same sex activity may be in conflict with the Kenyan Bill of Rights as well as with international laws, perhaps necessitating a review of the law. Additionally, following the 2010 Universal Periodic Review by the Human Rights Council, Kenya committed to adopting an extensive non-discrimination framework for all Kenyans - irrespective of their sexual orientation. This study could aid in recommending such a framework.

1.4 Hypothesis

The study proceeds on the hypothesis that the current domestic laws in Kenya regarding LGBTIQ individuals do not comply with the international and regional framework on human rights as well as the constitutional threshold set by the Bill of Rights.

1.5 Statement of the Objectives

1.5.1 General objective

To review the legal framework in Kenya on the LGBTIQ community and investigate whether these laws meet the threshold for the protection of fundamental human rights set by the Constitution, regional laws and international laws.

1.5.2 Specific objectives

1. To investigate laws regarding LGBTIQ activity in Kenya and in the international scene.

⁴¹ Section 162, *Penal Code* (Act No. 14 of 2014).

2. To investigate the effect that these laws have had on the LGBTIQ community in Kenya, particularly regarding their human rights.
3. To investigate on whether Kenya's domestic laws regarding the LGBTIQ community comply with regional and international standards.

1.6 Research Questions

The research will aim to answer the following questions:

1. What is the current legal position of Kenya with regard to the human rights of LGBTIQ individuals and what effect does this position have on LGBTIQ individuals living in Kenya?
2. Does Kenya's current position on LGBTIQ rights comply with its regional and international obligations?
3. What is the best way forward on protection on LGBTIQ rights?

1.7 Theoretical Framework

This study shall be anchored on three key theories that underpin human rights: the universality of human rights, natural rights, and social justice. Donnelly defines human rights as rights one has simply because they are human.⁴² The theoretical basis for human rights rests on two fundamental assertions: that first, every human being has *special moral value*, and that, *because* of this reason, "certain things ought not be done to any human being and certain things ought to be done for every human being".⁴³

That 'special moral value' can be correlated to the theory of human dignity, which is tied to natural rights. Early scholars such as Aquinas, influenced by Plato and Aristotle, posited that all men are *equal* before God and are entitled to universal rights. The theory of human dignity is a foundational concept in human rights law, and is often cited in all major human rights instruments and scholars. For instance, human dignity and the universality of human rights are the main foundational concepts of the Universal Declaration of Human Rights.

⁴² See generally: Donnelly J, *Universal Human Rights in Theory and Practice*, London: Cornell University Press, 2013.

⁴³ See generally: Lovell N, 'Theorising LGBT Rights as Human Rights: A Queer(itical) Analysis' *E-International Student Relations*, 30 December 2015.

Aquinas was however influenced by a heavy religious dialect,⁴⁴ that sometimes reinforces discrimination based on religious imports. With relevance to our study, the Bible condemns homosexuality and directs that it should be punished.⁴⁵ Rawls departs from this kind of religious import in giving a basis for social justice, that will be the complementary theory to human rights theories in this study. Rawls, who was a critic of utilitarianism, posits that each person has an inviolability founded on justice which cannot be overridden at the expense of the 'maximum utility'.⁴⁶

Rawls' theory of justice poses that the principles of justice can be derived from a hypothetical contract, with the device of what he calls 'the veil of ignorance.' The veil of ignorance would have all members in society to forget the social, physical and economic inequalities that divide us, and instead imagine that we are all in a position of equality. This veil of ignorance would hide from us, and abstract those very realities that exist in society- that some are stronger than others, others healthier than others, or even in the spirit of this study, that we have different sexual orientations. Only from this veil of ignorance would we be able to truly agree on principles that are just.⁴⁷

In stating the principles that would be chosen, he states that behind this veil of ignorance, each person would still want to be respected and treated with dignity. Further to this, a principle would emerge that we would adopt equal basic liberties. Fundamental rights would be respected. Utilitarianism would therefore be rejected, since we would not want to take the risk of being in an oppressed minority, with a majority tyrannising over us.⁴⁸ The oppressed minority in this case would sexual minorities, who in Kenya, are already being tyrannised by the homophobic majority. Rawls' theory of justice would eventually lead us to the conclusion that social justice is dependent on the respect of fundamental rights of all human beings, rights which we all have by virtue of

⁴⁴ O'Connor, DJ, *Aquinas and Natural Law*, London: Macmillan & Co Ltd, 1967, 7.

⁴⁵ See: Leviticus 18:22 (King James): "*Thou shalt not lie with mankind, as with womankind: it is abomination.*"; Leviticus 20:13 (King James): "*If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death. Their blood shall be upon them.*"

⁴⁶ Utilitarianism is a theory championed by Bentham, Kant and Jon Stuart Mill that advocates for the avoidance of pain and that the best moral action is that which maximises utility from the system. Therefore, this theory poses that as long as the majority in the society are satisfied, it is a just sacrifice if a few minorities are undermined.

⁴⁷ Sandel M, *Liberalism and the Limits of Justice*, Cambridge University Press, 1982, 66-103.

⁴⁸ Rawls J, *A Theory of Justice*, Cambridge, Belknap Press of Harvard University Press, 1971, 1-19, 109-123.

being human underscoring the universality of human rights.

1.8 Research Design and Methodology

This paper will employ a descriptive design. This design will allow to accurately describe the situation as it is, and draw correct conclusions from it. The study will undertake a qualitative research as to existing literature on the field. The study will review both municipal and international laws on LGBTIQ activity. The study will also review other works already written on LGBTIQ rights. Some of these sources have already been cited in the literature review herein.

1.9 Scope and Limitations to the Study

It is important to note that while the conversation on gender identity is equally important, the focus of this study will primarily be on homosexual activity since Section 162 of the Penal Code only expressly criminalises same sex activity between males; and it is on this provision that this study proceeds.

The study will also face a limitation as to information available in secondary sources. The researcher intends on overcoming this limitation by drawing from case jurisprudence in the field, as well as analysed findings from field work and reports already performed that are relevant to the study.

1.10 Chapter Breakdown

1. Introduction

This will be an introduction into what the study involves, and the proposed methods of research. Moreover, the introduction provides an outline of the sources relied upon throughout the study.

2. Legislative framework and Practice in Kenya

Under this chapter, the paper will undertake an extensive analysis of the laws that relate to the LGBTIQ community in Kenya from a constitutional and statutory standpoint. This chapter will also discuss the harsh realities that face LGBTIQ individuals in the face of a predominantly homophobic nation.

3. LGBTIQ Rights in the International Sphere

This chapter will undertake an analysis of human rights framework in the regional and international treaties that Kenya is a party to, and a brief inquiry on whether Kenya's domestic laws comply with these standards.

4. Lessons for Kenya

After the study of regional and international laws in Chapter Three, this chapter will analyse the findings, and juxtapose the findings to the situation in Kenya dealt with in Chapter Two. From these findings, the study will be able to draw lessons for Kenya on what would be best practice for Kenya.

5. Conclusion and recommendations

This chapter will conclude the findings, and finally make final recommendations for implementation in Kenya.

CHAPTER TWO: THE SITUATION OF LGBTIQ RIGHTS IN KENYA

2.1 Introduction

In Chapter One, we gave a background to the reality in Kenya, which is that Kenya is crossed by frames of exclusion and violation of fundamental human rights for sexual minorities.¹ We also summarised the problem that Kenya's anti-sodomy laws present in this conundrum, by exacerbating the challenges experienced by the Lesbian, Gay, Bisexual, Transgender, Intersex and Queer (**LGBTIQ**) community in Kenya.

In this chapter, we proceed to answer the first two research questions posited, which are on the laws in Kenya relating to the LGBTIQ community, as well as the effect these laws have on them. This chapter shall first undertake an exposition of the current situation in Kenya regarding the LGBTIQ community, by highlighting the challenges experienced by the community and then looking at some cases in which Kenya has actually made strides towards protecting the rights of LGBTIQ individuals. Thereafter, the next subchapter shall undertake an analysis of Kenya's anti-sodomy laws in the Penal Code and then contextualise the crime of sodomy by looking into its origins. This same subchapter shall also espouse the problems created by anti-sodomy laws, and the challenges related to enforcement thereof. Lastly, the chapter will look at the Constitution of Kenya [2010], which is heralded as the new dawn for protection of LGBTIQ rights, and analyse the provisions therein that promote the protection of LGBTIQ rights.

2.2 Side-lined and Abused: Challenges Faced by LGBTIQ Individuals in Kenya

In 2011, the Kenya Human Rights Commission (**KHRC**) performed a study on the human rights violations that the LGBTIQ community in Kenya faces, interviewing numerous members of the community.² The findings were that in a primarily homophobic culture, the LGBTIQ community in Kenya is left vulnerable and marginalised, not able to realise the fundamental rights guaranteed by the 2010 Constitution.³ What follows, is a summary of some of the challenges faced by the

¹ Horn R, Safe Haven, 'Sheltering Displaced Persons from Sexual and Gender-Based Violence' *Human Rights Centre, Berkeley Law, University of California*, May 2013, 81.

² Kenya Human Rights Commission Report, *The Outlawed Among Us: A Study of the LGBTI Community's Search for Equality and Non-Discrimination in Kenya*, 2011.

³ Chapter 4: The Bill of Rights, *Constitution of Kenya*, 2010.

LGBTIQ in this country, most of which are exacerbated by the legitimacy, prima facie, granted by criminalisation of homosexual activity.

First, LGBTIQ individuals in Kenya are routinely harassed and hassled by police and state officials, and taken to remand houses without due procedure and sometimes beyond the constitutional limit.⁴ This contravenes the Constitution, which guarantees fair administrative action to all citizens and access to justice as well as certain rights to arrested persons, for example the right to be brought before a court as soon as reasonably possible.⁵

Other cases have been reported where police officials blackmail and extort suspected homosexuals with the threat of arrest and/or imprisonment. One interviewee reported that police officials barged into his house one night and forced him and his partner to undress- threatening to charge them with being caught in the act of homosexuality; eventually blackmailing the interviewee for a handsome sum of money that he had to pay in fear of being arrested.⁶

These allegations are rarely, if ever, investigated by the police, since the police officials themselves are unlikely and unwilling to charge and investigate their own.⁷ This is in addition to the fact that even state officials themselves share the same general mind-set that homosexuals are ‘criminals and rapists’ that should be ostracised from society.⁸ Persons Marginalised and Aggrieved – Kenya (**PEMA-Kenya**) interviewees reported that even where police protected LGBTIQ victims of violence,⁹ perpetrators of the violence were not brought to book for the crimes.

LGBTIQ individuals are also subjected to physical violence and threats of social exclusion from the community at large, in a country where majority of the population believe homosexuality is a sin that ought to be punished and corrected.¹⁰ Interviewees reported cases of gang rape and

⁴ Kenya Human Rights Commission Report, *The Outlawed Among Us: A Study of the LGBTI Community's Search for Equality and Non-Discrimination in Kenya*, at 21. See also: PEMA-Kenya, *The Issue is Violence: Attacks to LGBT People at the Kenyan Coast*, Human Rights Watch, 2015, at 19.

⁵ Article 47 - 49, *Constitution of Kenya* (2010).

⁶ Kenya Human Rights Commission Report, *The Outlawed Among Us: A Study of the LGBTI Community's Search for Equality and Non-Discrimination in Kenya*, at 21.

⁷ PEMA-Kenya, *The Issue is Violence: Attacks to LGBT People at the Kenyan Coast*, at 3.

⁸ Kenya Human Rights Commission Report, *The Outlawed Among Us: A Study of the LGBTI Community's Search for Equality and Non-Discrimination in Kenya*, at 24.

⁹ PEMA-Kenya, *The Issue is Violence: Attacks to LGBT People at the Kenyan Coast*, at 23.

¹⁰ Finerty CE, ‘Being Gay in Kenya: The Implications of Kenya’s New Constitution for its Anti-Sodomy Laws’ *45 Cornell Law Journal* (2012), 433.

violence perpetuated by a homophobic attitude from such violent groups, with some positing their motivation to rape LGBTIQ individuals as being to ‘correct their errant ways’.¹¹ One interviewee reported such violence coming from the police force itself.¹²

These violent rouses are particularly more frequent in the Coastal region where recently in February 2015, after pictures and videos of two men engaging in sex were disseminated on social media, vigilante ‘witch hunts’ for homosexuals followed in Diani and Ukunda.¹³ During this time, instead of protecting LGBTIQ individuals, the police force also engaged in gross human rights violations by arbitrarily arresting homosexual men and subjecting them to degrading anal tests to ‘gather evidence of the crime’.¹⁴

Even more appalling, after the two individuals petitioned the High Court for Mombasa on the gross human rights violations regarding the forced anal testing, the Court upheld the tests, claiming that it was the only way to gather evidence for the crime which is legislated in the Penal Code.¹⁵ This ruling is merely characteristic of the majority of the Kenyan population’s homophobic attitude which is also perpetuated by religious and political leaders that frequently use anti-gay agendas to bolster their popularity.¹⁶

Evidently, Kenya’s anti-sodomy laws legitimise these attitudes and indeed give credence to the justification of abuse against LGBTIQ individuals.¹⁷ Moreover, they dissuade LGBTIQ individuals from reporting these abuse cases in fear of arrest and imprisonment in a system that is built against them from the onset.¹⁸

¹¹ Kenya Human Rights Commission Report, *The Outlawed Among Us: A Study of the LGBTI Community’s Search for Equality and Non-Discrimination in Kenya*, at 29.

¹² Kenya Human Rights Commission Report, *The Outlawed Among Us: A Study of the LGBTI Community’s Search for Equality and Non-Discrimination in Kenya*, at 28.

¹³ PEMA-Kenya, *The Issue is Violence: Attacks to LGBT People at the Kenyan Coast*, at 29.

