

An Examination of LGBTQI Rights in Kenya: Gains from the 2010 Constitution

Francis E A Owakah

Senior Lecturer Department of Philosophy

Email: fowakah@yahoo.com/francis.owakah@uonbi.ac.ke

Abstract

Every society has a normative system designed to determine what is right and wrong. Much of what is ordinarily considered right and wrong arises from the conventions that have evolved in many societies are those concerning sexual relations and therefore sexual expression and practices sexuality. Sexual expression and practices are in many societies a taboo topic. Individuals are expected to conform to socially constructed gender roles. Deviation is frowned upon. In Africa, there is a contradiction in attitude towards sex and sexuality. Many people shy away from discussing sex and overt public display of affection is not too common. Yet, African music, dance and other art forms exude eroticism and sexuality. Aspects of sexuality that are influenced by culture include values, such as decisions regarding appropriate sexual behaviours, suitable partner or partners, appropriate age of consent, as well as who is to decide what is appropriate. African nations that claim to base her social values and practices on African culture is Kenya. Therefore, when one expresses their sexuality in a manner that contradicts the norm, it is not only immoral but is also socially criminal. Such individuals become social pariahs who are not expected to enjoy any rights within the community. However, the Constitution of Kenya (2010) by granting an array of rights without exception and including all persons, provides communities hitherto deemed criminal such as the LGBTQI an opportunity to enjoy all the human rights granted under Chapter four of the Constitution. As a result, this Constitution has been lauded as one of the most progressive in Africa in recent times. Given that the constitution is the supreme law in Kenya, then Sections 162, 163 and 165 of the Penal Code Cap 63 Laws of Kenya clearly offends it and regrettably violates the sexual rights of the lesbian gay bisexual transgender queer and intersex (LGBTQI) community in Kenya. In light of this contradiction, repeal of these sections would contribute to promoting the rights of LGBTQI community in Kenya.

Key Words

LGBTQI; African culture; Penal Code; Constitution of Kenya (2010), sex, gender

Introduction

The term gender has time and again invited controversy. Often, one may use sex when they mean gender, and the converse is also true. Leneck, (1994) writing in the *Canadian Medical Association Journal* observes that '[g]ender is a grammatic term referring to whether a word is masculine, feminine or neuter. It has nothing to do with whether an organism is male or female and should never be used in this way. The correct term is sex.'¹ But Smith and Tummon (1994) raise interesting counter to this observation. They argue that the term 'sex' in the phrase 'sex ratio' has specific meaning within the discipline of reproductive toxicology: 'in order to communicate with other researchers in this field, standard terminology is required. Sex ratio is a parameter used to monitor biologic health in animal and human populations and refers to the ratio of biologic males to biologic females. In this case, gender is not a substitute for sex.'² However literature abound warning on confusing gender and sex because that is akin to confusing cultural processes with biological ones. Quite often the word gender is used to refer to the cultural and social meanings attached to being a man or a woman. In this paper, gender will be used to mean the culturally determined cognitions, attitudes, and belief systems about females and males, and it varies across cultures, it changes through historical time, and differs in terms of who makes the observations and judgments.

This distinction is important because equivocating on the two, sex and gender will create confusion in assigning roles when it is not clear what was intended. Thus, sex will refer to biological characteristics of being male or female while gender will refer to the social construct that refers to the internal sense of self, whether an individual perceive themselves either as a man or a woman, or another ascribed gender identity. Significant differences between sex and gender include the following; that, sex is determined by genetics and biology while gender is produced and reproduced by society; that, sex is permanent whereas gender varies over time and across cultures; that, sex is an individual ownership while gender is a social and relational quality.³ The last two, social and relational quality are important. Society,

¹Leneck CM. 1994. Definition of Gender. In *Canadian Medical Association Journal*, Jan 15; 150(2), p. 130.

²Ibid June 15, 1997, p. 156

³Angelica-Nicoleta Neculaesei, 2015. 'Culture and Gender Role Differences.' In *Cross Cultural Management Journal*, Vol. XVII, No. 1: 31-35.

through culture, creates and defines gender roles on which meaning is attached including perception and significance whose attributes are embedded and transmitted through socially constructed values and practices. These social prescriptions become the defining characteristics with potential to express personal identity and who the individual ought to become; either male or female, which prescriptions are derived from society's perception of one's sex, again, either as male or female therefore leaving no room for ambiguous self-presentation by the individual. Consequently males are to engage sexually with females with each expected to perform duties and roles associated with the gender in correspondence with one's assigned sex at birth.

Thus, when it comes to gender perceptions, culture plays a significant role in influencing the thinking, and behaviour towards the members. The social environment into which individuals are born and live, not only shapes their attitudinal, emotional and behavioural reactions, but also determines their perceptions and the social expectations. Indeterminate sex identity is then glossed over and not worth paying attention to since it runs contrary to cultural dictates that reflect differences in gender roles. For society, one has to be male or female.⁴ It is worth noting however that although gender is culturally determined and since culture is dynamic, gender perceptions, views and roles ought to be equally dynamic, hence changing with time and in space. This understanding and perception however limits our experience of gender to culturally defined parameters which substantially ignore the individual. The flip side of this argument will hold that one's gender identity is defined by the personal experience of own gender. If this be granted, then gender identity can correlate with assigned sex at birth, or can differ from it.⁵ As observed above, all societies have a set of gender categories that serve as basis for the formation of individuals' social identity. This defines how individuals relate in to other members of the society. This categorization provides a basis for division between gender attributes assigned to males and females, some

⁴Weidler Erica .M, & Karen E Peterson, 2019. 'The Impact of Culture on Disclosure in Differences of Sex Development.' In *Seminars in Pediatric Surgery*, Vol. 28 No. 5.

