

**UNIVERSITY OF NAIROBI, SCHOOL OF LAW**

**PRESENT BUT GO UNRECOGNIZED: ANALYSIS OF THE RIGHT TO EQUALITY OF  
GAY PERSONS IN KENYA.**

**BY**

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**A thesis submitted in partial fulfilment of the requirement for the award of Masters in Law,  
LLM.**

**2018**

## **DECLARATION**

I BETH MUSHI SOLOMON do hereby declare that this is my original work, and has not been submitted for award of a degree or masters in any other university.

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This thesis has been submitted for examination with my approval as supervisor

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Date:.....

## **DEDICATION**

I dedicate this work to my mother Maria, my brothers Solomon and Ngeti and my husband Victor Rapando, for their constant love, inspiration, guidance, encouragement and moral and financial support. I will live to cherish and treasure you all forever. I also dedicate this research to my daughter, my dearest little angle who has given me the strength to have a reason to work hard in life which can be achieved through my education and lastly to the Kenyan citizens whose freedom from discrimination on the ground of sexual orientation has been denied.

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## **Table of Statutes**

Basic Conditions of Employment Act 75 of 1997, South Africa

Employment Equity Act 55 of 1998, South Africa

The Aliens Control Act 96 of 1991, South Africa

Immorality Act 23 of 1957, South Africa

Marriage Act No. 25 of 1961, South Africa

Sexual Offences Act 23 of 1957, South Africa

The Children Act no 8 of 2001, Kenya

The Constitution of Kenya 2010

The constitution of the Republic of South Africa 1996

The Marriage Act no 4 of 2014, Kenya

The Matrimonial Property Act 49 of 2013, Kenya

The Penal Code chapter 63 laws of Kenya

The Republic of South Africa, Civil Union Act 17 of 2006

## **Table of Conventions/ Treaties**

International Covenant on Civil and Political Rights

The International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966

Universal Declaration of Human Rights

## Table of Cases

*Carmichele v Minister of Safety and Security*(CCT 48/00) [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC)

*Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR; Civil Appeal 240 of 2011 [2014] eKLR (Court of Appeal).

*David Njoroge Macharia v Republic* [2011] eKLR [2011] Court of Appeal Criminal Appeal No. 497 OF 2007, eKLR.

*Eric Gitari v Non- Governmental Organisations Co-ordination Board & 4 others* [2015] eKLR [2015] High Court Petition no 440 of 2013, eKLR.

*Minister for Home Affairs v Fourie* 1 SA 524, 2005 ZACC 19 - 2006

*Minister of Finance v Van Heerden* 2004 11 BCLT 1125 (CC)

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*National Coalition for Gay and Lesbian Equality v Minister of Justice* CC 1998, 3 LRC 648

*R v Gough and Narroway*[1926] CPD 159 161

*Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others* [2013] High Court Petition 65 of 2010, eKLR.

*Tooten v Australia* United Nations Documents; CCPR/C/50/D/488/1992.

*Van Rooyen v Van Rooyen*[1994](2) SA 325 (WLD)

## **List of Abbreviation**

ANC -African National Congress

EAK- Evangelical Alliance of Kenya

GA -General Assembly

GASA -The Gay Association of South Africa

HIV- Human Immunodeficiency Virus

ICCPR -International Covenant on Civil and Political Rights

ICESCR -International Covenant on Economic, Social and Cultural Rights (ICESCR)

ICU- Intensive Care Unit

KHRC -Kenya Human Rights Commission

LGBT -Lesbians, Gays, Bisexual and Transgender

MP -Member of Parliament

NACC- National Aids Control Council

NCCA- National Cohesion and Constitutional Affairs

NGOs- Non-Governmental Organizations

PM- Prime Minister

SA -South Africa

UDHR -Universal Declaration of Human Rights

UN- United Nations

USA -United State of America

WHO -World Health Organization



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# CHAPTER ONE: INTRODUCTION

## 1.0 Background of the Study

Around the world today; the debate over gay rights continues with great variation in public opinion about the acceptability of gay rights, laws regulating same sex unions and penalties for sexual behaviors.<sup>1</sup> Vast changes in the engagement of human rights with sexuality have been made over the last two decades. The issue today is no longer whether human rights will engage with sexuality, but rather involves very particular practical questions: on what terms, for whom, for what purposes, about which aspects of sexuality, and with what limits.<sup>2</sup>

Human rights activists in Kenya argue that homosexuality is a foreign concept that was imported from the West.<sup>3</sup> However, it is the anti-homosexuality laws, not homosexuality as such, that were imported from the West into the Kenyan society. According to Professor Makau Mutua, the statement that it is un-African to be gay is misguided.<sup>4</sup> This claim is historically false as gays have always been part of the society. In Kenya, as in other African states, homosexuality was criminalized for the first time by the colonial state.<sup>5</sup> Before then, Kenya was governed by traditions and cultural values during the pre-colonial period. The status quo changed once Kenya was colonized by the British in 1895 after which its statutory laws existed alongside the native customs.

Despite the existence of a parallel court system to administer justice based on native law of the people of Kenya, customary law gave way to the English law in the event native law was inconsistent with the British law. English ideal of legal norm was made the standard for the validity of customary law. In criminal matters, customary law gave way to the provisions of the Penal Code.<sup>6</sup> Upon attaining independence in 1963, the Kenyan government adopted and applied the former British legal system. This was done without taking into account the views of the Kenyans

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<sup>1</sup>Amy Adamczyk and Cassidy Pitt, 'Shaping Attitudes about Homosexuality: The Role of Religion and Cultural Context' (2009) 38 *Social Science Research* 338.

<sup>2</sup>International Council on Human Rights, 'Sexuality and Human Rights' (Social Science Research Network 2009) SSRN Scholarly Paper ID 1551221 <https://papers.ssrn.com/abstract=1551221> accessed 28 October 2017.

<sup>3</sup> Makau Mutua 'Sexual orientation and human rights: putting homophobia on trial' in S Tamale *African sexualities: A reader* (2011) 89.

<sup>4</sup> Ibid

<sup>5</sup> Muna Ndulo, 'African customary law and women's rights' (2011) 18 *international journal global legal studies* 99

<sup>6</sup> Eugene Cotran, 'The development and reform of the law in Kenya' (1983)

with the aim of imposing European morality and culture on locals.<sup>7</sup> The Penal Code to date plays a major role in preventing homosexuals in Kenya from achieving legal protection.

Sexual rights remain to be one of the most controversial group of rights. Miller states that early efforts to bring human rights and sexuality together suffered from an initial focus on protecting people from harm: from sexual harm in the case of girls and women, and from extreme abuse and killing in the case of persons then identified as gay or transgendered.<sup>8</sup> The situation is now different: non-governmental organizations (NGOs), advocates, and policy makers as well as scholars employ the language of sexual rights.<sup>9</sup>

Despite these advanced global developments on the protection and recognition of gay persons: in Kenya, gay persons are still facing social marginalization and cannot participate or come out freely in the society. During the UN general assembly held in 2015, the fourth president of Kenya reiterated Kenya's commitment to the sustainable development goals and in particular to the eradication of gender-based violence.<sup>10</sup> He said, "We cannot reach our development goals without addressing human rights and complex humanitarian issues."<sup>11</sup> This position did not last long enough before the president placed himself in a very ironical position when he was quoted to have dismissed gay rights as "a non-issue" during President Obama's state visit to Kenya. Gay persons are facing this irony and tragedy altogether in Kenya. In the global arena, Kenyan government, advocates, lawyers, NGO's and civil societies appear to be fighting for inclusivity and appreciation of diversity, but they fail to recognize existence of gay persons at the domestic level, this being the first fundamental step in protecting the rights of this group of persons.<sup>12</sup> Gay persons exist in the Kenyan society however; they continue to be ignored and have stayed unrecognized. The

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<sup>7</sup>Iik Nyarang'o The role of judiciary in the protection of sexual minorities in Kenya (LLM Thesis University of Pretoria 2011) 3.

<sup>8</sup>Alice M Miller and Carole S Vance, 'Sexuality, Human Rights, and Health' (2004) 7 Health and Human Rights 5.

<sup>9</sup>Eleanor Maticka-Tyndale and Lisa Smylie, 'Sexual Rights: Striking a Balance' (2008) 20 International Journal of Sexual Health 7.

<sup>10</sup>Sam Jones and Carla Kweifio-Okai, 'World Leaders Agree Sustainable Development Goals – as It Happened' *The Guardian* (25 September 2015) <http://www.theguardian.com/global-development/live/2015/sep/25/un-sustainable-development-summit-2015-goals-sdgs-united-nations-general-assembly-70th-session-new-york-live> accessed 28 October 2017.

<sup>11</sup>OkunOliech, 'Kenya's Anti-Gay Laws Hurting the LGBT Community' *The Standard* (Nairobi, Kenya, October 2016) <https://www.standardmedia.co.ke/article/2000219659/kenya-s-anti-gay-laws-hurting-the-lgbt-community> accessed 28 October 2017. These were statements made by the 4<sup>th</sup> president of Kenya Hon Uhuru Kenyatta.

<sup>12</sup> These are the gay persons, lesbians and homosexuals.

society has persistently ‘sat’ on gay persons’ rights and their presence is associated with high levels of immorality. Gay persons are faced with public humiliation, and when found can sometimes face mob justice as the society equates them to criminals. Although it benefits all of us to prioritize inclusivity, gay persons cannot freely participate in society when exposure may cost them their lives.

Failure to recognize gay persons is demonstrated in a number of ways in the laws of Kenya; first, the penal code is very much in place and the 2010 Kenyan constitution does not contradict nor eradicate Section 162 to 165 categorically.<sup>13</sup> This still criminalizes homosexual behavior and attempted homosexual behavior between men, referring to it as “carnal knowledge against the order of nature”. The penalty remains 5 to 14 years imprisonment. The message to gay persons is very clear: they should not expect the basic protection of the state. When their sexuality – their very identity – is a criminal offence, they live as a felon who has not been caught, and they cannot trust even the police in their community to protect them from appalling violence.

Secondly, the marriage Act 2014 only recognizes marriages between a female and a male. Article 45(2) of the Constitution of Kenya, which specifically authorizes opposite sex marriage, but is silent about same-sex marriage, also takes this position. "*Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties,*". Same-sex couples want to marry for all the same reasons as their opposite-sex counterparts. These reasons include the need for legal protection, to publicly celebrate their commitment, to provide greater legal protection for their children,<sup>14</sup> or simply because of companionship as nature dictates. According to a national study by researchers at the University of Queensland, 54% of Australian same-sex partners would marry if they had the choice. While 80% of Australians in same-sex relationships support marriage equality even if they do not wish to marry.<sup>15</sup> A change in the law is therefore necessary to remove the discriminatory provisions from the *Marriage Act* and ensure equality for same-sex couples.

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<sup>13</sup>Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony and is liable to imprisonment for five years.

<sup>14</sup> This could be adopted children though the children Act 2001 does not allow adoption by gay persons.

<sup>15</sup>Sharon K Dane and others, ‘Not so Private Lives: National Findings on the Relationships and Well-Being of Same-Sex Attracted Australians(Version 1.1).’ 1.

Nevertheless, such changes can only come by first recognizing this group of persons who are present in the society but go unrecognized by the laws.

Thirdly, The Children Act, 2001 makes homosexuals and unmarried couples ineligible to adopt children. It is a terrible fact that in this age and era gay persons live as second-class citizens in 78 jurisdictions worldwide, because of the scourge of criminalization. All these positions points to lack of recognition of the gay persons, which peg this to a deficiency of the law.

Ideally, the first step to protect any human right is to recognize the group of persons that the right belongs to, and then recognize the right itself through the legal means or any other viable means. This discourse will majorly rely on this theoretical framework. Gay persons are present but they go unrecognized in Kenya. This indicates that there is a gap which has been created in the Kenyan constitution 2010 when it recognized under article 27 right to equality and freedom from discrimination; but did not define in its entire text whether gay persons could be a group to enjoy this right, creating the many controversies over gay rights.

This study intends to provide a legal analysis of gay persons in Kenya by taking a human rights approach. This approach will endeavour to highlight the human rights abuses that sexual minorities endure in their daily lives. They are denied individual rights and freedoms that their heterosexual counterparts are guaranteed as of right. These human rights violations include but are not limited to: interference with their safety and security, inadequate access to appropriate healthcare, education, housing, violence, both physical and psychological, abuse by state agents, economic deprivation leading to massive poverty and right to work among others.<sup>16</sup>In doing so, this study will seek to identify the obstacles that have made it impossible to realize gay rights such as criminalization of consensual same- sex, negative societal perceptions, myths, stereotyping and ultimately the lack of legal recognition. To curb this, this work will be keen to establish the legal standing of gay rights in Kenya and to make recommendations that will fill in the gap in our laws to give rise to a watertight legal dispensation that adequately protects and adheres to these rights. Further, this research study will be striking a balance between the legal rights and morality: which

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<sup>16</sup> Nancy Baraza, 'The Impact of Heteronormativity on The Human Rights of Sexual Minorities : Towards Protection Through Through The Constitution of Kenya 2010' (DPhil thesis, University of Nairobi 2016)

the discrimination of the gay persons have been majorly based on in the Kenyan society. It is in the spirit of this research to demonstrate that recognition is the first step to protect a human right.

### **1.1 Statement of the Problem**

Kenyan law is unsettled as it relates to sexual minorities. In 2010, Kenya enacted the Constitution of Kenya 2010, a rich Constitution which enshrines good governance and respect for fundamental rights and freedoms. Chapter four of the Constitution provides for a well detailed Bill of Rights which guarantees among others the freedom of equality and non-discrimination. Further, Kenya has ratified a plethora of international human rights treaties and conventions which guarantee equality and non-discrimination, and which have been purposively been applied to recognize, promote and protect sexual minorities. Additionally and to her credit, the Constitution incorporates international human rights standards and principles as part of its domestic law. However, despite the Constitution's progressive stance, Parliament is yet to respond to the imperatives of international human rights by enacting domestic legislation to protect and promote the equal rights of LGBT people and neither has it moved to repeal laws that criminalize consensual gay sex between adults. As a result of this lacuna in the law, gay persons remain unprotected against any discrimination that may be meted against them either by the state or by individuals. They continue to face stigmatization, violence, and other forms of abuse in social institutions in the country such as family, religious institutions, hospitals, workplace and media among others

The problem of this study is how the rights of sexual minorities can be best protected and recognized by statute; most particularly their right to live their lives free from discrimination. This will go a long way in realizing the hope that one day, LGBT people who are legitimately citizens of Kenya will experience freedom to lead lives that can be said to be worthwhile.

### **1.2 Research Objectives**

This research has a broader objective of finding out the rights of gay persons in Kenya. The research also has specific objectives, which include:

1. To investigate the Kenyan laws central to the right to equality of gay persons in Kenya
2. To determine whether sociological attitudes towards gay persons contribute to inequality and discrimination meted upon gay persons.



3. To conduct a comparative analysis of the right to equality and freedom from discrimination of gay persons in South Africa.
4. To come up with appropriate recommendations to address inequality of gay persons in Kenya.

### **1.3 Research Questions**

In trying to establish the legal position of gay persons in Kenya and trying to find out the extent to which gay persons are recognized in Kenya, the research study shall seek to find answers to the following research questions:

1. Whether the right to equality and non-discrimination of gay persons is adequately provided for in Kenyan laws
2. Whether sociological attitudes towards gay persons contribute to the homophobia and inequality experienced by gay persons in Kenya
3. What lessons can be adopted for Kenya from benchmarking the South African laws guaranteeing the right to equality and non-discrimination of gay persons?
4. What are some of the appropriate recommendations that can help address the inequality surrounding gay persons?

### **1.4 Research Hypothesis**

This research is based on the hypothesis that the legal position of gay persons in Kenya is not explicit; and that the present law, religion and cultural perspectives are more of discriminative towards them. To change this position, the laws need to be redeveloped to recognize the existence of gay persons. This would be the first step towards protecting the rights of gay persons.

### **1.5 Theoretical Framework**

#### **Liberalism**

This study is modelled on the theory of liberalism as advanced by John Stuart Mill, with a focus on the harm principle and moralism. John Stuart Mill (1806–1873) was the most famous and influential British philosopher of the nineteenth century. He was one of the last systematic philosophers, making significant contributions in logic, metaphysics, epistemology, ethics,

political philosophy, and social theory.<sup>17</sup> He was also an important public figure, articulating the liberal platform, pressing for various liberal reforms, and serving in Parliament.<sup>18</sup> During Mill's lifetime, he was most widely admired for his work in theoretical philosophy and political economy. However, nowadays Mill's greatest philosophical influence is in moral and political philosophy, especially his articulation and defense of utilitarianism and liberalism.<sup>19</sup> Mill asserts, "...the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection; and that the only purpose for which power can be rightfully be exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant."

Mill further explained that the only part of the conduct of anyone for which he is amenable to society is that which concerns others. "In the part which merely concerns himself, his independence, is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign."<sup>20</sup>

In other work, Mill distinguishes between genuine harm and mere offense.<sup>21</sup> In order to satisfy the harm principle, an action must violate or risk violation of those important interests of others in which they have a right. These distinctions allow Mill to defend a categorical approach to liberal rights. To decide whether an individual's liberty ought to be protected, we must ascertain to which category the potential restriction of liberty belongs: offense, moralism, paternalism, and harm prevention. Mill seems to permit or forbid restrictions on liberty by category, claiming that the only restrictions that are permissible involve harm prevention. Of course, a given regulation might fall under more than one category. Many provisions of the criminal law, such as prohibitions on murder and assault, might be designed both to enforce fundamental moral provisions and to prevent harm to others. Mill does not object to moralistic or paternalistic legislation that can also

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<sup>17</sup>David Brink, 'Mill's Moral and Political Philosophy' <https://stanford.library.sydney.edu.au/entries/mill-moral-political/> accessed 28 October 2017.

<sup>18</sup> Ibid

<sup>19</sup>Peter P Nicholson, *The Political Philosophy of the British Idealists: Selected Studies* (Cambridge University Press 1990).

<sup>20</sup>John Stuart Mill, 'On Liberty', *A Selection of his Works* (Palgrave, London 1966) [https://link.springer.com/chapter/10.1007/978-1-349-81780-1\\_1](https://link.springer.com/chapter/10.1007/978-1-349-81780-1_1) accessed 28 October 2017.