¹⁴ PEMA-Kenya, *The Issue is Violence: Attacks to LGBT People at the Kenyan Coast*, at 22-23.

¹⁵ Human Rights Watch, ‘Kenya: Court Upholds Forced Anal Tests’, 16 June 2016.

¹⁶ For example, a group of Kenyan MPs proposed a bill with harsh anti-gay laws, see: Human Rights Campaign, ‘Kenya: Draft Bill Proposes Stoning to Death of Gay People’, 15 August 2014, <http://www.hrc.org/blog/entry/kenya-draft-bill-proposes-stoning-to-death-of-gay-people> accessed on 1 November 2016.

¹⁷ Kenya Human Rights Commission Report, *The Outlawed Among Us: A Study of the LGBTI Community’s Search for Equality and Non-Discrimination in Kenya*, at 44.

¹⁸ Kenya Human Rights Commission Report, *The Outlawed Among Us: A Study of the LGBTI Community’s Search for Equality and Non-Discrimination in Kenya*, at 30.

For instance, a KHRC interviewee told of how she and her other lesbian friend had been gang raped by a gang of 'Mungiki' sect members,¹⁹ but did not report the crime after because she knew that 'after dealing with them before 'they would be of no help to her and would even continue to shame and ridicule her or worse yet threaten to also sexually violate them'.²⁰ Another Human Rights Watch interview, explained his reluctance to file a police report after having been attacked, facing a dilemma on what he would tell the police on why he had been attack.²¹

In addition, there is a concern with regard to access to health care for LGBTIQ individuals that is greatly diminished by the homophobic climate in Kenya.²² For example, in February of 2010, in Mtwapa, another coastal town in Kenya, there was another crackdown by local residents, this time on sympathisers of the LGBTIQ community or organisations perceived to be so.²³ As such, LGBTIQ peer educators from Kenya Medical Research Institute (**KEMRI**) who offered health services to LGBTIQ individuals were subjected to violence and threats. Another occurrence like this happened in Malindi in 2008, where an Men who have Sex with Men (**MSM**) Health Centre was forcibly shut down by local officials.²⁴ Such cases only make healthcare providers reluctant to offer much needed health services to LGBTIQ individuals, in fear for their lives.

The right to health is considered universal, resulting from a big political mobilisation of society.²⁵ Health care, or rather promotion of access to it, is a positive right imposed on the state to respect, fulfil and protect.²⁶ The World Health Organisation (**WHO**) provides a summary of the State's general obligations towards the right to healthcare as: to endeavour to progressively realise the right,²⁷ taking steps towards realisation of the right to health for example adopting a national

¹⁹ *Mungiki* is a banned ethnic sect in Kenya infamous for engaging in violence.

²⁰ Kenya Human Rights Commission Report, *The Outlawed Among Us: A Study of the LGBTI Community's Search for Equality and Non-Discrimination in Kenya*, at 29.

²¹ PEMA-Kenya, *The Issue is Violence: Attacks to LGBT People at the Kenyan Coast*, at 21.

²² Open Society Foundations, *LGBT Health and Rights in East Africa: A Snapshot of Successes and Challenges for the Advocacy Community*, September 2007, 2.

²³ PEMA-Kenya, *The Issue is Violence: Attacks to LGBT People at the Kenyan Coast*, at 37.

²⁴ Gay and Lesbian Coalition of Kenya, 'Kenya: Gay and Lesbian Coalition of Kenya Condemns Closure of Centre in Malindi', 27 June 2008.

²⁵ Yamin AE, 'The Right to Health under International Law and its Relevance to the United States' *US National Library of Medicine, National Institutes of Health*, 2005, 2-3.

²⁶ Positive rights, usually associated with second and third generation rights, are human rights that impose a positive obligation on the State to ensure a progression of her citizens towards realisation of these rights.

²⁷ Article 2, *International Covenant on Economic, Social and Cultural Rights* (1966). The interpretation of this article implies that retrogressive measures with respect to the right are not permissible, unless a

strategy,²⁸ and to establish a core minimum obligation to ensure the satisfaction of minimum essential levels of each of the rights under the Covenant.²⁹

Research reveals that members of the LGBTIQ community, particularly male homosexuals, are more susceptible to health problems particularly Sexually Transmitted Illnesses (STIs).³⁰ Prior to *Toonen*, Australia advanced the submission that one of the benefits of criminalisation of same-sex activity would be to check the spread of Human Immuno-deficiency Virus (HIV).³¹ *Toonen* however advanced a plausible counter-argument that such efforts to criminalise homosexual activity and to vilify homosexuals would only result in the opposite effect i.e. a proliferation of the spread of HIV since such vilification would only ‘drive underground’ many of the individuals at risk for infection, and impede health programs and policies dedicated to this purpose.³²

As aforementioned, promotion of the access to healthcare of citizens is a positive right, which requires a move from the State towards the realisation of this right.³³ This is the rationale that underpins progressive rights, that they are to be realised progressively as the States continues to make efforts to promote their realisation. As evidenced above, however, criminalisation of homosexuality is retrogressive to the realisation of access to healthcare for homosexuals, as it induces a fear of alienation or social threat and violence to those involved in providing healthcare to LGBTIQ individuals thus impeding overall healthcare efforts to homosexuals.³⁴

Lastly, only in this brief summary of the situation in Kenya but not in infinite totality, there is an abject lack of fair administrative action for the LGBTIQ community in Kenya. Interviewees

State can demonstrate that it has made every effort to use all resources at its disposal to meet its obligations.

²⁸ World Health Organisation, *The Right to Health*, Fact Sheet No. 31, 2008, 24.

²⁹ With respect to the right to health, the Committee has underlined that States must ensure: (i) The right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalised groups; (ii) Access to the minimum essential food which is nutritionally adequate and safe; (iii) Access to shelter, housing and sanitation and an adequate supply of safe drinking water; (iv) The provision of essential drugs; (v) Equitable distribution of all health facilities, goods and services.

³⁰ For example, in the USA, symptoms of HIV were first cited among the homosexual community in San Francisco. See: Power J, *Movement, Knowledge, Emotion: Gay Activism and HIV/AIDS in Australia*, ANU E Press, 2011, 1.

³¹ Ambani JO, ‘The second wave of criminalising homosexuality in Kenya, Nigeria and Uganda’ Published Doctoral Thesis, Centre for Human Rights, University of Pretoria, November 2016, 199-200.

³² *Toonen v. Australia*, CCPR Comm. No. 488/1992 (31 March 1994), para. 8.5.

³³ Yamin AE, ‘The Right to Health under International Law and its Relevance to the United States’, 2-3.

³⁴ *Toonen v. Australia*, CCPR, para. 8.5.

reported cases of expulsion from school or interruption of studies in other ways, or dismissal from employment without fair procedure once employers discovered their sexual orientation.³⁵ These cases demonstrate blatant discrimination against LGBTIQ individuals which is contrary to the Constitution.³⁶ Moreover, this said discrimination in most cases, lacks the judicial and political goodwill to remedy, leaving LGBTIQ individuals twisting in the cold, so to speak, marginalised and vulnerable without remedy.

2.3 The Other Side of the Coin

Conversely, in recent years, Kenya has made some strides in the protection of the human rights of LGBTIQ individuals, however small. For example, in *Republic v. Non-Governmental Organisations Co-ordination Board & another ex parte Transgender Education and Advocacy & 3 others*,³⁷ Members of the Transgender Education and Advocacy (**TEA**) successfully sued the Non-Governmental Organisations Co-ordination Board (**NGO Board**) for refusal to register their organisation, on grounds that the names and photos of TEA's board members as submitted in registration documents did not match the names and photos on their national identity cards. The Court, in finding for TEA, found that the NGO Board was in contravention of the Constitution by discriminating against TEA's officers on the basis of sex, which is in violation of the Constitution's Bill of Rights,³⁸ and ordered it to register TEA.

Additionally, in *Republic v. Kenya National Examinations Council & another Ex-Parte Audrey Mbugua Ithibu*,³⁹ Audrey Mbugua, a transgender woman successfully sued the Kenya National Examinations Council (**KNEC**) for refusing her request to reissue her school diploma with her female name and gender. The Court ruled that KNEC's refusal to change the gender marker on the certificate violated Audrey's dignity, while referencing Article 28 of the Constitution.⁴⁰

³⁵ Kenya Human Rights Commission Report, *The Outlawed Among Us: A Study of the LGBTI Community's Search for Equality and Non-Discrimination in Kenya*, at 32.

³⁶ Article 27, *Constitution of Kenya*. See also: *Severine Luyali v Ministry of Foreign Affairs & International Trade & 3 others* [2014] eKLR, para. 25.

³⁷ *Republic v. Non-Governmental Organisations Co-ordination Board & another ex parte Transgender Education and Advocacy & 3 others* [2014] eKLR.

³⁸ Article 27 (4), *Constitution of Kenya*.

³⁹ *Republic v. Kenya National Examinations Council & another Ex-Parte Audrey Mbugua Ithibu* [2014] eKLR.

⁴⁰ Article 28 contemplates that: *Every person has inherent dignity and the right to have that dignity respected and protected.*

Another case was *Baby 'A' & another v. Attorney General & 6 others*,⁴¹ where an intersex child, who had been denied a birth certificate because hospital staff had been unable to determine the child's sex, successfully sued for violation of the right to be issued a birth certificate. The Court found that the Constitution, the Children's Act, and international treaties to which Kenya is a party protect children against all forms of discrimination, including on the grounds of intersex status, and ordered the government to develop guidelines for the recognition and support of intersex people.

More on the international scene, in 2010, during the Universal Periodic Review of the United Nations Human Rights Council, Kenya accepted to adopt an extensive framework protecting citizens from discrimination regardless of sexual orientation or any other factor of discrimination.⁴² They however rejected Human Rights Council (HRC)'s recommendation to decriminalise homosexuality.

2.4 Kenya's Penal Code

Homosexuality in Kenya is criminalised through the Penal Code.⁴³ Section 162 criminalizes carnal knowledge against the order of nature, with a maximum penalty of fourteen years' imprisonment. Subsequent sections criminalise the attempt of carnal knowledge against the order of nature⁴⁴ and gross indecency.⁴⁵ To properly understand the Penal Code, we first need to understand the genesis of its operation.

The year is 1895. The British have just settled in Kenya, and are in the process of making it into a British Protectorate.⁴⁶ What this involves, among other things, is mostly a slow wipe-out of laws of the African people, and a consequent importation of British Laws.⁴⁷ The British man views the

⁴¹ *Baby 'A' & another v. Attorney General & 6 others* [2014] eKLR.

⁴² Human Rights Council Working Group on the Universal Periodic Review, *National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1, Kenya*, 8 Annual Session, 3–14 May 2010.

⁴³ *Penal Code*, Act No. 14 of 2014.

⁴⁴ Section 163 of the Penal Code gives the maximum punishment as 7 years' imprisonment.

⁴⁵ Section 165 of the Penal Code gives the maximum punishment as 5 years' imprisonment.

⁴⁶ Ojwang JB, *Constitutional Development in Kenya: Institutional Adaptation and Social Change*, ACTS Press, 1990, 23.

⁴⁷ This was done through East African Order in Council 1 and 2, in 1895 and 1897 consecutively.

African man as backward, illiterate and thus incapable of law-making.⁴⁸ The British man therefore institutes his own system of justice to run parallel to the African customary system, but however puts a caveat that the African customary system had to give way to the English system where it is *repugnant to justice and morality*.⁴⁹

What this essentially meant is that African customary law came second to English law, and that English ideals were the ultimate test for the validity of African customs.⁵⁰ This resulted in a gradual wane of Native law as the definitive source of law particularly for criminal justice. For instance, while Native Criminal law was initially applied in Native Tribunals, such application was subject to the supervision of district officers that were appointed by the Crown.⁵¹ Gradually, where a Tribunal or a Court was given jurisdiction to try a Penal Code offence, it became that it was tried under the relevant sections of the Penal Code and not under ‘native law and custom,’ even where there existed such offence under native law and custom. This eventually resulted in the virtual disappearance of the customary criminal law and so that at the end of the colonial period there were very few offences that were tried under native law and custom in the African Courts.⁵²

What resulted, is an assimilation of British laws into Kenya as the primary adjudicative law and an eventual phasing out of the Native Courts and Tribunals.⁵³ The Penal Code was one such Victorian relic that was fitted as a straitjacket onto the Kenyan people – not necessarily as a reflection of the values and principles of the Kenyan people, but as a representation of the Crown.⁵⁴ The argument that anti-sodomy laws are an import of African cultural identity is thus moot, as the

⁴⁸ Human Rights Watch Report, *This Alien Legacy, The Origins of “Sodomy” Laws in British Colonialism*, December 2008, at 5.

⁴⁹ Finerty CE, ‘Being Gay in Kenya: The Implications of Kenya’s New Constitution for its Anti-Sodomy Laws’, 437. See also: Cotran E, ‘The Development and Reform of the Law in Kenya’, 27 *Journal of African Law* (1983), 42.

⁵⁰ Finerty CE, ‘Being Gay in Kenya: The Implications of Kenya’s New Constitution for its Anti-Sodomy Laws’, 437.

⁵¹ Cotran E, ‘The Development and Reform of the Law in Kenya’, 44-45.

⁵² Cotran E, ‘The Development and Reform of the Law in Kenya’, 44-45.

⁵³ Human Rights Watch Report, *This Alien Legacy, The Origins of “Sodomy” Laws in British Colonialism*, at 5.

