

**HOMOSEXUALITY IN AN AFRICAN CONCEPT; A STUDY INTO THE
DECRIMINALISATION OF HOMOSEXUALITY IN KENYA.**

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DECLARATIONS

I FREADA KINDA OWINO, 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:**F.K.O.**.....

Date:30th July 2021.....

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

Signed:Mukami Wangai.....

ABSTRACT

The paper brings to light the notion that Kenya's anti-sodomy laws are unconstitutional and incompatible with international human rights instruments. In relation, the paper looks at the constitutional approach to decriminalization of same sexual conduct and the manner that it can be interpreted and applied to advance a case for decriminalization. Desktop research methodology is used to look at various theories in relation to decriminalization of homosexuality, the position of LGBTIQ rights in the international sphere and in addition, progressive interpretation of the constitution to potentially decriminalize anti-sodomy laws. Kenya does not list sexual orientation as a prohibited ground for discrimination. However, it has adopted an open list approach towards grounds for discrimination. Despite this, the paper concludes that the LGBTIQ rights are constantly violated without any legal recourse. The inquiry finds that the penal code provisions do not meet the constitutional threshold on the protection of human rights. Judicial review of the anti-sodomy laws would be a great step towards a more inclusive and welcoming society for the LGBTIQ community.

LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and People's Rights
ANC	Africa National Congress
CAT	Convention against Torture
COK	Constitution of Kenya
ECHR	European Convection on Human Rights
ICCPR	International Covenant on Civil and Political Rights
LGBTIQ	Lesbian, Gay, Bisexual, Transgender, Intersex, Queer
SOGI	Sexual Orientation and Gender Identity
UN	United Nations
UDHR	Universal declaration of human rights UNGA United Nations general Assembly
UDHR	Universal Declaration of human rights

LIST OF CASES

National Coalition of Gay & Lesbian Equality & Another v Minister of Justice and Others [1998] Constitution Court of South Africa.

Francis Odingi v R [2014] eKLR.

Obergefell v Hodges [2015] The Supreme Court of the United States

Toonen v Australia, CCPR

A.D.T. v United Kingdom, ECtHR Judgment

Zimbabwe NGO Human Rights Forum v. Zimbabwe

J.K. v. Canada, ECtHR

Griswold v State of Connecticut [1965] The Supreme court of the United States

Lawrence v Texas [2003] The Supreme court of the United States.

Republic v Non-Governmental Organizations Co-ordination Board & another ex parte

Transgender Education and Advocacy & 3 others [2014] eKLR

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

LIST OF LEGAL INSTRUMENTS

Constitution of Kenya

South African Constitution

United Nations Charter

International Covenant on Civil and Political Rights

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or
Punishment

Universal Declaration of Human Rights

African Charter on Human and People's Rights

CHAPTER 1: HOMOSEXUALITY IN AN AFRICAN CONCEPT

1.1. Background of the problem

The population in Africa is more than a billion. With Africa having 55 countries, one common misconception is that homosexuality was non-existent in Africa until white men imported it.¹ The desire to explore and experiment with one's sexuality has never been confined to geographical location in history. This myth of homosexuality being un-African is used to endorse anti-gay legislation and stir persecution and homophobia in Africa even though studies have shown that homosexuality is African.²

During US President Barack Obama's visit to Africa in July 2015, he gave a legal discourse to discrimination against LGBTIQ community in a meeting with Uhuru Kenyatta, Kenya's president. He was the opinion that, "When you start treating people differently not because of any harm they are doing to anybody but because they are different, that is the path whereby freedom begins to erode." Kenyatta's response was that our traditions and culture does not accept some things.³ African presidents have used the same argument to limit human rights of the LGBTIQ community in their countries. A good example is President Yoweri Museveni when he ceremoniously signed the anti-gay bill in Uganda⁴ and Goodluck Jonathan who signed the bill criminalizing same sex relationships in Nigeria.⁵ Yahya Jammeh, Gambia's president went ahead to call slitting of gay people's throats.⁶

In most African communities, social establishments such as culture, law and religion are eventually liable for the vast criminalisation of same sex relationships.⁷ They have been challenged and rejected not only by developments in science but by international jurisprudence

¹ Dlamini B, 'Homosexuality in African Context' 20 *Agenda*, 2011, 67.

² Evaristo B, 'The idea that African Homosexuality was a colonial import' *The Guardian*, 8th March 2014 - < <https://www.theguardian.com/commentisfree/2014/mar/08/african-homosexuality-colonial-import-myth> > on 12th January.

³ Schiavenza M, 'President Obama pushes for Gay Rights in Kenya' *The Atlantic*, July 26th 2015 - < <https://www.theatlantic.com/international/archive/2015/07/why-obama-pushed-for-gay-rights-in-kenya/399635/> > accessed on 12th January.

⁴ Anti-homosexual Act 2014, (Uganda)

⁵ Same Sex Marriage Prohibition Act 2013, (Nigeria)

⁶ 'African civil society organizations oppose Anti-gay laws.' < <http://menengage.org/african-civil-society-organizations-oppose-anti-gay-laws/> > Accessed 4/10/2020.

⁷ World Health Organization, *Sexual, Health, Human Rights and the Law*, World Health Organization, 2015.

and numerous courts throughout the world.⁸ Criminalisation of homosexuality is incompatible with the human rights that should ideally be present in an effective domestic system. It means that rights granted in national legislations, national constitutions and international agreements are being disapplied to the LGBTIQ community.⁹

1.1.1 Introduction

One of the constitution's structure that guarantees equal respect for dignity in the society is democracy, rule of law and human rights interconnected.¹⁰ Kenya's penal code has always included the clause prohibiting same-sex activity as an unnatural offence since it came into force. This offence is punishable to up to 14years imprisonment.¹¹ The anti-sodomy provisions support the prevailing homophobic attitude in Kenya hence putting the LGBTIQ community at threat of human rights infringement and simultaneously broadening the gap between the LGBTIQ persons and their access to justice.

The Bill of Rights assures all Kenyan citizens basic freedom and rights that are fundamental. It states the rights of every Kenyan in a way that was declared formally. Some of the rights include the right to life,¹² privacy,¹³ right to equality¹⁴ human dignity¹⁵ and right to non-discrimination.¹⁶

1.1.2 Statement of the problem

Anti sodomy laws in Kenya should be repealed to coincide with international and the constitution's demands. In Kenya same sex relationships are prohibited by the penal code. These laws are contradictory to human rights merit and vary with the ideals of universality of human rights, natural and social justice.

⁸ *National Coalition of Gay & Lesbian Equality & Another v Minister of Justice and Others* (1998), Constitution Court of South Africa.

⁹ Human Dignity Trust, '*Criminalising homosexuality; Irreconcilable with Good Governance.*'2016, 9.

¹⁰ Human Dignity Trust, '*Criminalising Homosexuality; Irreconcilable with Good governance*'4.

¹¹ Section 162, *Kenyan Penal Code*, (1930).

¹² Article 16, *Constitution of Kenya*, (2010).

