

**Decriminalisation of consensual same sex conduct: A missed opportunity in
Kenya, Progress in Botswana**

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Summary

Lesbian, gay, bisexual, transgender and queer (LGBTQ) people in Kenya face various challenges including rights violations, discrimination and violence which this thesis argues are in part due to the existence of Penal Code provisions that criminalise consensual same sex conduct between adults.

This thesis seeks to answer the question, how would decriminalisation of consensual same sex conduct between adults contribute to an important step towards the advancement of the rights of the LGBTQ community in Kenya. This thesis highlights the existing international human rights framework and argues that Kenya is failing in its regional and international law obligations by allowing the existence of criminalisation provisions in the Penal Code.

Kenya and Botswana share the same colonial history and thus it is unsurprising that their Penal Codes contain(ed) similarly worded provisions criminalising consensual same sex conduct between adults. This thesis explores the advocacy towards decriminalisation in both countries zeroing in on comparing the strategic litigation cases filed by civil society and members of the LGBTQ community in their respective High Courts as part of a wider advocacy strategy and the courts' reasoning in judgments released weeks apart in 2019. It goes on to argue that the advocacy win in Botswana and loss in Kenya were results of different legal and political factors in both countries, and in order to substantiate this argument, the thesis briefly analyses and compares the prevailing legal, social and political climates.

In the conclusion, this thesis reiterates Kenya's international law obligations and the importance of decriminalisation as a first step towards enhancing protection of the rights of LGBTQ people in Kenya and easing the work of activists and organisations seeking to promote the protection of LGBTQ rights.

Introduction

Criminalisation of consensual same sex conduct between adults continues to happen globally in 68 UN members states including Kenya¹ despite a global shift towards decriminalisation and increase in discussions on how to enhance the protection of the rights of LGBTQ people.² Homosexuality in Kenya, like in many other African countries, is termed as being ‘un-African’ and a western import by some in the country³ even though some scholars such as sociologist Stephen O. Murray, have written on the existence of same sex relations in pre-colonial Africa.⁴ Whether homosexuality existed in pre-colonial Kenya is a separate discussion, what is undisputed however is the fact that criminalisation laws are the western import introduced in Kenya through the Penal Code during the British colonial times.⁵

This thesis examines criminalisation as a human rights issue. It argues that the existence of law provisions that criminalise consensual same sex conduct, even in the absence of high rates of prosecutions, constitutes a violation of the rights to privacy, equality and non-discrimination for LGBTQ people, putting Kenya in direct violation of its obligations under regional and international human rights law. An examination of the impact of criminalisation on the lives of LGBTQ people and organisations seeking to promote LGBTQ rights is used to support this argument. Discrimination, harassment, exclusions and even violence against LGBTQ people has necessitated a push towards decriminalisation of consensual same sex conduct and the focus of this thesis will be on Kenya and Botswana.

Botswana is the chosen comparator for this thesis because it is legally bound by the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples’ Right (African Charter) just like Kenya. Both Kenya and Botswana were British colonies up until 1963 and 1966 respectively, and have penal codes enacted during the

¹ ‘State-Sponsored Homophobia|Global Legislation Overview Update’ (ILGA World 2019) Pg.47 <https://ilga.org/downloads/ILGA_World_State_Sponsored_Homophobia_report_global_legislation_overview_update_December_2019.pdf> accessed 27 April 2020.

² Nancy Nicol and Monica Tabengwa, ‘The Development of Sexual Rights and the LGBT Movement in Botswana’, *Human Rights, Sexual Orientation and Gender Identity in the Commonwealth: Struggles for Decriminalisation and Change* (2013) Pg. 355.

³ Binta Bajaha, ‘Postcolonial Amnesia: The Construction of Homosexuality as “Un-African”’ (London School of Economics (LSE)).

⁴ Stephen O Murray, ‘Homosexuality in “Traditional” Sub-Saharan Africa and Contemporary South Africa’ <https://pdfs.semanticscholar.org/b361/3fb3cd78a9b33d85654ddf8d27503d150b3d.pdf?_ga=2.259997577.2096022.1589666696-331411344.1589666696> accessed 17 May 2020.

⁵ Courtney E Finertyt, ‘Being Gay in Kenya: The Implications of Kenya’s New Constitution for Its Anti-Sodomy Laws’ (2012) 45 Cornell International Law Journal 30 Pg. 436-437.

colonial era, with clauses that criminalised homosexuality similar to their colonial master.⁶ With the introduction of the Sexual Offences Act of 1967, consensual sex between gay men over the age of 21 was decriminalised in England and Wales⁷, and later the same was applied in Scotland through legislation passed in 1980⁸ and finally in Northern Ireland as a result of *Dudgeon v. UK*.⁹ However, British colonies such as Kenya, Botswana and even India continued to criminalise consensual same sex acts. Furthermore, the Botswana's High Court ruled to decriminalise while Kenya's High Court opted to maintain criminalisation.

This thesis explores strategic litigation as part of a wider decriminalisation advocacy in both countries zeroing in on comparing the arguments for decriminalisation by civil society and members of the LGBTQ community and the courts' reasoning in judgments released weeks apart in 2019. It argues that the advocacy results in both countries were influenced by the different legal, social and political climates and not by a lack of strategic approach or effort.

In the conclusion, this thesis reiterates Kenya's international law obligations and the importance of decriminalisation as a first step towards enhancing protection of the rights of LGBTQ people in Kenya and easing the work of activists, organisations seeking to promote the protection of LGBTQ rights. It also offers additional recommendations to the Kenyan government as well as activists and LGBTQ people in Kenya on actions that can ensure greater protection and inclusion of the LGBTQ community in Kenya.

The findings in this thesis are limited largely to desktop research and discussions with some members of civil society in Kenya and Botswana.

⁶ *ibid.* Pg. 437.

⁷ 'A Timeline of LGBT Communities in the UK' (*The British Library*) <<https://www.bl.uk/lgbtq-histories/lgbtq-timeline>> accessed 6 April 2020.

⁸ Criminal Justice (Scotland) Act 1980.

⁹ *DUDGEON v THE UNITED KINGDOM* [24 February 1983] European Court of Human Rights 7525/76.

Chapter 1: Impact of Criminalisation

Samir's story

“Samir, a gay man lives in the coastal region of Kenya. One night as he waited for a bus, a man grabbed him and forced him into a secluded area. Seven men, stripped him and raped him in turns in 2011. He was only 20 years old. They made away with his phone and money. After the rape, Samir informed his mother, who took him to the police station, but the officer on duty refused to file Samir's complaint.

Officer: ‘Why did you bring a person with such claims? See this, they're just common showgirls. He deserves whatever he got.’

Samir's mom: ‘What if he were your son?’

Officer: ‘I would want him to die.’”

This story has been extracted from a Human Rights Watch 2013 report “The Issue is Violence | Attacks on LGBT People on Kenya's Coast”.¹⁰ Samir's story is just one of many lived experiences of LGBTQ people in Kenya.

Criminalisation impact

According to Human Rights watch, they have recorded “two prosecutions against four people under Article 162 in the last 10 years”¹¹ indicating that these provisions are rarely implemented. Nevertheless, members of the LGBTQ community still face the risk of prosecution of up to 14 years in jail if arrested and charged for engaging in same sex conduct. Posner asserts that negative societal attitudes and perceptions against LGBTQ people are influenced by the existence of criminalisation laws¹², such that even though the laws are rarely used, over time these negative attitudes and perceptions become the social norm.¹³ In Kenya, the social

¹⁰ ‘The Issue Is Violence | Attacks on LGBT People on Kenya's Coast’ (Human Rights Watch 2015) <<https://www.hrw.org/report/2015/09/28/issue-violence/attacks-lgbt-people-kenyas-coast>> accessed 23 April 2020.

¹¹ ‘Kenya: Court Upholds Archaic Anti-Homosexuality Laws’ (*Human Rights Watch*, 24 May 2019)

<<https://www.hrw.org/news/2019/05/24/kenya-court-upholds-archaic-anti-homosexuality-laws-0>> accessed 27 April 2020.

¹² Eric A Posner, *Law and Social Norms* (Harvard University Press 2009).

¹³ *ibid.*

norm presents itself through widespread homophobia¹⁴ that has resulted in the stigmatisation of LGBTQ people who are at times also labelled as ‘criminals’¹⁵ within the society owing to their sexual orientation. As such, they have found themselves vulnerable to harassment, threats¹⁶, arbitrary arrests, detention and blackmail¹⁷ from police officers. The society at large, including their families subject them to threats, attacks, harassment, exclusion¹⁸ and discrimination. Their families have also been subjected to attacks and threats.¹⁹ As highlighted in the following chapter, criminalisation laws prevent LGBTQ people from enjoying full rights as others in the society do. Criminalisation has also made the work of individuals and organisation working on the protection of LGBTQ rights challenging, including by serving as a basis for restrictions on their right to freedom of association.