DOI: 10.1016/j.sempedsurg.2019.150840; Kuhnle, Ursula & Krahl, Wolfgang 2002. 'The Impact of Culture on Sex Assignment and Gender Development in Intersex Patients.' In *Perspectives in Biology and Medicine*, Vol. 45, No. 1. pp. 85-103.

DOI:[10.1353/pbm.2002.0011](https://doi.org/10.1353/pbm.2002.0011)

⁵Ibid

kind of gender binary to which most individuals adhere. This includes but not limited to expectations of masculinity and femininity, gender identity and sex-gender expression. However, it is also true that some people do not identify with some or even most aspects assigned to their biological sex: some are transgender, gender-queer or even non-binary. In many societies, these are categorized as minorities.⁶

At this point several questions may arise: First, are there cultural premises of discrimination? Second, does the masculinity/femininity divide provide guidance for this discrimination? Finally, is it possible that these cultural premises of discrimination are related to the whole context of socio-cultural mentalities as well as economic and political ideology? It would be risky to consider the values involved by this cultural dimension as defining and determining. But even if this were the case, recourse to law becomes an important component to be considered, because it not only makes us all human and equal, but it confers dignity to member of the human population.

The argument in this paper is that discrimination based on social and cultural paradigms breeds conditions in which human rights are violated on account of difference and discrimination of minority groups among them the LGBTQI. Even if it were possible to justify discrimination on the basis of culture, the very idea that culture is dynamic opens opportunity for a plethora of contradictions. That is how human rights defenders come: to seek the promotion and protection of civil and political rights as well as the promotion, protection and realization of economic, social and cultural rights.

Human rights defenders are people who, individually or collectively with others, act to promote and protect human rights in a peaceful manner. These individuals are identified by what they do and the contexts in which they work. Their work and is to address any human rights on behalf of individuals or groups.⁷ To this end therefore, human rights defenders are instrumental in defending victims of human

⁶See Little William, 12016. **Introduction to Sociology**. 2nd Canadian Edition. Victoria: BCcampus, pp. 296-297.

⁷See General Assembly Resolution A/RES/53/144 adopting the Declaration on human rights defenders

rights violations and ensuring their access to redress and remedy. Through these human rights defenders play a central role in making state policies human rights compliant and authorities accountable.

Since the work of human rights defenders is to create awareness among members of society and pass the message that to be different is not criminal and need not invite discrimination, they have on many occasions stood up to the offending laws in Kenya's statute books in a bid to have the gains of Constitution 2010, apply to all. One such law is Cap 63 Laws of Kenya, in particular article 162 and 165.

Social expectations and discrimination

Social institutions provide the parameters and processes that model human behaviour towards conformity for social harmony. Further, the institutions define values, ideals and a normative system that determine and reinforce order in society. However, despite institutions working together to provide a facilitative environment for individuals to thrive, they cannot entirely define individual personality. The discipline of psychology in explaining human personality defines our individual differences in terms of patterns of thought, feelings and behaving.⁸ In one's personality we read sociability or irritability, we perceive and interact with the sum of one's physical, mental and social qualities in an integrated manner. Personality thus, reveals the sum of the one's ideas, attitudes, and values which collectively determine ones role in society, and forms an integral part of one's character.⁹ The role of social institutions therefore is limited to creating stable patterns of interactions based on mutual expectations and contribute to overall stability. In this way social norms and social roles that are organized in a manner that provide patterns of behaviours which contribute to meeting the basic social needs of society namely; reproduction, socialization, sense of purpose, and preservation of social order.¹⁰ This is what informs moral responsibility. However, one remains free to define what they want to be outside the dictates of society.

⁸See American Psychological Association. 'Personality.'

<https://www.apa.org/topics/personality>

⁹Ibid.

¹⁰Turner, Ralph H. 1988. 'Personality in Society: Social Psychology's Contribution to Sociology.' In *Social Psychology Quarterly*, Vol. 51, No. 1, 1988, pp. 1–10.

<https://doi.org/10.2307/2786979>. Accessed 5 Sep. 2022.

Following, I seek to demonstrate that gender the definition of gender above¹¹ and the attendant social construction which assigns differentiated roles should not be a basis for discrimination. Indeed there is a natural normality responsible for differences at biological level in the same way there is a cultural normality that is linked to certain-gender roles and sexual differences. These two should not automatically reflect ‘inequality’ or ‘discrimination.’ In practice, cultural normality involves a violation of human rights and of free will because cultural assumptions on gender and sexual roles are deemed superior and that this superiority in values ought to take precedence over and above individual will. Thus, when individuals act outside the purview of cultural dictates their feelings and actions are constrained. These cultural limitation can be placed in the category of discrimination as this is perceived as ‘not natural.’ But this is an imposition of culture which demands stability and rigidity of gender and differences in sexual roles, regardless of the will of the individual and the situation. This however, can be perceived differently by people of different cultures.¹² More liberal cultures are tolerating of ‘deviance’ than cultures that rigidly adhere to traditions and customs of the past.¹³ Additionally, different cultures allow for different stages through which individuals absorb and learn to accord with culturally sanctioned practices.

According to the *American Academy of Paediatrics*, gender identity typically develops in three stages:¹⁴

1. Around age two: Children become conscious of the physical differences between boys and girls.
2. Before their third birthday: Most children can easily label themselves as either boy or girl.

¹¹Vide Supra....

¹²Kuhnle, Ursula & Krahl, Wolfgang 2002. Op Cit.