¹³ Article 31, *Constitution of Kenya*, (2010)

¹⁴ Article 14, *Constitution of Kenya*. (2010)

¹⁵ Article 28, *Constitution of Kenya*. (2010)

¹⁶ Article 7, *Constitution of Kenya*, (2010)

1.1.3 Purpose of the study/ General aims

The general aim of the study is to look at how the rights to privacy, human rights and equality are protected in the structural framework of the constitution. The main objective is to assess the material provisions in the Kenyan constitution that can be used in constructing a constitutional argument for the decriminalisation of same sex conduct.

1.2 Hypothesis

The dissertation advances from the hypothesis that the current anti sodomy laws in Kenya defer from the regional and international legal framework. In addition, The Bill of Rights which sets the constitutional threshold for the protection of citizen's right excludes protection from discrimination on grounds of sexual orientation.¹⁷

1.3 Research questions and Objectives of the study

One of the objectives of the study is to explore the constitutional approach into decriminalization of homosexuality in Kenya.

The paper will answer the following questions

1. What is the international and regional take on homosexual conduct?
2. What is the rationale behind criminalisation of homosexuality in Kenya?
3. How does the constitution address the question of decriminalization of homosexuality in Kenya?
4. How can the constitution be applied and interpreted to advance a case for accommodating the LGBTIQ community Kenya?

1.4 Justification of the study

Despite the constitution guarantying the LGBTIQ community the right of equality and freedom from discrimination, the LGBTIQ community are like inferior citizens.¹⁸ The Penal code serves to potentially prosecute and even imprison even those that engage in same sex acts. This activity is illegal even though its consensual and private hence contravenes the right to privacy

¹⁷ Section 27 (4), *Constitution of Kenya*, (2010).

¹⁸ Article 27, *Constitution of Kenya*, (2010).

of these citizens.¹⁹ In addition, criminalisation of same sex conduct goes a long way in wrongfully justifying the general homophobic attitude of most Kenyans.²⁰

1.5 Scope of limitation of the study.

Although the discussion on gender identity is significant, the study will proceed from section 162 of the Penal code which criminalises same sex activity between males specifically.

1.5.1 DEFINITION OF TERMS

The relationship or sexual attraction to a particular gender is defined as sexual orientation.²¹ Lesbian and gay individuals are attracted towards members of the same sex and the opposite sex in the case for heterosexuals.²² Sexual orientation is an essential element of personal identity as it is closely bound to close individual relationships that meet deeply felt need for love, attachment, and intimacy.²³

Decriminalisation is removing penalties for violation of a prohibited act. However, removing the unlawfulness of something does not make it legal.²⁴ This means that the law would not prosecute but rights may not flow from the decriminalisation. The paper is advocating to ensure that the provisions prohibiting same sex conduct are declared unconstitutional. This means that the laws will be decriminalised and the LGBTIQ's community's rights will flow from this.

LGBTIQ community refers to people who have identified themselves as lesbian, gay, transgender, intersex or questioning. Gays and lesbians are persons attracted to members of their own sex.²⁵ Bisexual means a person is attracted to both genders. A transgender person is one who does not identify with the biological sex they assigned at birth which is different from intersex. Lastly, queer means people who are still exploring their sexuality.²⁶

¹⁹ *Francis Odingi v R* (2014) eKLR.

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*, 2011, 27.

²¹ Cameroon E, 'Sexual Orientation and the Constitution; A test case for human rights', *South African Law Journal*, 1993, 118.

²² Cameroon E, 'Sexual Orientation and the Constitution; A test case for human rights', 118.

²³ American Psychological Association < [Sexual orientation and gender identity \(apa.org\)](https://www.apa.org/sexual-orientation) > accessed 1/7/2021

²⁴ Reddy V, Decriminalization of homosexuality in post-apartheid South Africa; A brief case history review from sodomy to marriage, 20 (67), *Agenda Empowering women for gender equity*, 2006, 146.

²⁵ < <https://gaycenter.org/about/lgbtq/> > on 1/8/2021.

²⁶ < <https://gaycenter.org/about/lgbtq/> > on 1/8/2021.

1.6 Outline of the dissertation and its flow argument

The research will mainly be based on desktop research. It will analyse Kenya's constitution, statutes, governmental policies, regional and international treaties, and conventions. Journals, books and legislations were examined. Scholarly work is selected based on the relevance of answering the research questions. The paper will compare Kenya and South Africa because the latter is the only African country that has successfully managed to decriminalise homosexuality.

1.6.1 Summary of overall results

Every human including the LGBTIQ community deserve protection by the law. This can only be achieved if the anti-sodomy laws are done away with. The paper will give insights as to the basis for which anti-sodomy laws in Kenya can be repealed.

1.6.2 Summary of overall conclusions

Kenya is a member of international legal instruments that prohibit discrimination based on sexual orientation. In addition, its equality clause in the Constitution also advocates for decriminalisation of homosexuality. The equality, non-discrimination and right to privacy clauses in Kenya's Constitution take on an open list approach. This can be interpreted in a progressive and creative manner to include sexual orientation as a prohibited ground of discrimination under 'other status.'

1.7 Chapter breakdown

Chapter one is the introduction to the paper. It will lay the basic structure of the dissertation by noting the statement of the problem, research questions, objectives and summary of overall results and conclusion.

Chapter two will look at various theories such as social justice theory, natural justice theory and universality of human rights theory.

Chapter three will look at LGBTIQ rights in the international sphere. There will be an analysis of the position decriminalisation of homosexuality holds in International and regional instruments.

Chapter four will assess how Kenya's constitutional provisions could be creatively and progressively interpreted to decriminalise homosexuality. The centre of attention will be on the

possible decriminalisation of homosexuality in Kenya. This chapter shall also include a comparative analysis between the South African Constitution and the Kenyan Constitution.

Chapter five will draw out conclusions and make recommendations.

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CHAPTER 2: HUMAN RIGHTS THEORY AND SOCIAL JUSTICE THEORY.

2.1 Introduction

This chapter will look at incompatibility of Kenya's anti- sodomy laws with human rights standards through the social justice theory and universality of human rights theory. In addition, the paper recommends that these laws be repealed to conform to international and constitutional demands.

2.2 Universality of human rights theory

Universality of human rights theory rests on the foundation that every human being has special moral value. Because every human being has special moral values, certain things should not be done to any human being and some should be done with every human being. This is because every person in the world is entitled to human rights.²⁷

The understanding of this theory comes down to all-inclusiveness with humans. Universality as general applicability implies the absence of any criterion restricting ingroup tie, gender time, place race, or nationality. By this it means that people are entitled to these rights because they are human being.²⁸ This principle strongly relates to equality and non-discrimination which is a requisite tool to guarantee universality of human rights.²⁹

The theory of human dignity that is intertwined with natural rights is correlated to special moral value. Human dignity is inherent in and possessed by every human being.³⁰ Their actions give humans, including the LGBTIQ community another sort of moral worth that archives moral status independent of inherent worth.³¹ It is the innate dignity of being human that lies at the foundation of both personal morality and political right.³²

²⁷ Lovell N, 'Theorising LGBT Rights as Human Rights: A Queercritical Analysis' E International Student Relations, 2015, 3.

²⁸ Donnelly J, *Universal Human Rights in Theory and Practice*, Cornell University Press, New York, 1989, 1.

²⁹ Brems E, *Human Rights; Universality and Diversity*, Martinus Nijhoff Publishers, London, 2001, 4.

³⁰ Engle E, 'Universal Human Rights: A Generational History' 12(1) *Annual Survey of International & Comparative Law*, 2006, 100.