<sup>21</sup>Brink, David. "Mill's moral and political philosophy." (2007).

be defended by appeal to the harm principle. Rather, the objection is to restrictions that can only be justified in these ways and cannot be justified by appeal to harm prevention.

Same-sex marriages should be viewed as part of diversity and experimentation in life-style, which are important not only in so far as they are expressions of self-government but also in so far as they enhance self-government. For experimentation and diversity of life-style expand the deliberative menu and bring out more clearly the nature and merits of options on the menu. This study intends to borrow the arguments brought forward by John Stuart Mill to demonstrate the need to give gay persons legal recognition and promote the liberty to have same-sex marriages. The government has in the past interfered with this liberty and furthermore failed to give gay persons legal recognition; pegging their argument on the societal morality which cannot be justified by the harm principle. Religious leaders have joined the government in this as well. They even condemn same-sex marriages as being ungodly and should not be accepted in the society. A sector of religious leaders asserts that accepting the acts of this group of persons will be harmful to the morals of the society which the laws originate from. The acts have therefore been criminalized in the penal code.

As Mill points out, not every unwelcome consequence for others counts as harm, for instance, the acts of gay persons: they are not harm to anyone in particular. Offenses tend to be comparatively minor and ephemeral. To constitute harm, Mill explains that an action must be injurious or set back important interests of particular people, interests in which they have rights. It would be difficult to allude that there are societal rights and interests that would be seriously interfered with if the liberty to have same-sex marriages were allowed and gay persons legally recognized. Whereas Mill appears to reject the regulation of mere offense, the harm principle appears to be the one justification he recognizes for restricting liberty. It is convincing to take this approach taken by Mill, the only ground for not recognizing gay rights and giving them legal recognition should be when this particular move will cause a greater harm to the society; but where such is not foreseen, then it should not be a problem.

Lastly, in Mill's opinion the harm principle should have a wide scope. He insists that the harm principle regulates more than relations between government and individuals. Its application should include the family, in particular, relationships between husbands and wives and parents and children. He further notes that moral is not sufficient warrant to interfere with someone's liberty

including the liberty to have same-sex marriages in this case; and more importantly, the actions which merely concerns oneself, his independence, is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.

### **Positivism and Separation Thesis**

This study adopts the positive law theory which asserts that law and morality are conceptually distinct. This is in line with the separability thesis. The main proponent of this school of thought is John Austin who tried to distinguish law from other phenomena, for example, moral rules and social customs. This implies that any reference to moral considerations in defining the concepts of law, legal validity, and the legal system is inconsistent with the separability thesis.<sup>22</sup> Hans Kelsen's pure theory of law also advocates for the strict separation of law from other concepts such as morality.

Austin in his works clearly emphasized the need to separate law from morality or religion.<sup>23</sup> In the middle ages, it was viewed that if man-made law conflicted with the law of God, then the law was not a valid law. This doctrine constitutes a key element of the natural law theory. This argument was strongly opposed by Austin. For Austin, a law is a valid law if it set by a sovereign. Its existence is not invalidated by its moral content. Thus what he called as 'positive law' is a law, regardless of its source or contents.

The Kenyan Constitution adopts this school of thought by upholding constitutional supremacy and subscribing to secularism and not 'religious supremacy'.<sup>24</sup> Article 8 provides that there is no state religion. In Kenya, the Constitution is supreme, and it requires conduct to be justified in terms of laws that meet the constitutional standard.<sup>25</sup> The state has to act within the confines of what the law allows, and cannot rely on religious texts or its views of what the moral and religious convictions of Kenyans are to justify the limitation of a right.<sup>26</sup> Our Constitution does not recognise limitation of rights on religious grounds neither does it allow the use of religious doctrine

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<sup>22</sup> James Fieser, Internet Encyclopedia of Philosophy: Legal Positivism  
<<http://www.iep.utm.edu/legalpos/>>accessed 2 May 2018

<sup>23</sup> Daniel W/Gebriel, Hassen Mohamed, 'Teaching Material on Jurisprudence' (2008) Ethiopian Justice and Legal Research Institute

<sup>24</sup> Seth MuchumaWekesa, 'A Constitutional Approach to the Decriminalization of Homosexuality in Africa : A Comparison of Kenya, South Africa and Uganda' (LLD, University of Pretoria)

<sup>25</sup> Petition 440 of 2013, eKLR

<sup>26</sup> Ibid

to interpret the Constitution. The Constitution is to protect those with unpopular views, minorities and rights that attach to human beings – regardless of a majority’s views.

To that effect, African culture and religion should not be a justification for limiting the rights of sexual minorities. The Constitution expressly guarantees that the rights and fundamental freedoms in the Bill of Rights accrue to each individual and are not granted by the State. Invoking one’s religious views to curtail the enjoyment of LGBT people’s right to equality, privacy, human dignity, freedom of association, freedom of assembly among others goes against the spirit and letter of the supreme law. This study will highlight how religion has contributed to the discrimination faced by these sexual minorities.

### **1.6 Literature Review**

What does the term “sexual rights” mean? The most commonly cited definition of sexual rights is the one cited by the World Health Organization (WHO). The WHO states that sexual rights embrace human rights that are already recognized in national laws, international human rights documents and other consensus statements.<sup>27</sup> They include the right of all persons, free of coercion, discrimination and violence, to the highest attainable standard of sexual health, including access to sexual and reproductive health care services.

On November 17, 2011, the United Nations (UN) High Commissioner for Human Rights issued a report at the request of the General Assembly entitled, *Discriminatory Laws and Practices and Acts of Violence against Individuals Based on Their Sexual Orientation and Gender Identity*.<sup>28</sup> In the report, the Commissioner asserts, “The fact that someone is lesbian, gay, bisexual or transgender does not limit their entitlement to enjoy the full range of human rights”<sup>29</sup> and enumerates obligations that states have towards LGBT citizens under international human rights law. Additionally, the Commissioner makes it clear that “the criminalization of private consensual

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<sup>27</sup>World Health Organization Department of Reproductive Health and Research, ‘Defining Sexual Health: Report of a Technical Consultation on Sexual Health, 28–31 January 2002, Geneva’ (2006) [http://www.who.int/reproductivehealth/publications/sexual\\_health/defining\\_sh/en/](http://www.who.int/reproductivehealth/publications/sexual_health/defining_sh/en/) accessed 28 October 2017.

<sup>28</sup>Mustafa Bilgehan Ozturk, ‘Sexual Orientation Discrimination: Exploring the Experiences of Lesbian, Gay and Bisexual Employees in Turkey’ (2011) 64 *Human Relations* 1099.

<sup>29</sup> *Ibid.*

homosexual acts violates an individual's right to privacy and to non-discrimination and constitutes a breach of international human rights law."<sup>30</sup>

Ball and Carlos in their book<sup>31</sup> entitled *the morality of gay rights: an exploration in political philosophy*; investigate whether the society has an obligation to recognize and support the relationships and families of lesbians and gay men.<sup>32</sup> They noted that some of the principles of political philosophy that for many years have provided the theoretical and justificatory framework for gay rights positions needed to be reconsidered. The framework has been based in part on the idea that the state should remain neutral regarding the morality of same-gender sexuality and relationships. The importance attached to neutrality is reflected in the often-heard demands by gay rights proponents that the state refrain from regulating the personal and sexual lives of lesbians and gay men.<sup>33</sup> Paradoxically, however, many lesbians and gay men these days are asking that the state involve itself in their lives by recognizing and supporting their committed relationships and families.

This inconsistency led Ball and Carlos to consider whether gay rights supporters have to specifically make moral arguments<sup>34</sup> in order to justify the kinds of state action that many are demanding. If this is answered in affirmative, a series of legitimate concerns about the advisability of incorporating notions of morality and the good into public policy matters associated with same-gender sexuality and relationships, when such notions have in the past contributed immensely to the oppression and marginalization of lesbians and gay men. Ball and Carlos in their book primarily concern themselves with finding the appropriate balance between, on one hand, incorporating notions of morality and on the other hand, protecting the basic rights to autonomy and equality of all individuals, including those whose sexuality is different from the norm.<sup>35</sup>

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<sup>30</sup>Report of the United Nations High Commissioner for Human Rights, 'Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity' (2011)

<sup>31</sup>Carlos Ball, *The Morality of Gay Rights: An Exploration in Political Philosophy* (Routledge 2014)..

<sup>32</sup> Carlos and Ball talks about the obligation of the society to recognize gay persons; while this research is concerned about the laws of Kenya recognizing gay persons. It is important to note that the laws come from the society; so if it is established by the work of Carlos and Ball that the society has an obligation to recognize gay persons, then it would be less difficult to change the laws to legally recognize this group of persons.

<sup>33</sup> Ibid.

<sup>34</sup>as opposed to neutral ones

<sup>35</sup> Ball (n23).

This book also has been motivated by an additional consideration, one that is less about political philosophy and more personal. Every gay or lesbian person experience a dissonance between his or her sense of self-worth on the one hand and social norms that deem homosexuality to intrinsically immoral and perverted on the other. “Those of us with a same-gender sexual orientation know from the very core of our beings that our sexuality is neither immoral nor perverted. And yet, in important ways, prevailing liberal norms contribute to rather than mitigate the effects of the dissonance because they encourage us to side step rather than directly address the moral objections to our relationship and our lives raised by many opponents of gay rights.”<sup>36</sup>

This study takes forward the work by Ball and Carlos. It uses it as one of the basis to raise the legal consideration that gay persons should be recognized by the laws of Kenya, in order to make it practical for the state to protect their rights, which have in the past and still is being violated due to lack of legal recognition. The work of Ball and Carlos stopped on the moral argument but didn’t push forward for legal recognition for this group. This is the gap this study intends to fill.

Courtney in his journal article titled *Being Gay in Kenya: The Implications of Kenya’s New Constitution for its Anti-sodomy Laws* argue that Kenya’s 2010 constitution renders its anti-sodomy laws unconstitutional under Kenya’s own domestic law.<sup>37</sup> Courtney places greater blame about the Anti-sodomy laws in Kenya on the colonial legal systems. He asserts that when Kenya acquired independence in 1963, the new government inherited, recognized and applied the former British legal system, including its colonial Office Model Code.<sup>38</sup> As Kenya’s anti-sodomy laws originated from this penal code, they are ultimately reflective of British norms and morality, as opposed to embodying ‘traditional Kenyan ideals.’ For instance the Zambian custom of woman-woman marriage in the event that a wife could not produce children for her husband was deemed repugnant to justice and morality.<sup>39</sup> Courtney is not arguing that sexual minorities were celebrated or even accepted in pre-colonial Kenya.<sup>40</sup> However, he asserts that the sentiment that being gay is anti-Kenyan fails to acknowledge the crucial role that the West played in entrenching homophobia

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<sup>36</sup> Ibid.

<sup>37</sup>Courtney E Finerty, ‘Being Gay in Kenya: The Implications of Kenya’s New Constitution for Its Anti-Sodomy Laws’ (2013) 45 Cornell International Law Journal 431.

<sup>38</sup>Muna Ndulo, ‘African Customary Law, Customs, and Women’s Rights’ (2011) 18 Indiana Journal of Global Legal Studies 87.

<sup>39</sup>Ibid.

<sup>40</sup> Ibid.

into Kenya's legal system and its continuous role in preventing LGBT Kenyans, as well as LGBT individuals in other African countries, from having legal rights.<sup>41</sup> He further explains that argument against imposing western values onto Kenya, as well as other African countries, is ultimately an argument in favor of repealing anti-sodomy laws.

Titled 'The Impact of Heteronormativity on the Human Rights of Sexual Minorities: Towards Protection Through the Constitution of Kenya 2010'<sup>42</sup> Nancy Baraza notes the potential of the Constitution of Kenya to provide a framework for the protection and promotion of the human rights of gay persons. She recognizes the role of the institutions of parliament and judiciary to legislate and interpret the law in a manner that is in accordance with the constitutional principles of equality. However, she notes that the legislature and judiciary are yet to exercise this power in a responsible and egalitarian manner when dealing with the marginalized sexual minorities. Although a few progressive judgments have emanated from the High Court of Kenya regarding registration of the Association of LGBT, intersex and transgender persons, the majority of the judges still take the conservative, textual and dogmatic approach to interpretation of the Constitutional principles, The legislature has also failed to repeal anti-sodomy laws in statutes, in spite of availability of empirical evidence that these laws violate both international human rights instruments and Kenya's own Constitution.

She proposes a new approach to law making and law adjudication by the legislature and the judiciary respectively in order to achieve legal protection of sexual minorities. She calls for the adoption of critical and transformative approaches which include queer methods and principles of practicable reasonableness, to decision making on the part of these institutions. Further, she strongly affirms the ability of Kenya's legislature and judiciary to transform the lives of sexual minorities who continue to suffer as a result of the heteronormative culture in the country. This study is vital and a bold milestone in studies on sexual minorities in Kenya as it broadly examines

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<sup>41</sup> For instance, a particularly disturbing example of Western influence occurred in Uganda when a Ugandan politician introduced the Anti-Homosexuality Bill of 2009 in Uganda's parliament that would have imposed the death penalty for 'homosexual conduct' if ratified.

<sup>42</sup> Nancy Baraza, 'The Impact of Heteronormativity on The Human Rights of Sexual Minorities : Towards Protection Through Through The Constitution of Kenya 2010' (DPhil thesis, University of Nairobi 2016)



the implementation potential of the Constitution and the central role of the institutions of Parliament and Judiciary in guaranteeing protection of the human rights of sexual minorities.

Seth Muchuma Wekesa, in his thesis titled '*A Constitutional Approach to the Decriminalisation of Homosexuality in Africa: A Comparison of Kenya, South Africa and Uganda*',<sup>43</sup> examines how the rights to equality, human dignity and privacy guaranteed in the Kenyan Constitution can be used to construct an argument for the decriminalization of same-sex conduct. He posits that the equality clause of the Kenya Constitution adopts an open list approach with regards to the prohibited grounds of discrimination.<sup>44</sup> As such, it would be possible to include sexual orientation to fall under 'other status' category.

Seth recognizes the role of the court in the realization and protection of gay rights since they are charged with the duty to interpret the Constitution. He advocates that judicial officers need to exercise judicial activism.<sup>45</sup> This will enable them interpret the Constitution in a manner that upholds constitutional values and avoid relying on public opinion in the determining constitutional matters which arouse social controversy. In addition, he recommends that apart from reviewing our anti-sodomy laws, public awareness ought to be created to change the society's perception about LGBT people as immoral. It is not sufficient the discriminatory laws are done away with, but mindset and cultures have to be done away too. It's one thing for one to have his rights in the law, it's quite another to continue enjoying those rights in the streets and other public places.

Article 27 of the constitution states that every person is equal before the law and has the right to protection like any other as well as equal benefit of law, equality includes the full and enjoyment of all rights and fundamental freedom. The article further continues to state that women and men have equal right to equal treatment including equal right to opportunities in areas such as political, economic, and social spheres, the state should also not discriminate directly or indirectly against any person on any ground including sex, race, pregnancy, marital status, health status, ethnic or social origin.<sup>46</sup> The push for legal recognition of the gay persons is fully supported by this

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<sup>43</sup> Seth Muchuma Wekesa, '*A Constitutional Approach to the Decriminalization of Homosexuality in Africa : A Comparison of Kenya, South Africa and Uganda*' (LLD, University of Pretoria)

<sup>44</sup> Seth (n 43 above)

<sup>45</sup> Seth (n 43 above)

<sup>46</sup> The equal Rights Trust and the Non-Governmental Kenyan Human Rights Commission 2012.

particular article; this therefore will defeat all the arguments that might be brought forward against this proposal based on constitutionality of it.

Kenya is currently not taking any measure to curb the discrimination of the same sex orientation unions. This comes as larger percentage of the public Union are strongly against the device and the legalization of the device. Under article 45(2) of the constitution, every person has the right to marry a person of the opposite sex based on the consent of the parties. Insisting on the opposite sex will be a violation of article 27 of the constitution.<sup>47</sup> Geoffrey Kibara, Secretary, Justice and Constitution Affairs, Ministry of Justice, National Cohesion and Constitution Affairs said on behalf of the Kenyan Delegation that, there has been a serious intolerance to gay relationship in the country due to social beliefs, which considered it a taboo to the community. That the only way perception towards these people can change is after a long period of time when changes in social beliefs occurs, but currently there is harsh opposition concerning the device. However, the Government should not support the discrimination of people who practice same sex relationship.<sup>48</sup>

The previous researchers differ in opinions where some oppose the practice while others welcoming the device based on their assumption. The opposition argue based on social beliefs that does not contain scientific results or directive. Their assumption stands at a blind decision as they leave a gap of explaining in details the harsh implication of having these people in the society. It is this gap that this research is conducted to explain. Those who welcome the device argue on the constitutional rights as stipulated by the legal system, where there is also a lot of criticism on gay rights and the Government cannot also come clear on the issue hence leaving the vulnerable people with no stand concerning their condition and how well to carry on with their daily activities. The research is set to fill all these identified gaps and demonstrate that legal recognition of this group of persons is paramount in the protection of their rights.

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<sup>47</sup> Replies from the Government of Kenya to the list of issues (CCPR/C/KEN/3), United Nations Human Rights Commission, CCPR/C/KEN/Q/3/Add 1, 30 May 2012, paragraph 116, page 20.

<sup>48</sup> Arye Oded, *Islam and Politics in Kenya* (Lynne Rienner Publishers 2000) <[https://books.google.com/books?id=8\\_UL9yJrD4QC&lpg=PP1&pg=PA11#v=onepage&q&f=false](https://books.google.com/books?id=8_UL9yJrD4QC&lpg=PP1&pg=PA11#v=onepage&q&f=false)>.

## **1.7 Research Methodology**

The research will employ qualitative research methodology. This entails analyzing secondary data relevant to the study. This will be done by way of desktop based research, library research, review of journals, reports, newspaper articles as well as internet searches such as jastor, lexisnexis etc. The information gathered will be evaluated for the purpose of this study. The study adopted a comparative approach. This research focuses on Kenya and South Africa. Both countries have an equality clause enshrined in their constitution. The Constitution of South Africa lists sexual orientation as one of the prohibited grounds of discrimination, enshrining gay rights in the supreme law of the land.<sup>49</sup> The case is different for Kenya. Sexual orientation is not included as one of the grounds. Further, South African Constitutional Courts have in many instances defended gay rights. In the landmark case of the National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others,<sup>50</sup> the constitutionality of section 25(5) of the Aliens Control Act 96 of 1991 which omitted to give persons, who are partners in permanent same-sex life partnerships, the benefits it extended to “spouses” was brought under scrutiny. The Court held that section 25(5) discriminated unfairly against gays and lesbians on the intersecting and overlapping grounds of sexual orientation and marital status and that it amounted to an infringement of their right to dignity and equality rights.