LGBTQ people in Kenya have been subjected to verbal attacks online²⁰ and offline including death threats²¹ as well as physical violence in the country. Derogatory words such as “*shoga*” (a Swahili slang word meaning gay, but one that is meant to be demeaning towards homosexuals) have been used against gay men in Kenya as a way of shaming them.²² They have been shunned by religious leaders who view homosexuality as being against religious teachings²³ and political leaders who have leveraged the homophobic environment in the country to gain favour with the masses at the expense of LGBTQ community. For example, during the 2010 referendum campaign for a new Constitution, those opposed to the referendum used the false narrative that it legalised same-sex conduct and marriage to rally support²⁴, while

¹⁴ Finertyt (n 5) Pg. 456.

¹⁵ Kenya Human Rights Commission, ‘The Outlawed amongst Us’ (Kenya Human Rights Commission 2011) Pg. 24.

¹⁶ *ibid.* Pg. 22.

¹⁷ *ibid.* Pg. 21.

¹⁸ *ibid.* Pg. 24.

¹⁹ *EG & 7 others v Attorney General (Petition 150 & 234 of 2016 (Consolidated))* [24 May 2019] (High Court of Kenya) Para. 4.

²⁰ *ibid.* Para. 24(b).

²¹ ‘The Issue Is Violence | Attacks on LGBT People on Kenya’s Coast’ (n 10).

²² ‘ERT Interview with David Kuria, Chairman of the Gay and Lesbian Coalition of Kenya (GALCK)’ (2010) Five The Equal Rights Review Pg. 86 <<https://www.equalrightstrust.org/ertdocumentbank/david%20kuria.pdf>> accessed 11 May 2020.

²³ Carey Lodge Thu 30 Apr 2015 18:41 BST, ‘Christian Leaders Oppose LGBT Rights in Kenya’ (*Christian Today*, 30 April 2015) <<https://www.christiantoday.com/article/christian-leaders-oppose-lgbt-rights-in-kenya/53101.htm>> accessed 18 May 2020.

²⁴ Ari Shaw, ‘From Disgust to Dignity: Criminalisation of Same-Sex Conduct as a Dignity Taking and the Human Rights Pathways to Achieve Dignity Restoration’ (2018) 18 African Human Rights Law Journal Pg. 695-696 <<http://ref.scielo.org/y8w3hx>> accessed 11 May 2020.

the drafting committee decided to exclude sexual orientation from the 2010 Constitution for fear that it would wane support for the Constitution during a Referendum.²⁵

Physical violence against LGBTQ people is not uncommon. Men are the main perpetrators of such violence based on the cases I have come across in the course of my research, something that is supported by Nussbaum's arguments that heterosexual men are more prone to reacting negatively to gay men than women are.²⁶ There are cases of LGBTQ people in Kenya that have been raped by an individual or a group of mostly men²⁷ and/or been beaten up and left for dead or being killed. For example, a gay man was attacked using a machete in Mombasa, Kenya and died while receiving treatment.²⁸

The motto of the police service in Kenya is "*Utumishi kwa wote*" (translates to "service to all" in English) meaning they have a duty to indiscriminately discharge their duties to protect everyone in the country. In some cases, police have helped LGBTQ people being targeted through violence, but for the most part they fail to act upon cases of violence including failing to prosecute perpetrators²⁹ or turning away LGBTQ people from police stations when they attempt to file complaints.³⁰ This sends the wrong message that violent behaviour directed at a sexual minority group is acceptable.³¹ Corrupt police officers have also used the threat of arrest and prosecution to blackmail and extort LGBTQ people in Kenya.³²

When arrested, gay men risked being subjected to undignified and degrading forced anal examinations to prove sexual conduct for purposes of prosecution. However, this changed after two gay men from the coastal region of Kenya, arrested in 2015 and charged on three counts including with "practicing unnatural offence contrary to section 162 (a) and (c) of the Penal Code"³³, challenged the use of forced anal examination by authorities in cases of consensual

²⁵ Seth Muchuma Wekesa, 'Decriminalisation of Homosexuality in Kenya: The Prospects and Challenges', *Protecting the human rights of sexual minorities in contemporary Africa* (PULP 2017) Pg. 88.

²⁶ MARTHA C NUSSBAUM, 'Shaming Citizens?', *Hiding from Humanity* (Princeton University Press 2004) Pg. 255 <<https://www.jstor.org/stable/j.ctt7sf7k.9>> accessed 5 May 2020.

²⁷ *EG & 7 others v. Attorney General (Petition 150 & 234 of 2016 (Consolidated))* (n 19) Para. 5.

²⁸ 'Kenya Making Progress, but Anti-Gay Violence Continues' (*Erasing 76 Crimes*, 18 July 2013) <<https://76crimes.com/2013/07/18/kenya-making-progress-but-anti-gay-violence-continues/>> accessed 23 April 2020.

²⁹ 'The Issue Is Violence | Attacks on LGBT People on Kenya's Coast' (n 10).

³⁰ Kenya Human Rights Commission (n 15) Pg. 28-29.

³¹ Shaw (n 24) Pg. 694.

³² Kenya Human Rights Commission (n 15) Pg. 21.

³³ *C O L & another v Resident Magistrate - Kwale Court & 4 others* (Petition 51 of 2015) [16 June 2016] (High Court of Kenya at Mombasa).

same sex conduct between adults. In March 2018, the Court of Appeal in March 2018 overturned an earlier decision by a High Court, declaring anal testing illegal and unconstitutional for adults charged with consensual same sex conduct.³⁴

Both heterosexual and homosexual couples engage in ‘carnal knowledge’³⁵, however, when it comes to the latter it is regarded as being ‘dirty’.³⁶ Laws that criminalise consensual same sex conduct serve to reinforce such a negative stereotype against homosexuality resulting in LGBTQ people being disowned by their families³⁷ or forced to attend counselling sessions to “correct” their sexual orientation.³⁸ Such laws also help further legitimise and entrench a culture of discrimination against LGBTQ people in Kenya owing to their sexual orientation.³⁹ They have been discriminated against by homeowners who evict them⁴⁰ and by academic staff in high schools, institutions of higher learning where they have either been suspended or expelled.⁴¹ They are discriminated against in public places such as being denied access to services at a barbershop⁴² and places of worship. They have been discriminated against in places of work where they have either had to quit their jobs⁴³ or have been fired.⁴⁴ Discrimination has also been a contributing factor to the restriction of the right to health for LGBTQ people in Kenya. When seeking medical treatment especially in public health facilities, some have been stigmatised and shamed by health practitioners, had the practitioners violate their right to privacy by speaking about their medical conditions to either other health practitioners or the police without the precise consent of the individual. This has made some LGBTQ people shy away from receiving medical care to the detriment of their health.⁴⁵

³⁴ *COI & another v Chief Magistrate Ukunda Law Courts & 4 others (Civil Appeal No. 56 of 2016)* [22 March 2018] (Court of Appeal at Mombasa).

³⁵ Wekesa (n 25) Pg. 83.

³⁶ MARTHA C NUSSBAUM, *From Disgust to Humanity/Sexual Orientation and Constitutional Law* (Oxford University Press 2010) Pg. 4.

³⁷ Kenya Human Rights Commission (n 15) Pg. 24-25.

³⁸ *ibid.* Pg. 25.

³⁹ Dimitrina Petrova, ‘The Use of Equality and Anti-Discrimination Law in Advancing LGBT Rights’ in Corinne Lennox and Matthew Waites (eds), *Human Rights, Sexual Orientation and Gender Identity in The Commonwealth* (University of London Press 2013) Pg. 480 <<https://www.jstor.org/stable/j.ctv512st2.22>> accessed 22 May 2020.

⁴⁰ *EG & 7 others v. Attorney General (Petition 150 & 234 of 2016 (Consolidated))* (n 19) Para. 7.

⁴¹ Kenya Human Rights Commission (n 15) Pg. 32-34.

⁴² *EG & 7 others v. Attorney General (Petition 150 & 234 of 2016 (Consolidated))* (n 19) Para. 24.

⁴³ ‘ERT Interview with David Kuria, Chairman of the Gay and Lesbian Coalition of Kenya (GALCK)’ (n 22).

⁴⁴ *EG & 7 others v. Attorney General (Petition 150 & 234 of 2016 (Consolidated))* (n 19) Para 24(c).

⁴⁵ Kenya Human Rights Commission (n 15) Pg. 34-38.