³¹ McCrudden C, 'Human Dignity and Judicial Interpretation of human Rights' 19(4) *European Journal of International law*, 2008, 2A.

³² McCrudden C, 'Human Dignity and Judicial Interpretation of human Rights' 2E.

Homophobic attitude towards the LGBTIQ community has been evident in Kenya's participation in the community in the international realms.³³ In 2014, Kenya opposed a resolution adopted by Human Right Council against LGBTIQ discrimination and violence. Time and again Kenya has opposed resolutions at the United Nations level that seek to universalise the requirement to protect sexual minority rights.³⁴

Even so, internationally, there is increasing unison that sexual orientation-based discrimination infringes on radical human rights. This can be seen through emergence of soft law on the subject.³⁵

2.3 Social Justice theory

This theory is centred originally around equality among people along numerous dimensions.³⁶ There is more to the concept of justice apart from the dimensions embodied in traditional moral frameworks and criminal and civil law. Social justice tends to pay attention to just associations between groups within society.³⁷

For a liberal society, according to Rawls' theory, justice is fairness. It establishes justice as fairness in the evaluation of the idea that society should be fair and that every citizen is free and equal. He sees it as settling the strain between the ideas of freedom and equality, which have been highlighted both by the socialist critique of liberal democracy and by the conservative critique of the modern welfare state.³⁸

One of the principles of justice as fairness according to Rawls is that each person has the same defeasible claim to a fully adequate scheme of equal basic liberties. This means that all citizens

³³ Economic and Social Council, Brazilian Resolution on Human Rights and Sexual Orientation, UN E/CN.4/2003/L.92, 25 April 2003.

³⁴ United Nations Human Rights Office of the High Commissioner, Human Rights Council adopts Resolution on Sexual Orientation and Gender Identity Doc. A/HRC/27/32, 2 October 2014.

³⁵ The Yogyakarta United Nations Human Rights Council, Human Rights, Sexual Orientation and Gender Identity, Doc. A/HRC/27/32, principles on the application of international human rights law in relation to sexual orientation and gender identity (March 2007).

³⁶ <https://www.investopedia.com/terms/s/social-justice.asp#:~:text=Social%20justice%20is%20a%20political,demand%2C%20or%20traditional%20moral%20frameworks.>> on 20th November 2020.

³⁷ Jost J, Kay A, *Social Justice; History, Theory and Research, Handbook of social psychology*, New York University, 2010, 1122-1165.

³⁸ Rawls J, *Political liberalism*, Columbia University Press 1996, 1.

should have the familiar basic rights and liberties.³⁹ Some of these rights include freedom of speech, freedom of association, right to be treated in accordance with the rule of law. These rights and liberties should be accorded to all citizens equally. Unequal rights would not benefit those who would get a lesser share of the rights, so justice requires equal rights for all, in all normal circumstances.⁴⁰

According Rawls, in order to develop principles of justice, “original position” is used. This is whereby everyone decides these principles from behind a veil of ignorance. This veil of ignorance is one that blinds people to all the truth about themselves so they cannot adjust the principles to their own advantage. Every member in the society would forget about social status, social and political inequalities and so on. Essentially, the veil would hide from us the inequalities that exist in the society.⁴¹

According to Rawls, if an individual is unconscious of the particulars about themselves and they do not know how they will end up in their own formulated society, he or she is unlikely to privilege any one class. This would lead principles that are fair. Those in the *Original Position* would all embrace a maxim strategy which would maximize the prospects of the least well-off. Each person would want to be respected and treated with dignity. In return, fundamental rights would be respected.⁴²

In 2010, Kenya rejected a recommendation by the United Nations Human Rights Committee to decriminalize same sex conduct and take on purported measures in order to ensure that the LGBTIQ community is safeguarded and respected.⁴³ Its reason was that the move would receive opposition from the public.⁴⁴ In conclusion, in the social justice theory and fundamental human rights of all human beings including the LGBTIQ community would be respected. In conclusion, this social justice theory depends on the respect of fundamental rights of all human beings that we all possess by virtue of being human underscoring the universality of human rights.

³⁹ Rawls J, *Political liberalism*, 23.

⁴⁰ Mandle J, *A Theory of Justice*, Cambridge University Press, New York, 20, 2009.

⁴¹ Rawls J, *Theory of Justice*, Belknap Press, Cambridge, 30, 1971.

⁴² Rawls J, *Theory of Justice*,

⁴³ UN Human Rights Committee, Third periodic report of state parties (Kenya), CCPR/C/KEN/3, 19 August 2010.

⁴⁴ 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.

CHAPTER 3: SEXUAL ORIENTATION AND GENDER RIGHTS IN THE INTERNATIONAL SPHERE

3.1 Introduction

There has been a lot of debate upon the emergence of human rights of what should be considered human rights and to whom those rights should extend to. In particular, the minority with diverse sexual preference continue to fight for recognition of their rights⁴⁵ upon such controversy as they face human rights violations in almost every region of the world.⁴⁶ International human rights laws have previously remained silent on issues relating to SOGI rights hence the recent increase in interaction with SOGI rights has been met with contention.⁴⁷ Recently, steps towards same sex marriage rights have been increasingly endorsed.⁴⁸ This chapter will look at whether international legal instruments allow for the growth of LGBTQT rights with a focus on the United Nations framework and system.

3.2 International Covenant on Civil and Political rights.

In relation to rights of the LGBTIQ community, the ICCPR is an international treaty that obliges countries that have ratified it to protect the right to non-discrimination.⁴⁹ It provides a range of protections for civil and political rights.⁵⁰ In addition, the treaty protects its members from cruel and unjust punishment⁵¹ and promotes equal status to women and men.⁵² The ICCPR compels governments that have ratified it to take judicial, administrative and legislative measures in order to protect the rights enshrined in the treaty and to provide an effective remedy.

⁴⁵ Waites M, 'Critique of 'Sexual Orientation' and 'Gender Identity' in Human Rights Discourse: Global Queer Politics Beyond the Yogyakarta Principles', 15, *Contemporary Politics*, 2009.

⁴⁶ O'Flaherty M., 'Sexual Orientation and Gender Identity' in Moeckli D., Shah S. and Sivakumaran S, (eds.) *International Human Rights Law*, Oxford University Press, 2010, 331.

⁴⁷ O'Flaherty M., 'Sexual Orientation and Gender Identity' in Moeckli D., Shah S. and Sivakumaran S, (eds.) *International Human Rights Law*, Oxford University Press, 2010, 331.

⁴⁸ *Obergefell v Hodges* (2015), The Supreme Court of the United States.

⁴⁹ Article 1, *International Covenant on Civil and Political Rights*, 19 December 1966, UNGA 2200A (XXI)

⁵⁰ United Nations Human Rights office of High Commissioner <
<https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> > on 5/12/2020

⁵¹ Article 7, *International Covenant on Civil and Political Rights*.

⁵² Article 3, *International Covenant on Civil and Political Rights*.