In 2002, the South African Constitutional Court held that the provisions of the Child Care Act and of the Guardianship Act, which reserve adoptions to married couples or single persons, violate the Constitution and has thus made possible co-parent adoptions by a same-sex partner.<sup>51</sup>

South African Constitution with regards to the question of gay rights is progressive. As such, by adopting a comparative approach between Kenya and South Africa, Kenya can draw lessons necessary for the promotion of a just society where the rights of LGBT people are respected.

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<sup>49</sup> Section 9(3)

<sup>50</sup> (CCT10/99) [1999] ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39 (2 December 1999)

<sup>51</sup>Du Toit and Another v Minister for Welfare and Population Development and Others, 2002 (10) BCLR 1006 (CC), 2002 SACLR LEXIS 23

### **1.8 Limitation of the Study**

This research will be limited to the right to equality and non-discrimination of gay persons in Kenya.

### **1.9 Justification of the Study**

LGBT persons in Kenya face legal challenges not experienced by their non-LGBT counterparts. Homosexuality is viewed as un-African as it goes against the cultural values of African societies and an abomination since it is contrary to religious beliefs. Parliament has been reluctant to review anti-sodomy provisions in the Penal Code, which were imported from the colonial regime. The existence of Penal sanctions has legitimized violence, discrimination, and stigmatization in the enjoyment of rights and access to services.

Despite the existence of a robust Bill of Rights guaranteeing every person equal rights, LGBT people continue to suffer in the hands of the law. They are constantly reminded that they are a disgrace to society and need to be shunned. Because of this intolerance and stigma, gay persons fear to come out as gay and end up entering into marriages so as conceal their true emotions.

This study recognises the plight of the LGBT person and calls for the recognition of gay rights. It encourages the society to protect gay persons even if they find homosexuality morally objectionable; as human rights is not about protecting only those people we like. It is, moreover, about safeguarding the rights of people who are socially or politically unpopular and shunned. To that effect, this research seeks to come up with recommendations to curb human rights violations against gays. A stand, which if implemented, will possibly map a way forward to resolving the conflict and enable gay persons to lead normal lives

The other point worth noting is that since the debate on gay rights is relatively new in Kenya, the research will contribute to body of knowledge on studies on same-sex relationships and human rights in Kenya. The conspicuous lack of data tends to have multiple impacts on gay persons and how their issues are addressed because it undermines the extent to which interventions exclusive for gay persons would be planned and implemented efficiently.

## **1.10 Chapter Breakdown**

### **Chapter One**

This will be the introduction to this study. It will provide the background of the study, statement of the problem, research objectives, research questions, research hypothesis, theoretical framework, literature review, justification of the study, scope of the study, and research methodology. It also gives the limitation of the study and this chapter outline.

### **Chapter Two**

This chapter probes the cultural, political and religious bases for homophobia in Kenya. It acknowledges the deep seated nature of homophobia and contends that there is nothing inherently African about it. It recognizes the role of the media in advancing human rights violations against gay persons. The chapter also expounds on the role of the judiciary in upholding rights of the marginalized sexual minorities by adopting critical and transformative decision making. Further, it highlights the plight of gay persons in accessing healthcare services. They are exposed to ill treatment and threats of being reported to the police and consequently denied medical services. The reluctance of the police to protect gay persons has also been discussed.

### **Chapter Three**

This chapter will provide a deeper analysis of the laws of Kenya on their position towards gay persons and further look at the constitutionality of the said laws. It examines the constitutionality of the Penal Code's anti-sodomy provisions, the Marriage Act's failure to recognize same-sex marriages, and the barring of gay persons from adopting children as seen in the Children's Act. To that effect, this chapter will seek to review the above mentioned laws in order to ensure compliance with constitutional principles of equality and non-discrimination. In addition, it analyzes international and legal instruments ratified by Kenya that legally recognize the rights of gay persons.

### **Chapter Four**

This chapter will do a comparative study between South Africa and the Kenyan law on gayism. It analyses similarities and variations between the two constitutions regarding the equality clauses and other human rights provisions relevant to the study. It also recognizes the progressive nature of the South African jurisprudence with regards to gay rights.

## **Chapter Five**

This chapter will provide recommendation and conclusions derived from the discussion on previous chapters.

## **2.0 CHAPTER TWO: SOCIOLOGICAL ATTITUDES TOWARDS GAY PERSONS IN THE KENYAN SOCIETY**

### **2.1 Introduction**

This chapter analyzes how gays are treated in Kenya and the various challenges they face for lack of legal recognition by the state laws. To understand the predicaments that gays undergo, this chapter looks at the various sectors from family, religion, health care facilities, and the media. It also analyzes how the State agencies have treated gays and whether the gay persons have recourse in the corridors of justice.

Gay persons in Kenya face social discrimination which seems well entrenched, and that has become a norm and not an exception. However, Prof Mutua asserts that much of the homophobia being experienced by gay persons is not homegrown.<sup>52</sup> The question this chapter seeks to answer is whether the discrimination against gays is by accident or it is well institutionalized in Kenya. Could there have been a difference if the law recognized them and protected their sexual rights? Do gays have recourse in the state agencies or the judicial system? This chapter particularly pays attention to the reports by various organizations on the status of gays in Kenya.

### **2.2 Status of Gays in Kenya**

Gays in Kenya are generally discriminated against; the discrimination spreads to various sectors of government and societal utilities. The Coast regional Police Commander, Francis Wanjohi while responding to a question raised on the protection of gay persons stated, “You do not expect to be protected when you engage in criminal and unacceptable behavior.”<sup>53</sup> His statement underscored two things. First, gays are criminals; second, they do not deserve police protection due to their 'criminal behavior'. The statement gives a glimpse of the discrimination that the LGBT community undergoes in Kenya. Unlike other citizens who enjoy police protection, they are viewed as 'walking felons'<sup>54</sup> who deserve jail rather than police protection. This is partly a problem

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<sup>52</sup> Makau Mutua, 'Sexual orientation and human rights: putting homophobia on trial' in S Tamale African Sexualities: A reader (2011) 89.

<sup>53</sup> Jonathan Cooper, 'Kenya's Anti-Gay Laws Are Leaving LGBT Community at the Mercy of the Mob | Jonathan Cooper' *The Guardian* (8 October 2015) <<http://www.theguardian.com/global-development/2015/oct/08/kenya-anti-gay-laws-lgbt-community-mercy-of-mob>> accessed 28 October 2017.

<sup>54</sup> *ibid*

of lack of legal recognition as deposited by the argument in this study, thus protecting their rights remain to be a challenge.

### **2.3 Discrimination of Gays in the health sector**

Non-discrimination and equality are fundamental human rights principles and critical components of the right to health. Gay persons in Kenya face challenges in accessing medical care due to the societal attitudes towards them. Article 43 of the Constitution guarantees every person the right to health care.<sup>55</sup> However, the gay community in Kenya is yet to realize this right. The Kenya Human Rights Commission conducted a series of interviews with 474 LGBT Kenyans aged eighteen to sixty five to document their experiences of homophobia within the country. The interviewees reported that accessing treatment for sexually transmitted diseases (STDs), counseling and testing for HIV is difficult because they are often afraid of honestly responding to medical interviews because honesty could lead to rebuke, arrest or both.<sup>56</sup> The discrimination is more in public hospitals than it is in private health institutions.<sup>57</sup>

A report by the Human Rights Watch established that gay persons in the Coastal region could not go to the hospitals due to the perception of the community, which is against them.<sup>58</sup> The kind of treatment they get in the hospitals makes it difficult for them to go for treatment. Gays living with HIV/AIDS are the major casualties of discrimination. An investigation conducted on gay persons living with HIV/AIDS revealed that most of them shy away from going to public hospitals. 'One gay person interviewed stated that he only goes to private hospitals to refill his antiretroviral medication; this is due to stigma associated with gays in public health facilities.'<sup>59</sup> The case is part of a large number of gays who shy away from seeking HIV medication from public health facilities citing fear that they may face discrimination the moment they reveal their sexual orientation. The fear prejudice makes them withdraw from seeking health care services. Unless this discrimination

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<sup>55</sup> Constitution of Kenya, Article 43(1) "every person has the right to the highest attainable standard of health, which includes the right to health services, including reproductive health care"

<sup>56</sup>Kenya Human Rights Commission, *The Outlawed Amongst Us: A Study of the LGBTI Community's Search For Equality and Non-discrimination in Kenya* 19 (2011), p 22

<sup>57</sup> Okun Oliech, 'Stigma and Discrimination among gay men living with HIV is rife in public health facilities' *Ureport* (19 December, 2016) <https://www.standardmedia.co.ke/ureport/article/2000227318/stigma-and-discrimination-among-gay-men-living-with-hiv-is-a-rife-in-public-health-facilities>. last accessed on May 23, 2017.

<sup>58</sup> The Human rights report

<sup>59</sup> Ibid.



and stigma is addressed, new HIV infections among gay men are likely to increase.<sup>60</sup> The healthcare professionals often breach the confidentiality of the patients and reveal their sexuality to third parties. The revelation of a patient's confidential information is in breach of both the right to privacy as guaranteed by article 31 of the Constitution<sup>61</sup> and the patient/doctor confidentiality. Medical ethics also bar medical practitioners from sharing the medical records of their patients. Gays in Kenya have their rights to privacy unnecessarily infringed upon. An HIV infected homosexual revealed that he lost three friends because of stigma and discrimination they faced after revealing their sexual orientation to the healthcare providers.

As majority of Kenyans continue with their ambivalence towards the gay people assuming they are just a fringe group that has no chance in Kenya, gay lobby groups are not sleeping. They are working day and night to ensure they win official legitimacy for their unhealthy sexual lifestyles. Remarkably, the homo lobbies already have representation in the Kenya National AIDS Control Council (NACC), ostensibly to highlight the plight of gay peoples afflicted by AIDS. The real reason was that foreign financiers arm-twisted the Government of Kenya to include them if they wanted more funding of fighting the AIDS scourge.

## **2.4 African Culture and Homosexuality**

The discrimination of gays has always been premised or justified on the basis that it is un-African. The narrative that has continually been put across is that gay is a Western issue and that the imperialist are attempting to force it down the throats of Africans. Evidence, however, points out that the narrative that gay is un-African may be a myth well-crafted to justify the injustices meted upon gays. Most African countries criminalize homosexuality while even those that allow homosexuality, violence against homosexuals are still high.<sup>62</sup>

Zimbabwean President Robert Mugabe at a UN meeting while condemning gay rights said, “We reject attempts to prescribe new rights that are contrary to our values, norms, traditions and

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<sup>60</sup> *ibid*

<sup>61</sup> The Republic of Kenya. Constitution 2010. Article 31 (c) "every person has the right to privacy, which includes the right not to have information relating to their family or private affairs not unnecessarily required or revealed"

<sup>62</sup> Winnie Mucherah, Elizabeth Owino and Kaleigh McCoy, 'Grappling with the Issue of Homosexuality: Perceptions, Attitudes, and Beliefs among High School Students in Kenya' (2016) 9 *Psychology Research and Behavior Management* 253.

beliefs."<sup>63</sup> President Museveni referred to homosexuality as an abnormality and that those practicing it can be helped through 'economic empowerment'.<sup>64</sup>

In Kenya, politicians and the government have justified their resistance towards gay rights using the African culture. In 2015, the Deputy President, William Ruto said that 'the government had no room for gays'. His spokesman further added, "the government believes that gay relations are unnatural and un-African."<sup>65</sup> The narrative cuts across majority of the Kenya's population, who detest gay relationships. Homosexuality is generally considered a taboo or immoral in Kenya.<sup>66</sup> Gay persons are therefore viewed as outcasts for committing a taboo.

From January 2014 to August 2015, Human Rights Watch conducted a research which focused largely on human rights violations against LGBT persons at the Kenyan Coast.<sup>67</sup> The study revealed a series of homophobic and transphobic attacks, fueled by the rhetoric of extremist religious leaders. One such instance occurred in February 2015 where a string of photos and videos depicting men engaged in same-sex conduct were disseminated on social media. The released photos resulted in public uproar and vigilante-style hunts for gay men in Diani and Ukunda, two neighbouring towns in Kwale County. The police on the coast, though charged with the duty to prevent violence and protect victims, committed serious human rights abuses by arbitrarily arresting two allegedly gay men and submitting them to illegal and degrading anal exams. Following the arrests, the Governor of Kwale County, Salim Mvurya made homophobic remarks by referring homosexuality as un-African.

Contrary to the widely spread myth, evidence points to the fact that homosexuality existed prior to colonization. The Portuguese explorers who came to Africa noted that there was “unnatural

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<sup>63</sup> Nick Sanchez, 'Robert Mugabe, Zimbabwe Dictator Renounces Gay Rights in UN Speech' *Newsmax*. (30 September, 2015) <http://www.newsmax.com/TheWire/robert-mugabe-zimbabwe-gay-rights-un/2015/09/30/id/694080/>

<sup>64</sup> John Tugume, 'Museveni now takes gays Bill to scientists'. *Daily Monitor* (26 January, 2014)

<sup>65</sup> 'Kenya's William Ruto Says There's No Room for Gays in His Nation' *NBC News* (4 May, 2015). Available at: <http://www.nbcnews.com/news/world/kenyas-william-ruto-says-theres-no-room-gays-his-nation-n353161>. last accessed on May 23, 2017

<sup>66</sup> Peter Orenge, 'Kenya's gay movement seeks stamp of approval' *STANDARD Digital*. Available at: <https://www.standardmedia.co.ke/article/2000087924/kenya-s-gay-movement-seeks-stamp-of-approval>. last accessed on May 23, 2017

<sup>67</sup> Human Rights Watch, "Issue is Violence: Attacks o LGBT People on Kenya's Coast"

damnation of male to male sex in Congo".<sup>68</sup> Andrew Battell, an English traveler in the 1590s, noted this about the Imbangala, "They are beastly in their living, for they have men in women's apparel, whom they keep among their wives."<sup>69</sup> Woman to woman marriage existed in many communities in Nigeria and Kenya.<sup>70</sup> The above evidence of gay cases prior to the colonial time debunks the theory that has often been used to stifle the gay community in Africa.

Professor Makau Mutua says that it is not un-African to be gay. He backs his assertions by the fact that African society had gays prior to colonization. He remembers, as a child he had gay neighbours. The neighbours had never stepped out of the country, therefore, ruling out the possibility that they imported their sexual orientation from outside the country. It is also noteworthy that the criminalization of gay relationships was introduced into the Kenya's Penal Code by the colonialists. Even if we were to buy the notion that gay is a Western thing, is it not hypocritical that the same African who embraces the White man's God and uses the White man's language would reject gay concept because it is foreign.<sup>71</sup>

Gay discrimination on cultural basis is not unique to Kenya but rather it is spread across many African countries. In most Sub-Saharan countries, people believe that people are born heterosexual and that homosexuality is an abnormality.<sup>72</sup> Homosexuals therefore lack any basis for arguing their case or seeking equality. They purely depend on the law to recognize them for the protection of their rights. Without this, they are going to remain victims for some time in this state.

## **2.5 Religion and Homosexuality**

Kenya is a secular State by virtue of Article 8 of the Constitution.<sup>73</sup> Majority of Kenyans, however, subscribe to the world's major religions. According to a United States of America (USA) government report, Kenya is composed of about 82% Christians, 11% Muslims, 1% while the rest

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<sup>68</sup>Bernardine Evaristo, 'The Idea That African Homosexuality Was a Colonial Import Is a Myth | Bernardine Evaristo' *The Guardian* (8 March 2014) <<http://www.theguardian.com/commentisfree/2014/mar/08/african-homosexuality-colonial-import-myth>> accessed 29 October 2017.

<sup>69</sup> *ibid*

<sup>70</sup>Roseline M Achieng', *Kenya Reconstructing?: Building Bridges of Peace : Post-Conflict Transformation Processes as Human Security Mechanisms* (LIT Verlag Münster 2012).

<sup>71</sup> Mutua (n.37).

<sup>72</sup> *Ibid*.

<sup>73</sup>The Constitution of Kenya. Article 8 "There shall be no State religion".

of the population are Hindus, Sikhs and Bahais. The rest of the population mostly subscribes to African traditional religious beliefs. Very few Kenyans prescribe to no religion at all.<sup>74</sup>

The debate on gays cannot be discussed without looking at the religious angle of it. Religious beliefs largely shape the societal attitudes in Kenya; one of the issues that have been shaped by religious beliefs is gay rights. The Christians and Muslims have entered into an alliance geared to forestall any recognition of gays, a claim they base on their conception of morality. Professor Makau Mutua in his article 'Sexual Orientation and Human Rights: Putting Homophobia on Trial' states that 'much of the revulsion on homosexuality can be traced to Christianity and Islam, the two religious traditions that express homophobia in their doctrinal teachings.'<sup>75</sup>

Discrimination on gays is deeply embedded on religious teachings. The Bible has mentioned homosexuality on six occasions,<sup>76</sup> thrice in the Old Testament and thrice in the New Testament. In the Book of Leviticus 18:22, it is stated that man shall not lie with mankind, as with womankind as it is an abomination.<sup>77</sup>The penalty for practicing homosexuality is death.<sup>78</sup> In Genesis 19, the story of the attempted gang rape of Lot's visitors by the men from Sodom is mentioned. This is where we derive the word sodomy. God destroyed the city of Sodom because of their immorality.<sup>79</sup>

In the New Testament, Paul in the book of 1 Corinthians 6:9-10 writes, 'Do you not know that the unrighteous will not inherit the Kingdom of God? Do not be deceived: neither the sexually immoral, nor idolaters, nor adulterers, nor men who practice homosexuality, nor thieves, nor the greedy, nor drunkards....will inherit the kingdom of God.' The words 'men who practice homosexuality' connotes parties that engage in same-sex sexual intercourse. A similar position is reiterated in 1 Timothy 1:10. The third place where homosexuality is described in the New Testament is in the teachings of Paul in Romans 1:24-28. Paul describes how men have given in to their sexual desires towards fellow men instead of women.

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<sup>74</sup> International Religious Freedom Report for. *United States Department of State. 2014.*

<sup>75</sup>Mutua (n. 37).