Section 162 of the Penal Code formed the basis for which the National Gay and Lesbian Human Rights Commission (NGLHRC), an NGO seeking to promote “equality and full inclusion of sexual and gender minorities”⁴⁶, was denied registration by the Non-Governmental Coordination Board (NGO Board) in Kenya. While referencing section 162, the NGO Board wrote to NGLHRC stating that their registration had been rejected because their name promoted homosexuality which was is “inconsistent with any law or is otherwise undesirable”.⁴⁷ NGLHRC’s founder, Eric Gitari took the matter to court arguing a violation of the right to freedom of association and in March 2019 the Court of Appeal directed the NGO Board to register NGLHRC, however to date the registration remains pending.⁴⁸

“Disgust-anxiety”⁴⁹ makes the heterosexual majority uncomfortable with not just the act of same sex conduct, but also with those who identify as homosexual.⁵⁰ It pushes them to want criminalisation laws to continue to exist to alleviate their anxiety. However, there is little justification for the limitation of the rights of LGBTQ people in Kenya given the negative impact criminalisation continues to have on them as shown in the preceding paragraphs, including death. Further, negative experiences due to the existence of criminalisation laws have prevented some LGBTQ people from ‘coming out’ for fear of prosecution and persecution. And even those who have publicly ‘come out’ have to deal with the stigma and discrimination in so many areas of their lives. They are out, but not free. All human beings have the right to live free from fear and insecurity and to personal autonomy, making choices without fear of reprisals. Organisations and individuals championing for LGBTQ rights must also be allowed to freely carry out their work including the push for decriminalisation in Kenya.

⁴⁶ ‘National Gay & Lesbian Human Rights Commission’ (*National Gay & Lesbian Human Rights Commission*) <<https://www.nglhrc.com>> accessed 18 May 2020.

⁴⁷ *EG v Non- Governmental Organisations Co-ordination Board & 4 others* [2015] High Court of Kenya at Nairobi Petition 440 of 2013.

⁴⁸ ‘Interview with Eric Gitari’ (22 November 2019).

⁴⁹ NUSSBAUM (n 36) Pg. 7.

⁵⁰ Dan Kuwali, ‘Battle for Sex: Protecting Sexual(Ity) Rights in Africa’ (2014) 36 Human Rights Quarterly 22 Pg. 28.

Chapter 2: Human Rights Framework

As of December 2019 at 59%, Africa is the region with the highest criminalisation rate with 32 out of 54 countries maintaining criminalisation laws.⁵¹ While Kenya's High Court upheld criminalisation laws in the Penal Code in May 2019 and in July Gabon – moving retrogressively – introduced a new Penal Code with Article 402 (5) which criminalises consensual same sex conduct⁵², Botswana's High Court went against the grain to decriminalise in June. In this chapter, we examine criminalisation as a human rights issue and Kenya's legal obligations.

Rights to privacy, equality and non-discrimination

Criminalisation of consensual same sex sexual conduct is a human rights issue. It is a violation of the right to private life⁵³ and right to equality and non-discrimination⁵⁴ guaranteed in international human rights law as indicated in the reasoning of courts in various jurisdictions such as *Norris v. Ireland*⁵⁵ and now *Letsweletse v. Attorney General*.⁵⁶ The right to private life as seen in many cases before the European Court of Human Rights extends to one's sex life. In *Dudgeon*, the Court acknowledged that even though there was no criminal proceeding instituted against the applicant, the fear of criminal prosecution due to the existence of criminal laws is enough for a violation of the right to private life.⁵⁷ Right to privacy is not only limited to the confines of one's personal space, it also extends to one's ability to choose including choosing an intimate partner⁵⁸ and therefore, existence of these laws interferes with this right as they seek to control a person's private life which is almost impossible to justify.

Criminalisation laws even though at face value may seem to apply even to heterosexuals, they are largely used to target homosexuals⁵⁹, predominantly gay men, owing to their sexual orientation. International human rights documents generally do not list sexual orientation as a

⁵¹ 'State-Sponsored Homophobia | Global Legislation Overview Update' (ILGA World 2019) Page 47 <https://ilga.org/downloads/ILGA_World_State_Sponsored_Homophobia_report_global_legislation_overview_update_December_2019.pdf> accessed 27 April 2020.

⁵² Gabon Penal Code 2019 [No. 042/2018].

⁵³ International Covenant on Civil and Political Rights (ICCPR) 1976 Art. 17.

⁵⁴ *ibid* Art. 26.

⁵⁵ *NORRIS v IRELAND* [26 October 1988] European Court of Human Rights 10581/83.

⁵⁶ *LETWELETSE MOTSHIDIEMANG V THE ATTORNEY GENERAL* [11 June 2019] High Court of Botswana MAHGB-000591 16.

⁵⁷ *DUDGEON v. THE UNITED KINGDOM* (n 3) Para 40.

⁵⁸ Sanjeev Kumar, *LGBT Community in India: A Study* (Educreation Publishing 2019) Pg. 165.

⁵⁹ Wekesa (n 25) Pg. 83.

protected ground in their non-discrimination clauses. However, due to the ‘open-ended’ nature of the discrimination clauses⁶⁰ in international law and also some Constitutions such as Kenya⁶¹, the list of grounds for non-discrimination should be treated as “illustrative rather than exhaustive”.⁶² This has been proven in international jurisprudence where courts and quasi-judicial bodies have expanded the interpretation of non-discrimination on the grounds of sex to include sexual orientation and thus effectively extending the right to freedom from non-discrimination to LGBTQ persons.⁶³ For example, in *Toonen v. Australia*, the Human Rights Committee (HRC) held that “reference to “sex” in articles 2, paragraph 1, and 26 (ICCPR) is to be taken as including sexual orientation”.⁶⁴

The right to privacy is not an absolute right⁶⁵ and neither is the right to equality and non-discrimination. Limitation of non-absolute rights in the ICCPR is allowed only if it is prescribed by law and “necessary in a democratic society” to achieve a “legitimate aim” for example, to protect public morals or the rights of others.⁶⁶ During a public emergency such as the Covid 19 which is a public health emergency⁶⁷, where non-absolute rights may be derogated from, pending that the suspension of rights is “strictly required by the exigencies of the situation”.⁶⁸ Kenya has an obligation to protect these rights and adhere to the limitation standards under international human rights instruments it has ratified.

Kenya’s obligations under international and regional human rights law

Kenya is legally bound by the ICCPR, which it ratified in 1972, with an obligation to respect all the rights in the Covenant including privacy⁶⁹ and equality and non-discrimination⁷⁰ for everyone “within its jurisdiction without discrimination”.⁷¹ In addition, Kenya is obligated to ensure the adoption and amendment of domestic laws to ensure they are aligned with the

⁶⁰ Finertyt (n 5) Pg. 449.

⁶¹ The Constitution of Kenya, 2010 Art. 27.

⁶² CESCR General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights Para. 15.

⁶³ Paula Gerber and Joel Gory, ‘The UN Human Rights Committee and LGBT Rights: What Is It Doing? What Could It Be Doing?’ (2014) 14 Human Rights Law Review 403 Pg. 429.

⁶⁴ *Toonen v Australia* [31 March 1994] Human Rights Committee Communication No. 488/1992 Para. 8.7.

⁶⁵ Tachilisa Balule and Bojosi Otlhogile, ‘Balancing the Right to Privacy and the Public Interest: Surveillance by the State of Private Communications for Law Enforcement in Botswana’ (2015) 37 Statute Law Review hmv023 Pg. 2.

⁶⁶ Siracusa Principles 1985 25 Para. 1 - 38.

⁶⁷ International Covenant on Civil and Political Rights (ICCPR) Art. 4.

⁶⁸ Siracusa Principles 1985 25 Para. 39-70.

⁶⁹ International Covenant on Civil and Political Rights (ICCPR) Art. 17.

⁷⁰ *ibid* Art. 26.

⁷¹ *ibid* Art. 2(1).

provisions of the ICCPR to ensure promotion and protection of rights.⁷² Further, the ICCPR established the Human Rights Committee (HRC) as a body to monitor its implementation and interpret its provisions.⁷³ As such, even though Kenya has not accepted the HRC's jurisdiction by ratifying the ICCPR Optional Protocol, it is still legally bound by the ICCPR and therefore to a large extent is required to accept and follow interpretations of its provisions provided by the HRC⁷⁴ such as the interpretation of sex provided in the above-mentioned *Toonen v Australia*.⁷⁵

On 1 May 1972, Kenya ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) which also places upon it an obligation to ensure rights guaranteed in the Covenant are protected and promoted without discrimination.⁷⁶ Even though, like the ICCPR, it does not have sexual orientation listed as one of the grounds for non-discrimination, General Comment No. 20 of the Committee on Economic Social and Cultural Rights states that criminalisation laws, even though applying to everyone, impact LGBTQ people more resulting in their direct and indirect discrimination⁷⁷ and thus a violation of a state's international law obligation.⁷⁸ It goes on to recommend that state parties adopt laws or amend existing laws to address the issue of discrimination.⁷⁹ Though not binding, Kenya should follow through with this recommendation as part of its obligation to ensure compliance with the ICESCR.