¹³Cultural liberalism is a theory which holds and that supports individuals to choose whether to conform to cultural norms or not. The case of S. M Otieno provide a case example. See J.B. Ojwang & J.N.K. Mugambi, eds. 1989. **The S. M Otieno Case: Death and Burial in Modern Kenya**. Nairobi: Nairobi University Press, pp. 79-88; 101-115; 127-132; 165-179; David William Cohen & E.S. Atieno Odhiambo, 1992. **Burying SM: The Politics of Knowledge and the Sociology of Power in Africa**. Nairobi: East African Educational Publishers; Thoreau, H. D., 1854. **Walden; or, Life in the Woods**. Boston, MA: Ticknor and Fields; Carens, Joseph H., 2000. **Liberalism and Culture', Culture, Citizenship, and Community: A Contextual Exploration of Justice as Evenhandedness**. N.P: Oxford University Press <https://doi.org/10.1093/0198297688.003.0003>, Accessed 30 Aug. 2022.

¹⁴See Jason Rafferty, 2018. ‘Gender Identity Development in Children.’ In *American Academy of Paediatrics*. <https://bit.ly/3RgKr5s>

3. By age four: Most children have a stable sense of their gender identity.

At the third stage, children learn gender role behaviour among those *things that boys do* or *things that girls do*. This stage sets up children to develop a clearer view of their gender over time through the guidance of culture which also reinforces this identity inviting social support, love, and social acceptance. The sexual *dos* and *don'ts* start to emerge, albeit, subtly. This also means that the children from age three have begun aligning socially constructed gender to their sexuality. It is thus safe to state that core gender identity is usually formed by age three. After age three, it is extremely difficult to change, and attempts to reassign it can result in gender dysphoria.¹⁵ Both biological and social factors have been suggested as influencing the process of gender identity.

Research shows that by age six, most children spend their playtime with members of their own sex and gravitate towards sports and other activities associated with their gender. At this point children begin to express their gender identity through:¹⁶

1. Clothing and hairstyle;
2. Preferred name or nickname;
3. Social behaviour that reflects varying degrees of aggression, dominance, dependency, and gentility;
4. Manner and style of behaviour and physical gestures as well as other non-verbal actions identified as masculine or feminine; and
5. Social relationships including selection of significant role models.¹⁷

Even with all these attempts at reinforcing and role modelling there are some children who as they grow and attain adulthood fail to meet these social expectations. To social conformists, these members of the society have a 'problem' that should be addressed. However, this position ignores the fact that an individual's interests and abilities may turn out to be different from the dictates of culture. When these members of the society who show difference express their sexuality the

¹⁵Gender dysphoria is a term that describes a sense of unease that a person may have because of a mismatch between their biological sex and their gender identity. This sense of unease or dissatisfaction may be so intense it can lead to depression and anxiety and have a harmful impact on daily life

¹⁶Jason Rafferty, Op cit.

¹⁷Ibid.

tendency is to subject them to discrimination. This expression of differences in sexuality may then manifest as lesbian, gay, bisexual, transgender, queer-gender or intersex (LGBTQI). These sexual expressions are deemed different, leading to an invitation for discrimination in which an individual's human rights violated.

What Are LGBTQI Rights In Kenya?

LGBTQI rights are human rights that are meant to promote the position of social and legal equality for lesbians, gays, bisexuals, queer and the intersex community in society.¹⁸ LGBTQI rights defenders seek to address injustices against members of this community by focusing on laws that protect and support the rights of this group while condemning discrimination based on one's perceived sexuality. They also focus on laws which justify discrimination and call for their repeal. LGBTQI rights defenders lobby for changes in access to health care, education, public benefits and proposing recognition for different types of relationships and families. Members of the LGBTQI community have the same rights as all other members of the society.¹⁹

There is documented evidence from research that LGBTQI community face challenges in exercising, and enjoyment of their rights and freedoms. These challenges manifest as social, cultural and legal. Appeal to customs and traditions would create further conflicts given the multi-ethnic nature of African nations, Kenya included. The moderating factor in modern nation-states are therefore becomes the legal structure. Consequently, law become the standard upon which right and wrong is to be judged. Laws provide prescriptions on what is acceptable and that which is prohibited. Laws in general target different sectors and prescribe penalties for non-compliance. In Kenya, in spite of the rights and liberties prescribed in chapter four of the Constitution of Kenya (2010),²⁰ the rights and liberties of sexual minorities continue to be violated. Section 162 and 165 of the

¹⁸ See UN. *About LGBTI people and human rights: OHCHR and the human rights of LGBTI people.* <https://bit.ly/3q0VN1i>

¹⁹ GoK, 2010. **Constitution of Kenya.** Arts. 19(2); 20(1&2); **Universal Declaration of Human Rights, 1948.** Preamble, Arts 1 & 2; International Covenant on Civil and Political Rights, 1966. Preamble & Art.1

²⁰ GoK, 2010. **Constitution of Kenya.** Arts. 19-57.

Penal Code, Cap 63 Laws of Kenya make sexual acts between persons of the same sex a crime.²¹

Ideally the LGBTQI community are better protected from violence and discrimination by the Constitution which outlaws discrimination on any grounds.²² However, this is only in theory since in practice the contrary is the case as Kenya's jurisprudence does not seem to adequately address the needs of this community. Extant research documents that members of this community experience challenges accessing health care and during request change their names and gender in legal documents,²³ all on account of sexuality. For example, while same sex-sexual activity among females is not explicitly prohibited by law, lesbians,²⁴ bisexual women and transgender people, are not recognised in the Kenya's Constitution, and they are subsequently discriminated against, covertly, as well as coerced to undergo corrective rape practices by heterosexual males.

The Constitution of Kenya (2010) at article 19 (3) (a) states that rights belong to individuals because they are human beings and are not granted by the state. Although some rights are subject to the limitation clause of article 24 of the Constitution, others cannot be limited at all including but not limited to:

1. Freedom from torture and cruel, inhuman or degrading treatment or punishment;
2. Freedom from slavery or servitude;
3. Right to a fair trial; and
4. Right to an order that a person be presented before a Court of law.