⁵⁴ Human Rights Watch Report, *This Alien Legacy, The Origins of “Sodomy” Laws in British Colonialism*, at 5.

laws themselves were a western import and today, a strange afterlife of a colonial legacy that has survived long after the British man has left.⁵⁵

Paradoxically, Britain, the very origin of Kenya's anti-sodomy laws as stands has since repealed those laws, and embraced rights of the LGBTIQ community, joining the international movement towards protecting LGBTIQ rights.⁵⁶ Britain's move towards repealing anti-sodomy laws began with the famous *Wolfenden report* which enunciated the function of law as being to protect citizens and to prevent harm upon citizens, not to invade the privacy and private intimate lives of said citizens.⁵⁷ This position is one of the forefront in theorising LGBTIQ rights.

Conversely, back to the Kenyan situation, as aforementioned, criminal sanctions on homosexuality enunciated in the Penal Code create a number of problems in the realm of human rights protection. For one, they continue to invade the privacy of these individuals and create inequality among the Kenyan citizenry. They relegate LGBTIQ individuals to an inferior status and degrade their dignity by declaring their most intimate, or even so, private feelings "unnatural" or illegal. They promote violence and impunity, handing the police and others the power to arrest, blackmail, and abuse while driving LGBTIQ individuals to live in fear.⁵⁸ While these provisions in the Penal Code are rarely enforced at court level, there are indeed cases where these provisions have been enforced. For example, in *Francis Odingi v R*,⁵⁹ the defendant, who was a minor, was charged and convicted of the offence of committing an 'unnatural offence' and was sentenced to 6 years imprisonment.

Even so, as was contended in *Toonen*, the UN Human Rights Committee accepted the applicants position that the threat of enforcement is in itself sufficient to raise concern on the rights of

⁵⁵ Colonial legislators and jurists introduced such laws, with no debates or "cultural consultations," to support colonial control. They believed laws could inculcate European morality into resistant masses. They brought in the legislation, in fact, because they thought "native" cultures did not punish "perverse" sex enough. The colonised needed compulsory re-education in sexual mores. Imperial rulers held that, as long as they sweltered through the promiscuous proximities of settler societies, "native" viciousness and "white" virtue had to be segregated: the latter praised and protected, the former policed and kept subjected.

See: Human Rights Watch Report, *This Alien Legacy, The Origins of "Sodomy" Laws in British Colonialism*, 5.

⁵⁶ Since 1982, same-sex sexual acts in the UK are legal.

⁵⁷ Home Office Scottish Home Department, *Report of the Departmental Committee on Homosexual Offences and Prostitution*, 4 September 1957.

⁵⁸ PEMA-Kenya, *The Issue is Violence: Attacks to LGBT People at the Kenyan Coast*, at 37.

⁵⁹ *Francis Odingi v R*, [2006] eKLR.

LGBTIQ individuals being compromised.⁶⁰ This can be evidenced with the former part of this chapter, where we discussed the status of LGBTIQ individuals when known being used as a blackmail chip by law enforcement officials leading them to live their lives in fear and in secret.

Another problem that presents itself, is that the anti-sodomy provisions are drafted vaguely, not giving a detailed breakdown of what exactly is forbidden and to what extent, therefore giving the State flexibility within the range of enforcement.⁶¹ For instance, while the Code does not specifically provide for the criminalisation of lesbian behaviour,⁶² human rights organisations report that lesbians still face harassment from law enforcement officials.⁶³

The advent of the 2010 Constitution however ushered a new dawn for the protection of LGBTIQ rights, which we now discuss as follows.

2.5 The Constitution of Kenya

Serious calls for a new Constitution to replace the 1963 Independence Constitution began in the 1990s, with a built up frustration over the feeling that the old constitution created an overly powerful and politically unaccountable presidency.⁶⁴ Eventually, in 2005, a Constitutional Review Commission was established to issue a report on the Independence Constitution and its shortcomings.⁶⁵

While their findings were numerous, with issues ranging from the form of governance, to the presidency, to land issues, the most pertinent findings to this study are those on the Bill of Rights. The Commission found that the Constitution's Bill of Rights was deficient because its rights could be easily limited or suspended;⁶⁶ that it failed in protecting social and economic rights; it did not recognise the principle of gender equality; the rights and duties of citizens and officials were not

⁶⁰ Ambani JO, 'The second wave of criminalising homosexuality in Kenya, Nigeria and Uganda' Published Doctoral Thesis, Centre for Human Rights, University of Pretoria, November 2016, 202.

⁶¹ Maguire S, 'The Human Rights of Sexual Minorities in Africa' *35 California Western International Law Journal* (2004), 5.

⁶² Section 162 of the Penal Code criminalises same-sex behaviour between males.

⁶³ Kenya National Human Rights Commission, *Realising Sexual and Reproductive Health Rights in Kenya: A myth or reality?* 2012, 101.

⁶⁴ Finerty CE, 'Being Gay in Kenya: The Implications of Kenya's New Constitution for its Anti-Sodomy Laws', 447.

⁶⁵ *The Final Report of the Constitution of Kenya Review Commission*, 2005, Preface at xiv.

⁶⁶ *The Final Report of the Constitution of Kenya Review Commission*, 34.

specified and fully explained; and there were not adequate mechanisms for enforcing the rights that did exist.⁶⁷

Following the review, efforts began to draft a new Constitution with a more comprehensive Bill of Rights. In 2010, the current Constitution came into force with a wide range of provisions that gave hope to the LGBTIQ, as the first framework under which LGBTIQ rights could be protected.⁶⁸ The changes in the Constitution favouring this move can be summarised as in three key changes.

First, the 2010 Constitution provides for a more extensive Bill of Rights which is lauded as one of the most progressive chapters⁶⁹ in the Constitution and imposes an affirmative duty on the State to promote the realisation of these rights.⁷⁰ The Bill of Rights provides that every individual under Kenya's jurisdiction has the following rights and fundamental freedoms, among others: the right to life;⁷¹ equality and freedom from discrimination;⁷² human dignity;⁷³ freedom and security of person – that extends to protection from torture and cruel, inhuman or degrading treatment;⁷⁴ privacy;⁷⁵ freedom of expression;⁷⁶ freedom of association;⁷⁷ a range of social and economic rights including but not limited to the highest attainable standard of health;⁷⁸ and access to justice.⁷⁹

On the freedom from discrimination secured in the Constitution, discrimination *on any ground*, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language, or birth is prohibited.⁸⁰ While the Constitution does not explicitly list sexual orientation as a prohibited ground of discrimination,

⁶⁷ *The Final Report of the Constitution of Kenya Review Commission*, 34.

⁶⁸ Finerty CE, 'Being Gay in Kenya: The Implications of Kenya's New Constitution for its Anti-Sodomy Laws', 448.

⁶⁹ 'The New Kenyan Constitution of 2010,' at: <http://www.kenya-information-guide.com/kenya-constitution.html> accessed on 29th November 2016.

⁷⁰ Article 21(1), *Constitution of Kenya*, 2010.

⁷¹ Article 26, *Constitution of Kenya*.

⁷² Article 27, *Constitution of Kenya*.

⁷³ Article 28, *Constitution of Kenya*.

⁷⁴ Article 29, *Constitution of Kenya*.

⁷⁵ Article 31, *Constitution of Kenya*.

⁷⁶ Article 33, *Constitution of Kenya*.

⁷⁷ Article 36, *Constitution of Kenya*.

⁷⁸ Article 43, *Constitution of Kenya*.

⁷⁹ Article 48, *Constitution of Kenya*.

⁸⁰ Article 27 (4), *Constitution of Kenya*.

scholars and human rights organisations have interpreted the ‘*on any ground*’ provision to include this as a ground.⁸¹ In any case, as Makau Mutua posits, where a human right is contested, the provision for it should be interpreted in the widest liberal sense possible to ensure that the right is granted and not denied.⁸²

Additionally, while the Independence Constitution permitted “fundamental rights” to be limited for the “public interest,” the 2010 Constitution contains no such provision, and instead allows a right to be limited only in the instance that such limitation is just and reasonable in an open and democratic society.⁸³ The threshold for this limitation is similar to most regional and international human rights regimes,⁸⁴ under which most would argue against a limitation extending to LGBTIQ rights particularly with regard to their freedom from discrimination.⁸⁵

The second constitutional move towards protection of LGBTIQ rights is the proviso repudiating any law, customary or otherwise, that is inconsistent with the Constitution of Kenya.⁸⁶ This

⁸¹ McGolan A, ‘National protection beyond the two EU Anti-Discrimination Directives: The grounds of religion and belief, disability, age and sexual orientation beyond employment’ *European Union Programme for Employment and Social Solidarity* (2013), 25-41.

⁸² “Makau Mutua: Rights body has finally stood up for gays and lesbians”, Daily Nation, 12 May 2012.

⁸³ Article 24 (1), *Constitution of Kenya*, 2010.

⁸⁴ For example, regarding the right to religion, the *European Convention on Human Rights* in Article 9 that the freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.

⁸⁵ In *Karua vs. Radio Africa Limited T/A Kiss FM Station and Others Nairobi* HCCC No. 288 Of 2004 [2006] 2 EA 117; [2006] 2 KLR 375, it was held:

“On the question of what is justifiable in an open and democratic society, the questions which fall to be considered are the needs or objectives of a democratic society in relation to the right or freedom concerned. Without a notion of such needs, the limitations essential to support them cannot be evaluated...The aim is to have a realistic, open, tolerant society and this necessarily involves a delicate balance between wishes of the individual and the utilitarian “greater good of the majority”. But democratic societies approach the problem from the standpoint of the importance of the individual, and the undesirability of restricting his or her freedom. However, in striking the balance certain controls on the individual’s freedoms of expressions may in appropriate circumstances be acceptable in order to respect the sensibilities of others... The limitation of constitutional rights for a purpose that it is necessary in a democratic society involves the weighing up of competing values and ultimately an assessment based on the proportionality...[T]he fact that different implications for democracy, and where “an open and democratic society based on freedom and equality” means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established but the application of these principles with particular circumstances can only be done on a case-by-case basis and this is inherent in the requirement of proportionality, which calls for the balancing of different interests.”

⁸⁶ Article 2(4), *Constitution of Kenya*.

provision enshrines the supremacy of the Constitution of Kenya, over all other applicable laws-including even statutes. What this would mean is that statutory provisions not in line with the spirit and otherwise explicit provisions of the Constitution are inconsistent and thus should not be relied upon.⁸⁷ This would therefore include the criminal sanctions against homosexuality contained in the Penal Code, which as discussed before, evidently contravene the rights of LGBTIQ individuals to privacy and to equality and freedom from discrimination.

The central tenet of constitutional supremacy is that it reigns supreme, even where there are unpopular views towards it. Makau Mutua again writes that Constitutions are not meant to only protect those who the majority find to be acceptable, but Constitutions should instead protect particularly the unpopular who are undoubtedly more vulnerable, and more prone to the tyranny of the masses.⁸⁸ It was so held in *S v Makwanyane and Another*,⁸⁹ where it was held that the function of courts is not to impute morals into the law, but to interpret the law without any fear or favour. We can therefore be concluded that public opinion, or the fact that a majority of Kenyans are homophobic would not suffice as a sufficient limitation to the rights of LGBTIQ individuals, in the face of the supremacy of the Constitutional provisions on their guaranteed fundamental human rights.

Finally, the third progressive move that the Constitution makes towards protection of LGBTIQ rights is the inclusion of international norms and standards as well as ratified international instruments as part of Kenyan law.⁹⁰ The Constitution further provides that the State should undertake appropriate measures and legislation to enable Kenya fulfil her international obligations.⁹¹ The implication of these provisions is clear. That Kenya is bound by international

⁸⁷ *Eric Gitari v Non- Governmental Organisations Co-ordination Board & 4 others* [2015] eKLR, para. 89.

⁸⁸ “*Makau Mutua: Why Kenyan Constitution Must Protect Gays*”, Sunday Daily Nation, 24th October 2009.

⁸⁹ *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3:

“Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for Constitutional adjudication.... The very reason for establishing [the Constitution], and for vesting the power of judicial review.... in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society.”

⁹⁰ Article 2 (5,6), *Constitution of Kenya*.

⁹¹ Article 21, *Constitution of Kenya*.

standards that currently represent a movement towards extensive protection of LGBTIQ rights, and prohibition of discrimination there against.⁹²

2.6 Conclusion

In the beginning of this chapter, we looked at the challenges that face LGBTIQ individuals in Kenya and highlighted the role that Kenya's anti-sodomy laws have played in perpetuating these challenges. We have established that anti-sodomy laws are in fact not indigenous to Kenya, and were imported from Britain. These laws, we have established, result in gross violations of the fundamental human rights of LGBTIQ individuals to equality and freedom from non-discrimination and privacy. In looking at the Penal Code provisions on unnatural offences, we established that they present a problem owing to the vagueness with which they are drafted – giving law enforcement officials a sort of *carte-blanche* on how they may choose to implement the provisions. Moreover, we found that these provisions are inherently discriminatory, thus inconsistent with the Bill of Rights in the Constitution.

We then examined the provisions in the 2010 Constitution which promote protection of LGBTIQ rights in Kenya. First, we found Article 2 to be a guiding source that repudiates any law that is inconsistent with the Constitution of Kenya. Since freedom from discrimination (even on any ground not stipulated explicitly) is enunciated in the Bill of Rights in the Constitution, it would appear that the Penal Code's inherently discriminatory provisions on unnatural offences are ultimately inconsistent with the Constitution. We therefore confirm part of the hypothesis, that the Penal Code provisions do not meet the Constitutional threshold on the protection of human rights. We now proceed to the second part of the hypothesis, which is on Kenya's international obligations – a conversation that we have introduced in the subchapter on the Constitution by highlighting Article 2 yet again, which provides that Kenya make steps towards fulfilling her international obligations.

This conversation on Kenya's international obligations is appropriate at this time, as it leads us into the next chapter of this paper, which discusses LGBTIQ rights in the international sphere.

