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The right to privacy under the Constitution of Kenya and the criminalisation of consensual sex between same-sex adults

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Summary: *This article argues that the provisions of the Kenyan Penal Code (sections 162 and 165) criminalising consensual sex between partners of the same sex limit the right to privacy enshrined in article 31 of the Constitution of Kenya of 2010. This limitation is not justifiable according to the Bill of Rights limitation clause in article 24 of the Constitution. Article 45(2) of the Constitution, which provides for a right to 'marry a person of the opposite sex', also does not justify this limitation. Embracing the idea of an open and democratic society, the Constitution precludes the state from imposing upon the individual moral choices, provided that those choices do not harm others. Therefore, the decision whether or not consensual sex is moral must be left to the individual concerned. By refusing to declare sections 162 and 165 unconstitutional in 2019, the High Court of Kenya misinterpreted the Constitution and consequently failed in its mandate to uphold the right to privacy of homosexual persons in Kenya.*

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1 Introduction

Although afforded enhanced protection in the current Constitution promulgated in 2010,¹ the enjoyment of the right to privacy in Kenya is not free from controversy. One of the contentious issues is defining a demarcation between individual privacy and the state's obligation to safeguard the collective conception of morality. In its formulation, the right to privacy was not intended to protect only select categories of persons. As in the case of all rights espoused in the constitutional Bill of Rights, it remains inherent and owed to all irrespective of the sentiments of others.

In this article we seek to address the question of whether making consensual sex (both penetrative and non-penetrative) between consenting same-sex adults a criminal offence via sections 162 and 165 of the Penal Code is compatible with the right to privacy as enshrined in the Constitution of Kenya.² To this end, we first explain our approach against the background of the 'homosexuality is un-African' claims. We subsequently examine the historical protection of human rights in the independence Constitution of Kenya focusing on the deficiencies and challenges encountered during the pendency of that Constitution. We further discuss the clamour for a new Constitution and the expansive constitutional review process that led to the promulgation of the current Constitution in 2010. This background is important for understanding the origin, character and scope of two provisions, namely, article 31 of the Constitution providing for the right to privacy and article 24 setting out the requirements for the limitations of fundamental rights. We argue that the 'homosexuality is un-African' narrative is not capable of limiting the right to privacy. We also demonstrate that there is nothing in the drafting history of the Constitution of Kenya, 2010 that would mandate the imposition of criminal sanctions for consensual sex between same-sex adults. We show, rather, that the historical context in which this Constitution was enacted forms a solid basis for the ideas of an open and democratic society and the moral autonomy of the individual, to which the limitation clause of article 24 refers.

1 Constitution of the Republic of Kenya, 2010, <http://kenyalaw.org/kl/index.php?id=398> (accessed 20 January 2020).

2 Penal Code Cap 63 of the laws of Kenya, <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%2063> (accessed 20 January 2020).

After defining the scope of application of article 31, the article proceeds to examine whether the criminalisation of consensual sex between persons of the same sex, which limits the right to privacy, is justifiable under article 24. In this context we analyse the 'right to marry a person of the opposite sex' provided for in article 45(2). Finally, we confront our findings with the arguments advanced by the High Court of Kenya in the case of *EG & 7 Others v Attorney-General; DKM & 9 Others (Interested Parties); Katiba Institute & Another (Amicus Curiae)*³ in 2019, in which the Court refused to declare sections 162 and 165 unconstitutional. Our aim, however, is not to review this judgment in full. We concentrate on the arguments that are relevant for the question addressed. We also leave aside the (important) questions of Kenya's international human rights obligations and prohibition of discrimination. Our focus is the Constitution of Kenya, 2010 and the right to privacy.

2 'Homosexuality is un-African'?

It is not uncommon to use the idea that homosexuality is un-African as a response to advocacy for lesbian, gay, bisexual and transgender (LGBT+) rights.⁴ It is an offspring of a toxic transnational discourse with some actors pursuing unsavoury agendas.

To start with, the statement that homosexuality is un-African simply is not true. This is evidenced not only by the presence of African LGBT+ advocacy groups, but also by the research showing that African traditional religions tolerated homosexual practices.⁵ As will be shown, the criminalisation of homosexual practices also is a colonial legacy. The recent invigoration of the anti-LGBT+ sentiments is attributable to the United States (US) renewal evangelical movements aligned to the neo-conservative right.⁶ The 'homosexuality is un-African' narrative thus is a myth invented for political purposes.⁷

³ Petition 150 & 234 of 2016 (consolidated).

⁴ A Wahab "'Homosexuality/homophobia is un-African'": Un-mapping transnational discourses in the context of Uganda's Anti-Homosexuality Bill/Act' (2015) 63 *Journal of Homosexuality* 10; ⁵ Tamale 'Exploring the contours of African sexualities: Religion, law and power' (2014) 14 *African Human Rights Law Journal* 165.

⁵ Tamale (n 4) 161.

⁶ JT Gathii 'Writing race and identity in a global context: What CRT and TWAIL can learn from each other' (2020) 67 *University of California Los Angeles Law Review* 24 with further references, <https://ssrn.com/abstract=362034324> (accessed 20 January 2020); Wahab (n 4) 7 11; Tamale (n 4) 155.

⁷ According to Wahab (n 4) 10, Africa has become a battleground for the American culture wars.

The myth is gaining traction for a number of reasons. The first reason is the abuse of LGBT+ advocacy to portray Africans as 'exceptionally homophobic' and backward in order to support racist claims to moral superiority of whites and white hegemonic aspirations.⁸ The disgraceful thinking of Africans as backward has a long tradition in the European thought⁹ and is currently used to justify the US-American and European own securitisation narratives exemplified, among others, by exclusionary immigration policies.¹⁰ As a consequence, it is not surprising that in the view of such racialised discourses about homophobia,¹¹ the LGBT+ rights advocacy may be regarded as an assault on the sovereignty of African states and a security threat¹² triggering securitised responses by African governments.¹³ Second, the myth of the un-African nature of homosexuality may help African leaders to build up their legitimacy by positioning themselves as defenders of an invented traditional symbolic order against perceived threats of Western decadence. The legitimacy boost through defence of a symbolic order rather is a low-hanging fruit and helps to mask inadequacies in other areas of governance. Third, the myth is used to construct what Tamale calls 'hegemonic sexual discourse',¹⁴ which facilitates the exercise of disciplinary power, by setting standards of 'correct' sexual behaviour, policing deviations from the same and marginalising those who do not comply.¹⁵ This is the position of power which political and religious leaders are not disinclined to assume and cement by legal regulations.