According to article 27 of the constitution, every person is equal before the law. article 27 (4) provides that: The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience,

²¹GoK. **Laws of Kenya**, Cap 63. Arts. 162, 163 & 165; Ghai Jill Cottrell & Yash Pal Ghai, 2018. *Understanding the Equal Rights Case*. <https://www.galck.org/equal-rightscase/>

²²GoK, 2010. **Constitution of Kenya**. Art. 27 (4)

²³ See the ruling in the case of Audrey Mbugua Ithibu vs KNEC dated 7th October, 2014 easily Provide a case example. JR Case No 147 of 2013. <https://bit.ly/3RneKYd>

²⁴Sexual acts between women are not explicitly prohibited in Kenya but the gender-neutral term 'person' in Section 162 of the Penal Code seem to cover lesbian sexual activities making this an offence under Kenya law.

belief, culture, dress, language or birth. Although sexual orientation is not included in article 27 (4) of the constitution, this does not mean that discrimination against an individual because of their sexual orientation is allowed.

Children’s Rights and the Constitution of Kenya, 2010

In discussing human rights we can expand our circle to include as many rights that are covered within the meaning of Chapter four of the Constitution of Kenya (2010) but which society for one reason or another find it proper to violate. For example, what should we do with children who are intersex?

While literature abound on how the Constitution of Kenya (2010) has been lauded as among the most progressive in the world, it needs to stand out and demonstrate inclusion of LGBTQI children.²⁵ It is imperative to note that this progressive constitution has expanded the dimensions of concern to include the children’s rights. The 6th day of July 2022 marked a milestone in the history of human rights in Kenya because a revised Children’s Act of 2022 came into effect.²⁶ The general objectives of the Act are *inter alia*:

1. to give effect to the provisions of articles 27, 47, 48, 49, 50, 51 and 53 of the Constitution on matters relating to children;²⁷ and,
2. to give effect to the State’s obligations concerning the well-being of children in accordance with the general rules of international law, treaties and conventions ratified by Kenya.²⁸

Two things about the Act that we are drawn to this discussion: First, it fulfils the Constitutional requirements regarding Children’s rights by repealing the offending

²⁵See Willy Mutunga, ‘People Power in the 2010 Constitution: A Reality or an Illusion?’ <https://bit.ly/3QichNi>; James Thuo Gathii, 2016. **The Contested Empowerment of Kenya’s Judiciary, 2010–2015: A Historical Institutional Analysis**. Sheria Publishing House; Morris Kiwinda Mbondenyi, Evelyne Owiye Asaala, Tom Kabau, & Attiya Waris, eds. 2015; **Human Rights and Democratic Governance in Kenya: A Post-2007 Appraisal**. Pretoria: Pretoria University Law Press; Elizabeth A. O’Loughlin 2017. ‘Kenya’s Constitution in a Global Context.’ In *International Journal of Constitutional Law*, Volume 15, Issue, pp. 839-848. <https://doi.org/10.1093/icon/mox062>

²⁶GoK, 2022. The Children’s Act.

²⁷Ibid. Arts. 27, 47, 48, 49, 50, 51 and 53

²⁸Ibid Art. 2 (5); UN, 1989. **Convention on the Rights of the Child (CRC)**; AU, 1990. **African Charter on the Rights and Welfare of the Child (ACRWC)**, 1990.

sections in the old Act,²⁹ and, second it grants equal rights and recognition to intersex people as the third gender with an ‘I’ gender marker in response to the gender.³⁰ This makes Kenya the first African country that has granted the intersex community this universal right. The new law requires intersex children to be treated with dignity and have equal access to basic services like medical treatment and education, in addition to social protection services as a special need. It also requires the accommodation of intersex children in child protection centres and other facilities. This is in contrast to the repealed Children’s Act which did not make any provision for such children.³¹ This is key among the gains deriving from the Constitution of Kenya (2010). The current contention is that these same measures ought to be extended to adult members of the LGBTQI community, the spirit being to uphold their human rights. The reasoning here is that soon these children will become adults and fall outside the meaning of the Children’s Act. What happens then when the society is frowning on their sexuality since it is not identified in the constitution as warranting acceptance and recognition?

The Status of LGBTQI and the Law in Kenya

Laws affecting the lesbian, gay, bisexual, transgender and intersex (LGBTQI) community vary greatly by country or territory; everything from the legal recognition of same-sex marriage,³² to the death penalty as punishment for same-sex romantic/sexual activity or identity.³³ The Penal Code, Cap 63 Laws of Kenya describes crimes and offences and punitive measures. Laws that affect LGBTQ people include, but are not limited to, Sections 162 (a) (c); 163 and 165.³⁴

²⁹ See Children Act, 2001, Cap 141 Laws of Kenya (Act No. 8 of 2001, L.N. 23/2002, Act No. 8 of 2010, Act No. 12 of 2012)

³⁰ Ibid. Section 21

³¹ GoK, 2001. **The Children’s Act**.

³² In 2001, the Netherlands became the first country to legalize same-sex marriages. Belgium followed suit in 2003 and granted equal rights to same-sex married couples. As at 2022, there are just about 29 countries that allow same-sex couples to marry. Costa Rica is the latest country to pass legislation making it the first Central American nation to allow same-sex marriage in May 26, 2020. See ‘The 29 countries around the world where same-sex marriage is legal.’ *Business Insider Africa* <https://bit.ly/3dLqBQP>

³³ In February this 2022, Angola’s President Joao Lourenco signed into law a revised penal code to allow same-sex relationships and bans discrimination on the basis of sexual orientation. In June last 2021, Gabon reversed a law that had criminalised homosexuality and made gay sex punishable with six months in prison and a large fine. See where is homosexuality still outlawed? <https://bbc.in/3wdIiiz>

³⁴ Kenya Law Reporting. **Penal Code Cap 63 Laws of Kenya**. <https://bit.ly/2BANFhX>

The Penal Code Cap 63 of the Laws of Kenya is an Act of Parliament that sets out to establish a code of criminal law. Since this paper is concerned with articles 162(a) &(c), and 165, an understanding of its requirement is necessary.