The ICCPR provides for the right to privacy relevant to the rights of the LGBTIQ. No person should face illegitimate interference with his privacy, family, home, or correspondence.⁵³ In addition, article 3 of the ICCPR asserts that all should be regarded as equal before the law. The state parties are supposed to ensure uniform right of both genders to the enjoyment of all rights in the covenant.⁵⁴

The collective jurisprudence of the ICCPR is considered to provide the strongest explicit protections against discrimination on the basis of sexual orientation.⁵⁵ This is because ICCPR is the most ratified treaty that covers the broadest range of rights relevant to the LGBTIQ community.⁵⁶

Different human rights treaty bodies have taken several different approaches to incorporate sexual orientation as a ground for discrimination. For the ICCPR, the Human Rights Committee (HRC) is the body of independent experts that monitors implementation of the International treaty by its members. In addition, it can receive individual complaints subject to ratification of an optional protocol.⁵⁷

In order to include homosexuality as unlawful ground for discrimination, the HRC in interpreting the ICCPR has relied on the concept of sex rather than other status.⁵⁸ The ICCPR is the most applicable binding international agreement that has been directly applied in the emerging concurrence on LGBTIQ rights.⁵⁹ In addition, unlike the United Nations Declaration of Human Rights, it contains no limitation clause.⁶⁰

⁵³ Article 17, *International Covenant on Civil and Political Rights*.

⁵⁴ Article 3, *International Covenant on Civil and Political Rights*.

⁵⁵ Kukara E., 'Sexual Orientation and Non-Discrimination' *Peace Review: A Journal of Social Justice*, 17, 2006, 186.

⁵⁶ First Optional Protocol to the International Convention on Civil and Political Rights, 999 UNTS, 19 December 1966.

⁵⁷ United Nations Human Rights Office of the High Commissioner, < <https://www.ohchr.org/> > accessed on 7/12/2020

⁵⁸ E Mittelstaedt, 'Safeguarding the right of sexual minorities; The incremental Legal approaches of enforcing International human rights obligations' *Chicago Journal of International Law*, 2008, 364.

⁵⁹ Xavier B, 'Homosexuality and Death: A legal analysis of Uganda's proposed anti-homosexuality bill', *Boston Journal of International law*, 2010, 147.

⁶⁰ Article 29, *Universal Declaration of Human Rights*.

3.3 Interpretation of ICCPR in *Toonen v Australia*

The state parties to the ICCPR have an obligation to respect the rights recognized in the present instrument of all individuals subject to its jurisdiction and within their territory. This should be without any distinction of sex, language or colour⁶¹ because everyone has the right to the protection of the law against such interference or attacks.⁶²

In *Toonen v Australia*, the complainant brought a complaint that Tasmanian laws criminalizing consensual sex between adult males in private were a violation of his right to privacy under Article 2 and 17 of the ICCPR.⁶³ The Tasmanian criminal code empowered police officials to enter one's household under the mere suspicion that they were engaging in homosexual conduct. This brought private activities into the public domain as the laws did not distinguish sexual activity in public or private.⁶⁴ This violation would lead to unlawful attacks on the members of the LGBTQ community given the stigma surrounding them. In addition, it did not outlaw any form of homosexual activity between consenting homosexual women in private and only some forms of consenting heterosexual activity between adult men and women in private.⁶⁵

The response from the defendant was that the laws were not arbitrarily enforced hence pursuant to a democratic process. In particular, article 17 does not create an unfettered right to privacy.⁶⁶ It only protects arbitrary interference with privacy. The courts ruled in favour of the claimant that Tasmania's anti-sodomy laws were in direct contravention of the ICCPR's privacy provision.⁶⁷ The concluding remarks were that the term 'sex' in the articles of the ICCPR is vital in the interpretation of the non-discrimination clauses where sexual orientation is not expressly stated as a non-discrimination ground.⁶⁸

⁶¹ Article 29, *International Convention on Civil and Political Rights*.

⁶² Article 2, *International Convention on Civil and Political Rights*.

⁶³ *Toonen v Australia*, CCPR Comm No. 488/1992 (25 December 1991).

⁶⁴ *Toonen v Australia*, CCPR.

⁶⁵ *Toonen v Australia*, CCPR.

⁶⁶ Article 17, *Tasmanian Criminal Code*.

⁶⁷ *Toonen v Australia* CCPR.

⁶⁸ *Toonen v Australia*, CCPR.

3.4 Universal Declaration of Human Rights

The Universal Declaration of Human rights (UDHR) forms part of the foundation of international human rights law.⁶⁹ Having emboldened several legally binding international human rights treaties, the UDHR was founded on principles of human dignity and non-negotiable human rights.⁷⁰ As it stands, it counts as an inspiration when addressing injustices, conflicts, and repression in the society in the strive towards universal enjoyment of human rights.

All rights and freedoms should be accorded to all people without any form of discrimination whatsoever; be it race, sex, colour, language just to mention a few. Discrimination based on political, jurisdictional, or international status of the country is also prohibited.⁷¹ The rights and freedoms go further to include the term 'other status' to broaden the spectrum of people specifically protected.⁷²

Nonetheless, at the time of its adoption, it was unanimously agreed by the General Assembly that this declaration would not impose legal obligations on the member states.⁷³ It being declaratory in nature brought about the status of a soft law in the international realm. Overtime, with the states accepting its provisions as normal practice, resulted to its crystallization into binding customary international law.⁷⁴ In 1969, the International Law Institute adopted a declaration affirming that all states have the obligation to guarantee respect for human rights that flow from the recognition of human dignity in the United Nations Charter and the UDHR.⁷⁵

In 1994 it was observed by the International Law Association that the declaration is regarded as an authoritative elaboration of the human rights provisions of the United Nations Charter

⁶⁹ Universal Declaration of Human Rights, December 10, 1948, 217A (III)

⁷⁰ Article 1, *Universal Declaration of Human Rights*.

⁷¹ Article 2, *Universal Declaration of Human Rights*.

⁷² Article 2, *Universal Declaration of Human Rights*.

⁷³ The Foundation of Human Rights Law, < <https://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/> > accessed on 7/12/2020.

⁷⁴ Wright S, *International Human Rights, Decolonization and Globalization: Becoming Human*, Routledge Group, New York, 2001, 13

⁷⁵ L'ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL : RESOLUTIONS 1957-1991, at 206.

and concluded that these rights have become widely recognized as constituting rules of customary international law.⁷⁶

For purposes of reiteration, the provision of ‘other status’ as herein mentioned above offers protection to sexual minorities and has since been interpreted as so.⁷⁷ Furthermore, each right granted in the UDHR begins with the word ‘everyone’ and as such, extending the protection to all regardless of their sexual orientation.⁷⁸ However, a limitation is limitation as the declaration goes further to state that everyone will be subject to limitations of the exercise of their rights and freedoms solely for the purposes of securing the rights and freedoms of others, as well as complying with the requirement of morality, public order, and the general welfare of the democratic society.⁷⁹ From this provision, the UDHR has been argued to be inadequate in the fight to secure rights for the sexual minorities seeing that it provides the anti-sodomy law lobbyists with a loophole to evade granting various rights and freedoms to the sexual minorities.⁸⁰

A recourse for the LGBTQIT advocates is that the declaration should not be interpreted as implying for any state or person having the authority to destruct any right and freedom provided by the same.⁸¹ Moral consideration should not be reason for states to exploit this limitation allowing for human rights violation. Be that as it may, precedent from decided cases would as well argue whether it is just and necessary in a democratic society to limit the fundamental human rights of sexual minorities.⁸²

⁷⁶ Arthur J, ILA 66th Conference of International Law Association, 1995.