The fact that the rights of LGBT+ persons are being weaponised in different ways domestically and in a transnational political discourse does not render those rights invalid. These discourses must not obscure the human rights dimension of the right to privacy or, in other words, while analysing the political dimension of anti-gay agendas, LGBT+ rights advocacy and responses to it one must not forget the individual person. The validity and scope of the right to privacy of LGBT+ persons in Kenya may be proved through a rigorous interpretation of the Kenyan Constitution, the legitimacy of which in

8 Wahab argues that the failures in protection of the rights of LGBT+ persons in Africa are 'the foil against which 'the West' and whites measure their legitimacy and value'; Wahab (n 4) 13. This attitude of 'the West' disregards its own persisting homophobia and its not too distant legacy of persecution of homosexuals.

9 See V Mudimbe *The invention of Africa: Gnosis, philosophy and the foundation of knowledge* (1988) 85-88 149.

10 Gathii (n 6) 24, Wahab (n 4) 26. On the immigration policies, see J Laine 'Ambiguous bordering practices at the EU's edges' in E Vallet & A Bissonnette (eds) *Borders and border walls: In-security, symbolism, vulnerabilities* (2021).

11 Wahab (n 4) 13.

12 Wahab (n 4) 2.

13 Wahab (n 4) 10.

14 Tamale (n 4) 170.

15 Tamale (n 4) 163 166.

Kenya is undisputed. Such a rigorous constitutional interpretation is the ambition of the present article.

3 The post-colonial journey to the 2010 Constitution of Kenya

Kenya attained its independence from British colonial rule on 1 June 1963. The independence Constitution was based on a settlement with the British. Kenya became a sovereign republic on 12 December 1964 by virtue of a constitutional amendment.¹⁶ The Constitution was repeatedly amended to suit the evolving governance realities of the new state. Also entrenched in the Constitution was a chapter on the protection of fundamental rights and freedoms of the individual, with section 84 conferring the power of enforcement and protection on the High Court.¹⁷ President Jomo Kenyatta became the founding leader of the new republic and he ascended into power with promises to stabilise and unite the new republic to forge a common future.¹⁸ However, following an outbreak of riots over the death of a popular politician, the President resorted to authoritarian rule starting with a declaration of Kenya as a *de facto* one-party state in 1969. By this, President Kenyatta triggered a cycle of violation of human rights protections in the Constitution through political detainments, assassinations and enforced disappearances to stifle his opponents and potential threats until his death in office in 1978.¹⁹

Following the death of the founding President, the Vice-President, Daniel Arap Moi, ascended into the presidency with promises of a united country free of human rights abuses.²⁰ Adar and Munyai recount that these promises were short-lived because soon thereafter, in 1982 following a failed *coup* attempt, President Moi embarked on a 'centralisation and personalisation' of power by amending the Constitution through section 2(A) which designated Kenya from a *de facto* to a *de jure* one-party state. President Moi presided over gross human rights violations ranging from torture, detainments without trial, arbitrary arrests to the forcible exile of opponents and

16 LG Francheschi & PLO Lumumba *The Constitution of Kenya: A commentary* (2019) 214.

17 The Constitution of the Republic of Kenya 1963 (repealed), [http://kenyalaw.org/kl/fileadmin/pdfdownloads/Constitution%20of%20Kenya%20\(Repealed\).pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Constitution%20of%20Kenya%20(Repealed).pdf) (accessed 30 January 2020).

18 C Odhiambo-Mbai 'The rise and fall of the autocratic state in Kenya' in WO Oyugi et al (eds) *The politics of transition in Kenya from Kanu to Narc* (2003) 51.

19 Equal Rights Trust and Kenya Human Rights Commission *In the spirit of Harambee: Addressing discrimination and inequality in Kenya* (2012) 28.

20 KG Adar & IM Munyai 'Human rights abuse in Kenya under Daniel Arap Moi 1978-2001' (2001) 5 *African Studies Quarterly* 1.

critics of his authoritarian rule, during most of what would be his 24-year reign.²¹ Notably, these violations often occurred within the confines of legislation (enacted to suit such purposes) and through state institutions.

The constitutional review process in Kenya began in the early 1990s with calls for the repeal of impugned section 2(A) and a return to multi-party politics to check the excesses of the executive arm of government.²² This process, which spanned a number of years, was faced with many challenges including opposition from political parties and religious divides, but ultimately culminating in a number of drafts and two referenda. With the background of gross human rights violations in mind, the process to review the Constitution began through the enactment of the Constitution of Kenya Review Act in 1997 and the swearing in of the Constitution of Kenya Review Commission (CKRC). The Commission presided over constituency disseminations through the civic education of people in all constituencies and the collation of views across the country. The Commission came up with a draft in 2002, which was tabled before the National Constitutional Convention convened in Bomas of Kenya (a cultural centre in Nairobi). This culminated in the draft Constitution that would be known as the Bomas Draft. The Bomas Draft was further changed by the Parliamentary Select Committee on Constitutional Review into the Wako Draft (named after the Attorney-General at that time) which was rejected during the referendum held in 2005. The constitutional review process was relaunched in 2008 through the enactment of another Act, the Constitution of Kenya Review Act 2008, which formed a basis for the appointment of a Committee of Experts (CoE), both Kenyan and international.²³ The task of the Committee was very elaborate, starting with a thorough examination of the prior drafts, proposals and reports of the previous constitutional review processes and proceeded to further collate the views of Kenyans from diverse backgrounds on the enactment of a new draft Constitution.

To sum up, the drafts that were adopted during the constitution-making process include the Constitution of Kenya Review Commission (CKRC) Draft of 2002; the Bomas Draft (2004); the Proposed New Constitution (2005); and the CoE Draft which eventually was enacted as the 2010 Constitution, after some changes made by Parliament. The Constitution was approved in a referendum.