Article 162 defines unnatural offences as;

- a. a person having carnal knowledge of any person against the order of nature;
or
- b. a person having carnal knowledge of an animal; or
- c. permitting a male person to have carnal knowledge of him or her against the order of nature.

By engaging in these acts, one is guilty of a felony and is liable to imprisonment for fourteen years:

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

- i. the offence was committed without the consent of the person who was carnally known;
- ii. the offence was committed with that person's consent but the consent was obtained by force or by means of threats or intimidation of some kind, or by fear of bodily harm, or by means of false representations as to the nature of the act.³⁵

Article 163 states that if a person attempts to commit unnatural offences specified in section 162 they are guilty of a felony and is liable to imprisonment for seven years.³⁶ Article 165 addresses indecent practices between males. It states that any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempt 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.³⁷ The wording of Section 162 (a) and (c) 'carnal knowledge against the order of nature' is read to mean any sexual activity between two or more persons that does not

³⁵Kenya Law Reporting. Penal Code, Cap 63 Laws of Kenya, Art. 162.

³⁶Ibid., Art. 163.

³⁷Ibid., Art. 165.

involve the penis penetrating the vagina. This includes anal sex, oral sex,³⁸ frottage,³⁹ thigh sex, hand-jobs, and anilingus.⁴⁰ By extension, the said Section makes it an offence for both homosexual and heterosexual couples to participate in the sexual activities described above. Sections 162 (a & c) and 165 of the Penal Code ought to apply to all Kenyans regardless of who they have sex with. However, it is curious that these laws affect Kenyans differently depending on their sexual orientation, gender identity and expression. For example, although Section 162 (a & c) makes it a crime to have ‘carnal knowledge against the order of nature,’ regardless who a person has sex with, it has only been applied to cases where two adults of the same sex have agreed to have sex with each other in private. Article 31 of the Constitution Kenya 2010 holds that ‘every person has the right to privacy which includes the right not to have:

1. their person or property searched;⁴¹
 2. their possessions seized;⁴²
 3. information relating to their family or private affairs required or revealed;⁴³
- or,
4. the privacy of their communication infringed.⁴⁴

However, a few questions may arise, including but limited to: how is it possible that the privacy of individuals suspected to be of a different sexual orientation can be violated just because they are different? Does Kenya apply two sets of laws: one, for those who are in agreement with what is claimed to be African culture, and another for those who wish to have expression outside this African culture? What happens to the application of the law in which ‘[e]very person is equal before the law and has the right to equal protection and equal benefit of the law where equality includes the full and equal enjoyment of all rights and fundamental freedoms?’⁴⁵

³⁸Oral sex involves using the mouth to stimulate the genitals or genital area of a sex partner. Types of oral sex include the penis (fellatio), vagina (cunnilingus), and anus (anilingus). See, Centres for Disease Control and Prevention (CDC). <https://bit.ly/3KKgW9P>

³⁹This involves sexually rubbing and touching a clothed body part as a way of achieving sexual Pleasure.

⁴⁰This involves sexual stimulation of the anus by the tongue or mouth.

⁴¹GoK, 2010. **Constitution of Kenya**. Art. 31(a)

⁴²Ibid, art. 31(b)

⁴³Ibid, art. 131(c)

⁴⁴Ibid, art. 131(d)

⁴⁵Ibid, art. 27

The article is written in the knowledge of an existing debate regarding whether there is a substantial distinction between law and morality. The first holds that all law is based on morality and the second that there are areas of overlap between the two.⁴⁶ The article adopts the position which appeals to language and would present the best distinction as to what is legal and what is moral. Much of the legal pronouncements are couched in a language of commands while that of morality seeks to appeal to what ought to be right hence appealing to reason. Immanuel Kant's categorical imperative would be a case in point. Kant's categorical imperatives is based on an absolute prescription to which all persons must follow, regardless of their desires or extenuating circumstances. He advises that one should act only on a maxim that one would wish is made universal law. As morals, these imperatives are binding on everyone. This makes the language of morality a prescriptive one.⁴⁷

It is this prescriptive sense found in Kant's categorical imperative that the language of human rights has adopted. Notably, the human rights language prescribes what others ought to do or refrain from doing, so that every individual enjoys their human rights as human beings. In our case the idea that sexual activities between two consenting adults constitutes 'gross indecency' fails to meet the threshold of rationality. But even as irrational as it may look, the violation of LGBTQI is justified on some hidden and vague framework called 'African culture.' Our own experience as Africans reveal that in certain African cultures, even if not common activities such as holding hands, hugging, kissing, dancing together, and even sleeping in the same bed by same sex persons was tolerated.⁴⁸ The contradiction then obtains because according to Section 165, the aforementioned activities constitute criminal offences requiring punishment.

Although a few people have been charged under Sections 162 (a) and (c) and 165, these same laws are used to justify violence and discrimination against members of the LGBTQI community. It is for this reason these provisions have been subjected to

⁴⁶See H. Odera Orika, 1990. **Ethics**. Nairobi: University of Nairobi Press, pp. 76-80.

⁴⁷See R. M Hare, 1952. **The Language of Morals** Oxford: Oxford University Press, 1952; Kant Immanuel, 1998. **Groundwork of The Metaphysics of Morals**, translated by Mary J. Gregor with an introduction by Christine Korsgaard. Cambridge: Cambridge University Press, p. 421.