⁹² Ndulo M, 'African Customary Law, Customs, and Women's Rights', *18 Indiana Journal Global Study* (2011) 87, 99; See also: Finerty CE, 'Being Gay in Kenya: The Implications of Kenya's New Constitution for its Anti-Sodomy Laws', 450.

CHAPTER THREE: LGBTIQ RIGHTS IN THE INTERNATIONAL SPHERE

3.1 Introduction

In the previous chapter, we discussed the domestic legal framework in Kenya on Lesbian, Gay, Bisexual, Transgender, Intersex and Queer (**LGBTIQ**) rights.¹ In discussing the 2010 Constitution that is lauded by many as quite progressive and a bold move towards better protection of the human rights of Kenyans, we found that the Constitution provides that Kenya takes measures towards fulfilling her international obligations. This effectively means that Kenya binds herself to international norms and ratified instruments as part of Kenyan law.²

It is therefore necessary to review these laws and practice at the international scene, so as to formulate comprehensive best practices for Kenya. In this chapter, we go in the quest to answer what these international obligations Kenya has are and whether they have been effected. This will aid in answering the third research question of this study, on whether Kenya's current position on LGBTIQ rights is consistent with her international and regional obligations.

Further to this, this chapter undertakes an analysis of selected international instruments that Kenya is bound to, and their respective stands on rights that may or have been used in making Sexual Orientation and Gender Identity (**SOGI**) rights claims. In addition to these international instruments, we will examine the African regional framework on LGBTIQ rights, which Kenya is bound to as well. Before all this, a discussion on the history of LGBTIQ rights in the international sphere is important in order to contextualise the rest of the chapter.

Ultimately, this chapter goes into testing the second part of the hypothesis – that Kenya's anti-sodomy laws are inconsistent with her international obligations. This shall be fulfilled by critically examining the international obligations that Kenya is bound to particularly with regard to LGBTIQ rights and evaluating on whether or not Kenya has fulfilled these obligations.

¹ LGBTIQ to be used interchangeably with Sexual Orientation and Gender Identity (**SOGI**).

² Article 2(5, 6), *Constitution of Kenya* (2010).

3.2 The Evolution of LGBTIQ rights in the international sphere

While the first documented homosexual subcultures and cases were reported as early as in the 1700s, meaningful movements towards protection of their rights did not begin until the twentieth century.³ Before this, homosexuality was widely criminalised in areas where it was recognised. Most notably, in Germany, homosexuality and ‘other grossly lewd acts’ were criminalised in the infamous New Prussian Penal Code, Paragraph 175.⁴

While there were mild attempts to spur a homosexual rights movement,⁵ these attempts bore no fruit in conservative and nationalist Germany. During the Nazi regime in the World War II, the German government led the persecution of more than 50,000 men identified as homosexual.⁶ This proportion of homosexual men persecuted was however relatively small in comparison to the overall number of people that were persecuted, particularly on the basis of their ethnicity.⁷ Therefore, after World War II, while these grave atrocities against humanity catalysed a general movement for international human rights, the SOGI rights lobby lagged behind.⁸

Ambani contends that the reason the homosexual rights lobby failed to share in the momentum for international human rights is because the regime did not fully anticipate sexual orientation claims in the way in which they have evolved now.⁹ Moreover, while there was a general consensus at the time that fundamental human rights such as the right to life need to be protected, never again

³ Narayan P, ‘Somewhere Over the Rainbow... International Human Rights Protections for Sexual Minorities in the New Millennium’ 24 *Boston University International Law Journal* (2006), 316.

⁴ The provision outlawed unnatural sexual acts between men, punishing the crime with a mandatory prison sentence of not less than three years. See: Plant R, *The Pink Triangle*, Henry Holt & Co., 1986, 206.

⁵ For example, in 1897, after a series of medical studies on homosexuality, Magnus Hirshfeld – a German doctor – founded the Scientific Humanitarian Committee to challenge anti-gay discrimination and push for law reform. In 1919, he later founded the Institute for Sexual Research to conduct further sexology studies.

⁶ Narayan P, ‘Somewhere Over the Rainbow... International Human Rights Protections for Sexual Minorities in the New Millennium’, 316.

⁷ Jewish Virtual Library, *Estimated Number of Jews Killed in the Final Solution*, 2006.

⁸ In fact, in West Germany, homosexual prisoners from WW II remained enslaved until 1969 as the government continued to enforce Paragraph 175.

⁹ Ambani JO, ‘The second wave of criminalising homosexuality in Kenya, Nigeria and Uganda’ Published Doctoral Thesis, Centre for Human Rights, University of Pretoria, November 2016, 188.

to be violated as during the war, there lacked such consensus on the rights of sexual minorities particularly since a huge number of countries still criminalised the acts.¹⁰

In 1981, for the first time in an international court, the European Court of Human Rights in *Dudgeon v UK* ruled that criminalisation of consensual homosexual acts in private violated the right to privacy.¹¹ A consequent wave of moves towards accommodating the needs of sexual minorities soon followed. In 1990, the World Health Organisation (**WHO**) moved to remove homosexuality from the International Classification of Diseases.¹² This was soon followed in 1992, by the first time an openly homosexual person addressed the United Nation (**UN**)’s Sub-Commission on the Prevention of Discrimination and Protection of Minorities to advocate for equal protection of sexual minorities.¹³

In 1994, the UN Human Rights Committee¹⁴ held in *Toonen v Australia* that Tasmania’s anti-sodomy laws violated the fundamental rights to equal protection under the law and to privacy.¹⁵ *Toonen* established a strong legacy of protection of the rights of sexual minorities, holding it undisputable that consensual sexual activity in private, whether same-sex or not, falls under the ambit of the concept of privacy. More on *Toonen*’s legacy and jurisprudence will be discussed later in this chapter.

After *Toonen*, in 2002, the UN made yet another move towards protecting sexual minorities when the United Nations High Commissioner for Refugees (**UNHCR**) declared that discriminatory laws against homosexuals may amount to gender-related persecution, observing that where homosexuality is illegal in a society, imposition of severe criminal penalties could amount to persecution.¹⁶

¹⁰ See generally: Narayan P, ‘Somewhere Over the Rainbow... International Human Rights Protections for Sexual Minorities in the New Millennium’.

¹¹ *Dudgeon v United Kingdom*, ECtHR, Judgment of 22 October 1981.

¹² Narayan P, ‘Somewhere Over the Rainbow... International Human Rights Protections for Sexual Minorities in the New Millennium’, 319.

¹³ Ambani JO, ‘The second wave of criminalising homosexuality in Kenya, Nigeria and Uganda’ Published Doctoral Thesis, Centre for Human Rights, University of Pretoria, November 2016, 5.

¹⁴ The Human Rights Committee is the body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights by its State parties.

All States parties are obliged to submit regular reports to the Committee on how the rights are being implemented.

¹⁵ *Toonen v. Australia*, CCPR Comm. No. 488/1992 (31 March 1994), para. 8.5.

¹⁶ UNHCR, *Guidelines on International Protection*, UN HCR/GIP/02/01 (7 May 2002), para. 17.

An even more momentous move in SOGI rights jurisprudence came in 2003, when Brazil, supported by 26 other states, introduced a resolution in the UN Commission on Human Rights (UNHRC)¹⁷ supporting equal treatment of all human beings and promotion and protection of their human rights regardless of their sexual orientation.¹⁸ While the resolution failed, due to strong opposition from conservative states,¹⁹ the resolution and subsequent resolutions at the UN level to be discussed later in this sub-chapter reflect a shifting momentum in the international community towards the protection of rights of sexual minorities.

In 2006, Norway presented a joint statement on human rights violations based on sexual orientation and gender identity before the Human Rights Council, on behalf of 54 other states.²⁰ The statement expressed grave concern on the human rights violations occurring in the world, and urged the Human Rights Council to pay due attention to these violations and take action against them. Another joint statement with a similar agenda presented at the General Assembly by Argentina on behalf of 66 states soon followed in December 2008.²¹

In 2011, South Africa led a resolution at the UN Human Rights Council requesting that the United Nations High Commissioner for Human Rights commission a study on the discriminatory laws and practices occurring worldwide affecting sexual minorities.²² The resolution passed with 23 countries in favour to 19 against, with the three abstentions. The resolution was the first of its kind to be passed at the United Nations level with a purposive approach towards protection of sexual minorities. The study released in 2012 catapulted consequent resolutions and moves to protect sexual minorities.²³

¹⁷ This body was elevated and is now referred to as the UN Human Rights Council.

¹⁸ United Nations Commission on Human Rights, *Resolution on Human Rights and Sexual Orientation*, UN E CN. 4/2003/L.92 (16 April 2003).

¹⁹ Ambani JO, 'The second wave of criminalising homosexuality in Kenya, Nigeria and Uganda' Published Doctoral Thesis, Centre for Human Rights, University of Pretoria, November 2016, 6.

²⁰ UN Human Rights Council, *Norwegian joint statement to the Human Rights Council on sexual orientation, gender identity and human rights* (1 December 2006). See the Joint Statement at: <http://arc-international.net/global-advocacy/sogi-statements/2006-joint-statement/> accessed on 25th December 2016.

²¹ UNGA, *Joint statement from the permanent representatives of Argentina, Brazil, Croatia, France, Gabon, Japan, the Netherlands and Norway to the United Nations addressed to the President of the General Assembly*, UN A/63/635 (18 December 2008).

²² UNGA, *Human rights, sexual orientation and gender identity*, UN HRC/RES/17/19 (14 July 2011).

²³ UNGA, *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, UN A/HRC/19/41 (17 November 2011).

In September 2014, Brazil, Chile, Colombia and Uruguay led a follow up resolution requesting the UN High Commissioner for Human Rights to update the 2012 study so as to share good practice and to promote international human rights standards, recalling the universality of human rights cited in the Universal Declaration for Human Rights (**UDHR**).²⁴

More recently in 2016, the UN Human Rights Council passed a resolution to appoint an "independent expert" mandated to combat discrimination against the LGBTIQ community, and foster discussion with governments about how to protect sexual minorities.²⁵ Also in 2016, the UN Security Council condemned the deadly 2016 Orlando nightclub shooting which was motivated by homophobia and classified as a terrorist attack,²⁶ marking the first time the U.N. Security Council has used language recognising violence targeting the LGBTIQ community.²⁷

In recent times, there has also been an increasing development of soft law on the subject, most notably the *Principles on the application of international human rights law in relation to sexual orientation and gender identity* (**Yogyakarta Principles**), which establish sexual orientation and gender identity as classes of discrimination that states should refrain from, and restore fundamental human rights to sexual minorities.²⁸ Another soft law instrument is the *Declaration of Montreal*, which underscores the inalienable rights that LGBTIQ individuals are entitled to, and the role of states and the international community as a whole to protect these rights.²⁹

While these soft law instruments are not binding as international sources of law, their existence reflects the shift in the international community towards the globalisation of human rights particularly regarding sexual minorities.³⁰ Moreover, as we have witnessed in the past, soft law

²⁴ UNGA, *Human rights, sexual orientation and gender identity*, UN A/HRC/27/L.27/Rev.1 (24 September 2014).

²⁵ UNGA, *Protection against violence and discrimination based on sexual orientation and gender identity*, UN A/HRC/32/L.2/Rev.1 (28 June 2016).

²⁶ UNSC SC/12399 (13 June 2016) Press Statement on Terrorist Attack in Orlando, Florida.

²⁷ UNSC SC/12399 (13 June 2016).

²⁸ See generally: *The Yogyakarta Principles: Principles on the application of international human rights law in relation to sexual orientation and gender identity* (March 2007).

²⁹ *Declaration of Montreal on Lesbian, Gay, Bisexual, and Transgender Human Rights* (July 2006).

³⁰ McGill J, 'SOGI... So What? Sexual Orientation, Gender Identity and Human Rights Discourse at the United Nations' 3 *Canadian Journal of Human Rights* (2014), 1.

sometimes crystallises into hard law – this has particularly happened in the past where it has involved human rights.³¹

From the roadmap to this point at the international level, we can clearly demonstrate a solidifying consensus in the protection of LGBTIQ rights making it paradoxical for Kenya not to share in this momentum while she remains committed to other international human rights instruments and initiatives. Let us now critically examine these international and regional human rights instruments that Kenya is bound to, under the various rights under which SOGI rights claims have and may be brought forward, that is, the right to privacy and the freedom from non-discrimination.

3.3. The United Nations Human Rights System and LGBTIQ rights

The UN has long been the most authoritative guide on matters in the international community, and this is no different in the sphere of human rights. As aforementioned, human rights in the international community began to gain binding practice most notably after World War II. This binding practice was guided under the auspices of the United Nations Charter, which gave priority to protection of fundamental human rights by creating a Commission on Human Rights (the Commission) whose mandate was the promotion of human rights.³²

The Commission consequently drafted the International Bill of Rights as a normative and authoritative source of international human rights law.³³ The Bill of Rights consists of constitutive human rights documents that have since become binding on all members of the UN. These include: The UDHR, the International Covenant on Economic, Social And Cultural Rights (**ICESCR**) and the International Covenant on Civil and Political Rights (**ICCPR**) as well as two additional protocols to the ICCPR which establish and allow individuals to bring complaints of human rights violations to the UN Human Rights Committee.³⁴

³¹ For example, the *Universal Declaration on Human Rights* (UDHR), is a guiding template on human rights now, but was once merely a declaration which in international law, has the status of soft law.

³² Article 68, *The United Nations Charter* (1946).

³³ Narayan P, ‘Somewhere Over the Rainbow... International Human Rights Protections for Sexual Minorities in the New Millennium’, 327.