21 GK Kuria 'The rule of law in Kenya and the status of human rights – Interview' (1991) 16 *Yale Journal of International Law* 217.

22 PK Mbote & M Akech *Kenya: Justice sector and the rule of law* (2011) 33.

23 Equal Rights Trust and Kenya Human Rights Commission (n 19) 31.

Mbondenyi and Ambani²⁴ were of the view that the protective model imbued in the repealed Constitution for the protection of fundamental rights proved weak and ineffective as a result of the many exceptions and limitations as well as a weak and often disinclined judiciary. The 2010 Constitution is meant to be different. Accordingly, it entrenches a progressively comparative wider range of rights from civil, political to economic rights. One of the peculiar aspects entrenched in the Preamble to the Constitution as a symbol of the historical violation of human rights is the recognition of the ethnic, cultural and religious diversity of the people of Kenya as well as the aspirations of Kenyans for a government based on respect for human rights. Article 8 of the Constitution provides that there shall be no state religion in Kenya, and article 20 obligates all state authorities to the values that underlie an open and democratic society based on human dignity, equality, equity and freedom while implementing the Constitution's Bill of Rights. These principles are crucial for the present inquiry.

One of the factors that legitimises the Constitution of Kenya is the rigorous process of its drafting, which not only involved the selected commissioners and Committee of Experts members drawn from various disciplines and jurisdictions, but also various stakeholders such as clergymen, civil societies and citizens through various representations. It is these groups of persons that played a major role in the delicate sculpting of various articles of the Constitution to reflect the popular views of religion, culture, traditions and social norms. These discussions were carried out in various levels and stages spanning years, including constituency disseminations, expert reviews, and submissions of memoranda by interested persons to the Committee.²⁵

4 Sections 162 and 165 of the Penal Code

4.1 Origin

The core legislations that touch on the right to privacy in the context of sexual relations in Kenya are the Penal Code and the Sexual Offences Act of 2006. The Penal Code is a legacy of the colonial regime in Kenya having been adapted from the Indian Penal Code of

24 MK Mbondenyi & JO Ambani *The new constitutional law of Kenya: Principles, governance and human rights* (2012) 155.

25 Committee of Experts on Constitutional Review, *Final Report of the Committee of Experts on Constitutional Review* (2010).

1866,²⁶ while the Sexual Offences Act is a recent statute enacted in 2006.²⁷ Of the two statutes, it is the Penal Code under sections 162 and 165 that defines and prescribes sanctions for acts which it terms as ‘unnatural offences’ and proceeds to pronounce them as against the ‘order of nature’. Although the Penal Code has undergone a number of amendments to reflect change in social norms and morality, some of the provisions remain unchanged.

The Sexual Offences Act does not contain a provision similar to that contained in the Penal Code criminalising unnatural offences. However, it defines indecent acts under section 2 to mean acts that compel or induce contact with the genitalia of another to the exclusion of penetration.

4.2 Carnal knowledge against the order of nature

The Penal Code provision that limits the right to privacy of homosexual persons in Kenya prohibits sexual contact using the term ‘unnatural offences’. Unnatural offences with respect to homosexual sex are defined as ‘carnal knowledge against the order of nature’. Section 162 criminalises carnal knowledge against the order of nature as a felony attracting imprisonment of 14 years.

4.3 Grossly indecent practices

Further prohibited and criminalised in the text of section 165 as felony are acts termed as ‘grossly indecent practices’ between male persons either in public or privately. The penalty is seven years’ imprisonment. While the Penal Code does not define the components of these acts, the High Court in *EG & 7 Others v Attorney-General*²⁸ adopted the definition of ‘indecent practices’ given in the text of the Sexual Offences Act 2006 to include all other acts that cause contact with genitalia to the exclusion of penetration.²⁹

In a nutshell, according to Kenyan laws, penetrative sex between persons of the same sex may attract up to 14 years’ imprisonment and non-penetrative sex up to five years.

26 DE Sanders ‘377 and the unnatural afterlife of British colonialism in Asia’ (2009) 4 *Asian Journal of Comparative Law* 1-10.

27 Sexual Offences Act 3 of 2006, <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%203%20of%202006> (accessed 22 March 2020).

28 Petition 150 & 234 of 2016 (consolidated) (n 3).

29 Petition 150 & 234 of 2016 (n 3) 273.

4.4 Sections 162 and 165 as a political question

These provisions have been subjected to civil, political and judicial contention in Kenya with different parties advancing conflicting arguments. On the one hand, opponents of these provisions argue that they do not conform to the stipulated standards of human rights entrenched in the Constitution, as well as the international obligations that Kenya has with regard to respecting and protecting the rights of minority categories of persons.³⁰ On the other hand, the parties that incessantly uphold and advocate the formulation of even more stringent measures argue that such sexual relations should not be recognised or permitted to thrive in Kenya for being offensive to religion, culture and traditions,³¹ which is in line with the 'homosexual is un-African' narrative explored above. The current Kenyan President, for example, stated that 'Kenya's cultural beliefs do not consider gay rights as human rights'.³²

The opposing views, however, barely find their way into Parliament, since even those politicians who are not necessarily pursuing the 'homosexuality is un-African' agenda, generally consider the rights of LGBT+ persons to be a 'non-issue' or they prefer to remain politically safe by upholding what they think are the beliefs of a majority of the electorates.³³ Also the judiciary, which has the mandate to safeguard against the encroachment of human rights (article 165 of the Constitution), failed to protect the right to privacy in its holding in *EG & 7 Others v Attorney-General* where it gave a broad deference to the legislator on the continuing penalisation of consensual sex between adults of the same sex. By so doing, the Court delegated the role of reviewing the impugned sections 162 and 165 of the Penal Code and the right to privacy to a political stalemate in Parliament. But is it a right approach? Even the lowest level of judicial scrutiny – the rational basis test³⁴ – presupposes a rational connection between the impugned regulation (sections 162 and 165 of the Penal Code) limiting an individual right (a right to privacy, for example) and a constitutionally admissible purpose of such limitation. As will be shown, there is no such connection here. First, an official conception of the order of nature alone may

30 Amnesty International *Making love a crime: Criminalisation of same-sex conduct in sub-Saharan Africa* (2013).

31 Kenya Human Rights Commission *The outlawed amongst us: A study of the LGBT+I community's search for equality and non-discrimination in Kenya* (2011).