⁴⁸Brenna M. Munro, 2017 'States of emergence: Writing African female same-sex sexuality.' In *Journal of Lesbian Studies*, 21:2, 186-203. DOI: [10.1080/10894160.2016.1148471](https://doi.org/10.1080/10894160.2016.1148471)

civil, political and judicial contention in Kenya with different parties advancing conflicting arguments.

One case that has attracted public attention on the human rights violations of the LGBTQI community is that of Eric Gitari vs Attorney General,⁴⁹ whose judgement was delivered at the High Court, Constitutional and Human Rights division in Nairobi on 24th May, 2019. Without going into the pleadings, I turn briefly to the judgement which makes quite some interesting reading.

The petition case was filed in the year 2016 by an activist, Eric Gitari, and other organizations working for the rights of LGBTQI in Kenya. Their main contention was that Sections 162 (unnatural Offences) and 165 (indecent practices between males) of the Kenyan Penal Code violated article 27 of the Constitution of Kenya (2010) which guarantees the right to equality, non-discrimination, human dignity, security, privacy, and health for all its citizens. The Attorney General on behalf of the Government held that whereas it does not support any form of discrimination against the LGBTIQ community, the Government considers same sex relations an affront and contrary to Kenyan culture and morals.

In its judgement, the High Court dismissed the petition on the ground that there is no substantial evidence to prove that members of the LGBTQI community have been discriminated against. The Court further held that decriminalization of same-sex relations would be contradicting article 45 (2) of the very constitution the petitioners were relying on.⁵⁰ Consequently, the Kenyan High Court upheld Sections 162 and 165 of the Kenyan Penal Code. While this interpretation may be appealing to those who are offended by same sex relationships, it is important to point out that these are acts of two consenting adults whose actions should be respected whether these complies with social expectations or not.⁵¹ The very fact of universalizing human rights make them:

...rights [that] we have simply because we exist as human beings. (T)hey are not granted by *the* state. These universal rights are inherent to us all, regardless of nationality, sex ...ethnic origin,

⁴⁹See **Petition number 150 of 2016**.

⁵⁰GoK, 2010. **Constitution of Kenya**. Art. 45 (2) marriage is defined as act between persons of the opposite sex and not the same sex.

⁵¹GoK, 2010. **Constitution of Kenya**. Art. 27.

colour, religion, language, or any other status. They range from the most fundamental—the right to life, to those that make life worth living, such as the rights to food, education, work, health, and liberty.⁵²

By becoming parties to international, regional or even local human rights instruments, states assume obligations and duties under international law to respect, protect, and to fulfil human rights. In which case the obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. While the obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights.⁵³ Any other way of looking at the law within the framework of human rights becomes faulty.

This argument therefore makes the judgment of the Kenyan High Court constitutionally and morally obnoxious if indeed one has to appeal to both Kenyan morality and the Constitution of Kenya (2010). I argue and submit that the greatest moral parameter should be appeal to human dignity. This ought to barricade the boundaries of any morality. Article 27 certainly speaks to the core of the UDHR; principles of equality,⁵⁴ non-discrimination,⁵⁵ human dignity,⁵⁶ security,⁵⁷ privacy,⁵⁸ and health⁵⁹ for all its citizens. A plain reading of article 27 (4) reveals that the state cannot discriminate against *any person on any ground*. This is a categorical directive to the interpretation and meaning of the intentions of the framers of the Constitution of Kenya (2010): that any form of discrimination is unconstitutional. However, the High Court thought otherwise. The court equally based its judgement on a speculative principle in the Kenyan culture; that Kenyan culture may at critical moments become superior to the Constitution of Kenya (2010).

⁵²See UN, What are Human Rights. <https://www.ohchr.org/en/what-are-human-rights>

⁵³ See Alston, Phillip, 1987. 'Out of the Abyss: Challenges Confronting the New U.N. Committee on Economic, Social, and Cultural Rights.' In *Human Rights Quarterly*, 1987, Vol. 9, No. 3, pp. 332-381; Nelson, Paul J. & Ellen Dorsey, 2008. *New Rights Advocacy: Changing Strategies of Development and Human Rights NGOs*. Washington, D.C.: Georgetown University Press.

⁵⁴UN. 1948. **UDHR**, art. 1.

⁵⁵ *Ibid.* Art. 7

⁵⁶*Ibid.* The Preamble

⁵⁷*Ibid.* Arts. 3 & 22

⁵⁸*Ibid.* Art. 12

⁵⁹*Ibid.* Art. 25

A research by Muller *et al*, (2021) on assessment of physical and sexual violence experienced by sexual and gender minorities in nine African countries revealed that of the 3798 participants, 23% were gender minorities, 20% were living with HIV, and 18% had been coerced into marriage. Of all the participants, 56% had experienced physical or sexual violence in their lifetime, and 29% in the past year.⁶⁰ These figures are telling: being in the sexual minorities as are LGBTQI in Kenya opens them violence. This violence is based on a culture that criminalises a minority and leads to violation of human rights on account of one has a different sexual expression.