<sup>76</sup> W L Graig 'A christian perspective on homosexuality' <http://www.reasonablefaith.org/a-christian-perspective-on-homosexuality> (accessed on 1 June 2018)

<sup>77</sup> Leviticus 18:22 The Holy Bible, King James Version

<sup>78</sup> Leviticus 20:13 The Holy Bible , King James Version

<sup>79</sup> Genesis 9 The Holy Bible, King James Version

Resulting from the Biblical teachings against homosexuality, the Catholic Church remains intolerant to homosexual relationships. Pope Benedict XVI instructed the church “not to admit to the seminary or holy orders those who practice homosexuality, present deep-seated homosexual tendencies or support the so-called ‘gay culture.’”<sup>80</sup>The position continues to be held by the church, which excludes gays from holding positions in the church. Gays are viewed as sinners, not worthy of serving in the church.

Religious leaders incite their followers against gays. In 2010, news of two men planning to hold a gay wedding at a hotel sparked outrage from the religious community. Both Muslim and Christian leaders promised to stop the wedding and calling upon the government to shut down nightclubs that promotes homosexuality.<sup>81</sup> In this case, the religious leaders went further to threaten actual violence on the gays. "We shall eradicate gays...How can a State institution be involved in providing counseling services to these criminals [homosexuals]."<sup>82</sup>

The topic of homosexuality sparks great emotions among Christians who see it as Devilish. During a visit by the then United Nations Secretary General, Ban Ki-moon to Zambia, his sentiments calling for the recognition of the rights of homosexuals as human rights sparked heated debate in the religious circles. The Christians engrossed in the debate considered the pressure to recognize homosexuality as 'a sign of end times'.<sup>83</sup> The religious zealotry is replicated in Kenya, where religious leaders, armed with their doctrinal values are ready to defend 'moral decay' at whatever cost.

The anti-gay crusade was so rife in Kenya that around the time of President Obama's visit to Kenya in 2015. The Evangelical Alliance of Kenya held a demonstration urging President Obama not to raise the gay issue. The Alliance's head, Bishop Mark Kariuki said, "homosexuality goes against

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<sup>80</sup> 'Stances of Faiths on LGBTQ Issues: Roman Catholic Church'. Available at:<http://www.hrc.org/resources/stances-of-faiths-on-lgbt-issues-roman-catholic-church>. last accessed on May 23, 2017

<sup>81</sup>Galgal Bocha, 'Gay Wedding Here? No Way, Vow Preachers' *Daily Nation* (Nairobi, Kenya, February 2010) <<http://www.nation.co.ke/news/1056-860254-ii8v7fz/index.html>> accessed 29 October 2017.

<sup>82</sup> *ibid*

<sup>83</sup>Adriaan S van Klinken, 'Gay Rights, the Devil and the End Times: Public Religion and the Enchantment of the Homosexuality Debate in Zambia' (2013) 43 *Religion* 519.

the moral values and sends a wrong message to the youth."<sup>84</sup> The Deputy President had earlier stated that gays should leave the country.<sup>85</sup>

In the context of Islam, sexual conduct that does not involve vaginal intercourse is punishable by the judge's discretion.<sup>86</sup> The Quran refers to Sodomy as Liwat.<sup>87</sup> Just like the Holy Bible, the Quran recounts the story of Sodom condemning their wickedness, moreso their homosexual behavior. Anal sex between husband and wife is also prohibited. The punishment for anal sex is set from a relatively light one at the judge's discretion since sodomy could not result in illegitimate children, to the same punishment imposed on fornicators, which is set at 100 lashes.<sup>88</sup>

The strong opposition towards gay by the religious leaders provides good fodder for anti-gay discrimination. Rather than preach tolerance, the religious leaders have chosen to join the anti-gay chorus and to cheer as they face discrimination, perhaps with the hope that gays will one day be eradicated from the country. Recognizing the gay persons in the laws of Kenya could be a step towards solving this problem.

## **2.6 Role of Politics in Sociological Attitudes towards Gays**

Politics and sociological attitudes towards gays are interlinked. The political class shape the country's direction through coming up with policies that may either protect gays or be anti-gays. In Uganda for instance, Parliament passed an anti-gay legislation. The bill introduced tough punishments for gays, including life imprisonment.<sup>89</sup> Kenya has not enacted an anti-gay legislation save for sections 163 to 165 of the Penal Code which criminalize homosexual acts. The political classes however, have taken an anti-gay stand.

Several politicians have voiced anti-gay rhetoric; no politician has come out to stand with gays. In 2010 Kenya's Prime Minister called for the arrest of homosexuals. According to some activists, the statement had negative impact on gays that were receiving treatment for HIV/AIDS. How

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<sup>84</sup>Tom Odula, 'Low Turnout Marks Anti-Gay Demonstration in Kenya' *AP News* (July 2015) <<https://www.apnews.com/94a7f889adec47fe987c3b5eca4c15e4>> accessed 29 October 2017.

<sup>85</sup> *ibid*

<sup>86</sup> J Brown 'How Islam really views homosexuality' <<http://variety.com/2015/voices/opinion/islam-gay-marriage-beliefs-muslim-religion-1201531047/>> accessed on 1 June 2018

<sup>87</sup> *ibid*

<sup>88</sup>Brown (n 36 above)

<sup>89</sup> Faith Kirimi, 'Ugandan parliament passes anti-gay bill which includes life in prison'. *CNN*. Available at: <http://edition.cnn.com/2013/12/21/world/africa/uganda-anti-gay-bill/>. Last accessed on May 23, 2017

would one go and collect drugs from the clinic when they know that they are marked and could be arrested any time?<sup>90</sup> Before making the statement, Kenya had started making strides towards integrating gays into HIV/AIDS care. However, with the lack of goodwill from politicians little progress can be made due to the continuous stigmatization of gay persons.

Nothing unites African politics like the opposition against gays. In Uganda, after the constitutional court rejected the anti-gay legislation 'both the members of the National Resistance Movement party and the opposition vowed to re-introduce the bill.'<sup>91</sup> In Kenya the anti-gay rhetoric has been from both sides of the political divide. Prior to President Obama's visit to Kenya in 2015, lawmaker Irungu Kangata led a demonstration meant to send a message that Obama should not discuss gay issue in Kenya. "We are telling Mr Obama when he comes to Kenya this month and he tries to bring the abortion agenda, the gay agenda, we shall tell him to shut up and go home."<sup>92</sup>

National Assembly majority leader Aden Duale once described homosexuality as being as serious as terrorism.<sup>93</sup> Terrorism has claimed many lives and is a universally condemned crime. The comparison of homosexuality with terrorism symbolizes a great intolerance towards the practice. Some Members of Parliament went further to suggest that Kenya should go the Uganda way and adopt anti-gay laws.

## **2.7 Role of the Media**

The media refers to various platforms of communication. It includes print media, radio and television among others. Social media also falls under this category. The media is a tool that shapes public opinion.<sup>94</sup> Many Kenyans follow news from the media platforms. Majority are also on social media. The media has failed to enlighten the people on gay rights while some media platforms,

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<sup>90</sup> 'Raila Odinga, Kenya Prime Minister: Gays 'Should Be Arrested.'" *HUFFPOST* (29 November, 2010). [http://www.huffingtonpost.com/2010/11/29/raila-odinga-kenya-prime-\\_n\\_789355.html](http://www.huffingtonpost.com/2010/11/29/raila-odinga-kenya-prime-_n_789355.html)

<sup>91</sup> 'Uganda President Wants To Have Anti-Gay Law Re-Issued', *HUFFPOST*. (2 February, 2016) available at: [http://www.huffingtonpost.com/2014/08/12/uganda-yoweri-museveni-gay-law\\_n\\_5671075.html](http://www.huffingtonpost.com/2014/08/12/uganda-yoweri-museveni-gay-law_n_5671075.html). last accessed on May 23, 2017

<sup>92</sup> Humphery Malalo, 'MP tells anti-gay rally: Obama should not push gay agenda in Kenya' *Reuters*. <http://www.reuters.com/article/us-kenya-gays-idUSKCN0PG1BM20150706>

<sup>93</sup> James Macharia, 'Leading Kenyan MP says homosexuality as serious as terrorism' *REUTERS* <http://www.reuters.com/article/us-kenya-gays-idUSBREA2P1UD20140326>

<sup>94</sup> Philip Birch, Rebecca Ozanne, Jane Ireland, (2017) 'Examining portrayal of homophobic and non-homophobic aggression in print media through an intergrated grounded behavioural linguistic inquiry (IGBLI) approach', *Journal of Forensic Practice*, Vol19 Issue: 3, pp.239-244, <https://doi.org/10.1108/JFP-02-2017-0003>

especially social media are filled with homophobic sentiments.<sup>95</sup> An article published in one of the popular Kenyan Newspapers in August 2010 illustrates the bias toward and lack of understanding of homosexuality in the country. The article talks about increasing lesbianism among school girls which is attributed to lack of training in managing sexuality and lack of self-control. It reports the views of a clinical psychologist who states that homosexuality and lesbianism are learned behaviours that can be unlearned. The article also recommends rehabilitation of gay persons as it compares homosexuality to drug abuse.<sup>96</sup>

The media has taken a partisan position against gays.<sup>97</sup> In the case of *Kasha Jacqueline, David Kato and Onziema Patience v Rollingstone Publications Limited & Giles Muhame*,<sup>98</sup> the High Court of Uganda affirmed the role of the media in protecting gay rights. In this case, the Civil Society Coalition on Human and Constitutional Law in Uganda filed an application for an injunction against Rollingstone Publication at the High Court. Rollingstone tabloid had featured in its 2 October 2010 edition front page the headline ‘100 pictures of Uganda’s top homos leak’. The publication revealed the names, pictures and places of residences of the alleged homosexuals. The Court in its ruling issued a permanent injunction against Rolling Stone Publication and its managing director, barring them from making any further publications of the identities of the persons and homes of petitioners and the homosexuals. The Court further awarded Ushs. 1,500,000 to each of the petitioners as compensation.

The ruling in this case highlighted that gay persons are entitled to equal rights like any other individual. It also sets a precedent for other media stations to refrain from publishing any information that would advance homophobia in our society. The media has the responsibility to uphold the rights of gay persons.

## **2.8 Court Ruling and the Debate on Gays**

The gay community in Kenya seems to have found an ally in the courts. In the case of *Eric Gitari v Non-Governmental Organisations Co-ordination Board* (NGO Board) the court ruled that members of the LGBT community had a right to register their organization. In this case the NGO Board refused to register the petitioner's organization saying that its objectives were unacceptable

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<sup>95</sup>Ibid

<sup>96</sup> Dorothy Kweyu, ‘The dilemma of lesbian school girls’ Daily Nation 10<sup>th</sup> August, 2010 (A Kenyan local dailies)

<sup>97</sup> Wekesa (n27 above)

<sup>98</sup> Miscellaneous Application No. 163 of 2010



since the Penal Code criminalized homosexual behavior. The court found that the respondent by refusing to register the petitioner's association had violated the petitioner's right to non-discrimination. The court also affirmed that Article 36 of the constitution guarantees every person the freedom of association.<sup>99</sup> The ruling granted the gay community great reprieve and showed that like other persons, they can seek the enforcement of their fundamental rights in court. Despite the court ruling that granted gays freedom of association, the same has not resulted in them being embraced by the society. Majority of Kenyans remain homophobic.

The debate on whether to legalize gay marriages in Kenya continues to rage in Kenya, a show of increasing awareness on the topic. 'The Kenya Human Rights Commission in its report recommended the legalization of same-sex marriages.'<sup>100</sup> The then Chief Justice Willy Mutunga acknowledged that the debate was a healthy one. It, however, remains to be seen whether the debate will promote greater awareness on gay rights.

## **2.9 Violence against Gays**

'From 2008 to 2015 Kenya experienced at least six cases of mob violence against gays'.<sup>101</sup> The violence occasioned against them neither sparked media attention nor public outrage. Gays face various forms of violence. Some of the major forms of violence include: physical violence, hateful publications and hate speech.<sup>102</sup> The gay community in Kenya is always at risk of violence from members of the public. Their problems are further compounded by the reluctance of the police to protect them. The gays fear reporting the cases of violence to the police for fear that the police may arrest them instead of protecting them. Despite the constitution of Kenya article 28 stating that, every person has the inherent dignity and the right to have that dignity respected and protected<sup>103</sup> gays in Kenya continue to have that right trampled upon.

The Human Rights Watch Report on '*Attack of LGBT People on Kenya's Coast*', 2015 detailed incidences of violence experienced by the gay community. The violence is not only from members

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<sup>99</sup> Eric Gitari v Non-Governmental Organisations Co-ordination Board & 4 others [2015] eKLR

<sup>100</sup> 'Embrace sobriety on gay discourse' STANDARD Digital. Available at: <https://www.standardmedia.co.ke/article/2000058295/embrace-sobriety-on-gay-discourse>. last accessed on May 23, 2017

<sup>101</sup> ibid

<sup>102</sup> Kenya National Aids Strategic Plan 2009/10 – 2012/13, Nairobi 2009 pg, 6.

<sup>103</sup> Constitution of Kenya. Article 28 "every person has inherent dignity and the right to have that dignity respected and protected"

of the community but also from the police. For example, in February 2015 the police arrested two men found engaging in homosexual behavior. Not only were the suspects forced to confess, the doctor also conducted forced anal examination on them in a bid to prove that they had engaged in homosexual conduct. This was in breach of their constitutional rights to dignity and to privacy. During the same period many gays were also forced to flee their homes due to the apprehension for violence. The media have further contributed to the situation through their sensational reporting on LGBT 'scandals'.<sup>104</sup>

The LGBT community are often harassed by the police and held in remand beyond the period legally allowed or they are charged on trumped up charges.<sup>105</sup> Corrupt police officers often extort and blackmail gays with the threat of arresting them should they fail to give bribes.<sup>106</sup> Some gays in the Coast have also reported cases of them being raped by police officers. In one reported case, a 23-year-old gay reported that he was arrested, together with a friend, at night by police officers who then raped them and then beat them up. When they reported the case to the police station the following day, the police officers at the station slapped them and even ridiculed them.<sup>107</sup>

Gays also face extortion from criminals who take advantage of the fact that homosexuality is criminalized. Eric Gitari, the executive director of National Gay and Lesbian Human Rights Commission states that there are numerous incidents where gays are lured into rooms with hidden cameras. The extortionists then use the recorded videos of them having sex to extort their gay victims.<sup>108</sup> The case of extortions is also rife in other countries where same-sex relationships are prohibited. In Nigeria, Bola a high school teacher was coerced by a coworker to pay her 10,000 naira per month out of her salary for fear that the coworker would report her which would result in loss of her job.<sup>109</sup> As long as gay relationships are prohibited in Kenya and no proper

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<sup>104</sup> 'Attack on LGBT People on Kenya's Coast', Human Rights Watch Report, 2015. <https://www.hrw.org/report/2015/09/28/issue-violence/attacks-lgbt-people-kenyas-coast>

<sup>105</sup> 'The Outlawed Amongst Us' *Kenya Human Rights Commission* (2011) Pg 21

<sup>106</sup> Partrick Kurth, 'LGBT Rights in Kenya: A Conversation with David Kuria | World Policy Institute' (*World Policy Blog*, July 2015) <<http://www.worldpolicy.org/blog/2015/07/28/lgbt-rights-kenya-conversation-david-kuria>> accessed 29 October 2017.

<sup>107</sup> Kenya National Aids Strategic Plan n. 37. Pg 23

<sup>108</sup> Anthony Langat and Jacob Kushner, 'In Africa, Being Gay Makes You a Target for Extortion' *Public Radio International* (July 2015) <<https://www.pri.org/stories/2015-07-03/africa-being-gay-makes-you-target-extortion>> accessed 29 October 2017.

<sup>109</sup> *ibid*

mechanisms are put in place to protect gays, they will continue to suffer from extortion and blackmail since they fear reporting.

## **2.10 Stigmatization**

Havey Milk, the first openly gay man to serve as a Supervisor at the San Francisco City Council once said, “coming out is the most political thing to do.”<sup>110</sup> The statement can be interpreted to mean that by sharing with others, we can slowly overcome the stigma associated with being gay. Some parents consider their gay children as 'sick, immoral and misguided'.<sup>111</sup> Few children can dare imagine the reaction from their parents should they confess that they are gay. A statement like "Mom, Dad I'm gay"<sup>112</sup> can attract backlash or in the extreme, one can be thrown out of the house.

Members of the LBGT community face discrimination and stigmatization. The stigma starts right from the family level and is occasioned by the lack of knowledge on the LGBT community. The lack of open debates on the matter has further entrenched the problem as people do not appreciate diversity. Gays face stigmatization from friends, workmates and even schoolmates, making them feel like outcasts.

The Kenya Human Rights Commission report, '*The Outlawed Among Us*' brought to fore the stigmatization and discrimination that gays face in Kenya. About 89% of respondents stated that they were disowned by their families the moment they confessed that they were gays.<sup>113</sup> The conservative nature of most Kenyan families can be attributed to the negative view of gay relationships. The discrimination does not stop at the family level; it extends to other areas such as the work place. Many respondents said that they had been discharged from duty the moment their sexual orientation or gender identity was discovered. Another incident is where a 20 year old intersex was forced to drop out of school since the students made fun of him. Another 27-year-old lesbian confessed that she was sacked due to her sexual orientation. The dismissal letter stated that she was dismissed due to gross misconduct.<sup>114</sup>

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<sup>110</sup> Robinson, V. Gene. "A Public Lecture: Why Religion Matters in the Civil Rights Debate for Gays and Lesbians." 32.3 Nova L. Rev. 573, 594 (2008)

<sup>111</sup> *ibid*

<sup>112</sup> *ibid*

<sup>113</sup> '*The Outlawed Among Us*' n 40

<sup>114</sup> Kenya National Aids Strategic Plan 37. Pg 26

Schools remain some of the places where homophobias are highest. In July 2015, Kababii High School in Bungoma County suspended 19 students on suspicion of engaging in homosexual acts.<sup>115</sup> Despite the strict rules that prohibit homosexual behaviors in schools, homosexual cases continue to be experienced in schools. In a study conducted among students, out of the 1250 students, 41% claimed homosexuality is practiced in schools and 61% believed that homosexuality is practiced mostly in single-sex boarding schools.<sup>116</sup> Notably 95% believed that homosexuality is an abnormal behavior with some students believing that it can be eradicated through counseling.<sup>117</sup>

Most gays in Kenya fear coming out to talk about their sexual orientation. Binyavanga Wainana, an Award winning literary writer narrates the difficulty of revealing his sexual orientation even to his mother. In 2000, he tries to confess to his mother, who is on her sick bed that he is a homosexual. However, she's dying in the Intensive Care Unit (ICU) and she can neither hear nor answer him. Binyavanga narrates that he knew he was gay from an age of five but had told it to no one. It is not until 2014 that he reveals his sexual orientation and even then there is a mixed reaction from the public.<sup>118</sup>

The voices of tolerance continue to be heard. Wanuri Kahiu believes that "homophobia is un-African and that homosexuality is not."<sup>119</sup> She produced a film featuring two women in love with each other in a country where homosexuality is illegal.<sup>120</sup> The film seeks to create awareness on homosexuality in a bid to make the society more receptive to homosexuals.