32 Kenya Human Rights Commission (n 31) 5.1.5.

33 Independent Advisory Group on Country Information *Country policy and information note Kenya: Sexual orientation and gender identity and expression* (2020) 22.

34 See K Roosevelt 'Constitutional calcification: How the law becomes what the court does' (2005) 91 *Virginia Law Review* 1649.

not serve as a valid limitation purpose in an open and democratic society. Second, there is no rational connection between protecting a certain family model, the constitutional entrenchment of which is questionable, and criminalising consensual homosexual sex between adults.

Moreover, even if the argument made here works on the lowest level of judicial scrutiny, one could even argue that a judge deciding on the constitutionality of sections 162 and 165 should adopt a higher level. The level of deference towards the legislator that the judges should apply while reviewing legislation is one of the most debated problems of constitutional law. Given the direct democratic legitimacy of the legislator, the judge may not simply replace the latter's assessment of constitutionality of the law passed with her own, an issue discussed as a 'counter-majoritarian difficulty'. One of the common methods of addressing the majoritarian difficulty is varying the levels of judicial scrutiny depending on the types of cases.³⁵ According to Ely, the judges are best positioned to police the quality of a political decision-making process and not the results of the same. Based on this, the level of scrutiny would be higher, if channels of political change are choked and minorities are systematically disadvantaged or denied a voice.³⁶ One may argue that this is precisely the effect of sections 162 and 165 when it comes to actually giving a voice to the LGBT community in Kenya.

5 Right to privacy (article 31)

5.1 Importance of the right to privacy

The right to privacy is a quintessential right of the individual as it secures the sense of humanity allowing the individual to not only live but also to thrive in the immutable facets of life, such as personality, consciousness, character, belief and social interaction with other humans as well as the environment around him or her.³⁷ Warren and Brandeis³⁸ argued that it is important to protect privacy as it is inextricably linked to other human rights, inter alia, the rights to life, dignity, health, ownership of property, enjoyment of family life, information and communication. Therefore, a failure to respect and protect the right to privacy can lead to devastating effects to the

35 As above.

36 JH Ely *Democracy and distrust. A theory of judicial review* (1980) 181-182.

37 J Rubinfeld 'The right to privacy' (1989)102 *Harvard Law Review* 739.

38 SD Warren & LD Brandeis 'Right to privacy' (1890) 4 *Harvard Law Review* 193.

individual. Recognising and protecting it as being inherent in all humankind protects against any arbitrary or unwanted interference either by other individuals or the state in the sexual sphere and moral choices of a person. In a recent ruling, the High Court of Kenya in *Kenya Human Rights Commission v Communications Authority of Kenya & 4 Others*³⁹ depicted the right to privacy as being 'central to the protection of human dignity' and forming 'the basis of any democratic society'.⁴⁰ It is also presumed to 'support and reinforce other rights, such as freedom of expression, information, and association'. Moreover, in the particular Kenyan context, the entrenchment of the right to privacy is largely a lesson learned from the past power abuses.

5.2 The right to privacy in the drafting process of the Constitution

During the drafting process of the 2010 Constitution, the CoE endeavoured to incorporate the right to privacy in a manner that it could be limited only by law, and 'only to the extent that the limitation would be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.⁴¹ The right to privacy was envisioned to contain a general protection to individuals from state agencies as well as from private persons. It was meant to cover protection for family, property, private information and communication. Notably, according to the Commission on Constitutional Review⁴² the formulation of the content of this right did not elicit much debate during the drafting process as there was general consensus that the repealed Constitution was inadequate in its provision and enforcement of the contents of the right to privacy.

The inclusion of this right in the text of the Constitution, therefore, was not an afterthought. Indeed, privacy as a right in Kenya bears a deeply-disturbing historical account of an era of extra-judicial surveillance, arbitrary intrusion in private lives and property of individuals, and violation of rights that culminated even in political assassinations. It resulted from the systemic failures and the consequent atrocities committed largely by state machineries during the tenure of the repealed Constitution.

39 eKLR (2018).

40 *Kenya Human Rights Commission* (n 40) 52.

41 Art 24 Constitution of Kenya.

42 Commission on Constitutional Review, Document III (An Annotated Version of the Draft Bill: Volume II (2003).

5.3 Scope of the right to privacy: What is protected?

The present text of article 31 extends the protection of the right to privacy to persons, their property, private information and communication against any search, seizure, unnecessary disclosure or infringement. Noteworthy in the context of sections 162 and 165 of the Penal Code is article 31(c), which is the right to have information relating to the family or private affairs not unnecessarily required or revealed. In essence, the postulation of this is that the law upholds the right to privacy in family life as well as in what it terms 'private affairs', which in the ordinary meaning denotes 'relating or belonging to an individual as opposed to the public'.⁴³

Consequent to the protection of the right to privacy in article 31 of the Constitution, a number of cases have been adjudicated in Kenyan courts on the interpretation, permutations and implications of interference with this right. The cases of *Okiya Omtatah Okiiti v Communications Authority of Kenya*⁴⁴ and *Kenya Human Rights Commission v Communications Authority of Kenya & 4 Others*⁴⁵ were founded upon similar issues on whether the proposed Device Management System (DMS) by the government threatened or violated the right to privacy of subscribers as it was contrary to the constitutional protection. In adjudicating the matter, the Court subjected the proposed limitation to the test of article 24 premised on the notion that although unpopular, should the intended encroachment on privacy be found reasonable and just, it would be lawful.⁴⁶ The Court dissected the interpretation, the content of the right to privacy, and its importance in the preservation of the fundamental facets of human personality and dignity. It conclusively opined that protecting the right to privacy necessarily dictated that there be non-interference with personal choices.⁴⁷ In view of those definitions, it may be concluded that also the choice of homosexual persons to engage in consensual sex or relationships falls within the scope of the protection of article 31. Sections 162 and 165 of the Penal Code, therefore, impose a limitation on the right to privacy. It could be added that according to article 20(b) of the Constitution the rights contained in the Bill of Rights shall be enjoyed by 'every person'.