The Impact of Penal Code on LGBTQI Rights

Henry Odera Oruka (1996) has observed that the question of right is closely related to the question of need, such that to say X has a freedom or right is to imply that X has to fulfil a certain need.⁶¹ In discussing needs, Oruka distinguishes between primary and secondary needs.⁶² He categorises sex as a primary need only when it is performing the biological function necessary for procreation. This translates to sexual freedom which falls under economic freedoms. Sex as pleasure is a secondary need hence translates to secondary freedom.⁶³ He holds that the significant difference between primary and secondary freedoms is that ‘...when any of the rights under the primary category comes into conflict with the elements under secondary freedoms, then ...secondary freedoms should retreat.’⁶⁴ Clearly the LGBTQI case falls under what Oruka is referring to as a secondary need that should be fulfilled but it is not basic. When the LGBTQI community enjoy this right it does not infringe on the rights of others, neither is it injurious. Those having different sexual expressions are free and consenting adults. Granted the constitutional requirement at article 27 that: ‘the State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience,

⁶⁰Müller, A., Daskilewicz, K., Kabwe, M.L. *et al*, 2021. ‘Experience Of And Factors Associated With Violence Against Sexual And Gender Minorities In Nine African Countries: A Cross Sectional Study.’ In *BMC Public Health* 21, 357. <https://doi.org/10.1186/s12889-021-10314-w>

⁶¹Oruka, H Odera, 1996. **The Philosophy of Liberty: An Essay on Political Philosophy**, 2nd ed. Nairobi: Standard Textbooks Graphics and Publishing Company, p. 59-82

⁶²Ibid. p. 60

⁶³Ibid. p. 62

⁶⁴Ibid p. 62.

belief, culture, dress, language or birth'⁶⁵ then it becomes obvious that this negates the dictates of the Penal Code Cap 63 of the Laws of Kenya. However 'if sexual freedom as pleasure does not cause anyone harm, then I ought to be free in the most absolute sense to exercise it.'⁶⁶ A number of questions may arise here:

- a. Did Sections 162 (a & c) and 165 envisage any harm to the community when individuals exercise their sexual rights?
- b. What informed this law?
- c. Is sex only practiced for procreation? Aren't there other forms of sexual expression available to animals and specifically human species?

In its application, the Penal code offends a number of rights that individuals should be left to enjoy as presented in the UDHR accruing to all human beings. Among these are:

1. Privacy: Consensual sexual conduct between adults in private without external intrusion;
2. Dignity: Inhuman treatment e.g. public stripping, forced anal testing, denied personhood, right against self-incrimination;
3. Health: positive and respective approach to sexuality and sexual relationships as well as possibility of having pleasurable and safe sexual experiences free from coercion, discrimination and violence;
4. Equality and non-discrimination; and,
5. Freedom and security of the person.

Below I seek to express further arguments within the doctrine of the supremacy of the constitution.

The Supremacy of the Constitution

The Constitution of Kenya (2010) declares that: '[t]his Constitution is the supreme law of the Republic and binding all persons and all State organs at both levels of government.'⁶⁷ A constitution is the fundamental and supreme law of any nation hence any law that conflicts with the law as laid down in the constitution is void to

⁶⁵ GoK, 2010. **Constitution of Kenya**. Art. 27(4).

⁶⁶ See Oruka, 1996. Op. Cit. p. 62.

⁶⁷ GoK, 2010. **Constitution of Kenya**. Art. 2(1).

the extent of the inconsistency.⁶⁸ A nation's constitution is the mother of all laws because other laws emerge from it and therein lies their validation. It is in the constitution that one finds a framework for governance that defines how the government is formed and run. In general terms, it is taken that constitutional supremacy abhors the idea that any other law can exist within the same jurisdiction when it is inconsistent or contradicts the dictates of a constitution. As things stand in Kenya, the Penal Code Sections 162, 163 & 165 stand in contradiction to the Constitution, and their application is clearly unconstitutional. However, the High Court in Kenya holds otherwise.

In the example of the case of *Eric Gitari Vs the Attorney General*, the Court at paragraph 244 observed that:

The Constitution gives prominence to national values and principles of governance which include human dignity, equity, social justice, inclusiveness, equality, human rights⁶⁹ and Rule of law⁷⁰ Leadership and Integrity,⁷¹ Values and Principles of Public Service,⁷² entrenchment of exercise of Judicial authority in the Constitution⁷³ and Independence of the Judiciary⁷⁴ and confers sovereignty to the people of Kenya to be exercised on their behalf by State Organs to perform their functions in accordance with the Constitution.⁷⁵

In making this observation the LGBTQI community had a lot of hope, that finally the courts were about to dispense justice. This is what courts all over the world are called upon to do, bridging the gap between what the law states and what it is intended to be. However, at paragraph 288 of the judgement, the court made a finding that Kenya's Constitution 'only prohibits unfair discrimination.' And by unfair discrimination it meant:

... differential treatment that is demeaning. This happens when a law or conduct, for no good reason, treats some people as inferior or less deserving of respect than others. It also occurs when a law or

⁶⁸Ibid. art. (4).

⁶⁹Ibid. art. 10.

⁷⁰Ibid art. 259.

⁷¹Ibid. Chapter 6.

⁷²Ibid art. 232.

⁷³Ibid. art. 159.

⁷⁴Ibid. 160.

⁷⁵Ibid. art. 1.

conduct perpetuates or does nothing to remedy existing disadvantages and marginalization.⁷⁶

This was quite a curious observation. In *Minos*,⁷⁷ Plato holds law as involving principles of justice and right. Conceiving law in this manner implies that some of the fundamental characteristics defining law should of necessity include morality, justice, and fairness. Evil legal systems or evil laws are to be disqualified as law in this view.⁷⁸ Immanuel Kant in his categorical imperative has two formulations:

Act only in accordance with that maxim through which you can at the same time will that it become a universal law.⁷⁹ So act that you use humanness, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means.⁸⁰

Kant is presenting a moral position in which reason commands and constrains us absolutely obeying moral dictates without regard to our preferences or empirical features or circumstances. Thinking unconventionally and discrimination based on this premise is prioritising our preferences and using them as standards for judging the morality of others. Instead, all laws ought to be fair and just. In all, the judgement was obeying the preferences of the majority and disregarding those of the minority.