³⁴ UNGA, *Optional Protocol to the International Covenant on Civil and Political Rights* (19 December 1966) 999 UNTS 171; and UNGA, *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty* (15 December 1989), 1642 UNTS 414.

3.3.1 The United Nations Declaration of Human Rights (UDHR)

In 1948, briefly after the atrocities of the Second World War, the United Nations General Assembly (UNGA) adopted the UDHR as a resolution which asserts fundamental human rights and freedoms to all human beings. The UDHR was founded on the principles of human dignity and the inalienable rights of man, and provides a wide array of civil, political, social, cultural and economic rights that are fundamental to all individuals.

While the UDHR was initially merely declaratory and thus having the status of soft law in the international realm, it has since crystallised into binding customary international law since states accept its provisions as normative practice.³⁵ Additionally, many of its provisions were consequently adopted into binding international instruments such as the ICCPR that we discuss as follows.

The UDHR entitles all human beings to all the rights and freedoms set forth in the declaration without distinction of any kind e.g. race, sex, colour, language, religion, political or other opinion, national or social origin, property, birth or *other status*.³⁶ The catch-all provision that the UDHR makes as to *other status* being one of the classes of discrimination already offers some protection to sexual minorities, and has since been interpreted as so.³⁷ Moreover, each right afforded in the declaration begins with the word *everyone* which is seen to extend the protection to all human beings regardless of their sexual orientation.³⁸

The UDHR however contains a provision that may be used by anti-sodomy law lobbyists to circumvent the application of various rights and freedoms to sexual minorities.³⁹ In providing the circumstances under which rights may be limited, the UDHR provides that member states may limit the rights and freedoms guaranteed under the declaration provided that such limitation meets the just requirements of morality, public order and general welfare in a democratic society.⁴⁰

³⁵ Wright S, *International Human Rights, Decolonisation and Globalisation: Becoming Human*, Routledge, Taylor and Francis Group, 2001, 13.

³⁶ Article 2, *United Nations Declaration of Human Rights* (1948).

³⁷ Yecies S, 'Sexual Orientation, Discrimination, and the Universal Declaration of Human Rights' *11 Chicago Journal of International Law* (2011), 793.

³⁸ Narayan P, 'Somewhere Over the Rainbow... International Human Rights Protections for Sexual Minorities in the New Millennium', 329.

³⁹ Narayan P, 'Somewhere Over the Rainbow... International Human Rights Protections for Sexual Minorities in the New Millennium', 329.

⁴⁰ Article 29, *United Declaration on Human Rights*.

Because of this, the UDHR has been argued to be inadequate in the fight to secure rights for sexual minorities. Moreover, unlike the ICCPR to be discussed in the following subchapter, the UDHR has no enforcement mechanism.⁴¹

Notwithstanding, a further provides recourse to LGBTIQ advocates, by providing that no provision in the declaration shall be interpreted so as to deprive any human being of the rights established henceforth.⁴² This shows that states cannot exploit the limitation provision to allow human rights violations to occur, regardless of moral considerations. In any case, precedent in decided cases would argue whether a limitation of fundamental human rights to sexual minorities is truly just and necessary in an open and democratic society.⁴³

3.3.2 The United Nations International Covenant on Civil and Political Rights (ICCPR)⁴⁴

The ICCPR is a binding multilateral human rights instrument that was adopted by the United Nations General Assembly on the 16th of December 1966. Associated mostly with ‘first generation rights’,⁴⁵ the ICCPR binds its state parties to ‘respect and ensure the fulfilment’ of the rights conferred therein to all its citizens.⁴⁶ Rights conferred under the ICCPR are mostly civil and political in nature, and protect the individual from excesses of the state- hence why they are often denoted as ‘negative rights’.⁴⁷

Some of the rights enunciated in the treaty include but are not limited to: the right to non-discrimination,⁴⁸ to the equal status of men and women,⁴⁹ and the right not to be subjected to cruel and unjust punishment.⁵⁰ Pertinent to the discussion on the rights of sexual minorities, the treaty provides for the right to privacy,⁵¹ and protects citizens from arbitrary or unlawful interference

⁴¹ Conversation with Dr. John Ambani, 17 January 2017.

⁴² Article 30, *United Declaration on Human Rights*.

⁴³ *Dudgeon v United Kingdom*, and *A.D.T. v United Kingdom*, ECtHR Judgment of 31 July 2000.

⁴⁴ Kenya acceded to the treaty on 1 May 1972.

⁴⁵ First-generation human rights, often called "blue" rights, deal essentially with liberty and participation in political life. They are fundamentally civil and political in nature and serve negatively to protect the individual from excesses of the state.

⁴⁶ Article 2 (1), ICCPR (1966).

⁴⁷ This is however not to say that the ICCPR deals exclusively with civil and political rights. It sometimes provides for social and cultural rights. For example, it gives the right to self-determination (Article 1) and minority rights and the right to enjoy one's culture (Article 27).

⁴⁸ Article 2, ICCPR.

⁴⁹ Article 3, ICCPR.

⁵⁰ Article 7, ICCPR.

⁵¹ Article 17, ICCPR.

with their right to privacy. Moreover, the state makes it clear that all should be regarded as equal before the law,⁵² which right is consistent in application to minority groups.

The ICCPR has been lauded as one of the most germane instruments in the lobby for sexual minority rights.⁵³ Persad observes that it is the most relevant binding international treaty that has been directly applied in the emerging consensus on LGBTIQ rights.⁵⁴

The strength of the ICCPR in application to the LGBTIQ community is found yet again, where unlike the UDHR, it contains no limitation ‘in consideration of morality’ clause. Such an argument from a state party would therefore be less persuasive before the UN Human Rights Committee (the Committee). The Committee is established under the ICCPR and is mandated to ensure the enforcement of provisions of the ICCPR, serving as its judicial monitoring body.⁵⁵

While the ICCPR makes no explicit provision protecting LGBTIQ individuals, this lacuna has not hindered the application of the ICCPR in favour of sexual minorities.⁵⁶ In the revolutionary case of *Toonen v Australia*,⁵⁷ the Committee ruled that Tasmania’s anti-sodomy laws contravened the rights of homosexual Tasmanians to privacy.

3.3.2.1 The interpretation of the ICCPR in *Toonen v Australia*

The Right to Privacy

In this case, the plaintiff – Nicholas Toonen, challenged the anti-sodomy provisions of the Criminal Code of Tasmania, holding that these provisions violated the right to privacy guaranteed under Article 17 by empowering police officials to enter one’s household under the mere suspicion that he was engaging in homosexual conduct.⁵⁸

⁵² Article 26, ICCPR.

⁵³ Persad XBL, ‘Homosexuality and Death: A legal analysis of Uganda’s proposed anti-homosexuality bill’ *Florida A & M Law Review* (2010), 147.

⁵⁴ Persad XBL, ‘Homosexuality and Death: A legal analysis of Uganda’s proposed anti-homosexuality bill’, 147.

⁵⁵ “*The Mandate of the UN Human Rights Council*” at:

<http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx> accessed on 20th December 2016.

⁵⁶ Ambani JO, ‘The second wave of criminalising homosexuality in Kenya, Nigeria and Uganda’ Published Doctoral Thesis, Centre for Human Rights, University of Pretoria, November 2016, 14.

⁵⁷ *Toonen v. Australia*, CCPR.

⁵⁸ *Toonen v. Australia*, CCPR, para. 3.1.

In responding to these contentions, the Tasmanian government argued that Article 17 of the ICCPR does not create an unfettered right to privacy, but merely protects against arbitrary interferences with privacy. These anti-sodomy laws, it contended, were not arbitrarily enforced and were enacted pursuant to a democratic process, therefore could not be deemed unlawful.⁵⁹ Moreover, the government asserted that these anti-sodomy provisions were in the public interest in a bid to check the spread of HIV/AIDS.⁶⁰

In finding in favour of Toonen, the Committee held that adult consensual sexual activity is covered under the concept of privacy and therefore Tasmania's anti-sodomy laws were in direct contravention of the ICCPR's privacy provision.⁶¹ In addition, the Committee rejected the claim that Tasmania's anti-sodomy provisions in finding that criminalisation may in fact impede public health programs, as we earlier discussed in Chapter Two of this paper.⁶² The Committee also held that Tasmania's interference with the privacy right of its citizens could not be permitted under the broad ambit of 'moral consideration' as this would in effect open a can of worms and give states unfettered discretion to interfere with rights under the ICCPR.⁶³

This privacy approach adopted by the Committee has received criticism by SOGI rights scholars. Selvanera has opined that reliance on the right to privacy for same-sex conduct, without more, could lead to such conduct being relegated only to the private sphere whereas heterosexuals are, so to speak, allowed to practice their heterosexuality in public.⁶⁴ This would further perpetuate and reinforce the stereotype that heterosexuality is somewhat superior to homosexuality, and that homosexuality is inherently wrong and should be kept hidden. Moreover, the reliance on the right

Section 122 of the *Tasmanian Criminal Code* provided that: Any person who (a) has sexual intercourse with any person against the order of nature; (b) has sexual intercourse with an animal; or (c) consents to a male person having sexual intercourse with him or her against the order of nature, is guilty of a crime. Section 123 of the *Tasmanian Criminal Code* provides: Any male person who, whether in public or private, commits any indecent assault upon, or other act of gross indecency with, another male person, or procures another male person to commit any act of gross indecency with himself or any other male person, is guilty of a crime.

⁵⁹ *Toonen v. Australia*, CCPR, para. 6.2.

⁶⁰ *Toonen v. Australia*, CCPR, para. 6.2.

⁶¹ *Toonen v. Australia*, CCPR, para. 8.2.

⁶² *Toonen v. Australia*, CCPR, para. 8.5.

⁶³ *Toonen v. Australia*, CCPR, para. 8.6.

⁶⁴ Selvanera G, 'Gays in private: The Problems with the privacy analysis in furthering human rights' *16 Adel Law Review* (1994), 333.

to privacy alone would not protect LGBTIQ individuals in the public sphere, and consequently the rights conferred therein such as expression, association or employment for that matter.⁶⁵

Freedom from discrimination and Equal Protection under the Law

In his submissions, *Toonen* also averred that Tasmania's anti-sodomy laws were applied on a discriminatory basis prohibited by the ICCPR's anti-discrimination provision⁶⁶ and right to equal protection under the law,⁶⁷ since they distinguish between individuals on the basis of sexual orientation and (because they apply to homosexual males and not homosexual women) on the basis of gender.⁶⁸

There was of course the question on whether the ICCPR could be stretched to include sexual orientation as a ground under which discrimination is prohibited. In responding to whether the provision of 'other status' as a category of protection under the Convention extended to sexual orientation, the Committee opted instead to make a more profound ruling that the category of 'sex' could be expanded to include sexual orientation.⁶⁹

Some scholars have criticised the choice of the Committee not to establish sexual orientation as an independent category of protection under the ICCPR. Bernstein for example observes the strategic use of identity-oriented movements in the fight for rights of sexual minorities and argues that once a group is able to demonstrate that it is vulnerable, discernible and has a shared identity, it should be able to claim protection under Article 2.⁷⁰ This approach however presents its own set of problems, particularly in the African context where a strong proud LGBTIQ identity is yet to

⁶⁵ Selvanera G, 'Gays in private: The Problems with the privacy analysis in furthering human rights', 340.

⁶⁶ Article 2(1), ICCPR.

⁶⁷ Article 26, ICCPR.

⁶⁸ *Toonen v. Australia*, CCPR, para. 3.1.

⁶⁹ *Toonen v. Australia*, CCPR, para. 8.7.

⁷⁰ Bernstein M, 'Celebration and Suppression: The Strategic Uses of Identity by the Lesbian and Gay Movement' *103 Arizona State University 3* (1997) 531–565. See also: Ambani JO, 'The second wave of criminalising homosexuality in Kenya, Nigeria and Uganda' Published Doctoral Thesis, Centre for Human Rights, University of Pretoria, November 2016, 200.

emerge.⁷¹ Moreover, Ambani correctly argues that certain groups such as intersex may lack the numerical strength to be determined as a discernible group.⁷²

The Aftermath of *Toonen*

While decisions of the Committee are not legally binding as sources of law in the international scene,⁷³ they are regarded as persuasive sources of law and often influence later findings before the Committee and other international tribunals.

For example, the decision influenced both the findings in *X v Colombia*⁷⁴ and *Young v Australia*⁷⁵ before the Committee, both of which involved the inheritance of benefits after the death of each of the plaintiff's same-sex partners. The Committee found in both cases that denial of these benefits would be tantamount to discrimination prohibited by the ICCPR.

Moreover, the *Toonen* ruling was further adopted by another UN Human Rights monitoring body - the Working Group on Arbitrary Detention (**WGAD**)⁷⁶ on two separate communications regarding detentions of homosexuals in Egypt⁷⁷ and in Cameroon.⁷⁸ In both rulings, the Working Group held that the detention and prosecution of persons on the grounds of sexual orientation constitutes an arbitrary deprivation of liberty in contravention of Article 2 and 26 of the ICCPR.

Ultimately, the consequential effect that *Toonen* has had on the SOGI rights lobby particularly regarding interpretation of the ICCPR was unmatched. Its jurisprudence has inspired the Committee to include SOGI rights as an agenda when examining state reports within the UN

⁷¹ McGill J, 'SOGI... So What? Sexual Orientation, Gender Identity and Human Rights Discourse at the United Nations', 28. See also: Ambani JO, 'The second wave of criminalising homosexuality in Kenya, Nigeria and Uganda' Published Doctoral Thesis, Centre for Human Rights, University of Pretoria, November 2016, 200.

⁷² Ambani JO, 'The second wave of criminalising homosexuality in Kenya, Nigeria and Uganda' Published Doctoral Thesis, Centre for Human Rights, University of Pretoria, November 2016, 200.