43 BA Garner & HC Black *Black's law dictionary* (2009).

44 [2018] eKLR.

45 *Kenya Human Rights Commission* (n 40).

46 *Okiya Omtatah Okiiti* (n 45) para 78.

47 *Okiya Omtatah Okiiti* (n 45) para 75.

Significantly, the Court restated that ‘human rights enjoy a *prima facie*, presumptive inviolability’, and often rank over notions of public interest.⁴⁸ This is of particular interest to the question of the violation of the right to privacy to homosexual persons in Kenya, given that most of the arguments advanced for upholding the impugned penal provisions are founded on notions of public and religious interests.

6 Limitations to the right of privacy

6.1 Characteristics of the limitation clause of article 24

Similar to most of the rights protected in the Constitution, the right to privacy is not absolute. To distinguish the protection of human rights in the 2010 Constitution from that of the repealed Constitution, the CoE designed a system that not only specified the rights to be protected but ensured the respect thereof by minimising possibilities of violation. This culminated in a protection that could be traversed only through legal measures and standards of reasonableness compatible with democratic principles and the rule of law. By this, the drafters ensured that the Constitution would not only pronounce human rights as unequivocally inalienable but also indivisible and subject only to legal limitations. Article 24 sets out the requirements that any limitation of the Bill of Rights (including the right to privacy) must meet cumulatively, otherwise the limitation would be unlawful. Article 24 is the only provision in the 2010 Constitution that provides for the legal limitation of the non-absolute human rights and, compared to the repealed Constitution, is a ‘progressive clause’.⁴⁹

Specifically, article 24 of the Constitution requires that a limitation to the right to privacy be designed taking into consideration the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the need to ensure that such enjoyment does not prejudice the rights of others; and whether less restrictive means exist to achieve the purpose. All these considerations must be analysed against the frame of an open and democratic society based on human dignity, equality and freedom. Sections 162 and 165 of the Penal Code, therefore, must be examined in compliance with this standard.

48 *Okiya Omtatah Okoiti* (n 45) para 79.

49 *Mbondenyi & Ambani* (n 24) 208.

6.2 Right to marry a person of the opposite sex in article 45(2): The drafting history

Article 45(2) states that every adult has the right to marry a person of the opposite sex, based on the free consent of the parties. The statement is made in the context of the protection of the family. According to article 45(1), the family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the state. Before examining article 45(2) as providing for a purpose for the limitation of the right to privacy through sections 162 and 165 of the Penal Code, we shed some light on its drafting history.

The provision for the protection to family formed the subject of debate during the drafting of the CKRC Draft. Article 38 of original text of the Draft (version from 2003) provided for the right to marriage of 'consenting adults of at least 18 years of age', and a right to found a family. According to the *Compendium of public comments* compiled by the CKRC, this phrasing elicited some opposition during the dissemination to the public, particularly from Kenyan churches that made strong recommendations that the provision on the right to marry expressly read 'person of the opposite sex' to protect against what they termed as 'foreign concepts of familyhood that have perverted this institution in other parts of the world'.⁵⁰ During the expert review of the draft, a Commission legal expert recommended that the text be formulated in a manner that would prevent ambiguity and erroneous interpretation. The expert in particular recommended that the concept of a family 'should be clearly defined', in order to make clear whether it includes extended family, polygamous family, sororate unions and – this is particularly relevant here – heterosexual unions and same-sex union.

Other sentiments gathered from the constituency disseminations and included in the *Compendium* were two newspaper articles. One contributor, Kabukuru, claimed that the original formulation that allowed consenting adults to marry (without the 'opposite sex' qualifier) would 'probably champion sexual orientations',⁵¹ while another, Kirui, claimed that 'a marriage or a family unit should clearly stipulate that it does not include a gay one. This careless provision

50 Commission on Constitutional Review, Document II: Compendium of Public Comments on the Draft Bill to Alter the Constitution: Volume II (2003).

51 FM Kabukuru 'Recommendations during constituency disseminations' *The People* (Nairobi) 27 October 2002.

could destroy a God-given, sacred institution, and so it should be re-written.⁵²

The deliberations noted in the *Compendium* include no sentiments and opinions of proponents of gay marriages or families. Ultimately, in 2005, these deliberations led to the amendment of the text to the current formulation of article 45 which recognises the family institution as the 'natural and fundamental unit of society', and specificities that 'every adult has a right to marry a person of the opposite sex, based on the free consent of the parties'.⁵³

By adding the words 'a person of the opposite sex' the CKRC took up the recommendation submitted by the churches of Kenya. However, it is an open question whether, by so doing, it also shared the churches' intentions. Most notably, the CKRC did not follow the expert recommendation and did not define the family, for example, stating explicitly that marriage is the union of a man and (one) women or expressly excluding same-sex marriages as proposed in the newspaper article of which CKRC took note. One may thus regard the current formulation as a compromise formula. Article 45(2) does not proclaim an unqualified right to marry and in so doing does not 'champion' same-sex marriages, as feared by the dissemination feedback quoted in the *Compendium*. On the other hand, it also does not define the family, leaving it for the decision to be made by the legislator, whether or not to establish a right to marry a person of the same sex. According to article 19(3)(b) of the Constitution, the legislator is free to confer upon individuals rights that go beyond those enshrined in the Constitution, as long as they do not contravene the same.

It follows that the preparatory works are not conclusive, whether a homosexual marriage should be prohibited by the Constitution, and the answer to this question should be given by interpreting the text of the Constitution as it is. However, what can be said with certainty is that debates documented in the *Compendium* do not touch upon the question of whether informal unions of persons of the same sex should be prohibited. Apparently, a prohibition of such relationships was not considered in the drafting process, which accordingly does not suggest that such prohibition can be read into article 45(2).

52 K Kirui 'Recommendations during constituency disseminations' *Kenya Times* (Nairobi) 12 November 2002.

53 Art 45 Constitution of Kenya.

While coming up with final draft in 2010, the CoE, having received close to 40 000 views from various stakeholders,⁵⁴ identified a number of issues which it deemed contentious. Notably, the questions of family and marriage were not in this group.