## 2.11 Misconceptions about Homosexuality

The negative attitude towards homosexuals is often based on myths and misconceptions. A research conducted on students showed that majority believe that homosexuality is due to sexual starvation. Some people also discriminate against gays due to the misconceived notion that

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<sup>115</sup> '19 students suspended from Kibabii high school for allegedly engaging in homosexuality' available at: <https://www.standardmedia.co.ke/ktnhome/video/watch/2000095589/19-students-suspended-from-kibabii-high-school-for-allegedly-engaging-in-homosexuality>. last accessed on May 23, 2017

<sup>116</sup> Mucherah (n 49)

<sup>117</sup> *ibid*

<sup>118</sup> 'I am a homosexual, mum Binyavanga Wainaina' *theguardian* (21 January, 2014)

<sup>119</sup> Stefan Nichols, 'Kenyan film director argues that Homosexuality is not un-African, homophobia is' PinkNews available at: <http://www.pinknews.co.uk/2014/05/01/kenyan-film-director-argues-homosexuality-is-not-un-african-homophobia-is/>. Last accessed on May 23, 2017

<sup>120</sup> *ibid*

homosexuals are pedophiles.<sup>121</sup> Some of the negative attitudes towards gays have been caused by lack of exposure to diversity, religious beliefs and social-cultural contexts.<sup>122</sup> It is shown that close contact with gays increases positive attitude and reduces prejudice towards gays.<sup>123</sup> In Ireland, for instance, a study on how students, teachers and school administrators treated homosexuals revealed an underling fear towards sexual minorities.<sup>124</sup> The societal attitudes determine how gays are treated in a given community. In the Carribean, a study conducted at West Indies University found that male heterosexuals had negative attitudes towards male homosexuality. Additionally the study revealed that sexual minorities are viewed as outcasts and homosexuality is condemned by families.<sup>125</sup>

## **2.12 Conclusion**

Kenyans remain unwavering in their resistance to homosexuality in Kenya. The discussion in this chapter is evidence that gay persons have not been legally recognized despite being present in the country. The chapter captures human right violations against sexual minorities. It highlights how they encounter discrimination, violence and other forms of abuse in social institutions in the country such as religious institutions, hospitals, and media among others. There is no doubt that the lack of legal protection has played a major role in shaping the society's perception towards this group of sexual minorities. There is widespread homophobia in the country among the general public, and religious and political leaders. This continues to exist despite the existence of the Constitution which advocates for equality and non-discrimination. Public awareness campaigns and sensitization programs should be developed to promote the idea that gay persons are human beings that deserve not only respect and dignity but also equal rights and treatment.

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<sup>121</sup> Mucherah (n 49)

<sup>122</sup> *ibid*

<sup>123</sup> *ibid*

<sup>124</sup> *ibid*

<sup>125</sup> *ibid*

## **3.0 CHAPTER THREE: ANALYSIS OF THE RIGHT TO EQUALITY OF GAY PERSONS IN THE KENYAN LAWS**

### **3.0 Introduction**

On the 4<sup>th</sup> of August 2010, Kenyans exercised their sovereign right by promulgating the Constitution of Kenya 2010. This exercise marked the end of a long struggle underpinned by the desire of a new political, economic and social dispensation, capable of eradicating poverty, inequality, discrimination and oppression.<sup>126</sup> Although sexual minorities did not actively join the struggle, they silently, just like other Kenyans, played a part in bringing into force the constitution. Kenya's former Chief Justice Willy Mutunga described the 2010 Constitution as a people's constitution, an outcome of what is rightly rated the most participatory process of constitution-making in the entire world.<sup>127</sup> The Constitution of Kenya 2010 is the supreme law of the land, and is largely applauded for depicting constitutionalism and the rule of law. It provides for a comprehensive bill of rights encompassed in chapter four of the constitution. The Bill of Rights is presented as an integral part of Kenya's democracy for its expansive provisions on civil, political, social, economic, cultural and even environmental rights.

This chapter focuses on the potential of interpreting the provisions of the Constitution in a progressive manner to fight discrimination against gay persons in Kenya. It begins with an analysis of provisions of various statutes in a bid to examine their conformity to the Constitution. This study submits that to protect gay rights, it is fundamentally important to first, recognize gay persons under applicable laws of the state as a group that is entitled to enjoy certain rights. Through this, the problems cited in chapter two of this study can partly be solved.

### **3.1 The penal code**

Before colonialism, there were no laws criminalizing same sexual conduct between consenting adults<sup>128</sup> partly because such conduct was not recognized as gay as it is identified today, nor

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<sup>126</sup> Nicholas WasongaOrago, 'The 2010 Kenyan constitution and the hierarchical place of international law in the Kenyan domestic legal system: a comparative perspective. *African Human Rights Law Journal*, (2-013) 13 HJL 415-440

<sup>127</sup> Ibid

<sup>128</sup> IIK Nyarang'o, 'The role of judiciary in the protection of sexual minorities in Kenya' (LLM Thesis University of Pretoria 2011)

deemed to attract legal sanctions.<sup>129</sup> Things changed in 1895 when Kenya was declared a British protectorate.<sup>130</sup> The colonial masters instituted their statutory laws that existed alongside traditional customs. In 1897 and 1921, Kenya applied the Indian Penal Code which was later replaced with the colonial office model code based on the Queensland Code of 1899.<sup>131</sup> After independence in 1963, the government inherited the former British legal system, including its colonial office model code.<sup>132</sup>

It follows then that the Penal Code is a colonial legislation that Kenya has adhered to since its inception with amendments. Sections 162, 163 and 165 of the Penal Code are modeled along section 377 of the Indian Penal Code, which provided a template for sodomy laws that were introduced to East African colonies during the 1890s by the British.<sup>133</sup> It is worth noting that this was done without taking into account the views of Kenyans, with the intention of imposing European morality on African natives. It is ironical that even after independence; the criminalization of the gay acts in the Penal Code has remained to be the law in the colonized states and not in the colonial states.<sup>134</sup>

Section 162 of the Penal Code states:

Any person who has carnal knowledge of any person against the order of nature or permits a male person to have carnal knowledge of him or her against order of nature is guilty of a felony and is liable to imprisonment for 14 years.<sup>135</sup>

Section 163 asserts that any person who attempts to commit any of the offences in section 162 is guilty of a felony and is liable to imprisonment for seven years. Section 165 of the Penal Code outlaws committing, encouraging or attempting ‘acts of gross indecency’ between males and imposes a penalty of up to five years’ imprisonment.

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<sup>129</sup> Ibid

<sup>130</sup> J B Ojwang constitutional development in Kenya: institutional adaption and social change (1990) 23

<sup>131</sup> E Cotran the development and reform of the law in Kenya (1983) 27 Journal of African Law 42

<sup>132</sup> M Ndulo African Customary law and women’s rights (2011) 18 international journal global legal studies 99

<sup>133</sup> Nyarang’o (n 3 above)

<sup>134</sup> Gupta, Alok. “The Origins of ‘Sodomy’ Laws in British Colonialism | HRW.” *Human Rights Watch*, December 2008. <https://www.hrw.org/report/2008/12/17/alien-legacy/origins-sodomy-laws-british-colonialism>. (accessed on 25 August 2017)

<sup>135</sup> Section 162 of the Penal Code

Failure to give legal recognition to gay persons is demonstrated in a number of ways in these provisions. First, the penal code is very much in place and it criminalizes homosexual behavior and attempted homosexual behavior between men, referring to it as “carnal knowledge against the order of nature”. The existence of penal sanctions legitimizes violence, discrimination and stigmatization in the enjoyment of rights and access to services. The message to gay persons is very clear: they should not expect the basic protection of the state. When your sexuality – your very identity – is a criminal offence, you live as a felon on run, and you cannot trust even the police in your community to protect you from appalling violence.

Sections 162, 163 and 165 of the penal code, taken individually or cumulatively contravene various provisions of the Constitution. For instance, Article 27 on equality and freedom from discrimination;<sup>136</sup> Article 28 on human dignity;<sup>137</sup> Article 29 on freedom and security of the person; Article 31 on privacy;<sup>138</sup> and Article 43 on economic and social rights, specifically the right to health.<sup>139</sup> Elaborating on the right to freedom from discrimination, Article 27 posits that every person is equal before the law and has the right to equal protection and equal benefit of the law. It further provides that no person shall be discriminated against on any round, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion,

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<sup>136</sup>Article 27 of the constitution provides that every person is equal before the law and has the right to equal protection and equal benefit of the law. Gay persons are often seen as inferior beings who have abnormal tendencies. Equality includes the full and equal enjoyment of all rights and fundamental freedoms. With the inferiority that gays are accorded, they are subjected to acts that infringe on their right to equality. Heterosexual persons in Kenya are widely protected. The Marriage Act provides for the different forms of marriage and grounds for dissolution of heterosexual unions. Furthermore, heterosexuality has been legalized. The constitution advocates for equal benefit of the law and therefore the gay persons should be able to enjoy these benefits.

<sup>137</sup>Homosexuals are being stripped of this inherent right to human dignity in many aspects. Other members of the community shun upon them as they are seen as lesser human beings. They are also subjected to degrading acts such as being stripped naked in public (Alexander Ngungu Nthungi v Republic (2010) eKLR). Their families see them as a disgrace and the stigma that surrounds homosexuals is rather hostile. In this kind of atmosphere, the gays live in constant fear and cannot take part in development agenda. They deserve the respect that a heterosexual human being enjoys, as their sexual orientation does not negate their inherent dignity by virtue of being human beings.

<sup>138</sup>The presence of privacy ensures that choices are free of government coercion, intimidation and regulation. However, this study appreciates that the right to privacy is not an absolute right. “The function of the law is to preserve public order and decency, to protect the citizen from what is injurious or offensive, and to provide sufficient safeguards against corruption and exploitation. It is therefore not in the place of law to intervene in the private lives of citizens or to seek to enforce a certain pattern of behaviour when such does not harm the public.

<sup>139</sup> Gay persons remain to be discriminated at health centers, as their act is perceived to be criminal.



conscience, belief, culture, dress, language, or birth.<sup>140</sup> One glaring shortcoming of the Constitution is that it fails to list sexual orientation as a prohibited ground of discrimination. However, the phrase ‘includes’ has been defined in the Constitution to mean ‘includes, but is not limited to’.<sup>141</sup> This connotes that the list of prohibited grounds is not conclusive. As such, the rights and freedoms outlined in the Bill of Rights must apply to gay persons in Kenya under its “including” and “on any ground” catchall provision.

The provisions of the Penal Code criminalizing homosexuality therefore ought to be struck down as they are void by virtue of their unconstitutionality. Moreover, the State does not act legitimately in seeking to regulate the most intimate and private sphere of conduct of all Kenyans, regardless of their sexual orientation.<sup>142</sup> Especially when the acts cause no substantive harm to the public as John Stuart would put it in his harm theory.

These issues were raised in the case of *Eric Gitari v Attorney General & another* [2016].<sup>143</sup> In this case, the petitioner Eric Gitari sought orders declaring section 162 and 165 of the Penal Code unconstitutional to the extent that they purport to criminalize private consensual sexual conduct between adult persons of the same sex. Justice Isaac Lenaola made a ruling that referred the matter to the Supreme Court for further interpretation, citing that the matter was raising substantial question of the law and was of general public importance.

### **3.2 Marriage Act 2014**

The Marriage Act, 2014<sup>144</sup> is a culmination of several years of reforms that started decades ago. The Act consolidates various pieces of legislation governing the various types of statutory marriages. Before the enactment of the Act, laws governing marriages were scattered in numerous statutes. The Marriage Act therefore aimed at minimizing the complexity, unpredictability, and inefficiency previously occasioned by the multiplicity of laws relating to the institution of marriage.

Marriage is the foundation of a family while the family is the basic social unit in our society. Family is necessary as it contributes tremendously to nation building; ensures continuity of our

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<sup>140</sup> Constitution of Kenya 2010 Article 27

<sup>141</sup> Ibid Article 259(4)(b)

<sup>142</sup> The act of gay is done in privacy, which is protected by the Constitution (article 31).

<sup>143</sup> Eklr petition No 150 of 2016 <<http://kenyalaw.org/caselaw/cases/view/122862/>> accessed on August 23, 2017

<sup>144</sup> No. 4 of 2014

country Kenya, instils values and promotes social and economic development. The constitution of Kenya recognizes the importance of family to the nation and accords it protection.<sup>145</sup> However, the laws are biased on the parties eligible to marry, which are consequently expected to form a family after marriage.

The Marriage Act defines marriage as the voluntary union of a man and a woman whether in a monogamous or polygamous union.<sup>146</sup> This definition excludes same sex couples. The same position is mirrored in the 1886 classic case of *Hyde v Hyde*<sup>147</sup> that defined marriage as the voluntary union for life of one man and one woman to the exclusion of all others. The Marriage Act has failed to recognize the existence of gay persons who might have same desires of starting up legitimate families as their heterosexual counter-parts. Gay couples want to be accorded the same rights accruing to heterosexual couples. Such rights include legal protection, public celebration of their commitment, to provide greater legal protection for their children,<sup>148</sup> and simply because of companionship.

Just as the Marriage Act 2014, the Constitution of Kenya has also taken similar approach in regards to parties to a marriage. The Constitution provides that the family is the natural and fundamental unit of society and the necessary basis of social order and shall enjoy the recognition and protection of the state.<sup>149</sup> It further provides that every adult have the right to marry a person of the **opposite sex**, based on the free consent of the parties. It also behooves Parliament to enact legislation which recognizes marriages concluded under any tradition or system of religious, personal or family law and...to the extent that any such marriages or systems of law are consistent with the Constitution.<sup>150</sup> This Article goes a long way in entrenching the heterosexist conception of marriage, clearly failing to recognize gay marriages. By requiring that marriages, whether religious or traditional adhere to the constitution, it expressly rules out the possibility of same sex marriages. Such application will amount to violation of Article 27 of the constitution which outlaws discrimination and guarantees equality for all. To appreciate both Article 27 of the constitution and the diversity that our society has, the interpretation of Article 45(2) should take the most

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<sup>145</sup> Article 45(1) Constitution of Kenya 2010

<sup>146</sup> Section 3(1) Marriage Act, 2014

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<sup>148</sup> This could be adopted children though the children Act 2001 does not allow adoption by gay persons.

<sup>149</sup> Article 45

<sup>150</sup> Article 45(4)(b)

accommodative approach. Providing that every person has the right to marry a person of the opposite sex, should not be misconceived to deny persons of the same sex their right to marry a person of their choice. Lastly, to protect the rights of the gay persons, it is of utmost importance to first recognize that they exist through our laws. Secondly, the constitution should be interpreted to accommodate gay persons. The enabling laws such as the Marriage Act should be in the forefront in recognizing the union of this marginalized group of persons.

### **3.3 The Children`s Act 2001**

Children are important to a family as they carry the family name from generation to generation. The Children’s Act is in place to govern matters that concern children in the country. It gives priority to the best interest of the child in all actions undertaken by private or public social welfare institutions, courts of law, administrative authorities and legislative bodies.<sup>151</sup> The Act further sets out among other matters the pre-requisites for adoption. One of the requirements is that one has to be heterosexual.<sup>152</sup> Additionally, for a joint application for adoption, the applicants ought to be married.<sup>153</sup>

Section 158 (3) of the Children’s Act 2001 states, “An adoption order shall not be made if the applicant or, in the case of joint applicants, both or any of them—

(a) is not of sound mind within the meaning of the Mental Health Act.

(b) has been charged and convicted by a court of competent jurisdiction for or any of the offences set out in the Third Schedule to this Act or similar offences.

(c) is a **homosexual**.

(d) in the case of **joint applicants, if they are, not married to each other**.

(e) is a sole foreign male applicant.”

Emphasis should be placed on (c) and (d). Firstly, it is clearly stated that a homosexual cannot adopt a child. In the case of joint applicants, they are required to be married. As noted earlier, homosexual marriages remain unrecognized under the laws of Kenya. It follows then that

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<sup>151</sup> Section 4 of the Children’s Act Cap 141 Laws of Kenya

<sup>152</sup> Section 158(3)(c) of the Children’s Act

<sup>153</sup> Section 158(3)(d) of the Children’s Act

homosexuals are barred by law from adopting children and raising a family of their own. The same sex couples just as heterosexuals, who cannot bear children, wish to adopt children to form a family. Categorically barring the gay persons from adopting children is in itself discriminative and is a violation of Article 27 of the constitution. This exclusion also deprives children of the possibility of acquiring a loving and stable family life as required by Article 53(2) of the Constitution which states that a child's best interest are of paramount importance. Section 158(3) is in complete utter disregard of the aforementioned rights and it ought to be declared unconstitutional.

With the advent of new reproductive technologies, such as in vitro fertilisation, homosexual couples can now become biological parents.<sup>154</sup> The law should be alive to the fact that this new technology has opened the door to previously unknown types of families. As such, by legalising gay marriages, Parliament will fill in the gap arising from this new concept of family. In the South African case of *J v Director-General, Department of Home Affairs*<sup>155</sup>, lesbian life partners had twins after a procedure of artificial insemination using the ova of the first applicant and the sperm of an anonymous male donor. The fertilised ova were implanted into the second applicant who gave birth to the twins. The applicants wanted to be registered and recognised as the parents of the twins. However, their registration was rejected by the Department of Home Affairs on the ground of the now-repealed Children's Status Act 82 of 1987, which provided that children born out as a result of artificial insemination are legitimate if the birth mother is married, but not if she is a partner in a same sex life partnership.<sup>156</sup> The Court held that this provision contravened the Constitution of South Africa, 1996 since it amounted to discrimination on the grounds of marital status and sexual orientation, which is expressly prohibited by the Constitution. The result of this decision was that a child born as a result of artificial insemination of a woman in a same sex life partnership is deemed to be the legitimate child of the same sex life partners.