⁷⁷ Yecies S, ‘Sexual Orientation, Discrimination, and the Universal Declaration of Human Rights’ 11 *Chicago Journal of International*, 2011, 793.

⁷⁸ Narayan P, ‘Somewhere Over the Rainbow; International Human Rights Protections for Sexual Minorities in the New Millennium’, *Boston University International Law Journal*, 24, 2006, 329.

⁷⁹ Article 29, *Universal Declaration of Human Rights*

⁸⁰ Narayan P, ‘Somewhere Over the Rainbow; International Human Rights Protections for Sexual Minorities in the New Millennium’, 329.

⁸¹ Article 30, *Universal Declaration of Human Rights*.

⁸² *A.D.T. v United Kingdom*, ECtHR Judgment of 31 July 2000.

3.5 African Charter on Human and People's Rights

The African Charter on Human and People's Rights (ACHPR) was created to safeguard and promote basic freedoms. ACHPR pioneered African countries⁸³ to supra national accountability by creating a basis for individuals to claim rights in the international forum and establishing basis for protection and promotion of rights.⁸⁴ It opened up Africa to supra-national accountability hence human rights violations cannot be swept under the carpet of internal affairs.

The ACHPR does not explicitly provide for sexual orientation in its forbidden ground for discrimination even though it recognizes universally accepted political and civil rights. These rights include but are not limited to non-discrimination,⁸⁵ equality⁸⁶ and freedom from cruel degrading treatment.⁸⁷

Even though sexual orientation is not a clear-cut ground for protection against discrimination, the ACHPR held in *Zimbabwe NGO Human Rights Forum v Zimbabwe* that sexual orientation was a class of protection under the African Charter. The instrument has been interpreted as a living instrument therefore, the provision on equal treatment before the law extends to this category. Article 2 and 3 of the African Charter offer the strongest argument against Kenya's anti-sodomy laws.⁸⁸ The provision on equal treatment before the law extends to this category hence, when taken together, Article 2 and 3 of the African Charter offer the strongest argument against Kenya's anti-sodomy laws.

The African Commission on Human and People's Rights also allows mainstream non-governmental organizations who have been granted with observer status⁸⁹ take up issues that regard the LGBTIQ community's rights during public sessions.⁹⁰ This suggests that the ACHPR has taken up safeguarding of LGBTIQ rights as part of its responsibility under the African Charter. In addition, Alternatives – Cameroun an NGO was afforded observer status

⁸³ African Charter on Human and People's Rights, 1st June 1981, UNTS 26363

⁸⁴ African Charter on Human and People's Rights, 1st June 1981, UNTS 26363.

⁸⁵ Article 2, *African Charter on Human and People's Rights*

⁸⁶ Article 3, *African Charter on Human and People's Rights*

⁸⁷ Article 5, *African Charter on human and People's Rights*

⁸⁸ *Zimbabwe NGO Human Rights Forum v Zimbabwe*, ACmHPR Comm 73/ 245/ (2002) Activity Report. 2006.

⁸⁹ The African Commission on human and people's rights < <https://www.achpr.org/> > on 1/8/2021.

⁹⁰ Johnson P, Homosexuality and The African Charter on Human and People's rights, *Journal of Law and Society*, 2013, 249.

by the commission whose responsibility was to work on the rights of gay men.⁹¹ Other organisations granted observer status include and are not limited to, Sexual Minorities of Uganda, Coalition of African Lesbians and Gay and Lesbians of Kenya.

After the conclusion of the 39th Ordinary Session of the ACMHPR in Gambia, a public session was held. In response to a statement read Sybil Ngo Nyeck a Cameroonian activist that provided details for the LGTIQ situation in Cameroon, one of the commissioners stated that Cameroon's penal code was not in harmony with article 2 of ACHPR.⁹² Other commissioners asked questions addressing the breach of human rights of the LGBTIQ people and the detention of Cameroonian 11 who were detained for 'homosexual acts.'⁹³

In 2014, the ACHPR Commission encouraged member states to constructively apply applicable laws forbidding all forms of violence including violence towards the LGBTIQ community while referring to articles in the African Charter.⁹⁴ In conclusion, violence on the basis of sexual orientation amounts to discrimination and violates the rights to human dignity and equality pledged in the African Charter.

3.6 The Convention against Torture and Other Cruel Inhuman or Degrading Treatment

The purpose of Convention Against Torture and other cruel inhuman or degrading treatment (CAT) is to eradicate and prevent the use of cruel and degrading treatment and to ensure that those that commit these acts are accountable.⁹⁵

⁹¹ Viljoen F, 'International Human Rights Law in Africa,' *Equal rights in a time of homophobia: an argument for equal protection of sexual minorities in Africa*, Oxford University Press, 2013, 42.

⁹² African Commission on Human & People's Rights, Final Communique of the 39th Ordinary Session of the African Commission on Human and Peoples' Rights, 2006.

⁹³. African Commission on Human & People's Rights, Final Communique of the 39th Ordinary Session of the African Commission on Human and Peoples' Rights, 2006.

⁹⁴ African Commission on Human & People's Rights African Charter on Human and People's Rights, Resolution 275 2014, 181.

⁹⁵ Article 1, *Convention against torture and other cruel inhuman or Degrading Treatment*, 10 December 1984, 1775 UNTS.

Article 1 of CAT is the minimum definition to be used by member state parties to the convention.⁹⁶ Members have an obligation to take legislative, judicial administrative and other measures to prevent acts of torture in the territories under their jurisdiction.⁹⁷ According to article 2(2) of CAT, there's no peculiar circumstance that may be adduced in justification of torture. In addition, a state party is required to ensure that attempts to commit torture, acts by any person which constitutes complicity or participation in torture and all acts of torture are offences under their criminal law.⁹⁸

The Committee Against Torture which is an independent body of experts has found in its work that marginalized and minority are frequently subject to the risk of torture. The committee publishes and monitors its interpretation of the content of the provisions of the CAT.⁹⁹ In its general comments and concluding remarks, references to sexual orientation and gender identity have been made when a complainant faced a risk of torture¹⁰⁰ because of prevalence of homophobia in certain regions.¹⁰¹

3.7 Conclusion

This chapter examines how international treaty bodies fundamental rights in relation to the LGBTIQ community. With Kenya being a member of international treaties that prohibit sexual orientation-based discrimination, it is required to enact and implement legislation to fulfil its international obligations in respect to human rights and fundamental freedoms.¹⁰² In conclusion, Kenya's anti-sodomy laws are incompatible with International and regional frameworks.

⁹⁶ Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 10th December 1984, UNTS 1465.

⁹⁷ Article 2, *Convention against torture and other cruel inhuman or Degrading Treatment*.

⁹⁸ Article 4, *Convention against torture and other cruel inhuman or Degrading Treatment*.

⁹⁹ Article 17, *Convention against Torture and other Cruel inhuman or Degrading Treatment*.