6.3 Protection of a family model enshrined in article 45(2): A valid limitation purpose?

It is doubtful if there is any relation between consensual sex between partners of the same sex and article 45(2) of the Constitution. The provision singles out its one aspect of the privacy, namely, the right to marry a person of the opposite sex, and puts it under special constitutional protection. Hence, article 45(2) reinforces the guarantee of article 31, rather than limiting it. Accordingly, there also is no basis for a claim that article 45(2) is a constitutional ban on same-sex marriages. The right to enter into a relationship – heterosexual or homosexual – is an expression of the right to privacy protected by article 31. However, it is only a marriage between persons of the opposite sex and the right to enter into such a marriage to which Article 45 accords *constitutional* protection. As Francheschi and Lumumba⁵⁵ explain, same-sex unions do not trigger the constitution of a family within the meaning of article 45, as same-sex unions do not have ‘any special relationship to bearing and rearing children’.⁵⁶ However, even accepting these reasons for the constitutional protection and recognition of a family based on a heterosexual marriage does not mean that the legislator may not allow persons of the same sex to get married. Of course, such a marriage and a family thus established would not enjoy the *constitutional* protection by article 45(2) and the decisions in this regard will be at the discretion of the legislator. Therefore, it cannot be said that the Constitution promotes homosexual marriages, which was raised as a point of concern at the drafting stage. By no means, however, can the recognition and protection granted to the family grounded on a heterosexual marriage be construed as a ban on homosexual relationships of any kind, especially the informal ones, and even less as a valid reason, or even a constitutional requirement, to penalise such relationships. Francheschi and Lumumba⁵⁷ who are, however, of the opinion that article 45(2) precludes homosexual marriages, point out that such ‘relationships or unions may be considered under a different heading’ and stress that the constitutional stipulation may

54 Committee of Experts on Constitutional Review, Final Report of the Committee of Experts on Constitutional Review (2010).

55 Francheschi & Lumumba (n 16) 214.

56 Francheschi & Lumumba 211.

57 As above.

not be construed as condoning 'homophobia or any related type of hatred that may lead to discrimination of any kind'.⁵⁸ Indeed, even assuming that article 45(2) introduces a constitutional ban on homosexual marriages or formal homosexual relationships (which does not seem to be the case) one cannot logically make an *a fortiori* claim that if the Constitution prohibits 'more' – the formal homosexual relationships – it also prohibits 'less', namely, the informal ones.

6.4 Justifiability in an open and democratic society based on human dignity, equality and freedom

In the Third Periodic Report to the Human Rights Committee, the Kenyan government submitted that 'Kenya may not decriminalise same-sex unions at this stage as such acts are considered as taboo and offences against the order of nature which are repugnant to cultural values and morality'.⁵⁹ As explained, article 45(2) may not be styled up to a constitutional expression of some official conception of the order of nature but it is worth examining whether a conception of the order of nature as such could serve a limitation purpose in light of article 24. Taking this path of reasoning would mean that the state positions itself as a guardian of such a conception which encapsulates some values and morality that the Third Periodic Report mentions, but fails to define. As a deontological category, values may be defined as ideas of what is right and what is wrong. Accordingly, the 'value' which the state protects by sections 162 and 165 of the Penal Code would be that it is wrong to engage in homosexual sex. One may even go further and assume that since the core expression of homosexuality is considered wrong, the homosexuality itself is also considered wrong. Hence, the 'order of nature' which the legislator seeks to uphold and enforce in the Penal Code is an order, in which homosexuality is a wrong thing. This is the moral choice which the state makes. The choice echoes the 'homosexuality is un-African' narrative which is a myth and a political manipulation.

The crucial question is whether the Constitution confers upon the state the entitlement to make such choices. Obviously, it cannot be argued that the state is not entitled to make any moral choices at all. The legal system is a reflection of morality, for instance, the criminalisation of manslaughter is a reflection of the moral choice that it is wrong to take somebody's life. But are there moral choices

58 As above.

59 Government of Kenya Third Periodic Report to the Human Rights Committee (2010) para 86.

which should be left to individuals exclusively? Articles 31 and 24 of the Constitution suggest that there indeed are such choices, and the choice whether being homosexual is a right or wrong thing belongs precisely to this category.

As stated, article 31 presupposes that there are some individual choices with which the state cannot interfere. A society that is 'open and democratic' as provided for in article 24 and the values of which the courts are obliged to promote according to article 20 is a society that allows for different moral choices of individuals or at least tolerates them. There must, therefore, be some space for the moral autonomy of the individual as an expression of freedom which article 24 invokes. Once admitted that there are moral choices that individuals are entitled to make on their own, the boundary of this moral autonomy is the distinction between the individual and the common. Dworkin⁶⁰ underscores that the respect for moral autonomy is a crucial condition for a legitimate exercise of political power in a democracy, since only those who are treated as genuine members of a community may be legitimately expected to comply with the majority decisions. No member of the community may thus be required to sacrifice essential elements of the control of his or her own life. Is one's own sexuality not such an essential element? A society that requires from the individual to make such a sacrifice would be neither an open nor a democratic society. Therefore, the limitation clause of article 24 cannot be used to suppress individual moral choices that have no bearing on others or the conduct of public affairs that are of concern for all. A decision to engage in consensual homosexual sex is such a choice. Mill calls this rule the 'harm principle'.⁶¹ The idea is traceable to John Locke, for whom 'naturally equal and independent men'⁶² agree to subject themselves to political power for a certain purpose, namely, to preserve property, life, liberty and possessions from other men.⁶³ Such a government necessarily is a limited government of which the power, as Locke explicitly observes, does not encompass an individual's private judgments.⁶⁴

This is the idea of a democratic society, which the High Court of Kenya invoked in one of the previous judgments. In *Eric Gitari*

60 R Dworkin *Freedom's law. The moral reading of the American Constitution* (1997) 22-25.

61 JS Mill *On liberty* (1859), <https://eet.pixel-online.org/files/etranslation/original/Mill,%20On%20Liberty.pdf> (accessed 16 April 2020).

62 J Locke *Second treatise on government* (1690) para 95, <https://www.earlymoderntexts.com/assets/pdfs/locke1689a.pdf> (accessed 20 April 2020).