Lastly, the Children's Act deals with an important aspect of succession. This is where the interests of the child are involved. At the high court of Mombasa, in the case of *Monica Jesang Katam V Jackson Chepkwony and another (2011), eKLR*; the court held that children of a same sex marriage

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<sup>154</sup> Nancy Baraza (n16) above

<sup>155</sup> 2003 (5) SA 621 (CC)

<sup>156</sup>This Act was repealed by the Children's Act 38 of 2005 on 1 Jul 2007. See J Heaton *The South African Law of Persons* 4 ed (Durban, 2012) at 9-10

were children under the Succession Act for the purposes of inheritance. The women had married in accordance with the Nandi traditions and practices. In light of this judgment, which revolved around an unconventional wife and children, homosexuals do have a place in the area of family law and succession as it was decided when the new constitution was in place.<sup>157</sup> It is therefore in the light of the constitution for gay persons to get full recognition by the law.

### **3.4 International Laws**

From an international human rights perspective, the Constitution of Kenya embraces international law in several ways. Firstly, the Constitution's comprehensive Bill of Rights is drawn from several human rights instruments. Secondly, through Article 2(5) and 2(6), the Constitution incorporates international law into domestic law. Article 2(5) asserts that general rules of international law shall form part of the law in Kenya. Article 2(6) on the other hand deals with the application of international agreements; and states that any treaty and convention ratified by Kenya shall form part of the law of Kenya. Under this Article, international agreements apply as part of Kenya's domestic law once they have been ratified. The Constitution further provides that the state must enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.<sup>158</sup> It follows then that international human rights norms that outlaw discrimination are applicable in Kenya.

Kenya has ratified a number of international and regional human rights instruments which recognize the right to equality and freedom from discrimination. They include, the Universal Declaration on Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic and Social and Cultural Rights (ICESCR), and the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment (CAT). It is worth noting that these international instruments do not list sexual orientation as one of the grounds prohibiting discrimination. However, this does not necessarily mean that gay persons are not protected from discrimination through international human rights law.

In relation to non-discrimination, Article 1 of the UDHR posits that all human beings are born free and equal in dignity and rights. Article 2 further provides that "Everyone is entitled to all the rights

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<sup>157</sup> Succession cause number 212 Of 2010, *Monica Jesang Katam V Jackson Chepkwony and another*(2011), eKLR.

<sup>158</sup> Article 21(4) of the Constitution

and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 7 emphasises that, “all are equal before the law and are entitled without any discrimination to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.” Given that the UDHR provides for the protection to individuals of “other status”, this implies that sexual orientation is a basis of discrimination prohibited under the UDHR. Also, the fact that most of the clauses of UDHR begin with the word “everyone”, mean that they confer rights on all human beings.

Similarly, the ICCPR like other UN treaties makes no specific mention to sexual orientation. However, it stands out as the most effective instrument in the protection of sexual minority rights.<sup>159</sup> The ICCPR’s Human Rights Committee has on two separate occasions held that discrimination based on sexual orientation is not allowed under the treaty.<sup>160</sup> The covenant establishes the Human Rights Committee to which state parties shall submit reports and the committee can thereafter make comments as it deems fit. The committee is a monitoring and judicial body for the realization of the purpose of the convention.<sup>161</sup> In *Tooten v Australia*,<sup>162</sup> the committee interpreted that the term sex under article 2<sup>163</sup> of the ICCPR includes sexual orientation of an individual. Kenya has not yet submitted to the committee’s jurisdiction. However, the case provides an interpretation of the Covenant’s provisions to which Kenya is bound as it has acceded to the treaty. The ICCPR enshrines the rights to self-determination, liberty and security of the person. Article 2 imposes both a negative and positive obligation on party States to refrain from restricting these rights as guaranteed in the Covenant, as well as to take positive steps to give effect to these rights. To that effect, Kenya has an obligation to repeal anti-gay laws that are not in line with international human rights law.<sup>164</sup>

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<sup>159</sup> International Covenant on Civil and Political Rights, Article 9

<sup>160</sup> Nancy Baraza (n17)p 152

<sup>161</sup> Part IV of the ICCPR.

<sup>162</sup> United Nations Documents; CCPR/C/50/D/488/1992.

<sup>163</sup> Article 2(1) of the ICCPR states: “Each State Party to the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

<sup>164</sup> Article 2(6) of the Constitution of Kenya

Article 26 of the ICCPR provides for the protection against discrimination.<sup>165</sup> It states: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” This Article contains a positive obligation on States to take steps against discrimination in all matters dealt with by law. Its enforcement guarantees protection of gay persons by suggesting that States should play a major role in advancing sexual minorities’ rights.

Unlike the ICCPR which is founded on civil and political rights, the ICESCR focuses majorly on the second generation rights of economic, social and cultural security.<sup>166</sup> The ICESCR pledges, among other things the right to work, to fair conditions of employment, to social security, health, housing, education and culture. Kenya ratified the treaty in 1972. Article 2(2) of the treaty provides as follows: “The State Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” This Article serves as a powerful means to guarantee the rights to equality of gay persons.

The Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or punishment was acceded to by Kenya in February 1997. The purpose of the convention is to ensure that measures are in place so as to prevent any acts of torture globally. In 2001, the Special Rapporteur on Torture found after investigation that sexual minorities are victims of torture and other forms of ill-treatment owing to the fact that they fail to conform to socially constructed gender expectations. This was after calls for reports on ill-treatment of minorities at the hands of state authorities. The special Rapporteur concluded that discrimination on the basis of sexual orientation often contributes to the dehumanisation of the victim and therefore, meets the condition to qualify as torture.<sup>167</sup> The Convention mandates that states investigate allegations when its officials have

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<sup>165</sup>International Covenant on Civil and Political Rights

<sup>166</sup> Tooten v Australia United Nations Documents; CCPR/C/50/D/488/1992.

<sup>167</sup> Human Rights Watch, ‘Sexual orientation and gender: Briefing to the 60<sup>th</sup> Session on the UN Commission on Human Rights’ (2004) available at [http://hrw.org/english/docs/2004/02/02\\_global\\_7249.htm](http://hrw.org/english/docs/2004/02/02_global_7249.htm) <accessed on May 30, 2009 (accessed on 9 November, 2018)

committed torture. It also urges states to provide training to law enforcement authorities on torture prevention. In Kenya, the police participate in the persecution of sexual minorities. Gay persons in Kenya are constantly beaten in public and are victims of emotional abuse according to the Kenya Human Rights Council.<sup>168</sup> As a member of the convention, the government of Kenya is mandated to protect the sexual minorities from torture and even degrading treatment by adopting legislative and administrative measures against those committing acts of torture.<sup>169</sup>

### **3.5 Minority rights**

The constitution recognizes that there are minorities and marginalized groups in the country. Article 56 of the Constitution provides that the state shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups; participate and are represented in governance and other spheres of life; are provided special opportunities in educational and economic fields; and have reasonable access to health services and infrastructure, inter alia.<sup>170</sup> However, the term “minority” has not been defined by the Constitution. It could be argued that gay persons fall under the category of minority. As a result of the injustice meted out on gay persons, they can rightfully be equated with groups that have historically been discriminated against for grounds such as race, disability, etc., and thus, they ought to receive the special benefits accrued by these groups. Article 27 of the ICCPR recognizes minorities based on ethnic, religious and linguistic grounds. This is a rather narrow approach to minorities as the term can even cover other grounds such sexual orientation. This is the position of international organs such as the Human Rights Council and the UN Sub-Commission on the prevention of discrimination and protection of minorities.

The Eric Gitari decision that held the denial of the NGO Board to register a gay organisation amounted to a violation of their rights to freedom of expression and association; recognised gay persons as members of a minority group<sup>171</sup> The Petitioner submitted that the Respondents failure to adhere to their constitutional obligations under Article 36<sup>172</sup> infringed on the rights of

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<sup>168</sup> Ibid

<sup>169</sup>Being gay in kenya;the implications of kenyas new constitution for its anti sodomy laws, Courtney Finerty, Cornell Law School, 2013.

<sup>170</sup>Constitution of Kenya 2010

<sup>171</sup> Petition 440 of 2013

<sup>172</sup> Article 36 of the Constitution of Kenya, ‘ Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.



marginalised and minority groups in the Republic of Kenya to which gay and lesbian persons fall.<sup>173</sup> Further, Justice Lenaola while making his judgement recognised sexual minorities as a minority and vulnerable group.<sup>174</sup>

In the famous South African case of *National Coalition for Gay and Lesbian Equality v Minister of Justice*<sup>175</sup>, the Constitutional Court was tasked with reviewing an order made by Witwatersrand Local Division declaring the common law offence of sodomy as unconstitutional. Ackermann J, who delivered the majority judgement, indicated that the Constitutional Court was obliged to conform to the High Court's order declaring invalid the common law offence of sodomy. He held further that gay men were a **permanent minority** in society and had in the past suffered from patterns of disadvantage the consequences of which were severe, affecting the dignity, personhood and identity of gay men at a deep level.<sup>176</sup> He recognised that the sole purpose of the offence of sodomy was to criminalise a particular form of gay expression which failed to conform to the moral or religious views of a section of society.<sup>177</sup> It follows then that Constitutions ought to protect those with unpopular views, minorities and rights that attach to human beings regardless of a majority's views. Therefore, the government has to take action in ensuring that the sexual minorities in Kenya are accorded positions in governance, equal opportunities in employment and access to basic facilities.

### 3.6 Other rights

The bill of rights is expansive and there are many other rights and freedoms accruing to every citizen of Kenya, including homosexuals in Kenya. These rights include; the right to own property, the right to information, the right to a fair trial, consumer rights, freedom of movement, political rights among many others.<sup>178</sup>

Article 43 as read with Article 20(5) of the constitution provides the basic framework for economic and social rights. This includes highest attainable standard of health care and education. In our education institutions there are instances of children and other individuals being expelled due to homosexuality. Homosexuality ought not to be a ground on which the education of an individual

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<sup>173</sup> Ibid par 29

<sup>174</sup> Ibid par 149

<sup>175</sup> 1999 (1) SA 6 (CC)

<sup>176</sup> Ibid par 26

<sup>177</sup> Ibid par 69

<sup>178</sup> Chapter four of the constitution of Kenya.

is curtailed. Homosexuals also need health care just like every other individual. They are denied access to health care on the basis of their sexual orientation yet they face exposure to diseases such as HIV/AIDs and other sexually transmitted diseases. HIV being a national disaster in Kenya, there ought to be no discrimination in administering healthcare and conducting awareness campaigns to those affected in order to curb the spread of the disease.

### **3.7 Conclusion**

A quick scan through the laws of Kenya demonstrates that gay persons are widely excluded in the enabling Acts of the state. This lack of recognition has to large extent contributed to the serious discrimination that the gay persons face in the society. The constitution of Kenya 2010 fails to directly recognize gay persons, however, it provides for a derogative right under article 27 which protects the gay persons from all forms of discrimination.

Failure to recognize gay persons has been demonstrated in the penal code, which only recognizes their acts as criminal acts; the Children Act, which denies them an opportunity to adopt a child; the Marriage Act, which does not recognize same-sex marriages, inter alia. These demonstrations points to the reasons why the society has a serious negative attitude towards gay persons as was illustrated in chapter two of this study. This chapter concludes by stating that the enabling Acts of the state, which fails to recognize the existence of gay persons and try to criminalize gay conducts, are unconstitutional to their entirety as has been illustrated in this chapter. Lastly, this chapter submits that, in order to protect the rights of the gay persons under the law, it is important that the laws of the state first recognise them.

## 4.0 CHAPTER FOUR: COMPARATIVE STUDY BETWEEN SOUTH AFRICA AND KENYAN LAWS ON GAYISM

### 4.1 Introduction

When South Africa's final constitution was promulgated in May of 1996 it became the first in the world to expressly prohibit discrimination on the grounds of sexual orientation.<sup>179</sup> Since then, South African courts have decriminalized sodomy<sup>180</sup>, upheld the right of gay partners to enter into legally recognized partnerships, and to enjoy the marital rights just like those in heterosexual relationships, and ruled in favour of gay employees seeking benefits for partners.<sup>181</sup> The courts also made possible co-parent adoptions by a same sex partner.<sup>182</sup> In September of 1999, South Africa became the first country on the continent to host the International Gay and Lesbian Alliance Conference, and the city of Cape Town is now hailed as the 'gay capital of Africa'.<sup>183</sup> This apparent tolerance contrasts sharply with official homophobia and repression in our country Kenya. In 2015, the Kenyan Deputy President, William Ruto said that the government 'had no room for gays'. Kenya's President Uhuru Kenyatta dismissed gay rights as 'a non-issue' during President Obama's state visit to Kenya. Yet against these and other challenges, the gay and lesbian movement has emerged as a vocal and effective interest group in South Africa's civil society.

Just like Kenya, South Africa is a society so deeply fragmented along lines of ethnicity such that sexual orientation would not be perceived as an issue warranting space on South Africa's already crowded political, social and economic agenda. It is also worth noting that this progressive government and constitution did not reflect the attitudes of most South Africans who did not support gay rights.<sup>184</sup> The government created a gap between its tolerant laws and the conservative social perception of its citizens.<sup>185</sup> A move if adopted by the Kenyan government is likely to result

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<sup>179</sup> Sheila Croucher, 'South Africa's Democratisation and the Politics of Gay Liberation', *Journal of Southern African Studies*, Volume 28, Number 2, June 2002

<sup>180</sup> *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others (CCT11/98) [1998] ZACC 15; 1999(1) SA 6; 1998 (12) BCLR 1517 (9 October 1998)*

<sup>181</sup> Sheila Croucher, 'South Africa's Democratisation and Politics of Gay Liberation'

<sup>182</sup> *Du Toit and Another v Minister for Welfare and Population Development and Others, 2002 (10) BCLR 1006 (CC), 2002 SA CLR LEXIS 23*

<sup>183</sup> *National Coalition for Gay and Lesbian Equality newsletters: Equality, 2, July-September 1998*

<sup>184</sup> Mwanawina Ilyayambwa, 'Homosexual Rights and the Law: A South African Constitutional Metamorphosis' *International Journal of Humanities and Social Science* Vol 2 No. 4 [Special Issue – February 2012]

<sup>185</sup> *Ibid*

to the protection of gay rights. This reasoning informed the study's focus on South Africa to provide a comparative approach as it has enshrined gay rights in its laws despite opposition from its citizens. It could therefore provide lessons for Kenya.

Chapter Four of the Kenyan Constitution enshrines the Bill of Rights.<sup>186</sup> Article 19<sup>187</sup> of the Constitution posits that the rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the State. Article 27<sup>188</sup> lists the grounds on which the state shall not discriminate against a person such as 'race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.' The article conspicuously omits sexual orientation as a ground on which a person should not be discriminated. The lacuna in the law leaves gays unprotected against any discrimination that may be meted against them either by the state or by individuals.

The South African Constitution has the Bill of Rights in Chapter 2. Article 9(3)<sup>189</sup> of the Constitution states that "the state may not unfairly directly or indirectly discriminate against anyone on one or more grounds including race, sex, gender, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth."

This chapter analyzes the legal framework of South Africa with regards to gays. In doing that, it looks at the Constitution and other legislations such as the Marriage Act and the Civil Union Act. It will also look at how the various court decisions have interpreted or influenced South Africa's legal framework on gays. The chapter will start by analyzing the evolution of South Africa's legal system up to the point where gays are accorded equal rights.

## **4.2 Historical Development of South Africa's Laws on Gays**

The laws that criminalized gay relationships can be traced back to the 17th century when the Dutch introduced the Roman Common Law. The law criminalized many sexual acts that were viewed as 'against the order of nature' such as homosexuality and bestiality. The criminal sexual acts were

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<sup>186</sup> Constitution of Kenya 2010

<sup>187</sup> Article 9, Constitution of Kenya 2010

<sup>188</sup> Ibid

<sup>189</sup> The Constitution of the Republic of South Africa, 1996

punishable by death.<sup>190</sup> In *R v Gough and Narroway* held that 'gross acts of indecency between men' were criminal.<sup>191</sup> In 1957, the country passed the Immorality Act<sup>192</sup> that criminalized any acts that were deemed sexually immoral.

The South African government continued to pass strict rules on sexual acts even in the 1960s. In 1966 the government enacted section 20A of the Sexual Offences Act which prohibited 'any male person from committing with another male person at a party any act which can be calculated to stimulate sexual passion or to give sexual gratification.'<sup>193</sup> This amendment empowered the police to raid parties that were suspected to have gays and to arrest them, making the gays feel more harassed. Similarly, the courts continued to view gay relationships as immoral. In *Van Rooyen v Van Rooyen*<sup>194</sup> the court held that lesbianism was immoral and therefore it denied a lesbian mother the right to access her children.

The gay rights movements were the main proponents of nondiscrimination of gays.<sup>195</sup> The Gay Association of South Africa was formed in 1982 as the vehicle for fighting for gay rights.<sup>196</sup> During the fight against apartheid, the gay rights movements worked closely with the African National Congress (ANC).<sup>197</sup> They drew a nexus between discrimination based on race and discrimination based on sexual orientation since in both cases the victims were deprived of their dignity. Notably, the 1955 ANC Freedom Charter had one of its goals as 'to achieve non-discrimination in South Africa.'<sup>198</sup>

The gay rights movements also lobbied for the inclusion of the nondiscrimination based on sexual orientation in the interim constitution.<sup>199</sup> Sexual orientation remained controversial even during the constitutional negotiations as some ANC top officials viewed it as a non-issue.<sup>200</sup> This section

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<sup>190</sup>Pierre De Vos, 'On the Legal Construction of Gay and Lesbian Identity and South Africa's Transitional Constitution' (1996) 12 South African Journal on Human Rights 265.

<sup>191</sup> [1926] CPD 159 161

<sup>192</sup> Immorality Act 23 of 1957

<sup>193</sup> Sexual Offences Act 23 of 1957, s. 20A

<sup>194</sup> [1994](2) SA 325 (WLD)

<sup>195</sup> Jacklyn Cock, 'Keeping the Fires Burning: Militarisation and the Politics of Gender in South Africa' [1989] Review of African Political Economy 50.