¹⁰⁰ Nolan H, International Lesbian, Gay, Bisexual, Trans and Intersex Association: [United Nations Treaty Bodies: References to sexual orientation, gender identity, gender expression and sex characteristics 2014](#) (Geneva: ILGA, September 2016);

¹⁰¹ Ambani O, 'The second wave of Criminalizing homosexuality in Kenya, Nigeria and Uganda' Published *Doctoral Thesis, Centre for Human Rights, University of Pretoria, November 2016, 29.*

¹⁰² Article 2(5), *Constitution of Kenya. (2010)*

4.0 CHAPTER 4; POTENTIAL DECRIMINALISATION OF ANTI-SODOMY LAWS IN KENYA.

4.1 Introduction

A study on human rights violations of the LGBTQ community performed by Kenya Human Rights Commission (KHRC) evidenced that sexual minorities in Kenya are crossed by frames of exclusion and infringement of fundamental human rights.¹⁰³ The KHRC found that the community is not able to acquire fundamental rights guaranteed by the Bill of Rights as they are left endangered and marginalised. They are often harassed by police officers with threats of arrest who go to the extent of extorting and blackmailing suspected homosexuals.¹⁰⁴

According to section 162 of the Penal code, anyone who practises gross indecency or carnal knowledge against the order of nature is liable for a maximum penalty of 14 years. Despite the fact the laws are hardly enforced LGBTIQ Kenyans are prosecuted and detained under these laws. A good example is where a conviction for committing the offence of sodomy was upheld in a court of appeal. In addition, the accused *In Francis Odingi v Republic*, was sentenced to six years for engaging in homosexual activities.¹⁰⁵

This chapter explore how the constitution's provisions could progressively be interpreted to creatively advance a case decriminalisation of anti-sodomy laws in Kenya. This will be done through looking at the right to human dignity and privacy, right to non-discrimination and integration of international law into Kenya's domestic laws. This chapter shall also include a comparative analysis between the South African Constitution and the Kenyan Constitution. The purpose of comparison is because South Africa is the only African country that lists sexual orientation as a restricted ground for discrimination in its constitution.¹⁰⁶ Both countries were previously colonised by the Europeans and South Africa originally criminalised same sex conduct. Kenya can draw lessons from how the South African Constitution court approached decriminalisation of homosexuality.

¹⁰³ Kenya Human Rights Commission, *The Outlawed Among Us: A Study of the LGBTI Community's Search for Equality and Non-Discrimination in Kenya*, Kenya Human Rights Commission 2011.7.

¹⁰⁴ Kenya Human Rights Commission, *The Outlawed Among Us: A Study of the LGBTI Community's Search for Equality and Non-Discrimination in Kenya*, 2011, 21.

¹⁰⁵ *Francis Odingi v Republic* (2002).

¹⁰⁶ Section 9(3), South African Constitution (1996).

4.2 Incorporation of international law

In order to advance principal freedoms and rights of individuals, there are obligations to governments laid down by international human rights laws. These universal human rights endorsed and guaranteed by the law in the form of customary international law, treaties, general principles and other sources of international law.¹⁰⁷

One of the principles of the United Nations is self-determination of people and equal rights (articles 1(2) and 3 which goes in line with its purpose to develop friendly relations among nations. Articles 13(1)(b), 55(c) and 76(c) reaffirm the organisation's principle of sovereign equality of all its members and the principle of non-discrimination in the observance of human rights. According to the UDHR which Kenya is a member, all human beings come to the world free and equal in rights and dignity.¹⁰⁸ International human rights such as the right to non-discrimination and equality apply to everyone regardless of their gender identity and sexual orientation. There is no hidden exemption in any human rights treaty that might allow a state to guarantee full rights to some but withhold them for others.

According to the Kenyan Constitution, international law established rules shall be incorporated into the domestic laws. Conventions and treaties approved by Kenya forms part of Kenya's laws.¹⁰⁹ In addition to this, the constitution has an obligation to enforce and enact regulations to fulfil its international obligations in respect to human rights and fundamental freedoms.¹¹⁰

Kenya is a member of the UDHR, ICCPR, ICESCR and the African Charter that all prohibit criminalisation of homosexuality as seen in chapter three. The Government of Kenya has a responsibility to set up legislation and domestic measures reconcilable with its treaty duties and obligations.¹¹¹ This implies that international human rights norms that prohibit discrimination are applicable in Kenya hence it has a constitutional obligation to repeal section 162 as it is not in line with international human rights law.¹¹²

¹⁰⁷ United Nations, The Foundation of International Human Rights law. < <https://www.un.org/> > accessed on 19 December 2020

¹⁰⁸ Article 1, *United Nations Declaration of Human Rights*.

¹⁰⁹ Article 2(4) *Constitution of Kenya*. (2010).

¹¹⁰ Article 21(4) *Constitution of Kenya*. (2010)

¹¹¹ Kenya National Commission on Human Rights; International human rights law < <https://www.knchr.org/International-Human-Rights-Law> > accessed on 10/12/2020.

¹¹² Article 2(6), *Constitution of Kenya*. (2010).

4.3 The Constitution

Before the promulgation of the 2010 Constitution, Kenya had retained the prior British colonial legal system.¹¹³ The laws in the penal code prohibited homosexuality. As such, Kenyan law to date criminalizes homosexuality.¹¹⁴ The Constitution of Kenya Review Commission (CKRC) was created to spearhead the review of the 2010 Constitution because the 1963 Constitution had numerous issues. The issues in the old constitution ranged from land issues, the powerful and unaccountable office of the president and most notable to the topic, the Bill of Rights that was scant as it could easily be limited and deferred.¹¹⁵ During the initial stages of drafting the Bill of Rights the technical committee agreed to exclude sexual orientation in the discrimination provision. This was to ensure that homosexual's rights were not protected in the Constitution.¹¹⁶

4.3.1 The right to non-discrimination

The promulgated 2010 Constitution seeks to generally protect individuals as a whole but does not expressly provide for the protection of sexual minorities.¹¹⁷ In addition, it has expressly provided for marriage between heterosexual people. The State is required not to make a prejudicial distinction against any person on any ground.¹¹⁸

Kenya's equality provision provides that before the law, every person is equal and should be accorded uniform protection.¹¹⁹ This clause does not exclude homosexuals from the scope of protection. In addition, prohibition from discrimination on the grounds of sex has been understood to include sexual orientation (article 27(4)).¹²⁰ Because the listed grounds for discrimination are not exhaustive, this permits persons suffering discrimination on grounds

¹¹³ Finnerty C, 'Being gay in Kenya: The implications of Kenya's new Constitution for its anti-sodomy Laws', 45, *Cornell International Law Journal*, 2013, 437.

¹¹⁴ Section 162, *Penal Code*. ((Act No. 14 of 2014).

¹¹⁵ Constitution of Kenya Review Commission, *The Final Report of the Constitution of Kenya Review Commission*, 2005, 34.

¹¹⁶ Constitution of Kenya Review Commission '*National Constitutional Conference verbatim report of the technical working committee b (TWC B) chapter 4 & 5 on citizenship and the bill of rights held intent 2 at Bomas of Kenya on 19 September 2003*' 3739 (accessed from the Kenya National archives)

¹¹⁷ Article 27(4), *Constitution of Kenya*. (2010)

¹¹⁸ Article 45, *Constitution of Kenya*. (2010).

¹¹⁹ Article 27(1), *Constitution of Kenya*. (2010).