⁷³ Article 38, *International Court of Justice Statute* (1946).

⁷⁴ *X v Colombia*, CCPR Comm. No. 1361/2005 (30 March 2007).

⁷⁵ *Mr. Edward Young v. Australia*, CCPR Comm. No. 941/2000 (6 August 2003).

⁷⁶ The WGAD was established by Resolution 1991/42 of the UNHCR.

⁷⁷ *Yasser Mohamed Salah et al v Egypt*, Working Group on Arbitrary Detention, UN Doc E/CN.4/2003/8/Add (24 January 2003) 68.

⁷⁸ *Francois Ayissi et al. v Cameroon*, U.N. Working Group on Arbitrary Detention, U.N. Doc. No. A/HRC/4/40/Add. 1 (2 Feb 2007).

Human Rights reporting mechanism. For example, in 2010, during its third universal periodic review, the Committee recommended that Kenya decriminalise its anti-sodomy laws.⁷⁹

The Committee also requested Kenya to provide additional information regarding the measures taken to eliminate negative stereotypes against LGBTIQ individuals, protect homosexuals from violence and extortion and to adopt an elaborate anti-discriminatory framework.⁸⁰ While Kenya rejected the recommendation to decriminalise anti-sodomy laws due to the strong negative public opinion on the issue, it however committed to developing a strong anti-discriminatory framework for all citizens regardless of their sexual orientation.⁸¹ Kenya also conceded to the fact that the non-discrimination clause contained in the 2010 Constitution was and is open to a liberal interpretation on the grounds, capable of accommodating SOGI rights.⁸²

In its concluding observations, the Committee registered its discontent with Kenya's legal framework concerning sexual minorities, citing the high prevalence of HIV/AIDS and STIs in the LGBTIQ community as a result of government neglect.⁸³ The Committee reiterated its initial recommendation that Kenya decriminalise consensual same-sex activity and the fact that Kenya's current position on the ICCPR is contradictory to the Committee's interpretation of the ICCPR.⁸⁴

3.3.3 The International Covenant on Economic, Social and Cultural Rights (ICESCR)⁸⁵

While the ICCPR deals with first generation rights which are denoted as 'negative rights', the ICESCR presents the opposite side of the coin as enunciating 'positive rights' which are second generation rights. While the ICCPR protects citizens from the excesses of the state, the ICESCR

⁷⁹ UN Human Rights Committee, *Third Periodic Report of States parties (Kenya)*, CCPR/C/KEN/3 (19 August 2010).

⁸⁰ UN Human Rights Committee, *List of issues to be taken up in connection with the consideration of the third periodic report of Kenya*, CCPR/C/KEN/3 (22 November 2011).

⁸¹ UN Human Rights Committee, *Replies from the Government of Kenya to the list of issues to be taken up in connection with the consideration of its third periodic report*, CCPR/C/KEN/Q/3/Add.1 (30 May 2012).

⁸² UN Human Rights Committee, *Replies from the Government of Kenya to the list of issue to be taken up in connection with the consideration of its third periodic report*, para. 116.

⁸³ UN Human Rights Committee, *Concluding Observations adopted by the Human Rights Committee*, CCPR/C/KEN/CO/3, Session 105, 9 – 27 July 2012, para. 9.

⁸⁴ See generally: UN Human Rights Committee, *Concluding Observations adopted by the Human Rights Committee*.

⁸⁵ Kenya acceded to the treaty on 1 May 1972.

requires a move from the state aimed at realisation or at least improving the access to such essential commodities or services.⁸⁶

The ICESCR provides for rights such as the right to self-determination,⁸⁷ the right to freely determine one's political status,⁸⁸ the right to favourable working conditions,⁸⁹ equal treatment of men and women,⁹⁰ adequate standard of living conditions,⁹¹ and the right to take part in cultural life.⁹²

Freedom from discrimination

Similar to the ICCPR, the ICESCR contains a non-discriminatory provision that the provisions therein should be interpreted without discrimination as to “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁹³ The non-discriminatory provision, like the one in the ICCPR, contains no explicit provision of sexual orientation as a category protected therein.

However, the U.N. Committee on Economic, Social, and Cultural Rights (**CESCR**), charged with the mandate to monitor the implementation of the ICESCR,⁹⁴ has determined that Article 2(2) of the ICESCR protects against the deprivation of rights guaranteed by the ICESCR based on sexual orientation on three separate occasions.⁹⁵ In its twentieth General Comment, the CESCR held that the ‘other status’ provision under Article 2 includes sexual orientation, calling for a flexible

⁸⁶ Ambani JO, ‘The second wave of criminalising homosexuality in Kenya, Nigeria and Uganda’ Published Doctoral Thesis, Centre for Human Rights, University of Pretoria, November 2016, 206.

⁸⁷ Article 1, *ICESCR* (1966).

⁸⁸ Article 5, *ICESCR*.

⁸⁹ Article 7, *ICESCR*.

⁹⁰ Article 5, *ICESCR*.

⁹¹ Article 11, *ICESCR*.

⁹² Article 15, *ICESCR*.

⁹³ Article 2, *ICESCR*.

⁹⁴ See: “Committee on Economic, Social and Cultural Rights” on <http://ohchr.org/en/hrbodies/cescr/pages/cescrindex.aspx> accessed on 20 December 2012.

⁹⁵ CESCR, *General Comment No. 14, The Right to the Highest Attainable Standard of Health (Art. 12)*, UN Doc. E/C. 12/2000/4, 11 August 2000, 18; See also: *General Comment No. 15, The Right to Water (Arts. 11 and 12 of the Covenant)*, UN Doc. E/C. 12/2002/11, 20 January 2003, 13; and generally: *General Comment 20, Non-Discrimination in Economic, Social and Cultural Rights*, UN Doc. E/C. 12/GC/20, 10 June 2009.

interpretation of the ground, adding that the nature and extent of discrimination may vary according to context and over time.⁹⁶

It is apparent that the CESCR, like the UN Human Rights Committee, has expanded the interpretation of the parent treaty to include the rights of sexual minorities as a priority. This interpretation has been applied to the reporting process within the ICESCR framework where for example in 2015, the CESCR requested Kenya to provide information on the measures taken to raise awareness, prevent and combat discrimination based on sexual orientation and gender identity.⁹⁷ In responding to the issues, Kenya invoked the decision made in *Republic v KNEC & Another ex parte Audrey Mbugua Ithibu*,⁹⁸ which we discussed in Chapter 2, where Kenya presented that the case showed, by ruling in favour of Audrey, that Kenya recognised the rights of transsexual Kenyans.

The ICESCR: A toothless bulldog?

The ICESCR is not without its setbacks, particularly within the context of its use in the sexual minority rights lobby. Hollander and Persad have for instance criticised the ICESCR as being too broad in application and having provisions with gross generality which place a heavy burden on the oversight body tasked with interpretation and development of human rights norms – in this case, the CESCR.⁹⁹ The result of this, Persad observes, is that development of these rights appears merely on an *ad hoc* basis through the CESCR.¹⁰⁰ Moreover, while the ICCPR is emphatic in its demand from state parties to ‘respect and ensure fulfilment’ of the rights enunciated therein,¹⁰¹ the ICESCR makes only a weak rhetorical demand that states should ‘take steps . . . with a view to achieving progressively the full realisation of the rights’ conferred therein.¹⁰²

⁹⁶ *CESCR General Comment 20*, 32.

⁹⁷ CESCR, *List of issues in relation to the combined second to fifth periodic reports of Kenya*, UN E/C 12/KEN/Q/2 – 5/Add. 1, 4 November 2015.

⁹⁸ *Republic v KNEC & Another ex parte Audrey Mbugua Ithibu* [2014] eKLR.

⁹⁹ Hollander M, ‘Gay Rights in Uganda: Seeking to overturn Uganda’s anti-sodomy laws’ *Virginia Journal of International Law* (2009), 233. See also: Persad XBL, ‘Homosexuality and Death: A legal analysis of Uganda’s proposed anti-homosexuality bill’, 152.

¹⁰⁰ Persad XBL, ‘Homosexuality and Death: A legal analysis of Uganda’s proposed anti-homosexuality bill’, 152.

¹⁰¹ Article 2 (1), *ICCPR*.

¹⁰² Article 2 (1), *ICESCR*.

Another setback of the ICESCR in the fight for LGBTIQ rights, is that it contains no guarantees or provisions that speak directly to the laws regulating sexual conduct such as the right to privacy.¹⁰³ Persad however presents a novel idea that the right to self-determination pronounced in the ICESCR may be used to apply to the LGBTIQ as a community. In the same breath, anti-sodomy laws could therefore be considered as a violation of the collective right of LGBTIQ Kenyans to freely pursue their social and cultural development pursuant to the principle of self-determination.¹⁰⁴ This position however may however present the same problems as the identity-based approach discussed in the previous sub-chapter.

3.3.4 Freedom from Torture: The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)¹⁰⁵

Another pertinent instrument in the UN Human Rights system is the CAT, which prohibits torture and other degrading treatment on all humans. State parties to the treaty are required to make effective steps towards ensuring the prevention of acts of torture and other degrading treatment.¹⁰⁶ There are no permitted limitations or exceptions under the treaty,¹⁰⁷ and the instrument is binding to members and non-members since prohibition against torture is considered *jus cogens* and is prohibited by customary international law.¹⁰⁸

Like the aforementioned treaties, CAT establishes a Committee against Torture charged with the mandate of monitoring compliance with the Convention.¹⁰⁹ In the course of its work, the Convention has found that minority and marginalised individuals are often vulnerable and subject to the risk of torture finding for example that because of the prevalence of homophobia in certain regions, LGBTIQ individuals are at risk of torture.¹¹⁰ In an annual report issued to the UN General Assembly in 2004, the Special Rapporteur on Torture reported that “. . . sexual minorities are

¹⁰³ Persad XBL, ‘Homosexuality and Death: A legal analysis of Uganda’s proposed anti-homosexuality bill’, 152.

¹⁰⁴ Persad XBL, ‘Homosexuality and Death: A legal analysis of Uganda’s proposed anti-homosexuality bill’, 152.

¹⁰⁵ Kenya ratified the treaty on 1 May 1997.

¹⁰⁶ Article 2(1), CAT (1987).

¹⁰⁷ Article 2(2), CAT.

¹⁰⁸ See generally: De Wet E, ‘The Prohibition of Torture as an International Norm of *jus cogens* and its Implications on National and Customary Law’ *15 EJIL Volume 1* (2004), 97-121.

¹⁰⁹ Article 17, CAT.

¹¹⁰ Ambani JO, ‘The second wave of criminalising homosexuality in Kenya, Nigeria and Uganda’ Published Doctoral Thesis, Centre for Human Rights, University of Pretoria, November 2016, 29.

disproportionately subjected to torture and other forms of ill-treatment because they fail to conform to socially constructed gender expectations.”¹¹¹ The Special Rapporteur stated that discrimination on the basis of sexual orientation often amounted to dehumanisation of the victim, which is a form of torture and degrading treatment.¹¹²

Further to this observation, the Committee against Torture therefore issued a General Comment advising that state parties ensure that their anti-torture laws are in practice applied equally to all persons regardless of (inter alia) *sexual orientation* or *transgender identity*. The Committee further recommended that states ensure full prosecution and punishment of all acts of violence and abuse against LGBTIQ individuals.¹¹³ This is incorporated into its monitoring function for example in 2015, where the Committee required Kenya to submit information regarding the measures undertaken by the state to address the discrimination, ill-treatment and violence against LGBTIQ individuals.¹¹⁴ The Committee also included as an agenda in the list of issues that Kenya indicate whether it had repealed any legal provisions that foresee penalties against LGBTIQ individuals.¹¹⁵

3.4 LGBTIQ Rights in the African Regional Framework

While the African regional human rights system has a number of treaties applicable to various spheres, the most relevant instrument within the discussion of sexual minority rights is the **African Charter of Human and People’s Rights (the African Charter)**.¹¹⁶ The African Charter, often cited as the ‘regional bill of rights’,¹¹⁷ is an encapsulation of the international instruments discussed above, and features all three generations of rights.

The African Charter recites most of the provisions in the international bill of rights and may rightly be described as a collection of all generations of human rights, and of the treaties in the

¹¹¹ Economic and Social Council, *Torture and other cruel, inhuman or degrading treatment or punishment: Report of the Special Rapporteur*, UN E/CN.4/2004/56, 23 December 2003.

¹¹² Economic and Social Council, *Torture and other cruel, inhuman or degrading treatment or punishment: Report of the Special Rapporteur*.

¹¹³ UN Committee against Torture, *General Comment No. 2: Implementation of Article 2 by state parties*, UN CAT/C/GC/2, 24 January 2008, para. 21.

¹¹⁴ UN Committee against Torture, *List of issues prior to submission of the third periodic report of Kenya*, UN CAT/C/KEN/QPR/3, 9 November – 9 December 2015.

¹¹⁵, UN Committee against Torture, *List of Issues prior to Submission of the Third Periodic Report of Kenya*, para. 33.

¹¹⁶ Kenya ratified the African Charter on 23 January 1992.

¹¹⁷ Ambani JO, ‘The second wave of criminalising homosexuality in Kenya, Nigeria and Uganda’ Published Doctoral Thesis, Centre for Human Rights, University of Pretoria, November 2016, 46.

international bill of human rights.¹¹⁸ For instance, the African Charter reiterates the non-discrimination as well as equal protection under the law clauses provided for in the ICCPR and the ICESCR, with identical grounds enunciated.¹¹⁹ Like the international bill of rights, Hollander argues that the African Charter is not more than a ‘well-meaning rhetorical device’ as it does not explicitly provide for sexual orientation or gender identity as a ground for protection from discrimination.¹²⁰

However, like the ICCPR and the ICESCR, the body charged with monitoring enforcement of the treaty has enumerated the provision to include sexual minorities. In the case of the African Charter, the body charged with this mandate is the African Commission on Human and People’s Rights (the Commission). The Commission held in *Zimbabwe NGO Human Rights Forum v. Zimbabwe*¹²¹ that sexual orientation was a category of protection under the African Charter and that the provision on equal treatment before the law extended to this category. Thus, when taken together, it would appear that Article 2 and 3 of the African Charter offer the strongest argument against Kenya’s anti-sodomy laws.