<sup>196</sup> *ibid*

<sup>197</sup> Jacklyn Cock. "Engendering gay and lesbian rights: The equality clause in the South African Constitution." In *Women's Studies International Forum*, vol. 26, no. 1, pp. 35-45. Pergamon, 2003.

<sup>198</sup> Cock (n 1390).

<sup>199</sup> *Ibid*.

<sup>200</sup> P Tatchell 'ANC rejects gay rights' (1987) 49 *Labour Briefing* 15

of officials did not support the inclusion of sexual orientation as a ground for non-discrimination. The conservative religious groups also strongly opposed the inclusion of sexual orientation stating that it is immoral and unbiblical.<sup>201</sup>

South Africa became the first country not just in Africa but in the world to allow for nondiscrimination based on sexual orientation.<sup>202</sup> The Bill of Rights was first included in the interim constitution in 1993.<sup>203</sup> Section 8(2) of the interim constitution stated: "No person shall be unfairly discriminated against directly or indirectly... on one or more of the following grounds: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, conscience, belief, culture, language."<sup>204</sup>

### **4.3 The Constitution of South Africa**

The Constitution of South Africa was promulgated in 1996. It has a progressive bill of rights that protects every citizen from discrimination. Being the supreme law of the country, any law that is inconsistent with the Constitution is null and void as was stated in *Minister for Home Affairs v Fourie*.<sup>205</sup> Section 9(3) of the constitution expressly prohibits discrimination of anyone on the ground of sexual orientation. A person therefore, cannot be barred from obtaining any right under the Constitution or any statute just because of their sexual orientation. The Constitution further grants every person the right to dignity. Section 10 states that 'everyone has inherent dignity and the right to have that dignity respected and protected.'<sup>206</sup> Given the constitutional right to dignity, gays can seek redress in court if they feel that that right is breached. The right to human dignity and the right to equality under section 9 are complementary, and one cannot be granted without the other. Section 39<sup>207</sup> states that the courts and tribunals shall promote human dignity and equality.

Section 8(1)<sup>208</sup> of the Constitution says that the bill of rights binds branches of the government and organs of the state. This means that the Bill of Rights must bind any state action or judicial

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<sup>201</sup> Constitutional Assembly annual report 1995-1996 <http://www.constitution.org.za>

<sup>202</sup> De Vos (n 134)

<sup>203</sup> ibid

<sup>204</sup> The Republic of South African. Interim Constitution 1993, s. 8(2)

<sup>205</sup> 1 SA 524, 2005 ZACC 19 - 2006

<sup>206</sup> (n 18 above) s. 10

<sup>207</sup> Section 39(1)(a) "When interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom."

<sup>208</sup> Section 8(1) "The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of state."

decision, otherwise, it is null and void. The chapter goes further to ensure the common law does not conflict with the Bill of Rights. Section 8<sup>209</sup> gives the court the power to develop the common law when applying the Bill of Rights. This means that a court cannot restrict itself to the common law in case the common law infringes on a fundamental right. Section 173<sup>210</sup> also gives the court the power to develop the common law in the interest of justice. The courts have used the Bill of Rights in determining cases where applicants complain about the infringement of their rights.

The South African Constitution also guarantees the freedom of religion. Section 15(1) of the Constitution states that 'everyone has the right to freedom of conscience, religion, thought, belief and opinion.' The question is what happens when the freedom of religion conflicts with the right to non-discrimination on the ground of sexual orientation?

### ***National Coalition for Gay and Lesbian Equality v Minister of Justice***<sup>211</sup>

The issue, in this case, was the constitutionality of section 20A of the Sexual Offences Act and other laws that criminalize homosexual activities. The court declared that the common law offence of sodomy was inconsistent with the Constitution of 1996. Further, the court declared that the offence of committing 'unnatural acts' was unconstitutional. It rightly held that all offences aimed at prohibiting sexual intimacy between gay men violate the right to equality in that they unfairly discriminate against gay men on grounds of sexual orientation. Such discrimination is presumed to be unfair as the Constitution expressly includes sexual orientation as a prohibited ground of discrimination. The court further held that gay persons are a vulnerable minority. Sodomy laws criminalise their most intimate relationships yet they cause no harm to anyone else. This intrusion on the innermost sphere of human life violates the constitutional right to privacy. This was a major victory for gays and lesbians in the country since the court allowed them to conduct their activities without fear of arrest and prosecution. This was in line with section 9(3) of the Constitution.

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<sup>209</sup> Section 8(3)(a) "When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection 2, a court in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right"

<sup>210</sup> Section 173 "The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice"

<sup>211</sup> CC 1998, 3 LRC 648

### *Minister for Home Affairs v Fourie*<sup>212</sup>

The issue in this case was marriage equality. The applicants, Adriaana Fourie and Cecelia Johanna Bonthuys, had sought to have their union recognized. The court, while considering the rights to equality and to non-discrimination held that 'the exclusion of same-sex marriages from the common law definition of marriage amounted to unfair discrimination.' The court further stated that sections of the Marriage Act that only allow heterosexual marriages were unconstitutional as they were in breach of Section 9(1) which gives every person the right to equal protection before the law. The homosexuals deserved the right to equal protection of the law just like their heterosexual counterparts.

Following the judgment, in this case, Parliament was directed to come up with legislation to allow same-sex couples equal rights to marriage. It is, therefore, this ruling that formed the basis for the enactment of the Civil Union Act.

#### **4.4 Civil Union Act**<sup>213</sup>

The Act was enacted in response to the judgment in *Minister for Home Affairs v Fourie*.<sup>214</sup> In the case, the court emphasized the right to non-discrimination based on sexual orientation as guaranteed in the South Africa Constitution. The object of the Act is to allow same sex couples to enter into legally recognized partnerships and to enjoy the marital rights just like those in heterosexual relationships. At the preamble, the drafters of the Act acknowledge Section 9(3) of the Constitution that provides for non-discrimination based on sexual orientation among other grounds. Further, the Act merges the right to human dignity and to equality as provided by the constitution.

The Act defines a civil union as 'the voluntary union of two persons who are both 18 years and older.'<sup>215</sup> This definition departs from the common law definition of marriage which only restricts it to a man and a woman. It seeks to confer legal rights upon parties to unions that do not fall within the common law definition of marriage.

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<sup>212</sup> 1 SA 524, 2005 ZACC 19 - 2006

<sup>213</sup> The Republic of South Africa. Civil Union Act 17 of 2006

<sup>214</sup> (n 26 above)

<sup>215</sup> Section 1 Definition



One of the goals of family law reform should be to give equal legal and social status to parties in gay and lesbian relationships. The Civil Union Act attempts to attain this equality through the recognition of the gay unions. The Act creates two categories of civil unions; that is, marriage and civil partnerships.<sup>216</sup> In *Minister of Finance v Van Heerden*<sup>217</sup> court emphasized the right to equality stating that "the achievement of equality is not only a guaranteed and justiciable right in our Bill of Rights but also a core and fundamental; a standard which must inform all law and against which all law must be tested for constitutional consonance." In recognizing homosexual unions, the Act, therefore, attempts to attain the equality of all persons with regard to marriages.

The Act, however, does not attain full equality for gay marriages. It makes a distinction between heterosexual marriages and homosexual marriages. Critics claim that the distinction places homosexual unions at a second-class. The Act also fails to define the term marriage and only refers to same-sex 'marriages' as unions.<sup>218</sup> Section 6<sup>219</sup> of the Act also gives marriage officers the right to refuse to solemnize civil unions. This puts the same sex couples in a difficult scenario if the marriage officers refuse to solemnize their union. The same sex couples are therefore, left at the mercy of the marriage officers. Consequently, in the case of a conflict between religion and the right of homosexuals to marry, the right to religion and conscience prevails.

#### **4.5 Promotion of Equality and Prevention of Unfair Discrimination Act<sup>220</sup>**

This Act was enacted to give effect to section 9 of the Constitution on Equality and non-discrimination. The Act defines discrimination as 'any act or omission including policy, law, rule, practice, condition, or situation which directly or indirectly (a)imposes burdens, obligations or disadvantage on; or (b) withholds benefits, opportunities or advantages from any person, on one or more of the prohibited grounds.'<sup>221</sup> Equality under the Act entails full and equal enjoyment of all the rights and freedoms under the Constitution.<sup>222</sup> The preamble of the Act provides that "the

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<sup>216</sup>David Bilchit and Melanie Judge, 'For Whom Does the Bell Toll? The Challenges and Possibilities of the Civil Union Act for Family Law in South Africa' (2007) 23 South African Journal on Human Rights 466.

<sup>217</sup> 2004 11 BCLT 1125 (CC)

<sup>218</sup>Vasu Reddy, 'The Same-Sex Marriage Complex in South Africa: Some Conceptual, Gendered and Rights-Based Interpretations' <<http://repository.hsra.ac.za/handle/20.500.11910/5946>> accessed 29 October 2017.

<sup>219</sup> Civil Union Act section 6 "A marriage officer other than the one designated under section 5, may in writing inform the Minister that he or she objects on the grounds of conscience, religion and belief to solemnise a civil union between persons of the same sex, whereupon that marriage shall not be compelled to solemnise such civil union."

<sup>220</sup> Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

<sup>221</sup> *ibid* s. 1

<sup>222</sup>Anton Kok, 'The Promotion of Equality and Prevention of Unfair Discrimination Act: Why the Controversy' (2001) 2001 Journal of South African Law 294.

prohibition of unfair discrimination and the promotion of achievement of equality requires the development of special legal and other measures, of historically disadvantaged individuals, communities, and social groups who were dispossessed of their land and resources, deprived of their human dignity and who continue to endure such consequences."<sup>223</sup> The gay and lesbian community falls into the category of those who have historically been deprived of their human dignity.

Section 24 of the Act gives the State the responsibility of promoting equality, which under section 9 of the Constitution includes nondiscrimination based on sexual orientation. A person can therefore, sue the state where the person feels that he/she has been discriminated. In the case of *Carmichele v Minister of Safety and Security*<sup>224</sup> the courts stated that "there is a duty imposed on the state and all its organs not to perform any act that infringes these rights. In some circumstances, there would also be a positive component which obliges the state and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection."

In *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*,<sup>225</sup> the constitutionality of Section 25(5) of the Aliens Control Act 96 of 1991 was challenged. This section omitted to grant partners in permanent same sex partnerships, the benefits it extended to opposite sex spouses. The Court held that section 25(5) reinforced harmful stereotypes of gays and lesbians. This conveyed the message that gay persons lack the inherent dignity to have their families and same-sex relationships respected. This section was held to discriminate unfairly against gay persons on the basis of sexual orientation and marital status and infringed on their rights to equality and dignity.

In 2002, the South African Constitutional Court upheld the rights of gay persons to adopt children. It did so by declaring the provisions of the Child Care Act and of the Guardianship Act, which reserve adoptions married couples as unconstitutional.<sup>226</sup>

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<sup>223</sup>Ibid (n 161).

<sup>224</sup> (CCT 48/00) [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) para. 44

<sup>225</sup> (CCT10/99) [1999] ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39 (2 December 1999)

<sup>226</sup> *Du Toit and Another v Minister for Welfare and Population Development and Others*, 2002

#### **4.6 Marriage Act of South Africa<sup>227</sup>**

The Marriage Act was enacted in 1961, which was many years before the 1996 Constitution. The Act does not define marriage. However, it has always adopted the common law definition of marriage, being between a man and a woman. The inadequacy of the Marriage Act saw same-sex couples denied the chance to get their unions recognized. Section 31<sup>228</sup> also gives the marriage officers the right to refuse to solemnize a marriage that is against their religious rites.

None of the legal consequences of marriage automatically apply when a same sex couple concludes a life partnership.<sup>229</sup> However, some statutes include same sex partners in the ambit of their provisions. For example, section 1 of the Employment Equity Act 55 of 1998 defines “family responsibility” as the “responsibility of employees in relation to their spouse or partner, their dependent children or other members of their immediate family who need their care and support”. “Partner” is not defined by the Act but may be interpreted to include a same-sex life partner. The Domestic Violence Act 116 of 1998 extends protection to persons who live or lived together in a relationship in the nature of a marriage and therefore includes same sex life partners. Section 27 of the Basic Conditions of Employment Act 75 of 1997 requires that an employer gives an employee three days’ paid leave in the event of the death of the employee’s “spouse or life partner”. The term “life partner” is not defined in the Act but may be interpreted to include a same-sex life partner.

#### **4.7 Right to privacy**

Section 14<sup>230</sup> of the Constitution grants the right to privacy. In *National Coalition for Gay and Lesbian Equality*<sup>231</sup>, Ackermann J held that the criminalisation of sodomy infringed the right to privacy guaranteed in section 14 of the South African Constitution, 1996. He averred that the right to privacy entails the right to establish and nurture relationships without interference from the outside community. The manner in which we give our expression to our sexuality is at the core of

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<sup>227</sup> Marriage Act No. 25 of 1961

<sup>228</sup> Section 31 Marriage Act "Nothing in this Act shall be construed so as to compel a marriage officer who is a minister of a religion or a person holding a responsible position in a religious denomination or organization to solemnize a marriage which would not conform to the rites, formularies, tenets, doctrines or discipline of his religious denomination or organization."

<sup>229</sup> J Heaton, 'South African Family Law 3 ed (Durban, 2010) p 243-247

<sup>230</sup> The Constitution of South Africa Section 14

<sup>231</sup> n 56

the right to private intimacy. If in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy.

It follows then that the state should have no business regulating the sexual activities of its citizens. As such, sodomy laws are in breach of the right to privacy as they tend to criminalise a particular form of sexual expression which failed to conform to the moral or religious views of a section of society.

#### **4.8 Conclusion**

The South African legal system has transcended all major constitutional and legal hurdles in an attempt to promote gay rights. As seen above, their laws greatly recognize gay persons as compared to Kenyan Laws. They have achieved this despite the challenges arising from the perceptions and religious backgrounds of its citizen. The supremacy of the constitution and the rule of law have been allowed to prevail amidst strong opposition. The gay and lesbian movements have played a major role in advancing the struggle of sexual minorities in South Africa. They fought tirelessly for the inclusion of sexual orientation in the Constitution and they were successful, making South the first democracy in the world to include sexual orientation as a prohibited ground of discrimination. The Judiciary has not been left behind. The Constitutional Court has acknowledged the rights of gay persons to equality, dignity and privacy as seen in its judgments. The Legislature as well has amended several statutes to ensure that the rights of gay persons are recognized and protected.

The Kenyan Constitution while recognizing the right to equality and freedom from discrimination, does not list sexual orientation as a ground upon which a person should not be discriminated against. Further, the Kenyan courts have not pronounced themselves on the right of gays and lesbians to enter into unions. The South African Constitution, on the other hand, prohibits discrimination on the ground of sexual orientation. The Civil Union Act also allows same sex marriages. To ensure the equality of gays and lesbians, Kenya must take legislative measures that include amending article 27 of the Constitution to provide for the right to non-discrimination based on sexual orientation. Lastly, it is clear from the discussion that it is easier to protect the rights of gay persons in South Africa as it would be in Kenya. This study submits that this is possible due to the wide legal recognition that gay persons in South Africa enjoy. To enable gay persons in

Kenya to enjoy their rights as their counterparts in South Africa, it would be important that the laws in Kenya are amended to recognize the existence of this group of persons.

## 5.0 CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

### 5.1 FINDINGS

In establishing the legal position of gay persons in Kenya, this study adopted three major research questions as indicated in chapter one of this study. These research questions were chosen selectively to help demonstrate that gay persons are present in Kenyan society but remain unrecognized under the law. In an attempt to make this demonstration, this study made the following findings: first, it is the finding of this study that the debate over gay rights continues with great variation in public opinion about the acceptability of gay rights, laws regulating same sex unions and penalties for sexual behaviors.<sup>232</sup>

Secondly, it is an observation of this study that in Kenya gay persons are still facing social marginalization and cannot participate or come out freely in the society. They face social discrimination which seems well entrenched, and that has become a norm and not an exception. Unlike other citizens who enjoy police protection, they are viewed as 'walking felons'<sup>233</sup> who deserve jail rather than police protection. This is partly a problem of lack of legal recognition as deposited by the argument in this study, thus protecting their rights remain to be a challenge.

Thirdly, in the global arena, Kenyan government, advocates, lawyers, NGO`s and civil societies appear to be fighting for inclusivity and appreciation of diversity, but they fail to recognize the existence of gay persons at the domestic level. This is demonstrated in chapter two. For instance, some Kenyan political leaders are quoted referring to gay issues as a 'non-issue'.

Fourthly, this study observes that gay persons exist in the Kenyan society, however; they continue to be ignored and have stayed unrecognized. Their presence is associated with high levels of immorality. Gay persons are faced with public humiliation, and when found can sometimes face mob justice as the society equates them to criminals. Although it benefits all of us to prioritize

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Adamczyk, Amy, and Cassidy Pitt. "Shaping attitudes about homosexuality: The role of religion and cultural context." *Social Science Research* 38.2 (2009): 338-351. Available at: <http://amyadamczyk.com/publications.html> last accessed on 13<sup>th</sup> March 2016

<sup>233</sup> ibid

inclusivity, gay persons cannot freely participate in society when exposure may cost them their lives. This study attributes this to lack of legal recognition of gay persons.

Fifth, this study finds that there has been a failure to recognize gay persons under the law in Kenya. This observation is demonstrated in a number of ways in the laws of Kenya; first, the penal code is very much in place and the 2010 Kenyan constitution does not contradict nor eradicate Section 162 to 165,<sup>234</sup> which still criminalize homosexual behavior and attempted homosexual behavior between men, referring to it as “carnal knowledge against the order of nature”. The penalty remains 5 to 14 years imprisonment. The Marriage Act 2014 only recognizes marriages between a female and a male whereas the Children Act, 2001 makes homosexuals and unmarried couples ineligible to adopt children.

Sixth, gay persons in Kenya face challenges in accessing medical care due to the societal attitudes towards them. The discrimination is more in public hospitals than it is in private health institutions.<sup>235</sup> The kind of treatment they get in the hospitals makes it difficult for them to go for treatment. Gays living with HIV/AIDS are the major casualties of discrimination. If they had legal recognition, things could have been a little bit better for them.