¹²⁰ *Toonen v Australia*, CCPR.

other than those indicated to mount a challenge. The Constitution furthermore removes all room to manoeuvre by prohibiting both direct and indirect discrimination.¹²¹

4.3.2 The right to privacy

The constitution of Kenya in article 31 provides for the right to privacy. This right according to the case of *Griswold v State of Connecticut* allows every person to create and nourish human relationships without obstruction from the outside world as it goes beyond protection for physical spaces.¹²² South Africa's constitutional court declared that one of the core areas of private intimacy was expressing and observing one's sexuality and forming sexual relationships.¹²³

A state is justified to interfere with its citizen's only when it is protecting them from harm. The interference should also be proportionate to the harm posed.¹²⁴ In this case, intrusion of uncontested same-sex conduct does not prevent any harm. If heterosexual relationships are not punishable, imposing criminal penalties on consensual homosexual conduct in private is discriminatory.

4.3.3 The right to human dignity

Every person has intrinsic dignity and the right to have that dignity protected and respected according to the COK. Dignity is the right of a person to be respected and valued for the sake of being human that includes a right to be treated equally. Every person holds a special value in society that is solely tied to their humanity.¹²⁵ It has nothing to do with their race, class, gender, or any other factor other than them being human.¹²⁶ Human dignity is inviolable. It must be respected and protected.¹²⁷

¹²¹ Article 27(5), *Constitution of Kenya*. (2010)

¹²² *Lawrence v Texas* (2003), The Supreme court of the United States.

¹²³ *National Coalition for gay and Lesbian Equality v Minister of Justice* (1988), The Constitutional Court of South Africa.

¹²⁴ Commonwealth human rights initiative report, '*The impact of criminalizing same sex sexual conduct in commonwealth*' 2011,60.

¹²⁵ Lorraine E, 'Human dignity as a rights-protecting principle', 17 *National Journal of Constitutional Law*,2004, 325.

¹²⁶ < <https://www.humanrightscareers.com/issues/definitions-what-is-human-dignity/> > accessed 10th December 2020

¹²⁷ Article 1, *Charter of Fundamental Rights of The European Union*, 1 December 2009, 2012/C 326/02.

The theory of human dignity can be used as a tool to include the rights of the LGBTIQ community. The criteria of being human justifies one being granted human rights.¹²⁸ One's humanity stipulates that they should be treated like other human beings and should enjoy the same rights irrespective of their sexual orientation.¹²⁹ In South Africa, the right to dignity was used as a toll of inclusion in order to allow previously excluded gays and lesbians to enjoy the full benefits of citizenship.¹³⁰ In the *Eric Gitari* case, the court held that the board and the court itself are constitutionally mandated to give effect to article 10 and Article 27 of the Kenyan Constitution which is the non-discrimination provision.¹³¹ In the COK, human dignity, equality and non-discrimination are some of the values and principles set out.¹³² Therefore, allowing discrimination of the LGBTIQ community is in contrast with the constitution's principles.

The Constitution of Kenya should also be interpreted in a method that promotes its citizen's rights and freedoms.¹³³ In connection, the rights to dignity and equality are not promoted if citizens are distinguished because of their sexual preference. In addition, in *Lawrence v Texas* the court declared anti sodomy laws unconstitutional.

4.4 The other side of the coin

In recent years, Kenya has made progress towards being more inclusive towards the LGBTIQ community. In one high court case, the defendant had refused to accept the names proposed by the claimant. The basis for this refusal was that the proposed NGO sought to advocate for the rights of persons who are not socially accepted. The holding was that the Board violated the petitioner's right to non-discrimination.¹³⁴ The court declared that the words "every person" in article 36 includes all persons living within the Republic of Kenya despite their sexual orientation.¹³⁵ The objectives of the proposed NGO were protection of persons who are transgender or intersex from discrimination and infringement of other rights.¹³⁶ The board had

¹²⁸ Jeffrey A, 'Dignity legal Pluralism and Same sex marriage' 75 Brooklyn Law Review, 2010, 794.

¹²⁹ Jackson C, Constitutional dialogue and Human Rights; States and transnational constitutional discourse, *Georgetown Law Faculty Publications and Other Works*, 2004, 27.

¹³⁰ Cameroon E, Dignity and Disgrace; Moral Citizenship and constitutional protection, 473.

¹³¹ *Eric Gitari v Non- Governmental Organisations Co-ordination Board & 4 others* (2013)

¹³² *Eric Gitari v Non- Governmental Organisations Co-ordination Board* (2013).

¹³³ *Eric Gitari v Non- Governmental Organisations Co-ordination Board & 4 others* (2013)

¹³⁴ *Eric Gitari v Non-Governmental Organisations Co-ordination board & 4 others.* (2013).

¹³⁵ Article 36, *Constitution of Kenya.* (2010)

¹³⁶ *Eric Gitari v Non-Governmental Organisations Co-ordination board & 4 others.* (2013).

denied the applicant registration on the basis that the beneficiaries would be homosexuals which was justified by criminalisation of homosexual intercourse in the penal code.¹³⁷ The court's holding was that, the penal code does not criminalise the status of being gay or lesbian neither does it limit the freedom of association.¹³⁸

In another case, the courts stated that being homosexual is not a crime. This set precedence for future petitions seeking protection and accordance of equal rights to sexual minorities.

4.5 Comparison between South Africa and Kenya

In Africa one of the few countries that recognise same sex marriage and LGBTIQ rights is South Africa. The South African constitutional court rendered sodomy laws unconstitutional holding that these laws' existence violated the freedom of discrimination, equality and the right to dignity.¹³⁹ In South Africa, every citizen is equal and is accorded equivalent protection by the law. In addition, they all have immanent dignity and the right to have that dignity respected.¹⁴⁰ To promote the achievement of equality, legislative and other measures are designed to protect or advance persons, disadvantaged by unfair discrimination may be taken. The Bill of rights provides that every person under its sovereignty has the right to equality, privacy, human dignity and freedom from discrimination.

In the fight for inclusion of the rights of the LGBTIQ community, the National Coalition for gay rights and Lesbian equality (NGK) was formed. Its mandate was making sure the sexual orientation provision was retained in the 1966 constitution.¹⁴¹ The NCK equated the notion of equality to non-discrimination which attributed to their success. The case made by the NCK was that "the Constitutional protection of gays is no doubt the product of peculiar history where institutionalized discrimination of people on the ground of race was perfected through the legal system. The racial legacy gave majority of the citizens a repugnance for the use of legal

¹³⁷ Section 162, *Penal Code Kenya*. (1963).

¹³⁸ *Republic v Non-Governmental Organisations Co-ordination Board & another ex parte Transgender Education and Advocacy & 3 others*.

¹³⁹ *National Coalition for Gay and Lesbian Equality v Minister of Justice*. (1988), The Constitutional Court of South Africa.

¹⁴⁰ Section 9, *Constitution of South Africa*. (1993).

¹⁴¹ *National Coalition for Gay and Lesbian Equality v Minister of Justice*. (1988), The Constitutional Court of South Africa.

processes for irrational discrimination.”¹⁴² Discrimination against the LGBTIQ community exhibits the same core feature as discrimination on the grounds of gender and race. Because of this, South Africa includes sexual orientation as a non-discriminatory ground within the Bill of Rights hence expressly protecting homosexuals.¹⁴³

In Kenya, discrimination, and stigma because of the perceived sexual orientation of the LGBTIQ community and the anti-sodomy laws has led to some killings and even denied the members social opportunities such as housing and employment.¹⁴⁴ Other people in the LGBTIQ community have been subjected to harsher prison sentences than the gravity of the offence. Kenya’s equality clause excludes sexual orientation as a ground for discrimination which creates a loophole for this right to be abused by people. The courts also fail to protect such persons as sexual orientation is not particularly indicated in the constitution as a prohibited ground for discrimination.