The African Charter however suffers from severe setbacks in the fight for sexual minority rights. First, there is an ostensible difference between the African Charter and the ICCPR, seeing as it contains no provision of the right to privacy.¹²² As we observed in *Toonen*, the right to privacy has in the past been interpreted in favour of sexual minorities, the absence of this right in the African Charter therefore has the potential to stifle efforts towards the development of human rights law and jurisprudence in favour of sexual minorities.¹²³ Murray and Viljoen however offer novel interpretation of other rights which could be taken to encompass the right to privacy, which in this case would be the right to life and human dignity.¹²⁴ They further argue that inclusion of the right

¹¹⁸ Ambani JO, ‘The second wave of criminalising homosexuality in Kenya, Nigeria and Uganda’ Published Doctoral Thesis, Centre for Human Rights, University of Pretoria, November 2016, 47.

¹¹⁹ Article 2 - 3, *African Charter on Human and People’s Rights* (1981).

¹²⁰ Hollander M, ‘Gay Rights in Uganda: Seeking to overturn Uganda’s anti-sodomy laws’, 234.

¹²¹ *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, ACmHPR Comm. 245/2002, 21 Activity Report, 169.

¹²² Maguire S, ‘The Human Rights of Sexual Minorities in Africa’, 50.

¹²³ Ambani JO, ‘The second wave of criminalising homosexuality in Kenya, Nigeria and Uganda’ Published Doctoral Thesis, Centre for Human Rights, University of Pretoria, November 2016, 48.

¹²⁴ Murray and Viljoen argue that sexual attraction to persons of the same sex is integral to one’s personality and thus tied with their human dignity. See: Murray R, Viljoen F, ‘Towards Non-Discrimination on the basis of sexual orientation: The Normative Basis and Procedural Possibilities

to privacy in latter treaties of the AU like the African Charter on the Rights and Welfare of the Child demonstrates that the region may not necessarily be averse to the protection of the right to privacy.¹²⁵

The second setback of the African Charter with regard to sexual minority rights, is the broad limitation clause, which establishes a strong moral compass in the Charter and opens up the rights in the Charter to limitation in the interest of the rights of others, collective security, *morality* and *common interest*.¹²⁶ The effect of this kind of limitation, Persad argues, creates the likelihood that the argument based on Articles 2 and 3 of the African Charter against the anti-sodomy laws would be too weak to withstand counter arguments based on Article 27(2)'s limitation clause, as it confers immense power of limitation to the state parties.¹²⁷

3.5 Conclusion

We began this chapter by drawing a road map of LGBTIQ rights in the international scene. We observed that the movement for LGBTIQ rights has been slower to progress as compared to other international human rights standards, due to a number of factors- the most pertinent of which is that there lacks a strong consensus in the international community regarding the status of the LGBTIQ community. Through the roadmap, we also cited both the political and judicial instances that have been made at the international scene, particularly at the UN level. What is slowly starting to show, is that judicial forums have generally been more effective in securing some form of SOGI rights, as opposed to political movements. This is because political moves such as UNGA resolutions require a consensus among states of the status of the LGBTIQ community, which while this consensus is emerging, it is not fully established.

More could be said on the effectiveness of the judicial versus political movement towards SOGI rights, even in the Kenyan context. We explored certain cases in chapter two that have made positive strides towards protection of sexual minorities for example the *Eric Gitari* case.

before the African Commission on Human and People's Rights and the African Union,' 29 *Human Rights Quarterly* (2007), 90.

¹²⁵ Murray R, Viljoen F, 'Towards Non-Discrimination on the basis of sexual orientation: The Normative Basis and Procedural Possibilities before the African Commission on Human and People's Rights and the African Union', 90.

¹²⁶ Article 27(2), *The African Charter*.

¹²⁷ Persad XBL, 'Homosexuality and Death: A legal analysis of Uganda's proposed anti-homosexuality bill', 155.

Meanwhile, the politics behind this issue lags behind in Kenya as it does in the international sphere because more often than not, the politics of an issue is dependent on the public opinion surrounding that issue – and as we have established, public opinion has usually required some time to adjust and conform to the notion of LGBTIQ rights.

Notwithstanding this lack of consensus on LGBTIQ identity, we have established that there is a growing momentum internationally regarding protection of sexual minorities. We analysed the international bill of rights, and found that with each convention, the monitoring body has in each case interpreted the treaties to include sexual orientation as a category of protection, regardless of the fact that all treaties fail to explicitly include this category. Famous cases such as *Toonen* have, as discussed, shifted the international human rights jurisprudence towards protecting the rights of sexual minorities.

In discussing famous cases before human rights committees, we find that in protecting sexual minorities, the rights to privacy, equality and freedom from discrimination feature most predominantly. We however discussed the shortfalls of the privacy approach under the *Toonen* discussion, and the potential this approach has to lead to eventual discrimination against the LGBTIQ community by reinforcing the stereotype that heterosexuality is ‘superior’ to homosexuality and can therefore be practiced in the open. Moreover, the privacy approach may not adequately protect the rights of LGBTIQ individuals that are, so to speak, enjoyed publicly for example fair treatment in employment.

In discussing the international bill of rights, we compared the different treaties at the UN level, finding that the ICESCR may be less powerful in the fight for LGBTIQ rights compared to its ICCPR counterpart. We found that while the ICCPR is emphatic in requiring its state parties to ensure and fulfil the rights therein, the ICESCR only requires that states make steps towards the *progressive* realisation of the rights contemplated therein. Moreover, save for the freedom from discrimination Article, the ICESCR does not contain rights that speak directly to the protection of sexual minorities, such as the right to privacy.

We ended the discussion by looking at the African international human rights framework which recites most of the provisions in the international bill of rights. We found that while the African Charter does not explicitly include sexual orientation as a category of protection, the African Commissioner for Human and People’s Rights has also interpreted the non-discrimination clause

to include sexual orientation. Another setback we established the African Charter suffers, is its exclusion of a right to privacy. Scholars have however, as we discussed, posited ways in which other rights may interpreted as to include the right to privacy, or even so, how sexual minorities may be protected in the absence of this right.

Ultimately, from this chapter, we have established that there is a notable shifting momentum in the international community towards protection of sexual minorities. From the jurisprudence at African regional human rights monitoring bodies, it would seem that Africa is also slowly beginning to share in this momentum. What is clear from the foregoing is that Kenya's anti-sodomy laws are incompatible with international and regional frameworks, confirming the second part of our hypothesis. From here, we therefore ensue on a discussion on these incompatibilities and inconsistencies in the next chapter.

CHAPTER FOUR: LESSONS AND FINDINGS FOR KENYA

4.1 Introduction

In the foregoing chapters, we have discussed Lesbian, Gay, Bisexual, Transgender, Intersex and Queer (LGBTIQ) rights both in the Kenyan context, and in the international context. We have established that there exists an inconsistency regarding Kenya's anti-sodomy laws with the constitutional bill of rights, and with the international human rights standards Kenya ascribes to.

The discussion that ensues in this penultimate chapter is primarily on the incompatibility of Kenya's anti-sodomy laws within Kenya's human rights framework. This discussion is necessary so as to draw lessons for Kenya for best practice and a possible review of laws. The first part of this brief chapter shall delve into the inconsistencies of the anti-sodomy laws with the Constitution of Kenya, and the second part shall discuss the inconsistencies of the anti-sodomy laws with general principles of international law and agreements that Kenya is party to.

4.2 Unconstitutionality of Anti-Sodomy laws

In Chapter Two of this paper, we got a glimpse of Kenya's anti-sodomy laws and their ramifications on the treatment of LGBTIQ Kenyans. We then juxtaposed these laws against the Kenyan Constitution and raised the question of the legality thereof under the high constitutional threshold of the protection of the human rights of Kenyans.

We embarked on a discussion on some of the atrocities LGBTIQ Kenyans live through in Kenya,¹ and how anti-sodomy laws irrefutably play a role in enabling and legitimising these violations to continue. The Kenyan constitution imposes an affirmative obligation on the state to make steps towards ensuring that the Bill of Rights is upheld and that the rights of all Kenyans are respected and promoted.² It would therefore follow in this grain, that Kenya's authorities have a duty to enact laws that promote the fulfilment of human rights, and to repeal those that promote violations of the same.³ Due to the inherently discriminatory nature of anti-sodomy laws, and the role they play

¹ See generally: Kenya Human Rights Commission Report, *The Outlawed Among Us: A Study of the LGBTI Community's Search for Equality and Non-Discrimination in Kenya*, 2011.

² In specific wording, the Constitution of Kenya in Article 21 (1) imposes the duty on the State to "observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights."

³ Finerty CE, 'Being Gay in Kenya: The Implications of Kenya's New Constitution for its Anti-Sodomy Laws', *45 Cornell Law Journal* (2012), 451.

in legitimising a homophobic culture that perpetuates human rights violations against LGBTIQ Kenyans, these laws automatically impede any effort to abide by Article 21 (1) within the LGBTIQ rights context. While the Constitution calls for progressive measures towards the promotion of human rights for Kenyans, anti-sodomy laws instead present a retrogressive move from the state from a human rights perspective.⁴

In addition, the Constitution imposes an obligation on the state and state organs to address the needs of vulnerable groups in the society.⁵ While it makes no mention on whether sexual minorities constitute a ‘vulnerable group’, it includes ‘members of minority or marginalised groups’. This, much like the ‘other status’ we observed in international and regional human rights instruments, may be interpreted to include sexual minorities. Finerty argues that particularly owing to the social oppression, stigmatisation and abuse that LGBTIQ Kenyans face, they may qualify as a marginalised group.⁶

The Bill of Rights in the Constitution of Kenya mirrors the provisions in most international human rights instruments, and in providing for the ‘freedom from discrimination’ for all Kenyans, similarly enumerates an ‘on any ground’ category for protection.⁷ The clause is to be interpreted as an inclusive one, and lists grounds only as examples, and not as an exhaustive list. It therefore follows that sexual orientation and gender identity could fall under this catchall provision, effectively making Kenya’s anti-sodomy laws inconsistent with this constitutional provision due to their inherently discriminatory nature.⁸

Yet another hallmark of the Constitutional Bill of Rights is the fact that it excludes ‘public interest’ as a limiting factor for the fulfilment of human rights. This is a stark difference from the Independence Constitution, which allowed for fundamental human rights of Kenyans to be limited in the interest of the public and allowed limitations for public morality as well.⁹ The 2010

⁴ Finerty C, ‘Being Gay in Kenya: The Implications of Kenya’s New Constitution for its Anti-Sodomy Laws’, 451.

⁵ Article 21 (3), *Constitution of Kenya* (2010).

⁶ Finerty C, ‘Being Gay in Kenya: The Implications of Kenya’s New Constitution for its Anti-Sodomy Laws’, 450.

⁷ Article 27 (4), *Constitution of Kenya*.

⁸ Finerty C, ‘Being Gay in Kenya: The Implications of Kenya’s New Constitution for its Anti-Sodomy Laws’, 450.

⁹ See generally: Chapter V, *Constitution of Kenya* (1963).

Constitution however, only provides a limitation where it is ‘reasonable and justifiable in an open democratic society, based on human dignity, equality and freedom, taking into account all relevant factors...’¹⁰ To the view that discrimination based on sexual orientation violates one’s human dignity by degrading one’s most intimate and personal feelings as Murray and Viljoen posit, a limitation of the rights of LGBTIQ persons would fail the requirement for justifiability based on human dignity.¹¹ Moreover, due to the inherently discriminatory nature of anti-sodomy laws, the limitation would also fail the requirement of its justifiability based on equality. A limitation of rights based on sexual orientation would therefore be inconsistent with this constitutional provision.

Ultimately, what is clear from the Constitution is that Kenya’s anti-sodomy laws are inconsistent with its Bill of Rights. The April 2015 High Court ruling on the petition filed by the National Gay and Lesbian Human Rights Commission (**NGLHRC**) leaves no doubt in the interpretation of the Bill of Rights that the fundamental rights enumerated therein apply to all Kenyans, regardless of their sexual orientation or gender identity.¹²

4.3 Contravention of general principles of international law and agreements

Article 2 of the Constitution is a key provision in the protection of LGBTIQ rights, as it incorporates international law into Kenyan law. It is from this provision that international law and principles regarding the protection of sexual minorities acquire traction in the Kenyan context. In Chapter Three of this paper, we discussed at length, the jurisprudence of sexual minority rights within international and the African regional frameworks. We established the growing consensus in the international and regional communities, that anti-sodomy laws are inherently discriminatory and may contribute to human rights violations.

We discussed revolutionary cases that have been heard at international human rights tribunals, which have had a lasting effect in the fight for sexual minority rights. In *Toonen v Australia*, we discussed the Human Rights Committee ruling, which found that the category of ‘sex’ under the

¹⁰ Article 24 (1), *Constitution of Kenya*.

¹¹ Murray R, Viljoen F, ‘Towards Non-Discrimination on the basis of sexual orientation: The Normative Basis and Procedural Possibilities before the African Commission on Human and People’s Rights and the African Union’, 29 *Human Rights Quarterly* (2007), 90.