Closer home at the regional level, Kenya is a state party to the African Charter which requires states, such as Kenya, to not only recognise the rights in the Charter, but also put in place national laws or measures to protect these rights.⁸⁰ The African Charter guarantees the right to equality⁸¹ and non-discrimination⁸² and although sexual orientation is not included as a ground for protection under these provisions, their wording is such that it leaves room for the inclusion

⁷² *ibid* Art. 2 (2).

⁷³ *ibid* Art. 28.

⁷⁴ Dominic McGoldrick, 'The Development and Status of Sexual Orientation Discrimination under International Human Rights Law' (2016) 16 Human Rights Law Review 613 Pg. 627 Referencing: Yogesh Tyagi, 'The UN Human Rights Committee: Practice and Procedure' (2011) Cambridge University Press Pg. 43-44.

⁷⁵ *Toonen v. Australia* (n 67).

⁷⁶ International Covenant on Economic, Social and Cultural Rights (ICESCR) 1976 Art. 2 (2).

⁷⁷ CESCR General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (n 65), Para. 10 (a) and (b).

⁷⁸ Petrova (n 39) Pg. 484.

⁷⁹ 'CESCR General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights | Global Health Rights' (n 65) Para. 37.

⁸⁰ African Charter on Human and Peoples' Rights 1986 Art. 1.

⁸¹ African Charter on Human and Peoples' Rights 1986 Art. 3 and 19.

⁸² *ibid* Art. 2.

other grounds.⁸³ Furthermore, the African Commission on Human and Peoples' Rights (African Commission) in recognition of challenges faced by LGBTQ people in the region passed the 'Resolution 275 on the Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity' in 2014⁸⁴ and adopted General Comment No. 4 in 2017.⁸⁵ The Resolution and General Comment recommend, among other things, an end to violence against people on the basis of their gender identity or sexual orientation, and calls on states to adopt effective measures such as by enacting legislation to prevent and redress such violence. Resolutions and General Comments are non-binding, but Kenya as a state party to the African Charter should seriously consider adopting their recommendations to protect LGBTQ people.

Kenya's Constitution contains a 'Bill of Rights' that guarantees rights such as the right to equality and non-discrimination⁸⁶ and privacy⁸⁷ for every person. Sexual orientation is not included in the Constitution, however, the High Court in *EG v. NGO Co-ordination Board* interpreted the words "every person" as used in the Constitution to mean all individuals regardless of sexual orientation.⁸⁸ Further, the right to non-discrimination included in the Constitution of Kenya is "open-ended" leaving room for the inclusion of other grounds for non-discrimination such as sexual orientation.⁸⁹ Kenya also has a constitutional obligation to ensure the automatic domestic integration of international norms and laws that Kenya has ratified such as the ICCPR⁹⁰ and that domestic laws are in line with the Constitution.⁹¹ This includes the obligation to amend, repeal or void legal provisions that criminalise consensual same sex

⁸³ Rachel Murray and Frans Viljoen, 'Towards Non-Discrimination on the Basis of Sexual Orientation: The Normative Basis and Procedural Possibilities before the African Commission on Human and Peoples' Rights and the African Union' (2007) 29 Human Rights Quarterly 86 Pg. 91.

⁸⁴ 275 Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity 2014 (ACHPR/Res275(LV)2014).

⁸⁵ General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5).

⁸⁶ The Constitution of Kenya, 2010 Art. 27.

⁸⁷ CONSTITUTION OF KENYA, 2010 Art. 31.

⁸⁸ *EG v Non- Governmental Organisations Co-ordination Board & 4 others* (n 47) Para. 76.

⁸⁹ 'INTERNATIONAL HUMAN RIGHTS LAW AND THE CRIMINALIZATION OF SAME-SEX SEXUAL CONDUCT' (International Commission of Jurists 2010) ICJ Briefing Paper Pg. 6 <<https://www.icj.org/wp-content/uploads/2012/06/International-human-rights-law-and-the-criminalizaion-of-same-sex-sexual-conduct-anyalsis-brief-2010.pdf>> accessed 17 May 2020.

⁹⁰ Ndulo, 'African Customary Law, Customs, and Women's Rights' (2011) 18 Indiana Journal of Global Legal Studies 87 Pg. 99.

⁹¹ *ibid* Art. 2 (4).

conduct that have been found in other jurisprudence to be a violation of the rights to privacy⁹² and equality and non-discrimination.⁹³

Owing to these regional and international laws as well as constitutional obligations, Kenya should strive to repeal Penal Code sections 162 and 165 that are contrary to its obligations.

⁹² *Toonen v. Australia* (n 67) Para. 8.6 and 8.7.

⁹³ *Navtej Singh Johar & Others v The Union of India* [2018] Supreme Court of India No. 76 of 2016 493 Para 253 (xiv) and (xv).

Chapter 3: Comparative Component: Strategic Litigation in Kenya versus Botswana

“Advocacy is a way to systematically press for change.”⁹⁴ Effective advocacy entails a multi-faceted approach where different tactics and actions are developed and used both separately and together, in private and in public.⁹⁵ Similar advocacy tactics were used in both countries including strategic litigation, publication of advocacy materials such as a report showing the negative impact of the criminalisation laws on LGBTQ people⁹⁶ and human stories, online advocacy with messages such as #Repeal162 and #LoveisHuman for Kenya, and #Repeal164 and #ReBatwana (we are all Batswana) for Botswana, and offline advocacy including the use of billboards around major cities in Kenya, public education and awareness activities and engaging multiple stakeholders including government officials, religious leaders, police, judiciary and communities.

In this section, this thesis focuses on highlighting the Kenya and Botswana strategic litigation cases used as part of a broader advocacy strategy, comparing the cases and eventually the factors that could have led to different results in Kenya and Botswana despite existing similarities. It should be noted that this comparison is in no way meant to show that one country did better than the other, but rather serves to show some of the court reasoning put forward in the judgments and also the different circumstances that contributed to such a varied result in the advocacy efforts.

Kenya case

In 2016, two petitions were filed separately at the High Court of Kenya in Nairobi seeking the decriminalisation of consensual same sex conduct in the country through voiding sections 162 (a), 162 (c) and 165 of the Penal Code of Kenya. Section 162 on “unnatural offences” criminalises consensual “carnal knowledge of any person against the order of nature”⁹⁷ or

⁹⁴ Robert Blackburn, Barbara R Blackburn and Ronald Williamson, *Advocacy from A to Z* (Routledge 2017).

⁹⁵ ‘Speaking Out - Advocacy Experiences and Tools of LGBTI Activists in Sub-Saharan Africa’ (Amnesty International 2014) Pg. 34.

⁹⁶ “The Law Needs to Change, We Want to Be Free” <<https://www.southernafricalitigationcentre.org/wp-content/uploads/2018/05/Botswana-rights-booklet.pdf>> accessed 7 April 2020.

⁹⁷ Penal Code of Kenya 1970 (Cap 63) Art. 162(a).

anyone who allows a “male person to have carnal knowledge of him or her against the order of nature”, and makes these acts punishable with imprisonment up to 14 years.⁹⁸ Section 165 criminalises “indecent practices between males” in public or private with a penalty of up to five years in prison.

Petition 150⁹⁹ was brought by Eric Gitari (referred to as EG in the case) who identifies as a gay man. Petition 234¹⁰⁰ was filed by several civil society organisations such as the Gay and Lesbian Coalition of Kenya (GALCK) as well as individuals from the LGBTQ community in Kenya. Both petitions challenged the constitutionality of sections 162 (a) (c) and 165 of the Penal Code of Kenya. First, on the grounds that they were “uncertain and vague”¹⁰¹ and secondly, that they were in violation of human rights such as the right to privacy and equality and non-discrimination guaranteed in international human rights law including in the ICCPR and the African Charter and against Kenya’s Constitution.¹⁰² The High Court of Kenya merged the two cases in January 2018.