It is true that the law serves many purposes. Among these are: establishing standards; maintaining order; resolving disputes; and, protecting liberties and rights. It is also true that there are wide varieties of laws: those created through legislations; those created by administrative agencies; and those created from tradition, or common law, and finally, case laws, those that arise from judicial pronouncements directing how laws should be interpreted. These are all useful. They help in protecting the day-to-day life activities. However, the framework of human rights demands that laws should first and foremost protect individual rights and liberties and this is contained in the Universal Declaration of Human Rights

⁷⁶Kenya Law Report. Judgment in **Petition No. 150** of 2016, para. 288.

⁷⁷ See Plato, 1925. 'Minos 313 a.' In **Plato in Twelve Volumes**, Vol. 9 translated by W.R.M. Lamb. Cambridge, MA, Harvard University Press; London, William Heinemann Ltd.

⁷⁸Ibid.

⁷⁹Immanuel Kant, 1952. **The Critique of Practical Reason**. Chicago: The University of Chicago Press, p 421.

⁸⁰Ibid p. 429.

UDHR),⁸¹ and acclaimed international human rights instrument,⁸² the African Charter on Human and Peoples Rights (ACHPR)⁸³ and chapter four of the Constitution of Kenya⁸⁴ which ensures and guarantees several important protections.

Conclusion

The Constitution of Kenya (2010) provided Kenyan citizens with a new lens to use when looking at society. The advantage with this document is that while broad in scope it not only brings forth a new architecture for managing public affairs but also hands the current and future generation a refreshing way of looking at human rights, away from the independent constitution that bothered least with human rights. One fundamental question that arises among practitioners and human rights defenders is: Can there be any good reason for imposing on fellow citizens a type of intrusion, humiliation, or even persecution? In other words, is there a social or legal justification for discriminating against fellow citizens when and while the constitution serves all? Considering that the Constitution provides for right to privacy, dignity, and to equal treatment, to engage in profiling the LGBTQI community and denying them rights and freedoms is tantamount to interrogating one's private relationships which is an assault on one's dignity.

Similarly, although *in law*, heterogeneous couples ought to be equally prosecuted for one of the Penal Code offences (engaging in anal sex), but *in reality* it does not happen. According to the Penal code, anal sex is described as unnatural. This is another example of applying the law discriminately

Under the Constitution of Kenya (2010), members of the LGBQ community have the same rights as all members of the Kenyan society. They have equal rights in society as human beings. They however face challenges when it comes to exercising their rights, just because they are different. Although chapter four provides for robust and comprehensive rights that are to be enjoyed by Kenyan citizen, the LGBTQI seem to be silently exempted. Being lesbian, gay, bisexual, transgender,

⁸¹See UN, 1948. UDHR.

⁸²Ibid. Preamble, articles, 1 & 2 among others

⁸³See AU, 1986, **The African Charter on Human and Peoples Rights**. Preamble & art. 2

⁸⁴GoK, 2010. **Constitution of Kenya**. Chapter Four, arts. 19-57.

intersex or queer is not a crime because it is a protected freedom according to article 33 of the constitution. The article guarantees freedom of speech and expression though some laws make homosexuality a crime, it should be noted that these arrangements are private, consensual and between willing adults. Disregarding this guarantee of freedom and criminalizing sexual expressions by the LGBTQI is clear violation of the constitution. When consensual same sex sexual conduct is criminalized under the sections of the law cited above,⁸⁵ they create a misguided perception in society that LGBTQI persons are criminals. This perception drives further the perpetuation of human rights violations and acts of violence against the LGBTQI who are innocent citizens. By making private consensual same-sex conduct a crime, Sections 162 and 165 interfere with the lives of individuals who are freely exercising their rights to sexual expression. A person's sexuality is an important part of an individual who when not fully and freely able to express themselves is negatively affected in their search for happiness. Laws that make adult, private and consensual same-sex conduct a crime lead to violence and discrimination against individuals on grounds of their sexuality. Additionally, in some cases in Kenya, members of the transgender and intersex community have faced violence and discrimination after being mistaken for being gay, lesbian, or bisexual.

The making of the Kenyan 2010 Constitution involved ordinary citizens striving to reject and revise the then existing social order and redefine a new social, economic, cultural, and political institutions and order for themselves. On examination the constitution of Kenya (2010) is no doubt a radical document that looks to a future that is very different from Kenya's past, both in its values and practices. One would interpret the vision of the constitution as:

1. A reconstitution or reconfiguration of the Kenyan society
2. A nationhood premised on unity and integration, while respecting diversity;
3. A democracy and framed institutions that serve the people and does not enslave them; prioritizing integrity in public leadership;

⁸⁵Penal Code CAP 63 Laws of Kenya articles 162, 163 & 165

4. A bill of Rights that provides for economic, social and cultural rights to reinforce the full enjoyment human rights and the power to radically mitigate the status quo and signal the creation of a human rights society in;
5. Reflecting the will of the people for fundamental and radical changes through the implementation of the Constitution.

The LGBTQI Community in Kenya is diverse and different, just like all of people cannot hold same views on society, hygiene and cuisine. People differ in their approach to life, work and social activities and therefore to express homogenous response to the LGBTQI would be community would be erroneous. Being a minority community, the LGBTQI is expressing difference within diversity. Society should respect this if in fact it considers and value humanity, if for no other reason but by the fact that the LGBTQI community are members of the larger human community. It was in this article that laws function to bring harmony in the society. These social harmony allows for creation of a framework of generating rules that help in resolving disputes between individuals, setting standards, and maintaining order in society. These do not in any way override the human rights function. Ultimately, the Constitution of Kenya (2010) grants rights to all. We are all human. Let all enjoy human rights

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