4.6 Conclusion

Kenya’s anti- sodomy go a long way in validating the widespread attitude of homophobia that exists within the country.¹⁴⁵ Decriminalisation of homosexuality results in discrimination of the right to suitable work and housing, access to the highest standard of physical and mental health and access to effective remedy for violations. In return, fear for arrest and prosecution has led people to avoid seeking medical care for injuries or diseases that could expose their sexual orientation.¹⁴⁶

¹⁴² Richard G and Donald W, *Social -legal control of homosexuality; A multinational comparison*, E Cameron South Africa 1997. 37.

¹⁴³ Section 10, *Constitution of South Africa* (1993).

¹⁴⁴United Nations, ‘United Nations Secretary-General’s Statement to Human Rights Council, Geneva, Switzerland’ 7th March (2012).

< <https://www.un.org/sg/en/content/sg/speeches/2012-03-07/message-human-rights-council-meeting-violence-and-discrimination> > on 23rd July 2021

¹⁴⁵ Pew Research Centre, World Publics Welcome Global trade but Immigration; 47 National Pew global attitudes Survey 35 (2007) < <https://www.pewresearch.org/wp-content/uploads/sites/2/2007/10/Pew-Global-Attitudes-Report-October-4-2007-REVISED-UPDATED-5-27-14.pdf> > on 15/12/2020.

¹⁴⁶ Gay and lesbian coalition of Kenya, research of the lived experiences of lesbians, bisexual and queer women in Africa 29 (2016),< <https://www.icop.or.ke/wp-content/uploads/2016/10/Research-on-the-lived-experiences-of-LBQ-women-in-Ke> >on 15/12/2020.

As seen in the holding in *S v Markwayne* and another, the function of the court is to interpret the law without any favour or fear and not to ascribe morals to the law. Public opinion is not sufficient to limit the LGBTIQ rights as its outweighed by the constitution's supremacy. Because freedom from discrimination on any ground is clearly stated in the Constitution's Bill of Rights, the discriminatory provisions in the Penal Code on unnatural offences in hindmost are inconsistent with the Constitution.

CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS OF THE STUDY

5.1 Introduction

Up until chapter four, the paper has discussed the legality of Kenya's anti-sodomy laws against the framework of the constitution and International legal instruments standards. The objective of the paper was to establish whether criminalization of homosexuality is a violation of the constitutional rights of same sex orientated persons as well as a contravention of the International treaties that Kenya is a member of as in chapter three.

5.2 Conclusions

The study embarked to research four main questions guided by the universality of human rights theory and social justice theory which assert that fundamental rights of all human beings including the LGBTQ community ought to be respected by virtue of being human.

The paper has answered the following questions

5. What is the international and the regional take on homosexual conduct?
6. What is the rationale behind criminalisation of homosexuality in Kenya?
7. How does the constitution address the question of decriminalization of homosexuality in Kenya?
8. How can the constitution be applied and interpreted to advance a case for accommodating the LGBTIQ community in Kenya?

5.3 Constitutional approach to decriminalization of same sex conduct and how it can be interpreted to advance for decriminalization in Kenya.

Even though sexual orientation is not included in Kenya's equality clause, it has adopted an open list viewpoint towards grounds of discrimination. In chapter four the dissertation concluded that, because discrimination on any ground is clearly stated in the Constitution, the discriminatory provisions in the Penal Code on unnatural offences in hindmost are contrary to the Constitution.

5.3.1 Recommendation: Appeal by the Kenya National gay & lesbians commission

South Africa lists sexual orientation in its equality clause as a prohibited ground for discrimination while Kenya's equality clause excludes sexual orientation as a ground for discrimination. This has consequences on the extent to which the right to equality could guard

the rights of the LGBTIQ community in Kenya. Although Kenya has adopted an open list approach to prohibited ground for discrimination, the courts are the most reliable avenue for change. In 2016, a petition was filed by three Kenyan organizations with the notion that the Penal code should be declared unconstitutional. The High Court of Kenya upheld the laws criminalizing homosexual acts.¹⁴⁷ The Kenya National Gay and Lesbian Rights Commission (NGLHRC) should appeal this decision by the High Court as the sodomy laws are clearly unconstitutional and deny basic rights to citizens. In addition, courts should interpret the law as a living instrument taking into consideration the present conditions and evolution of society.

5.4 International and Regional Instruments

The discourse in chapter three revealed that international instruments such as the ACHPR and ICCPR recognize and guarantee universally accepted civil and political rights. According to these instruments, the LGBTIQ community should be treated as a minority group that needs special protection by International Human rights law. These instruments clearly provide a platform through which Kenya's anti-sodomy laws could be challenged. This is because general rules of International law are incorporated into domestic law as any treaty or convention ratified by Kenya forms part of the law of Kenya. In conclusion, continued existence of anti-sodomy laws found in Kenya's penal code is unconstitutional and is an infringement of the rights of the LGBTQT community under the provisions found in the ICCPR, The African charter and ICESCR.¹⁴⁸

5.4.1 Recommendation: Judicial activism

The words "and any other ground" in the non-discrimination provision may consequently be interpreted to include sexual orientation and gender identity.¹⁴⁹ In addition, given the priority afforded to International law in the Constitution, Kenya is impelled to review its domestic laws to ascertain compliance with International obligations. Courts are the place to play a crucial role in the realization and preservation of rights of the LGBTQT community because they have the mandate to interpret the constitution. The judges have the mandate to interpret the constitution in an approach that upholds constitutional values such as human dignity and equality.¹⁵⁰

¹⁴⁷ *Eric Gitari v Non-Governmental Organisations Co-ordination board & 4 others*. (2013).

¹⁴⁸ Article 2(6) *Constitution of Kenya*.

¹⁴⁹ Article 27, *Constitution of Kenya*.

¹⁵⁰ Article 160 (1), *Constitution of Kenya*. (2010)

5.5 Justification for criminalisation of same sex conduct

Criminalisation of homosexuality is vast in African countries. The rationale given for criminalization of same sex conduct among most African states is that homosexuality is un-African as it goes against African cultural values. Second, it has been contended that same sex conduct is contrary to religious beliefs hence immoral. These justifications have been used to stir up homophobia even though studies have shown that homosexuality existed before the pre-colonial era.

5.5.1 Recommendation

To move from the belief that homosexuality is un-African, sexual orientation should be included in the school curriculum by the Ministry of Education. Children should be taught that homosexuality is not restricted to time and culture. Instilling the culture of inclusivity from a young age will go a long way in changing the society's view of the LGBTIQ community. Family members, guardians and teachers need to provide support to adolescents by getting accurate information about sexual orientation and gender identity as they are coming out more with the help of access to resources. Lack of communication and misunderstanding between the LGBTIQ youths and parents often leads to conflict and disruption in the family. This often leads to the children feeling secluded.

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