Botswana case

A similar case was filed at the High Court of Botswana by Letsweletse Motshidiemang, a student and gay man in Botswana¹⁰³ seeking to have sections 164 (a) (similar to Kenya’s Section 162 (a)), 164 (c) (similar to Kenya’s Section 162 (c)) and 165 (“Attempts to commit unnatural offences”) of Botswana’s Penal Code¹⁰⁴ declared unconstitutional since they violated his rights and encouraged discrimination of LGBTQ people in the country.¹⁰⁵ In November 2017, Lesbians, Gays and Bisexuals of Botswana (LEGABIBO), an LGBTQ rights organisation in Botswana, was admitted as *amicus curiae* in the case for the purpose of providing factual evidence to support the petitioner’s arguments that the Penal Code provisions were discriminatory and led to the violation of the rights of LGBTQ people in the country.¹⁰⁶

⁹⁸ *ibid* Art. 162 (C).

⁹⁹ *Eric Gitari v Attorney General & another*. Petition 150 of 2016.

¹⁰⁰ *EG & 7 others v Attorney General (Petition 150 & 234 of 2016 (Consolidated))* [24 May 2019] (High Court of Kenya).

¹⁰¹ *Eric Gitari v Attorney General & another* (n 18) Para 13.

¹⁰² *EG & 7 others v. Attorney General (Petition 150 & 234 of 2016 (Consolidated))* (n 25) Para 65.

¹⁰³ *LETWELETSE MOTSHIDIEMANG V. THE ATTORNEY GENERAL* (n 56) Para. 21.

¹⁰⁴ Penal Code (Botswana) Law No. 2 of 1964.

¹⁰⁵ *LETWELETSE MOTSHIDIEMANG V. THE ATTORNEY GENERAL* (n 56) Para. 6.

¹⁰⁶ *ibid* Para. 8-20.

Comparing arguments and court judgements

In their judgment, both the High Courts of Kenya and Botswana dealt with the issue of uncertainty and vagueness of the criminal provisions in the Penal Code. Arguing from the point of legal certainty, petitioners in the Kenya and Botswana cases asserted that some of the terms such as “unnatural offences”¹⁰⁷, “carnal knowledge”¹⁰⁸ and “against the order of nature”¹⁰⁹ were unclear¹¹⁰ and vague¹¹¹, therefore they should be declared unconstitutional and voided. Kenya and Botswana High Courts both deferred to the case of *Gaolete v. State* which defined “carnal knowledge against the order of nature” as anal sexual intercourse.¹¹² Kenya also deferred to the Black’s Law Dictionary which provided a similar definition for “unnatural offences”.¹¹³ Both courts ruled that since these definitions were available, the sections were not unconstitutional and thus could not be voided on the grounds that they were unclear and vague.

The petitioners alleged that the Penal Code provisions were discriminatory against LGBTQ people in Kenya and Botswana and went on to provide factual and scientific evidence to support this allegation. However, the High Court of Kenya found that they were not discriminatory as they were not targeted at any particular group of people as alleged by the petitioners owing to the use of word such as “any person”¹¹⁴ which meant all human beings, and “any male person”¹¹⁵ which meant anyone ascribing to the male gender and not just gay men.¹¹⁶ Furthermore, the Court in Kenya argued that it lacked sufficient evidence to prove discrimination arguing that “no iota of evidence was tendered to establish any of the cited acts of discrimination”.¹¹⁷ In my opinion, the assertion of the High Court of Kenya assertion that there was insufficient evidence to prove discrimination was flawed because there was sufficient evidence provided in the form of individual testimonies as well as scientific evidence of the impact of criminalisation on LGBTQ people for example on their mental health¹¹⁸ similar to

¹⁰⁷ Penal Code of Kenya 1970 Sec. 162 and Penal Code (Botswana) Law No. 2 of 1964 (n 106) Sec. 164.

¹⁰⁸ *ibid* Sec. 162 (a), and Penal Code (Botswana) Law No. 2 of 1964 (n 106) Sec. 164 (a).

¹⁰⁹ Penal Code of Kenya 1970 Sec. 162 (a) and (c) and Penal Code (Botswana) Law No. 2 of 1964 (n 106) Sec. 164 (a) and (c).

¹¹⁰ *EG & 7 others v. Attorney General (Petition 150 & 234 of 2016 (Consolidated))* (n 19) Para. 261 and 262.

¹¹¹ *LETSWELETSE MOTSHIDIEMANG V. THE ATTORNEY GENERAL* (n 56) Para. 83.

¹¹² *Gaolete v The State* [24 August 1991] (High Court of Botswana in Lobatse) BLR 325; *EG & 7 others v Attorney General (Petition 150 & 234 of 2016 (Consolidated))* (High Court of Kenya) 2019 Para. 271.

¹¹³ *EG & 7 others v. Attorney General (Petition 150 & 234 of 2016 (Consolidated))* (n 19) Para. 272.

¹¹⁴ Penal Code of Kenya 1970 Sec. 162.

¹¹⁵ *ibid* Sec. 165.

¹¹⁶ *EG & 7 others v. Attorney General (Petition 150 & 234 of 2016 (Consolidated))* (n 19) Para. 296 and 297.

¹¹⁷ *ibid* Para. 298 and 299.

¹¹⁸ *ibid* Para. 38.

what LEGABIBO had presented in the Botswana case where the High Court took a different position from its Kenyan counterpart. The High Court of Botswana began by accepting the interpretation of the word ‘sex’ in the Constitution¹¹⁹ to include ‘sexual orientation’ as a ground for non-discrimination.¹²⁰ The Court in Botswana argued that the Penal Code provisions were “discriminatory in effect”¹²¹ because, even though they seemed ‘gender neutral’, sufficient evidence had been provided by the *amicus curiae* showing their existence disproportionately impacted LGBTQ people¹²², prevented gay men from engaging in an act that would allow them to full sexual expression¹²³ and there was no justification for discrimination in a democratic society.¹²⁴

Kenya and Botswana’s Penal Code provisions had also been challenged on the ground that they violated the right to privacy for LGBTQ people. Both courts at the outset agreed that the right to privacy was not an absolute right and therefore could be subjected to limitation. The High Court of Kenya found a limitation of the right to privacy to be lawful and “reasonable and justified in an open and democratic society”¹²⁵ as the limitation was necessary to uphold the values and principles in the Constitution¹²⁶ which were reflective of the will of Kenyans¹²⁷ and further argued that allowing same sex conduct even in private would lead to a violation of Article 45 (2) which allows marriage only between a man and a woman.¹²⁸ Kenya’s Court found no violation of the right to privacy. On the other hand, Botswana’s High Court found that the law provisions criminalising consensual same sex conduct by adults in private were a violation of the right to privacy because they restrict an intimate, private, consensual conduct that should not be subjected to any interference since there is no victim.¹²⁹ Botswana’s High Court also argued that criminalisation “is not in the public interest”¹³⁰ and found a limitation

¹¹⁹ Constitution of Botswana 1966 50 Sec. 3 and 15 (1).

¹²⁰ *LETSWELETSE MOTSHIDIEMANG V. THE ATTORNEY GENERAL* (n 56) Para. 157.

¹²¹ *ibid* Para. 170.

¹²² *ibid* Para. 168.

¹²³ *ibid* Para. 169.

¹²⁴ *ibid* Para 191.

¹²⁵ CONSTITUTION OF KENYA, 2010 Art. 24.

¹²⁶ *EG & 7 others v. Attorney General (Petition 150 & 234 of 2016 (Consolidated))* (n 19) Para. 386-388.

¹²⁷ *ibid* Para. 389.

¹²⁸ *ibid* Para. 396.

¹²⁹ *LETSWELETSE MOTSHIDIEMANG V. THE ATTORNEY GENERAL* (n 56) Para. 127.

¹³⁰ *ibid* Para. 189.

on the right privacy not to be reasonably justified as the state failed to provide factual evidence that was needed¹³¹ to support the limitation, instead choosing to present “bare assertions”.¹³²

If compared to the Botswana case, Kenya’s Court failed to recognise that such a limitation on the right to privacy even though lawful was not reasonable as it disproportionately affected LGBTQ people in Kenya whose personal lives were significantly negatively impacted by the law provisions which sought to control intimate aspects of their lives that did not harm the society. Kenya’s High Court also brought in the issue of same sex marriage even after the petitioners had expressly stated that they were not seeking marriage equality. It was unfair to bring up an issue that was not a matter before the court to further arguments beyond the scope of what was being sought.

Both courts referenced the *Kanane v. State*¹³³ case whose overall ruling was similar to the one delivered by the High Court of Kenya on 24 May 2019 where the Court dismissed the case finding that the legal provisions challenged were not unconstitutional¹³⁴. On the other hand, Botswana referenced *Kanane v. State* for purposes of explaining why its final ruling was different. Botswana’s High Court asserted that in *Kanane v. State* no evidence was presented to support the claim that the Penal Code provisions were discriminatory and the Court failed to address the issues of violation of the right to privacy and the discriminatory nature of the provisions.¹³⁵ In its final judgment on 11 June 2019, the High Court of Botswana declared sections 164 (a), 164 (c) and 165 of the Penal Code to be unconstitutional and “struck down” the provisions.¹³⁶ After arguing that the law should not be used to control matters pertaining to consenting adults in private and the Court went ahead to invoke the ‘doctrine of severability’ where it invalidated the word ‘private’¹³⁷ in section 167 of the Penal Code¹³⁸ ordering the amendment of the section such that it no longer applied to consensual same sex acts by adults in private.¹³⁹

¹³¹ *Good v The Attorney General (2) BLR 337* [2005] Court of Appeal Civ App No 28 of 2005.