Seventh, this study finds that the narrative that has continually been put across that gay is a Western issue and that the imperialist are attempting to force it down the throats of Africans is not entirely true. Evidence points out that the narrative that gay is un-African may be a myth well-crafted to justify the injustices meted upon gays. In Kenya, politicians and the government have justified their resistance towards gay rights using the African culture. The narrative cuts across majority of the Kenya's population, who detest gay relationships. Homosexuality is generally considered a taboo or immoral in Kenya.<sup>236</sup> Gay persons are therefore viewed as outcasts for committing a taboo. Contrary to the widely spread myth, evidence points to the fact that homosexuality existed

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<sup>234</sup>Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony and is liable to imprisonment for five years.

<sup>235</sup> Okun Oliech, 'Stigma and Discrimination among gay men living with HIV is rife in public health facilities' *Ureport* (19 December, 2016) <https://www.standardmedia.co.ke/ureport/article/2000227318/stigma-and-discrimination-among-gay-men-living-with-hiv-is-a-rife-in-public-health-facilities>. last accessed on May 23, 2017.

<sup>236</sup> Peter Orenge, 'Kenya's gay movement seeks stamp of approval' *STANDARD Digital*. Available at: <https://www.standardmedia.co.ke/article/2000087924/kenya-s-gay-movement-seeks-stamp-of-approval>. last accessed on May 23, 2017

prior to colonization as has been demonstrated in chapter two of this study. Woman to woman marriage existed in many communities in Nigeria and Kenya.<sup>237</sup> The above evidence of gay cases prior to the colonial time debunks the theory that has often been used to stifle the gay community in Africa. Further, this study finds that gay discrimination on cultural basis is not unique to Kenya but rather it is spread across many African countries. In most Sub-Saharan countries, people believe that people are born heterosexual and that homosexuality is an abnormality.<sup>238</sup> Homosexuals therefore lack any basis for arguing their case or seeking equality. Gays therefore will purely depend on the law to recognize them for the protection of their rights. Without this, they are going to remain victims for some time in this state.

Eighth, this study finds that Kenya is a secular State by virtue of Article 8 of the Constitution.<sup>239</sup> Majority of Kenyans, however, subscribe to the world's major religions. This study observed from its discussion that the Christians and Muslims have entered into an alliance geared to forestall any recognition of gays, a claim they base on their conception of morality. In Kenya discrimination on gays is deeply embedded on religious teachings. Religious leaders incite their followers against gays. The Christians engrossed in the debate considered the pressure to recognize homosexuality as 'a sign of end times'.<sup>240</sup> This stand is similar to the stand of the Kenyan politicians. Several politicians have voiced anti-gay rhetoric; no politician has come out to stand with gays. The media is not left behind in this kind of discrimination. It is an observation by this study that they have failed to enlighten the people on gay rights while some media platforms, especially social media are filled with homophobic sentiments. From 2008 to 2016 Kenya experienced at least ten cases of mob violence against gays. The violence against gays received neither media attention nor public outrage. Gays face various forms of violence. Some of the major forms of violence include: physical violence, hateful publications and hate speech.<sup>241</sup> The gay community in Kenya is always at risk of violence from members of the public. Their problems are further compounded by the

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<sup>237</sup>Roseline M. Achieng'. *Kenya Reconstructing?: Building Bridges of Peace: Post-conflict Transformation Processes as Human Security Mechanisms*. Vol. 65. LIT Verlag Münster, 2012.

<sup>238</sup> *ibid*

<sup>239</sup> Constitution of Kenya. Article 8 "There shall be no State religion"

<sup>240</sup> Adriaan Klinken, 'Gay rights, the devil and end times: public religion and the enchantment of the homosexuality debate in Zambia' *Religion* Vol 43, 2013 - Issue 4

<sup>241</sup>Kenya National Aids Strategic Plan 2009/10 – 2012/13, Nairobi 2009 pg, 6.



reluctance of the police to protect them. The gays fear reporting the cases of violence to the police for fear that the police may arrest them instead of protecting them

Lastly, this study found out that the members of the LGBT community face discrimination and stigmatization. The stigma starts right from the family level and is occasioned by the lack of knowledge on the LGBT community. The lack of open debates on the matter has further entrenched the problem, as people do not appreciate diversity. Gays face stigmatization from friends, workmates and even schoolmates, making them feel like outcasts.

## **5.2 CONCLUSION**

The findings above point to one thing, that the legal position of gay persons in Kenya is not explicit; and that the present law, religion and cultural perspectives are more of discriminative towards them. To change this position, the laws need to be redeveloped to recognize the existence of gay persons. This would be the first step towards protecting the rights of gay persons. This position confirms the hypothesis of this study.

Secondly, this study concludes that the same-sex marriages should be viewed as part of diversity and experimentation in life-style, which are important not only insofar as they are expressions of self-government but also insofar as they enhance self-government. For experimentation and diversity of life-style expand the deliberative menu and bring out more clearly the nature and merits of options on the menu. There is the need to give gay persons legal recognition and promote the liberty to have same-sex marriages. The government has in the past interfered with this liberty and furthermore failed to give gay persons legal recognition; pegging their argument on the societal morality which cannot be justified by the harm principle theory. Religious leaders have joined the government in this as well. They even condemn same-sex marriages as being ungodly and should not be accepted in the society. They both claim that accepting the acts of this group of persons will be harmful to the morals of the society which our laws originate from. The acts have therefore been criminalized in the penal code.

As Mill points out, not every unwelcome consequence for others counts as harm, for instance, the acts of gay persons: they do not harm anyone in particular. Offenses tend to be comparatively minor and ephemeral. To constitute harm, Mill explains that an action must be injurious or set back important interests of particular people, interests in which they have rights. It would be difficult to allude that there are societal rights and interests that would be interfered with if the

liberty to have same-sex marriages is allowed and gay persons legally recognized. Whereas Mill appears to reject the regulation of mere offense, the harm principle appears to be the one justification he recognizes for restricting liberty. It is convincing to take this approach taken by Mill, the only ground for not recognizing gay rights and giving them legal recognition should be when this particular move will cause a greater harm to the society; but where such is not foreseen, then it should not be a problem.

By taking a comparative analysis approach; it is noteworthy to note that the South African laws on gays differ significantly from the legal framework in Kenya. The Kenyan Constitution while recognizing the right to equality and freedom from discrimination it does not list sexual orientation as a ground upon which a person should not be discriminated against. Further, the Kenyan courts have not pronounced themselves on the right of gays and lesbians to enter into unions. The South African Constitution, on the other hand, does not allow discrimination on the ground of sexual orientation. The South African Civil Union Act also allows same sex marriages. To ensure the equality of gays and lesbians, Kenya must take legislative measures that include amending article 27 of the Constitution to provide for the right to non-discrimination based on sexual orientation.

It is evident that the gay persons have not been legally recognized despite being present in the Kenyan society. This could be attributed to the negative attitude that the Kenyan society has towards the gay persons. This group of persons keeps on living in hiding, as the attitude that the society portray towards them is humiliating. The constitution of Kenya 2010 advocates for equality and non-discrimination, but this is not enough to protect this group of persons from the humiliation that comes from the society as has been witnessed in the above discussions. The enabling laws should therefore be enacted to facilitate the recognition and protection of this vulnerable group of persons that exist in the Kenyan society but remain unrecognized.

## **5.3 RECOMMENDATIONS**

### **5.3.1 Legal Reforms**

#### **5.3.1.1 Amendment of the Constitution**

The constitution of Kenya 2010 is the supreme law of the land, and is largely applauded for depicting constitutionalism and the rule of law. The bill of rights encompassed in chapter four of the constitution is expansive in its provisions.

Although as observed above, the Constitution of Kenya 2010 has several provisions that can address the issues of marginalisation and discrimination of sexual minorities, the same Constitution contains provisions which outrightly discriminate against sexual minorities and which Parliament in exercising its obligation to implement international human rights standards ought to have scrutinised and amended. As discussed extensively in this study, the fact that Article 27(4) which identifies grounds upon which no individual should be discriminated against, it does not list sexual orientation as a ground of discrimination, yet the Constitution has been enacted in times when there is a greater movement around the world to recognise and protect sexual minorities. Another conflicting provision in the Constitution that discriminates against sexual minorities is Article 45. The Article authorizes opposite sex marriages but remains silent on same sex marriages, denying gay persons the opportunity of marrying partners of their choice.

To remedy this lacuna in law, it is necessary for the Constitution to be amended to recognize the rights of gay persons. Amending Article 27(4) of the Constitution to include sexual orientation as one of the prohibited grounds of discrimination is necessary to guarantee equality for gay persons. Also Article 45(2) should be amended to extend the right to marriage of same sex partners. Article 255(1) (e) of the Constitution allows for a proposed constitutional amendment if it relates to the Bill of Rights. The amendment may either be by parliamentary initiative or by popular initiative. However, in both instances, the proposed amendment should be approved by a referendum. Gay rights activists may want to take advantage of the mounting calls for a referendum to change Kenya's Constitution. A campaign led by the Dr. Ekuru Aukot-led Thirdway Alliance to amend the Constitution is in the process of gathering one million signatures needed to pass through the first stage of the planned referendum. It would therefore be prudent if the gay community used this opportunity to lobby for legal reforms to support the protection of human rights of gay persons.

### **5.3.1.2 Need to Repeal Discriminative Legislation**

There is need to repeal sections 162, 163 and 165 of the Penal Code which prohibit same sex conduct. These sections taken individually or cumulatively contravene various provisions of the Constitution, specifically: Article 27 on equality and freedom from discrimination;<sup>242</sup> Article 28

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<sup>242</sup>Article 27 of the constitution provides that every person is equal before the law and has the right to equal protection and equal benefit of the law. Gay persons are often seen as inferior beings who have abnormal tendencies. Equality includes the full and equal enjoyment of all rights and fundamental freedoms. With the inferiority that gays are accorded, they are subjected to acts that infringe on their right to equality. Heterosexual persons in Kenya are widely protected. The Marriage Act provides for the different forms of marriage and grounds

on human dignity;<sup>243</sup> Article 29 on freedom and security of the person; Article 31 on privacy;<sup>244</sup> and Article 43 on economic and social rights, specifically the right to health.<sup>245</sup> Alternatively, the disputed provisions contravene common law and constitutional principles (including Articles 10 and 50 of the Constitution) relating to legal certainty, because of their vagueness and uncertainty and consequently cannot operate to create criminal penalties. In accordance with Article 2 of the Constitution, the Constitution is the supreme law of Kenya. These provisions therefore ought to be struck down, as they are void by virtue of their unconstitutionality or in the alternative that they should be interpreted to exclude the relevant conduct. Moreover, the State does not act legitimately in seeking to regulate the most intimate and private sphere of conduct of all Kenyans, regardless of their sexual orientation.<sup>246</sup> Especially when the acts cause no substantive harm to the public as John Stuart Mill would postulate.

As noted above, a number of statutes have contributed to the stigma and discrimination experienced by gay persons. The Marriage Act assumes a heterosexist approach in its definition of marriage which is a voluntary union between a man and a woman. This definition locks out gay couples from having their unions solemnized and is therefore discriminatory and unconstitutional. It should be reviewed to include non-heterosexual marriages.

The Children's Act of 2001 also contains discriminatory provisions. The Act expressly forbids gay couples from adopting children, even where there is no proof that gay couples cannot be suitable

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for dissolution of heterosexual unions. Furthermore, heterosexuality has been legalized. The constitution advocates for equal benefit of the law and therefore the gay persons should be able to enjoy these benefits.

<sup>243</sup>Homosexuals are being stripped of this inherent right to human dignity in many aspects. Other members of the community shun upon them as they are seen as lesser human beings. They are also subjected to degrading acts such as being stripped naked in public (Alexander Ngungu Nthungi v Republic (2010) eKLR). Their families see them as a disgrace and the stigma that surrounds homosexuals is rather hostile. In this kind of atmosphere, the gays live in constant fear and cannot take part in development agenda. They deserve the respect that a heterosexual human being enjoys, as their sexual orientation does not negate their inherent dignity by virtue of being human beings.

<sup>244</sup>The presence of privacy ensures that choices are free of government coercion, intimidation and regulation. However, this study appreciate that the right to privacy is not an absolute right. "The function of the law is to preserve public order and decency, to protect the citizen from what is injurious or offensive, and to provide sufficient safeguards against corruption and exploitation. It is therefore not in the place of law to intervene in the private lives of citizens or to seek to enforce a certain pattern of behaviour when such does not harm the public.

<sup>245</sup> Gay persons remain to be discriminated at health centers, as their act is perceived to be criminal.

<sup>246</sup>The act of gay is done in privacy, which is protected by the Constitution (article 31).

and loving parents. These provisions need to be repealed to allow the right of gay couples to adopt children and raise families just as their heterosexual counterparts.

Article 119 of the Constitution obligates Parliament to legislate petitions from the public. It states that every person has a right to petition Parliament to consider any matter within its authority, including to enact, amend or repeal any legislation. It follows then that gay rights activists may petition Parliament to repeal discriminatory laws and align them to reflect the international human rights law standards and the Constitution.

### **5.3.2 Non-Legal Reforms**

#### **5.3.2.1 Creating awareness**

It is clear that majority of Kenyans, including the elite, are ignorant about homosexuality. The homophobia witnessed in the country is as a result of ignorance based mainly by lack of information and myths. Although a lot of research has been conducted to understand sexual minority rights, such information is lacking from the public domain in Kenya. There is need to create public awareness on gay rights to ensure Kenyans are emancipated on these rights. Government institutions such as the Kenya National Commission on Human Rights with the help of NGOs can conduct large scale education and public awareness campaigns to remove the stereotypes, prejudices and hatred for gay persons from the minds of the people. The Government by putting in place such programs will be fulfilling its international human rights obligations to sexual minorities.

#### **5.3.2.2 The Judiciary**

The judiciary, more than any other organ of government, is charged with the constitutional duty to promote fundamental rights and freedoms. In Kenya, the judiciary has an important role to interpret provisions of the Constitution as well as strike down laws such as the sodomy laws in the Penal code that were made maliciously with the aim to prejudice sexual minorities. The Court Ruling in the Eric Gitari case highlighted how the judicial branch plays a major role in upholding the Constitution and not the popular views or views of a majority. Lenaola J in his judgment averred that Article 159 of the Constitution is clear that the people of Kenya have vested judicial authority in the courts to do justice according to the law. He emphasized that judicial officers have the responsibility to interpret the Constitution and uphold its provisions without fear or favour and without regard to popular opinion.

The judicial branch acts as a check against any form of unconstitutional abuse by the other branches of government. It does this through the principle of judicial review. The power of judicial review is particularly important in the protection of minority rights, including those of gay persons. The judiciary must employ this power to stop excesses by the executive and legislature in order to promote fundamental rights in a democratic and just society. As evidenced in the Eric Gitari case, the High Court of Kenya through the power of judicial review mandated the Non-Governmental Co-ordination Board to comply with its constitutional duty under Article 27 of the Constitution and accord just and fair treatment to gay and lesbian persons seeking registration of an association of their choice.

Lastly, it is evident that there is need to empower the Judiciary to adopt the critical and transformative decision making in interpreting cases touching on gay rights. Many judges and magistrates are part of the old regime, with little knowledge about human rights, more so gay rights. The Judiciary Training Institute needs to carry out intensive training of judges in these aspects in order to give life to the rights of equality, non-discrimination and respect for human dignity of gay persons.

### **5.3.2.3 Political Goodwill**

Political goodwill is essential to the protection of gay rights. Politics play a major role in advancing homophobia in Kenya. Political leaders have uttered statements that tend to dehumanize gay persons. These views continue to be embedded in the minds of the political class yet they are voted in power to protect the interests of those who elected them, including gay persons. As a result, gay persons have been rendered helpless, passive victims of the political processes and objects of prejudice. Kenya's legislature is unwilling to legislate against oppression of gay persons as our legislators are prisoners of popular public opinions and religious rhetoric.

In order to remove the homophobic tendencies from the minds of the people, political leaders need to engage in a decisive, unbiased process of expansive sensitization of its people to the idea that gay persons are human beings and deserve equal protection. Being people of influence, they are better placed in supporting the review and amendments of statutes to protect gay rights. As seen earlier, constitutional amendments can be instituted by parliamentary initiative. A Bill to amend the Constitution shall be said to have been passed by Parliament when each House of Parliament has passed the Bill, in both its second and third readings, by not less than two thirds of all the

members of that House. After which the Speakers of the two Houses of Parliament shall jointly submit to the President the Bill for assent and publication. It follows then that our legislators have the power to bring an end to the stigma experienced by gay persons by amending the discriminatory provisions in the Constitution.

#### **5.3.2.4 Civil Society Organisations**

In the wake of constitutional amendments in Kenya, Civil Society Organizations and Gay Rights Movements should lobby for the review of discriminatory provisions in the Constitution. This will go a long way in alleviating the discrimination experienced by gay persons in the proposed referendum. They can achieve this by coming up with initiatives aimed at sensitizing the public on issues related to sexual orientation and gender identity.

Kenya's human rights movement should take a leaf from South Africa's gay liberation movement. Gay and lesbian activists in South Africa have been at the forefront of challenging the constitutionality of discriminatory laws, lobbying for the passage of legislation to guarantee equal rights for all citizens, organizing voter education drives and maintaining close working relationships with non-governmental organisations. They have also brought populist litigation before the South African Courts, litigation that has led to the decriminalization of sodomy, the right of foreign partners of gay South Africans to the same immigration exemptions as heterosexual spouses etc. If Kenya's civil society adopted a similar approach, then the gay community could finally achieve justice.

Lastly, Civil Society Organisations and Gay rights Movements should play an active role in highlighting the plight of gay persons to the international community. They can achieve these by submitting reports to human rights treaty bodies on the violation of the rights of gay persons under the various international and regional mechanisms. This is likely to capture the attention of the international community which will put pressure on the government to amend its laws in order to avoid sanctions.

#### **5.3.2.5 Government**

As seen earlier, the gay persons are a minority group as they continue to face injustices like other minority groups such as persons with disabilities. As such, the Government should ensure that it adopts affirmative action measures to protect them. This can be achieved by including at least one

commissioner in the National Gender and Equality Commission to represent the interests of gay persons.

#### **5.3.2.6 Good Citizenry**

A compliant citizenry is central to the attainment of social justice. Constitutional amendments in Kenya can be spearheaded by popular initiative signed by at least one million registered voters. Civil Society Organisations are charged with the duty of dismantling homophobia in the country by creating awareness and emancipating the public on gay rights. It is only when the public is educated on the rights of gay persons that they will be able to petition parliament to amend or repeal anti-gay legislation.



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