63 Locke (n 64) 13.

64 As above.

v Non-Governmental Organisations Co-ordination Board & 4 Others,⁶⁵ decided in 2015, the High Court ruled that a refusal to register a non-governmental organisation (NGO) advocating the rights of LGBT+ persons was unconstitutional. The Court observed that 'in a representative democracy, and by the very act of adopting and accepting the Constitution, the state is restricted from determining which convictions and moral judgments are tolerable'.⁶⁶

Allowing the state to decide that it is (morally) wrong to be homosexual and enforce this choice through penal provisions has consequences that are not compatible with the notion of human dignity. Human dignity is not only to be respected and protected by the state (article 28 of the Constitution) but it is also according to article 24 a yardstick for the admissibility of the limitation to the Bill of Rights, including the right to privacy. Protection of dignity implies that the state should treat the individual as an end in itself, rather than a means towards other ends.⁶⁷ This is well illustrated by the High Court judgment in *COL & Another v Resident Magistrate*,⁶⁸ in which the judge rejected the petitioners' contention that an examination of the anus against the will of the applicants would amount to 'an affront to human dignity, cruel, inhuman and degrading treatment'.⁶⁹ According to the judge, such an examination was the only way in which to establish whether there had been 'anal sex'.⁷⁰ The answer to this question was necessary to decide whether the petitioners had committed the crime envisaged in section 162 of the Penal Code.⁷¹ Here, the state's drive to enforce a moral choice that being a homosexual is wrong led to a cruel deprivation of the core of one's intimacy. Moreover, the cruelty and disrespect of the most intimate sphere of an individual was portrayed as legitimate as it was the only way in which to enforce a certain conception of the order of nature. Paramount importance was attached to what the state thinks is 'natural'. Allowing this to happen means treating a human being as an instrument of enforcement and not as an end in itself. This goes against the idea of human dignity. The case sheds light on the link between dignity and privacy mentioned earlier.

The cited case proved it impossible for a state to uphold dignity and, at the same time, usurp moral choices that do not impact on

65 [2015] eKLR.

66 *Gitari* (n 67) 88.

67 A Narrain 'Brazil, India, South Africa: Transformative constitutions and their role in LGBT+ struggles' (2014) 20 *SUR International Journal on Human Rights* 151.

68 [2016] eKLR.

69 *COL* (n 70) 45.

70 *COL* (n 70) 53.

71 *COL* (n 70) 51.

individuals other than those whom those choices concern. What follows is that the choice of whether or not being homosexual is moral must be left to every individual and not made by the state. Otherwise, the human being becomes a tool of an ideology, which is at odds with the idea of an open and democratic society based on human dignity, equality and freedom and the lessons learned from the past human rights abuses. The limitation of the right to privacy enshrined in article 31 based on the official idea that homosexuality is wrong thus cannot pass the limitation test of article 24. The idea of an open and democratic society is an idea that allows individuals to hold different opinions about what the order of nature is and whether homosexuality belongs to it. It does not allow for hegemonic discourses on sexuality. Accordingly, sections 162 and 165 of the Penal Code encroach upon the right of privacy guaranteed in article 31 of the Constitution and this encroachment cannot be justified in an open and democratic society based on human dignity, equality and freedom, as article 24 of the Constitution requires. Those provisions, therefore, are a violation of the Constitution of Kenya.

7 The 2019 judgment on the constitutionality of sections 162 and 165 of the Penal Code

The Kenyan High Court is tasked to adjudicate upon any matters that touch on the interpretation and/or application of human rights in articles 26 to 57 of the Constitution. It is in the performance of this mandate that *EG & 7 Others v Attorney-General; DKM & 9 Others (Interested Parties); Katiba Institute & Another (Amicus Curiae)*⁷² was instituted to adjudicate on the constitutionality of sections 162 and 165 of the Penal Code.

When called upon to interrogate the constitutionality of sections 162 and 165 for reasons of vagueness and uncertainty against article 31 of the Constitution, the High Court proceeded to an elaborate definition of terms using both judicial precedents and law dictionaries.⁷³ In its interpretation the Court restated the values and principles entrenched in the Constitution as a reflection of the history, economy, socio-cultural and political realities and aspirations of Kenyans. The Court went on to interpret article 31 in connection with article 45 (2) justifying it with the need of systemic interpretation. As the Court put it, 'the entire Constitution has to be read as an integrated whole'.⁷⁴ Following this, the Court declined to declare

⁷² Petition 150 & 234 of 2016 (consolidated) (n 3).

⁷³ Petition 150 & 234 of 2016 (n 3) 242-408.

⁷⁴ Petition 150 & 234 of 2016 404.

sections 162 and 165 of the Penal Code unconstitutional, as that would contradict the protection accorded to the family institution in the Constitution and thereby 'defeat the purpose and spirit of article 45(2) of the Constitution'.⁷⁵ The Court held that 'decriminalising same-sex sex on grounds that it is consensual and is done in private between adults, would contradict the express provisions of article 45(2)'.⁷⁶ Claiming the 'clear wording of article 45(2)', the Court refused to address the question of whether the impugned sections satisfy the requirements of the limitation clause of article 24 of the Constitution and, in particular, whether the limitation of the right to privacy is 'justifiable in an open and democratic society based on human dignity'.⁷⁷

Clearly, the High Court does not examine the impugned sections of the Penal Code as a limitation to the right to privacy. By refusing to address the clause of article 24, the Court seems to suggest that homosexual relationships simply fall outside the scope of protection of article 31. From the fact that 'article 45(2) only recognises marriage between adult persons of the opposite sex',⁷⁸ the Court deduces that this norm serves not even as an exception to article 31, but rather as a carve-out. Homosexual relationships, the Court claims, 'whether in private or not, formal or not would be in violation of the tenor and spirit of the Constitution'.⁷⁹ From the allegedly holistic interpretation of the Constitution⁸⁰ the Court seems to leave out the commitment to 'the values that underlie open and democratic society' which it is obliged to promote according to article 20(4)(a). The Court does not discuss this provision.