¹³² *LETWELETSE MOTSHIDIEMANG V. THE ATTORNEY GENERAL* (n 56) Para. 179-183.

¹³³ *KANANE v THE STATE* [2003] Court of Appeal, Lobatse (2) BLR 64.

¹³⁴ *EG & 7 others v. Attorney General (Petition 150 & 234 of 2016 (Consolidated))* (n 19) Para. 406.

¹³⁵ *LETWELETSE MOTSHIDIEMANG V. THE ATTORNEY GENERAL* (n 56) Para. 171.

¹³⁶ *ibid* Para. 228 (a).

¹³⁷ *ibid* Para. 216-225.

¹³⁸ Penal Code (Botswana) Law No. 2 of 1964 (n 106) Sec. 167.

¹³⁹ *LETWELETSE MOTSHIDIEMANG V. THE ATTORNEY GENERAL* (n 56) Para. 228 (b).

Legal, social and political factors influencing the strategic litigation outcomes

The difference in results in both countries, decriminalisation in Botswana and continued criminalisation in Kenya, could be attributed to a number of factors including but not limited to the different legal, social and political climates in both countries.

First, unlike Botswana that has maintained, with some amendments¹⁴⁰, its 1956 Constitution¹⁴¹, Kenya has a relatively new Constitution voted in through a Referendum in 2010. It has been touted as being progressive¹⁴² since it contains a Bill of Rights which guarantees the protection of both civil and political rights and economic, social and cultural rights and in an effort to ensure that Kenya abides by its international law obligations and recommends the voiding of any domestic laws that go against the constitution's provisions.¹⁴³ However, it fell short on protection for LGBT rights through the omission of "sexual orientation" from the discrimination clause¹⁴⁴ both by the Constitutional Review Committee and the Committee of Experts (CoE)¹⁴⁵. Therefore, it is left to the Court to expand the interpretation of the word 'sex' in the discrimination clause to include sexual orientation as was the case in *EG V. NGO Coordination Board*¹⁴⁶ rather than providing for an automatic and direct legal argument for discrimination on the basis of sexual orientation during litigation.

Secondly, judges at Botswana's High Court chose to exercise judicial activism¹⁴⁷ treating the Constitution as a 'living instrument'¹⁴⁸ whose interpretation should be reflective of prevailing developments such as the international shift towards greater protection of LGBTQ rights, while Kenya's judges exercised judicial restraint¹⁴⁹ determined to maintain the *status quo* stated at one point that "...situations may arise where generous and purposive interpretations may not

¹⁴⁰ Druscilla Scribner and Priscilla A Lambert, 'Constitutionalizing Difference: A Case Study Analysis of Gender Provisions in Botswana and South Africa' (2010) 6 Politics & Gender 37 Pg. 43.

¹⁴¹ Constitution of Botswana.

¹⁴² Courtney E Finertyt, 'Being Gay in Kenya: The Implications of Kenya's New Constitution for Its Anti-Sodomy Laws' (2012) 45 30 Pg. 432.

¹⁴³ CONSTITUTION OF KENYA, 2010 Art. 2(4).

¹⁴⁴ *ibid* Art. 27.

¹⁴⁵ 'About the CoE Process' <<http://www.katibainstitute.org/Archives/index.php/coe-process/about-the-coe-process>> accessed 29 May 2020.

¹⁴⁶ *EG v Non- Governmental Organisations Co-ordination Board & 4 others* (n 47) Para. 137.

¹⁴⁷ Henri de Waele, 'JUDICIAL ACTIVISM IN THE EUROPEAN COURT OF JUSTICE — THE CASE OF LGBT RIGHTS' (2010) 19 28 Pg. 658-662.

¹⁴⁸ *Attorney General v Dow* [1992] Court of Appeal, Lobatse BLR 119.

¹⁴⁹ Susan Gluck Mezey, *Beyond Marriage: Continuing Battles for LGBT Rights* (Rowman & Littlefield 2017) Pg. 209.

coincide”.¹⁵⁰ For example, Botswana’s High Court building upon the precedent set by in *Attorney General v. Dow* which added ‘sex’ as a ground for non-discrimination¹⁵¹, accepted the interpretation of the word ‘sex’ to mean sexual orientation including an additional ground for non-discrimination¹⁵² owing to a similar interpretation in *Toonen v. Australia*¹⁵³ and Botswana’s international obligation under the ICCPR,¹⁵⁴ while Kenya’s High Court merely mentioned a similar local precedent from *EG v. NGO Board*¹⁵⁵ but did not address the issue of sexual orientation as a ground for non-discrimination.¹⁵⁶ Such interpretation gives way to addressing the specific issue of protecting the rights of LGBTQ people as a sexual minority.

In addition, Botswana’s High Court referenced progressive international jurisprudence where courts had found criminalisation laws were unconstitutional¹⁵⁷ and a violation of rights¹⁵⁸ to strengthen its own arguments and judgment. The Court also referenced the dissenting opinion of Chief Justice Gubbay in *Banana v. The State*¹⁵⁹ who held that the negative impact of criminalisation on gay men far outweighed any justification the state could provide and that denying them the freedom to choose intimate partners and that society ought to be more tolerant.¹⁶⁰ On the one hand, Kenya recognised the importance of deferring to local and international jurisprudence, but on the other hand also warned that “... it is important to appreciate that foreign case law will not always provide a safe guide for interpretation of our Constitution.”¹⁶¹ The Court overlooked the arguments in several positive jurisprudence on decriminalisation¹⁶² including cases such as *Johar v Union of India*¹⁶³ and *Norris v. Ireland*¹⁶⁴ which it mentioned in its judgement and that could have served to the judges well in delivering a progressive judgment, arguing instead that “... courts across the world are divided on this issue [decriminalisation]”.¹⁶⁵

¹⁵⁰ *EG & 7 others v. Attorney General (Petition 150 & 234 of 2016 (Consolidated))* (n 19) Para. 380.

¹⁵¹ *Attorney General v. Dow* (n 159).

¹⁵² Constitution of Botswana Sec. 15 (3).

¹⁵³ *Toonen v. Australia* (n 67).

¹⁵⁴ *LETSWELTSE MOTSHIDIEMANG V. THE ATTORNEY GENERAL* (n 56) Para. 161.

¹⁵⁵ *EG v Non- Governmental Organisations Co-ordination Board & 4 others* (n 47) Para. 137.

¹⁵⁶ *EG & 7 others v. Attorney General (Petition 150 & 234 of 2016 (Consolidated))* (n 19) Para. 372.

¹⁵⁷ *NORRIS v. IRELAND* (n 55).

¹⁵⁸ *Orozco v Attorney General of Belize* [2016] Supreme Court of Belize No. 668 of 2010 38.

¹⁵⁹ *Banana v The State* (Supreme Court, Zimbabwe).

¹⁶⁰ *LETSWELTSE MOTSHIDIEMANG V. THE ATTORNEY GENERAL* (n 56) Para. 203-206.

¹⁶¹ *EG & 7 others v. Attorney General (Petition 150 & 234 of 2016 (Consolidated))* (n 19) Para. 355.

¹⁶² *ibid* Para. 359-367.

¹⁶³ *Navtej Singh Johar & Others v. The Union of India* (n 98).

¹⁶⁴ *NORRIS v. IRELAND* (n 55).

¹⁶⁵ *EG & 7 others v. Attorney General (Petition 150 & 234 of 2016 (Consolidated))* (n 19) Para. 398.

Thirdly, political and social factors in both countries played a role in the eventual outcome of the advocacy. According to survey results published by AfroBarometer in 2020, between 2016 and 2018 public tolerance for LGBTQ people in Botswana stood at 38%, while in Kenya it stood at 9%.¹⁶⁶ This intolerance by Kenyans is reflected in their choice of political leaders whereby, like citizens in other democracies, they are more inclined to vote for leaders who share their views on a wide range of issues¹⁶⁷ such as being anti-homosexuality and in so doing have contributed to a unfavourable political climate in Kenya for LGBTQ people. Homophobic remarks have been made by Kenya's political leaders for example, after the signing of the new Constitution in 2010, then Prime Minister Raila Odinga publicly called for the arrest of anyone engaging in same sex conduct even if consensual.¹⁶⁸ Furthermore, in 2014, the Anti-Homosexuality Bill of 2014 was tabled in Kenya's Parliament aimed at introducing stiffer penalties for same sex conduct such as life in prison under the guise of protecting Kenya's cultural, family and religious values.¹⁶⁹ The Parliamentary Justice and Legal Affairs Committee rejected the Bill¹⁷⁰ however; it showed the lengths to which elected leaders in Kenya would go to ensure the continued criminalisation of same sex conduct even between consenting adults.