¹² *Eric Gitari v Non-Governmental Organisations Co-ordination Board & 4 others* [2014] eKLR.

non-discrimination clause may be interpreted to include sexual orientation.¹³ Moreover, the Committee found that anti-sodomy laws were inherently discriminatory, and violated the rights of Tasmanian homosexuals to privacy.¹⁴ LGBTIQ Kenyans face the same invasion of privacy complained of in *Toonen* since police officers use the laws to investigate their homes at times arbitrarily, and often harass and abuse them once inside.¹⁵

We discussed the ICCPR and the ICESCR and found that, while each instrument makes no mention of sexual orientation as a category for protection under the non-discrimination clauses, scholars and their own monitoring bodies have interpreted the provisions to include sexual orientation under ‘other status’. We also discussed the reporting mechanisms under each covenant, and deduced that LGBTIQ rights are a priority under each.¹⁶ We found that international human rights instruments mandate their state parties to take steps to ensure and fulfil rights under the covenants, as well as undertake progressive measures in ensuring this mandate is fulfilled.¹⁷ It is this paper’s submission that Kenya’s anti-sodomy laws do not partake in these progressive measures to fulfil international human rights instruments and are instead retrogressive in the promotion and realisation of human rights. They create and fuel a homophobic atmosphere which enables human rights violations of LGBTIQ persons.

We also discussed a number of relevant resolutions at the UN with regard to LGBTIQ rights, as well as an emergence of soft law on the subject,¹⁸ which continues to indicate the momentum the sexual rights lobby has attracted in recent decades. It is undeniable that the international community holds the rights of sexual minorities to a high regard, which is why there remains a discernible disconnect between Kenya’s anti-sodomy laws and international laws on the matter.

In Chapter Two, we embarked on a discussion on the atrocities that Kenyan sexual minorities undergo, such as violence and harassment even by state officials. This discussion is particularly

¹³ *Toonen v. Australia*, CCPR Comm. No. 488/1992 (31 March 1994), para. 8.7.

¹⁴ *Toonen v. Australia*, CCPR, para. 8.5.

¹⁵ Kenya Human Rights Commission Report, *The Outlawed Among Us: A Study of the LGBTI Community’s Search for Equality and Non-Discrimination in Kenya*, at 21.

¹⁶ See: *Universal Periodic Reviews for Kenya, ICCPR and ICESCR (2010 onwards)*, discussed at length in Chapter 3.

¹⁷ See generally: Preamble, *ICCPR (1966)*. See also: Preamble, *ICESCR (1966)*.

¹⁸ *The Yogyakarta principles on the application of international human rights law in relation to sexual orientation and gender identity (March 2007)*.

relevant in bringing into focus the provisions of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). In the convention, torture is defined as the intentional infliction of severe pain or suffering on a person by, or with the consent of, a public official or person acting in an official capacity.¹⁹ In 2001, the Special Rapporteur of the Commission on Human Rights called for reports from States concerning the mistreatment of LGBTIQ persons by state officials and, based on the submissions, concluded that discrimination based on sexual orientation contributes to the dehumanisation of LGBTIQ people, which is often a necessary condition to torture and may therefore contravene the convention.²⁰

The African regional human rights framework has not been left behind in the sexual rights lobby. Despite having significant drawbacks as we discussed in Chapter three such as the allowance to limit the rights therein based on public interest and moral considerations, the African Charter has been interpreted by the African Commission of Human and People's rights to protect sexual minorities through its non-discrimination clause.²¹ The Commission has also expressed concern over the treatment and overall atmosphere of intolerance towards sexual minorities.²² The Commission has also gone on to provide that any limits exercised on the rights enunciated in the Charter must be just and proportionate to goals advanced.²³ Given the discrimination and human rights violations that anti-sodomy laws perpetuate, it is unlikely that they would pass this test of justifiability and proportionality to any kind of 'benefit'. Moreover, reading in the line of the ruling given by the Commission in *Social and Economic Rights Actions Centre v Nigeria*, each African state party is under an affirmative obligation to promote the rights enumerated in the Charter.²⁴

¹⁹ Article 2, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984).

²⁰ Finerty CE, 'Being Gay in Kenya: The Implications of Kenya's New Constitution for its Anti-Sodomy Laws', 444.

²¹ *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, ACmHPR Comm. 245/2002, 21 Activity Report, 169.

²² African Commission on Human and Peoples' Rights, *Concluding Observations and Recommendations on the Periodic Report of the Republic of Cameroon*, 39 Ordinary Session, 11-25 May 2005.

²³ *Media R. Agenda v. Nigeria*, ACmHPR Comm. No. 105/93, 12 Annual Activity Report (1998), para. 69-70.

²⁴ *Social and Economic Rights Action Centre v. Nigeria*, ACmHPR Comm. No. 155/96, 15 Activity Report (2001), para. 44.

This directive ultimately imposes an obligation on Kenya to repeal anti-sodomy laws, since they in fact do the exact opposite of promotion of rights in the Charter.²⁵

Given that Article 2 of the Constitution affords a certain primacy to international law and principles that Kenya is party to, Kenya is under an obligation to repeal laws that run afoul of international law and principles.²⁶ Article 2 also places an obligation on the state to make steps towards ensuring that Kenya fulfils her international obligations. As it stands, Kenya's anti-sodomy laws are inconsistent with general international human rights principles and should therefore be reviewed and repealed in a bid to align Kenya's human rights framework to international and regional demands.

Another consequence of Article 2 is that it ensures that international law and principles take precedence over customary law.²⁷ The same article provides that any law, *including customary law*, that is inconsistent with the Constitution is void to the extent of that inconsistency.²⁸ It therefore follows that arguments to retain anti-sodomy laws based on the fact that African customs do not permit LGBTIQ activity are no longer constitutionally viable. The United Nations Secretary General echoed similar sentiments in his speech on Human Rights Day in 2010, making it clear that where cultural attitudes clash with universal human rights, universal human rights must carry the day.²⁹

4.4 Conclusion

This chapter began by expounding on the unconstitutionality of anti-sodomy laws that we began to go into in Chapter two. Therein, we examined constitutional provisions particularly in the Bill of Rights, and juxtaposed these provisions against anti-sodomy laws. We have uncovered the fact that the Constitution of 2010 was a new dawn in the fight for sexual minority rights in Kenya. The 2010 Constitution departs from the old Constitution in leaving out limitations based on moral

²⁵ Finerty CE, 'Being Gay in Kenya: The Implications of Kenya's New Constitution for its Anti-Sodomy Laws', 455.

²⁶ Finerty CE, 'Being Gay in Kenya: The Implications of Kenya's New Constitution for its Anti-Sodomy Laws', 453.

²⁷ Article 2 (5-6) render general rules of international law and treaties that Kenya has ratified as part of Kenyan law; and Article 2 (4) states that any law, including customary law, that is inconsistent with the constitution is void to the extent of the inconsistency. See: Article 2 (4-6), *Constitution of Kenya*.

²⁸ Article 2 (4), *Constitution of Kenya*.

²⁹ Ban Ki-moon, *U.N. Secretary General, Address at the Event on Ending Violence and Criminal Sanctions Based on Sexual Orientation and Gender Identity*, UN SG/SM/13311, 10 December 2010.

considerations or public interest in its Bill of Rights. This has the implication of invalidating any such claim by those who are pro - anti-sodomy laws.

We then went on to underscore the affirmative obligation that the Constitution places on the state to respect and promote the Bill of Rights, and interpreted this to mean that Kenya may be under an obligation to repeal anti-sodomy laws as they run afoul to the Bill of Rights. We examined the non-discrimination clause which enumerates an ‘on any ground’ catch-all provision which may be used to apply to sexual orientation as a ground.

Guided by Article 2, we continued to explain the unconstitutionality of anti-sodomy laws in Kenya akin to its provisions on international law. Through Article 2, Kenya incorporates international law into domestic law therefore binding Kenya to international law and norms. As we discussed in Chapter 3 and briefly in this subchapter, we have established that there is an ever-growing consensus that laws that discriminate against sexual minorities violate international human rights norms. Kenya’s anti-sodomy laws are therefore inconsistent with the general consensus of the international community on the rights of sexual minorities.

Ultimately, this chapter has encapsulated the findings of Chapters two and three in confirming our hypothesis that Kenya’s anti-sodomy laws are inconsistent with both the Constitution and international human rights standards. What this then means, is that the laws may require a review. In our next and final chapter, we go into conceptualising rights for LGBTIQ Kenyans with a view to recommend how Kenya may begin to forge a way forward for the community.

CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

Up until this point, we have discussed at length Kenya's anti-sodomy laws and brought to question the legality thereof against the backdrop of both the Constitution and international human rights standards. This final chapter seeks to answer our final research question on recommending the best way forward and to finally conclude the study. We will begin by restating the initial problem and hypothesis of this study, and then proceed to outline our findings from the study. We will then make recommendations for how Lesbian, Gay, Bisexual, Transgender, Intersex and Queer (LGBTIQ) rights may be conceptualised for Kenya, after which we shall conclude by making recommendations for further research.

5.2 Restating the problem

We began this study by shedding light on the human rights violations that sexual minorities in Kenya go through in a prevalently homophobic country. We then introduced the anti-sodomy provisions in the Penal Code and posited that these inherently discriminatory provisions have an adverse effect on the human rights of sexual minorities in Kenya. We then began a discussion on the constitutional and international human rights provisions relevant to LGBTIQ rights. This discussion led us to our hypothesis, which was that Kenya's anti-sodomy provisions are incompatible with the standards of protection of human rights set by the Constitution and international human rights instruments and norms.

5.3 Findings

Challenged by the above problem, this study embarked to research three principal questions:

1. What are the laws in Kenya regarding LGBTIQ activity, and how do these laws affect LGBTIQ Kenyans?
2. What general position does the international community take on LGBTIQ rights, and does Kenya comply with this position?
3. What is the best way, moving forward, to protect the human rights of LGBTIQ Kenyans?

Guided by the theories of the universality of human rights, human dignity and natural rights, underscored by social justice to which we believe all human beings - including sexual minorities - are entitled to, our study led us to the following findings.

5.3.1 Kenya's anti-sodomy laws promote violations of the human rights of LGBTIQ individuals living in Kenya

In Chapter Two, we began to question the constitutionality of the laws, and examined the situation of LGBTIQ rights in Kenya finding that more often than not, LGBTIQ individuals are exposed to harsh realities in Kenya that are only exacerbated by the legitimacy given to them by anti-sodomy laws. We examined the 'unnatural offences' provision in the Penal Code and discussed the issues it presents with its vague and unclear wording, basically giving authorities carte-blanche to overstretch the provision to the detriment of LGBTIQ Kenyans.

5.3.2 Kenya's anti-sodomy laws are unconstitutional

In Chapter Two, we also embarked on another discussion examining the Constitution and in particular, the Bill of Rights. We found that the Bill of Rights in the 2010 Constitution creates a higher threshold for protection of human rights- a threshold that anti-sodomy laws do not meet. We continued this discussion in Chapter Four, where we established that unlike the Independence Constitution, the 2010 Constitution excludes 'public interest' or any moral considerations as permitted limitations for rights under the Constitution. We also discussed the catch-all 'and any other ground' provision that the Constitution makes in its non-discrimination article, which may consequently be interpreted to include sexual orientation and gender identity.

5.3.3 Kenya's anti-sodomy laws are inconsistent with international human rights standards

In Chapter three, we examined the international and regional frameworks on LGBTIQ rights which are relevant in Kenyan law by virtue of the Constitution which incorporates international law to domestic law.¹ After examining the human rights framework at both the United Nations and at the African Union, we established that there is a shifting momentum towards the protection of sexual minorities, one which Kenya lags behind in sharing due to its inherently discriminatory anti-sodomy laws. We established that given the priority afforded to international law and standards in

¹ Article 2, *Constitution of Kenya* (2010).

the Constitution, Kenya is obligated to review its domestic laws to ensure her compliance with her international obligations.

5.4 Recommendation: *The Journey to a Clearer Rainbow*

Now that we have established that anti-sodomy provisions in the Penal Code² are both unconstitutional and against international human rights standards, a conversation on review of the Penal Code is necessary at this point. The wounds of the LGBTIQ community in Kenya are bare, oozing with pus, with these laws only continuing to perpetuate a lethal atmosphere that deepens these wounds. Repealing these laws is the first step towards healing these wounds, and granting the community what is rightfully theirs- their inherent human rights. The sole recommendation of this study therefore, is that the Penal Code's anti-sodomy provisions are repealed, and that the government undertakes serious measures to protect sexual minorities from discrimination and other human rights violations.

5.5 Final conclusions

Ultimately, this study has tested and confirmed its hypothesis that Kenya's anti-sodomy laws are inconsistent with both the constitutional threshold of human rights in the Bill of Rights, and with Kenya's international human rights obligations.

We have then gone on to establish that there is need for reform of the Penal Code provisions on homosexuality so as to meet constitutional and international human rights standards. While the road to law reform for sexual minorities in Kenya will be a long and winding one, due to a number of reasons such as the prevalent homophobic attitude in Kenya, and the lack of specific provisions both internationally and regionally to protect sexual minorities, there is a light at the end of the tunnel. Recent moves internationally indicate a strong support for LGBTIQ rights, and it is imperative that this support be felt during Kenya's journey to securing rights for sexual minorities.

Eventually, as international pressure continues to grow, Kenya will have to join in the growing consensus that LGBTIQ individuals are *indeed* entitled to human rights without any distinction or discrimination. Anti-sodomy laws endanger LGBTIQ persons, and encourage violations of their

² Section 162 – 165, *Penal Code* (Act No. 14 of 2014).

human rights. What is clear at the moment, is that these laws must be repealed, and protective safeguards to be put in place to ensure LGBTIQ rights are respected.

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