For attaching such far-reaching consequences to article 45(2), the Court gives the following explanation:⁸¹

We remind ourselves that in interpreting the Constitution, the Article should not be 'unduly strained' and we should avoid 'excessive peering at the language to be interpreted without sufficient attention to the historical contextual scene', which includes the political and constitutional history leading up to the enactment of a particular provision. We have already referred to the historical context of the constitution making process and the fact that marriage union was reserved for adults of the opposite sex.

75 Petition 150 & 234 of 2016 400.

76 Petition 150 & 234 of 2016 396.

77 Petition 150 & 234 of 2016 401.

78 Petition 150 & 234 of 2016 396.

79 As above.

80 The Court stresses that 'the entire Constitution has to be read as an integrated whole'; Petition 150 & 234 of 2016 (n 3) 404.

81 Petition 150 & 234 of 2016 (n 3) 392.

The Court adds that ‘throughout the discussion, we have not come across a country that has a provision the equivalent of our Article 45(2) and has decriminalised similar provisions’.⁸² In this regard it can be noted that, for example, the 1997 Constitution of Poland outrightly defines marriage as a ‘union between a man and a woman’, while the Kenyan Constitution does not do so. Yet, in Poland homosexual consensual sex has since 1932 been decriminalised.⁸³

The Court unduly magnifies article 45(2) to a ban of any sexual relationship between persons of the same sex. To support this conclusion, the Court insists on clarity of the wording and meaning of article 45(2). However, as argued in the previous parts, article 45(2) conveys a very different meaning.

The idea of a carve-out is an unusual argument in constitutional law. The Court is not consistent in applying this. While invoking the ‘tenor and spirit’, the holistic interpretation of the Constitution and even explicitly distancing itself from ‘excessive peering at the language’, the Court clearly does not look at articles 31 and 45(2) as a rule and a carve-out, but as a conflict of values which it seeks to resolve. Yet, if a conflict of values had existed between the values enshrined in article 31 and those in article 45(2), it should have been resolved through balancing, for which article 24 provides a test. It is a test that the Court is keen to avoid. It is also a test that sections 162 and 165, as argued, cannot pass.

In this case, however, a conflict of values does not even exist. The Court misconstrues the relationship between articles 31 and 45(2). As explained in part 6.3 of the present article, article 45(2) does not limit the right to privacy in article 31, but reinforces it by placing its one particular aspect – the right to marry a person of the opposite sex – under special protection.

To sum up, the Court’s argument is based on a multi-layered misinterpretation of the Constitution. First, it wrongly presents article 45(2) as a carve-out in relation to article 31, whereas the rights of article 31 may be limited only according to the requirements of article 24. The latter norm provides that the limitation must be ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom’. Second, the Court undervalues the idea of the open and democratic society, for it allows to enforce an official conception of morals in an area where such choices must be

82 Petition 150 & 234 of 2016 (n 3) 396.

83 *Journal of Laws of the Republic of Poland* 1932, 60 item 571.

left to the individual. Third, the Court fails to establish the necessary rational connection between the limitation of the right to privacy (the criminalisation of consensual sex between same-sex adults) and a legitimate purpose for this limitation (the 'reasonableness' test of article 24) and, as such, a legitimate purpose simply is missing. The extra-constitutional narrative that 'homosexuality is un-African' – or any version thereof – may not serve as such a purpose. Imposing it upon individuals under a threat of criminal sanctions would amount to the imposition of moral choices, already outlawed by the idea of an open and democratic society and the moral independence of the individual on which such a society necessarily is established. Whether sexuality is African or not African is not more than a matter of political opinion which in a democratic society may be debated, but never imposed or used to wield power over minorities and marginalise them. Also, the 'political and constitutional history' and the 'tenor and spirit' of the Constitution, which the court invokes as a legitimate purpose of the limitation of the right to privacy, point rather in the opposite direction than the court suggests. Born out of a struggle against an authoritarian regime, the abuse of power and the clamour for freedom, the Constitution with its extensive human right guarantees hardly envisages the individual as needy of moral guidance by the politicians. In addition, the drafting history of article 45(2) does not warrant the conclusion that the norm was meant to criminalise not formalised homosexual relationships, neither does the safeguarding of the right to marry a person of the opposite sex enshrined in this norm require or even mandate such a step.

The judgment can also be looked at from the perspective of judicial policy. After years of subjugation, the Kenyan judiciary has only begun to reinstate its assertiveness towards other branches of government. The annulment of the 2017 presidential election by the Supreme Court in *Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others* is its most prominent,⁸⁴ but not the only, example. One may wonder whether the Court did not want to risk the position of the judiciary by clashing with the legislator over a contentious issue without having the backing of the majority of the population. Of course, given that human rights are designed precisely to protect the minorities, the judgment cannot be justified with judicial policy.

84 [2017] eKLR.

8 Conclusion

This article has noted that Kenya's Penal Code violates the right to privacy of homosexual persons as protected by the Kenyan Constitution. It notes that the current Sexual Offences Act enacted in 2006, which ought to be a reflection of evolved beliefs and morality, does not contain penal provisions similar to those in the Penal Code that are an inheritance of colonialism. Further, the article noted that certain individual traits and choices should not be the basis of deciding who merits the enjoyment of human rights and, thus, the protection of the law. Any purported limitation of human rights other than through the test set in article 24 of the Constitution is not permissible.

According to the Kenyan Constitution every person has the right to enjoy privacy in their person and property. The Constitution embraces the idea of an open and democratic society, in which every person has a right to make his or her own moral choices as long as these choices do not impact on the freedom of others. This includes the freedom to decide on cultural and religious standards for one's own sexuality. Given the recognition of Kenya as a secular state, purportedly religious and cultural arguments that propagate intrusion into the lives of homosexual persons under the guise of the 'majority' have no legal basis. In particular, such intrusion is not supported by article 45(2). Also, it cannot be legitimised by a hegemonic sexual discourse rooted in the myth of 'homosexuality is un-African'. As has been demonstrated, the Constitution is not only the fruit of a constitution-making process, the inclusiveness of which is unprecedented, but also a lesson learned from past injustices. It is a Constitution meant to transform the state and inspire Kenyans to embrace the diversity of the culture, beliefs and morals of its people while keeping pace with the dynamic nature of the society.