On the other hand, the political climate in Botswana is slightly more favourable when compared to Kenya. In 2010, as Kenya adopted a new Constitution, Botswana's Parliament adopted the Employment Act of 2010 which includes sexual orientation among the non-discrimination grounds in workplace.¹⁷¹ Even though the law is currently applicable to discrimination in the workplace, it signals a recognition by Parliamentarians, as representative of the people, of the importance of prohibition of discrimination on the basis of sexual orientation. In its judgment, the High Court of Botswana alluded to this stating that, "the people of Botswana have spoken through such amendment".¹⁷² Another goodwill gesture by the Botswana government came in 2016 when Botswana's government deported an American pastor for 'hate speech' after he

¹⁶⁶ Brian Howard, "'All in This Together': Africans Tolerant on Ethnic, Religious, National, but Not Sexual Differences' Pg. 12

<https://afrobarometer.org/sites/default/files/publications/Dispatches/ab_r7_dispatchno362_pap17_tolerance_in_africa_2.pdf> accessed 28 May 2020.

¹⁶⁷ PJ Tierney, *Theocracy: Can Democracy Survive Fundamentalism?: Resolving the Conflict Between Fundamentalism and Pluralism* (iUniverse 2012) Pg. 180.

¹⁶⁸ Petrova (n 39) Pg. 483.

¹⁶⁹ Wekesa (n 25) Pg. 85 and 86.

¹⁷⁰ *ibid* Pg. 86.

¹⁷¹ Employment (Amendment) Act 2010 [No. 10] Sec. 23 (d).

¹⁷² *LETSWELTSE MOTSHIDIEMANG V. THE ATTORNEY GENERAL* (n 56) Para. 195.

called for the “killing of gays and lesbian” on air during a radio broadcast.¹⁷³ And in 2018 during a public address, current Botswana President Dr. Mokgweetsi Eric Keabetswe Masisi when speaking on the issue of violence in the country mentioned those in same sex relationships as one of the groups that has faced violence and discrimination in the country stating that, “just like other citizens, they deserve to have their rights protected”.¹⁷⁴ This is in sharp contrast to Kenya’s current President who has shunned the LGBTQ community in Kenya recently reiterated his stand against homosexuality stating that “on things that do not conform with our cultures and religion, we will firmly reject”.¹⁷⁵

In conclusion, many aspects of the advocacy by Kenyan and Botswana civil society and members of the LGBTQ community were similar, however what Veneklasen and Miller refer to as “the invisible power”¹⁷⁶ determined the different outcome. Political, cultural and social interests were the invisible power that hindered a success in the first attempt at decriminalisation in Kenya.¹⁷⁷

¹⁷³ ‘Hate Spewing American Preacher Deported from Botswana’ (*OutRight Action International*, 23 September 2016) <<https://outrightinternational.org/content/hate-spewing-american-preacher-deported-botswana>> accessed 30 May 2020.

¹⁷⁴ ‘Remarks by His Excellency Dr. Mokgweetsi Eric Keabetswe Masisi on the Occasion of the Launch of the 2018 Commemoration of 16 Days of Activism against Violence on Women and Children’ Para. 6 <<https://www.facebook.com/BotswanaGovernment/posts/remarks-by-his-excellency-dr-mokgweetsi-e-kmasisi-on-the-occasion-of-the-nationa/1954879291261386/>> accessed 30 May 2020.

¹⁷⁵ AfricaNews, ‘Kenya’s President Uhuru Kenyatta Rejects Gay Agenda in Global Population Conference’ *Africanews* (November 2019) <<https://www.africanews.com/2019/11/09/kenya-s-president-uhuru-kenyatta-rejects-gay-agenda-in-global-population/>> accessed 17 May 2020.

¹⁷⁶ Lisa Veneklasen and Valerie Miller, *A NEW WEAVE OF POWER, PEOPLE & POLITICS: THE ACTION GUIDE FOR ADVOCACY AND CITIZEN PARTICIPATION* (World Neighbours 2007) Pg. 39-41 <https://www.justassociates.org/sites/justassociates.org/files/07chap3_power_final.pdf> accessed 17 May 2020.

¹⁷⁷ *EG & 7 others v. Attorney General (Petition 150 & 234 of 2016 (Consolidated))* (n 19) Para. 371.

Conclusion

This thesis has shown the negative impact the negative impact the existence of criminalisation legal provisions has on the lives of LGBTQ people and the right to freedom of association of organisations seeking to protect LGBTQ rights in Kenya. Decriminalisation through the repeal of sections of the Penal Code that criminalise same sex conduct would not only serve to enhance the protection of the rights of LGBTQ people in Kenya, it would also ensure that Kenya is abiding by its regional and international law obligations. Kenya should also go a step further and enact an anti-discrimination law. Even though Kenya supported a recommendation from Sweden in the second cycle of its Universal Periodic Review (UPR) to enact such a law, to date it has yet to enact such a law as noted by civil society organisations in a joint submission to the UPR review.¹⁷⁸ In addition, Kenya should ratify the ICCPR Optional Protocol to recognise the jurisdiction of the HRC to receive individual communications on case related to the violation of the ICCPR to ensure that Kenya's LGBTQ community has an alternative avenue to seek redress should domestic remedies fail to result in decriminalisation.

At the moment, the African Commission may not be the best options to seek redress on the issue of decriminalisation for various reasons including the length of time it takes the African Commission to consider individual communications and lack of independence of Commissioners¹⁷⁹ as well as a lack of precedent on related cases. Nevertheless, activists and members of the LGBTQ can work together to raise the issue of criminalisation at any of the two annual sessions of the African Commission to elicit discussions and also reaction and action from the Kenyan government especially during state reporting on the domestic implementation of the African Charter¹⁸⁰ and an individual complaint can be filed with the African Commission whose finding of a violation of rights can lead to the submission of a case to the proposed African Court of Justice and Human Rights¹⁸¹ if Kenya signs and ratifies both the Protocol on the Statute of the African Court of Justice and Human Rights¹⁸² and the Protocol

¹⁷⁸ 'Summary of Stakeholders' Submissions on Kenya: Report of the Office of the United Nations High Commissioner for Human Rights' (2019) A/HRC/WG.6/35/KEN/3 Para. 20
<<https://undocs.org/A/HRC/WG.6/35/KEN/3>> accessed 6 April 2020.

¹⁷⁹ Murray and Viljoen (n 88) Pg. 106.

¹⁸⁰ *ibid* Pg. 101-105.

¹⁸¹ Konstantinos Magliveras and Gino Naldi, 'The African Court of Justice and Human Rights: A Judicial Curate's Egg' (2012) 9 International Organizations Law Review 383 Pg. 383-449.

¹⁸² Protocol on the Statute of the African Court of Justice and Human Rights 2008. NOTE: It has not entered into force as it has not attained 7 out of the required minimum of 15 ratifications

on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.¹⁸³

In the lead up to an appeal hearing, the petitioners must ensure that they systematically and regularly collect data¹⁸⁴ on the impact of criminalisation on LGBTQ people in Kenya¹⁸⁵ and the disproportionate application of these laws through arrest, prosecution and conviction¹⁸⁶ to counter assertions made at the High Court assertion that there was insufficient evidence to prove a violation of the right to equality and non-discrimination.

Decriminalisation of same sex conduct in Kenya would be a good first step towards the enhanced protection of LGBTQ people in the country, but more would need to be done¹⁸⁷, because as Ran Hirschl posits Constitutions “appear to have only a limited capacity to advance progressive notions of social justice”.¹⁸⁸ Scribner and Lambert recommend a mix of constitutional changes and activism to bring about societal change.¹⁸⁹ Kenyan civil society, members of the LGBTQ community and their allies must ensure consistent and sustained advocacy, even after decriminalisation, aimed at changing the negative perceptions and attitudes of homosexuality among the Kenyan public.

¹⁸³ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights 2014. NOTE: It has not entered into force as it has not been ratified by any of the African states. Kenya signed it in 2015, but has not ratified.

¹⁸⁴ Chimaraoke Izugbara and others, ‘Regional Legal and Policy Instruments for Addressing LGBT Exclusion in Africa’ (2020) 28 Sexual and Reproductive Health Matters 1698905 Pg. 2.

¹⁸⁵ Courtney E Finertyt, ‘Being Gay in Kenya: The Implications of Kenya’s New Constitution for Its Anti-Sodomy Laws’ (2012) 45 30 Pg. 457.

¹⁸⁶ Petrova (n 39) Pg. 499 and 500.

¹⁸⁷ Shaw (n 24) Pg. 705.

¹⁸⁸ Scribner and Lambert (n 148) Pg. 39 **Referencing:** (Ran Hirschl, ‘Towards Juristocracy: The Origins and Consequences of the New Constitutionalism, (Harvard University Press 2004). Available at SSRN: <https://ssrn.com/abstract=503284>).

¹⁸⁹ *ibid* Pg. 39 and 40.

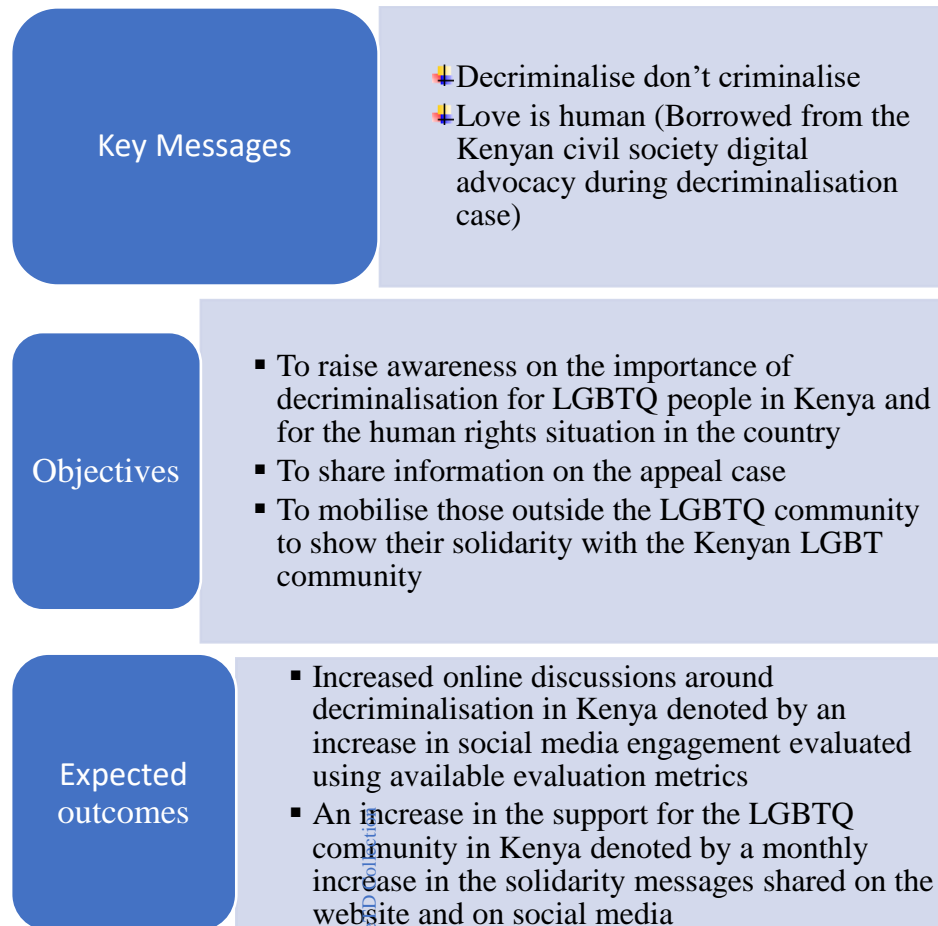
Appendix

Appendix A



Capstone Project: Practical Component
by Stephanie Wairimu

When?, What? and How?



Duration of digital action:

January 2021 – June 2021 (6 months)

Why?

The situation:

Kenyan civil society, members of the LGBTQ community and their allies are gearing up for a court appeal following a May 2019 decision by the High Court to maintain provisions in the Penal Code that criminalise consensual same sex conduct between adults. One of the conclusions in my research has been the need for consistent and sustained advocacy around decriminalisation targeted at both the government and the public in Kenya. In this advocacy brief, I will outline a short-term digital advocacy action that is targeted at highlighting stories of the LGBTQ community and the challenges they face owing to criminalisation, educating the public in Kenya on the importance of decriminalisation as a step towards enhancing protection for the LGBTQ community in Kenya and galvanising support of the public including allies in support of the LGBTQ community in Kenya.

This is a practical component prepared in partial fulfilment of the requirements of a Capstone Project. Due to limited time and resources this action is presented in a written form with the hope that at some point it can be actualised.

Key Dates	Actions	Advocacy targets
January 2021: Start of the digital action	<ul style="list-style-type: none"> - Unveiling of the DecriminaliseDon'tCriminalise social media pages on Twitter, Facebook and Instagram as well as a moderated website which will be used by partners to share information on decriminalisation and provide and updates on the appeal hearing and will the main platforms for engaging the advocacy targets outlined in this brief - Sharing of online resources such as; decriminalise posters and stickers, a decriminalise question and answer one-pager, graphics for use on social media to support the campaign, information on the appeal case 	<u>Action directed at:</u> The Kenyan LGBTQ community; Civil society members in Kenya and beyond; Allies of the LGBTQ community in Kenya and beyond; The public in Kenya aged between 18 and 55 years old; Religious groups and leaders; Political decision and policy makers, for example, Parliamentarians; State authorities such as, the police
14 February 2021: Valentine's Day	<ul style="list-style-type: none"> - Social media storm – advocacy targets encouraged to participate in mass sharing of messages of solidarity and love with the Kenyan LGBTQ community all day with the hashtags #DecriminaliseDon'tCriminaliseKe and #LoveisHuman (the latter used by civil society in Kenya over the duration of the High Court trial) 	<u>Taking action:</u> Civil society members in Kenya and beyond; Allies of the LGBTQ community in Kenya and beyond; The public in Kenya aged between 18 and 55 years <u>Action directed at:</u> The Kenyan LGBTQ community
1 March 2021: Zero Discrimination Day	<ul style="list-style-type: none"> - Through the social media pages, advocacy targets will be asked to re-share on different social media platforms stories of discrimination faced by LGBTQ people in Kenya calling for an end to discrimination and urging embracing equality through decriminalisation <p style="writing-mode: vertical-rl; transform: rotate(180deg);">CEU eTD Collection</p> Solidarity messages can also be shared through the website where the moderator will post the messages on the home page of the website. The number of solidarity messages will be reflected on a 'Show your Love' tally counter on the website as a way of encouraging more people to	<u>Taking action:</u> The Kenyan LGBTQ community; Civil society members in Kenya and beyond; Allies of the LGBTQ community in Kenya and beyond; The public in Kenya between 18 and 55 years <u>Action directed at:</u> The Kenyan LGBTQ community, Religious groups and leaders; Political decision and policy makers,

	<p>show their support for the Kenyan LGBTQ community by sharing their message on the website</p>	for example, Parliamentarians; State authorities such as, the police
22 March 2021: First anniversary of the court ruling ordering the registration of National Gay and Lesbian Human Rights Commission (NGLHRC) in Kenya	<p>- Celebrating organisations putting LGBTQ rights first by asking people to post names of LGBTQ organisations and their countries on social media, highlighting the work they have done for the LGBTQ community within their countries. This can include photos of the successes of these organisations, their logos and/or the people that work with them (if safe to do so)</p>	<p><u>Taking action:</u></p> <p>LGBTQ communities in Kenya and globally; Civil society members in Kenya and beyond; Allies of the LGBTQ community in Kenya and beyond; The public in Kenya between 18 and 55 years old</p> <p><u>Action directed at:</u></p> <p>LGBTQ rights organisations</p>
17 May 2021: International Day Against Homophobia, Transphobia and Biphobia	<p>- A Facebook Live discussion on the importance of decriminalisation in Kenya with key LGBTQ rights activists and members of the LGBTQ community in Kenya</p> <p>- After the discussion, people will be invited to participate in a virtual photo exhibition hosted on the website with photos depicting the lived experiences of LGBTQ people in Kenya under the criminalisation laws</p>	<p>▪ All advocacy targets mentioned above</p>
24 May 2021: Anniversary of the ruling against the repeal of section 162 of Kenya's penal code	<p>Mainly targeted at the LGBTQ community in Kenya encouraging them to share their '<i>What will decriminalisation mean for you</i>' stories</p> <p>Asking others to reshare these stories widely to bring attention to the need for decriminalisation in Kenya</p>	<p>▪ Advocacy targets similar to those on Zero Discrimination Day above</p>

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