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**LGBTIQ+ HUMAN RIGHTS TO BE
INCORPORATED IN THE
CONSTITUTION TO CURB
VIOLENCE OF LGBTIQ+
COMMUNITY IN KENYA.**

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**BACHELOR THESIS: LGBTIQ+ HUMAN RIGHTS TO BE INCORPORATED IN THE
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ABSTRACT

LGBTIQ+ human rights are frequently neglected by Kenyan laws. This paper seeks to explore laws in the Kenyan Constitution concerning LGBTIQ+ rights as well as the consequences suffered for not abiding by the law. The research paper will also explore real-life case studies of discrimination against LGBTIQ+ persons either in public, health facilities, schools, government offices, etc. Reasons that are currently hindering legislative committees in Kenya from not enacting laws that are LGBTIQ+ protective will also be discussed. The research paper explores LGBTIQ+ rights internationally to have a global understanding of human rights. Kenya has ratified international laws that will be discussed about the LGBTIQ+ community. National laws in Kenya that support international laws will also feature in this research paper.

ABBREVIATIONS

LGBTIQ+ Refers to Lesbian, Gay, Bisexual, Transgender, Intersex, and Queer/Questioning +

HIV Human Immunodeficiency Virus

AIDS Acquired Immune Deficiency Syndrome

STD/STI Sexually Transmitted Disease/ Infection

SGBV Sexual and Gender-Based Violence

MAAYGO Men Against Aids Youth Group

MSM Men who have sex with Men

ICCPR International Covenant on Civil and Political Rights

UDHR Universal Declaration of Human Rights

UNHCHR UN Office for the High Commissioner of Human Rights

TABLE OF CONTENTS

ABSTRACT.....1

ABBREVIATIONS.....1

INTRODUCTION.....3

BACKGROUND OF THE STUDY.....4

LITERATURE REVIEW.....7

PROBLEM STATEMENT.....9

RESEARCH OBJECTIVE.....10

RESEARCH QUESTIONS.....10

THEORETICAL FRAMEWORK.....10

EMPIRICAL ANALYSIS.....14

DISCUSSION.....17

CONCLUSION.....19

RECOMMENDATIONS.....20

INTRODUCTION

A report by the United Nations revealed that violent and discriminatory acts across the world are committed against individuals due to their gender identity or sexual orientation (United Nations, 2011, as cited in Ibhawoh, 2014, p.620).

LGBTIQ+ community has been facing numerous challenges in Africa with extreme cases leading to death (Amnesty International, 2013). Many LGBTIQ+ persons in Kenya have been subjected to outright discrimination in the workplace, hospitals, educational institutions, social settings, and even within their own families (“KHCR,” 2011). The failure of addressing LGBTIQ+ stigmatization and discrimination is still a taboo topic in Kenya (“KHCR,” 2011, p.24). Homosexuality is still seen as a decaying western culture that is un-African (Amnesty International, 2013). LGBTIQ+ community is not protected by Kenyan law which places them at the forefront of violence and marginalization from the police to homophobic Kenyan citizens. This way they face sexual and gender-based violence (SGBV) as a corrective measure to reverse them back to ‘normal’, mob beatings and stigmatization by homophobic Kenyans and subject to police brutality (“KHCR,” 2011, p. 1-2).

This research mainly seeks to highlight the injustices and biases faced by the LGBTIQ+ community. Infringement of LGBTIQ+ rights will be discussed as captured by the Kenyan Constitution. An examination of the provisions in the constitution of Kenya relating to the LGBTIQ+ community will be explored to find out if it is lacking or insufficient in any way. Some other research objectives that will help further enlighten my topic are related to the consequences that LGBTIQ+ persons face when they are identified and brought to the book. Moreover, what are some of the reasons that are presently hindering the legislative committees in Kenya from not passing laws that are LGBTIQ+ friendly and protective laws? I will draw on these objectives as a guide in forming my thesis and present real-life cases that have been documented that prove discrimination and violence against this community. These cases have only exacerbated with time. Further, this research offers opinions and recommendations that will promote LGBTIQ+ human rights.

BACKGROUND OF THE STUDY

This section introduces Kenyan laws that discriminate against the LGBTIQ+ community. Additionally, it briefly explores the discrimination of LGBTIQ+ people generally which will further be exemplified in the empirical analysis. International laws that have been ratified by Kenya will be discussed as well as the Kenyan laws that strengthen the use of international laws in Kenya.

The Kenyan statute prohibits homosexuals from child adoption (“Children Act No.8 of 2001,” 2019). The Kenyan Penal code criminalizes homosexuality under sections 162,163 and 165 (“Penal code,” 2012). Kenya Human Rights Commission mentions that the criminalization of homosexuality justifies the harassment of sexual minorities in Kenya (“KHRC,” 2011, p. 44). The binary dichotomy of male and female in Kenyan law excludes transgender and intersex persons and hence no legal provisions of these subcategories in the constitution (“KHRC,” 2011, p.2). Nonetheless, they are not exempted from abuse and discrimination by society. Transgender and intersex persons undergo corrective surgeries at birth to fit in the male or female system without their consent or consideration which inhibits their freedom of expression (“KHRC,” 2011, p.42-43). Intersex children are insulted and referred to as ‘hermaphrodites’ (“KHRC,” 2011, p.43). Some doctors are unaware of how to treat transgender people as they often have the perspective of sinners who should be rebuked and offered counseling services (“KHRC,” 2011, p.44).

LGBTIQ+ community in Kenya is not only sexually and verbally abused by mobs and vigilantes, but they are also harassed by government officials who, ironically are supposed to protect them and their rights (“KHRC,” 2011, p.1). The officials blackmail, extort bribes as well as demand sexual favors from LGBTIQ+ persons, failure to which they are falsely prosecuted (“KHRC,” 2011, P.21). Health services are poorly administered to LGBTIQ+ persons due to the structural barriers, and fear of exposure which leads to prosecution or due to personal prejudice by health workers (“KHRC,” 2011, p.37-38). Moreover, Kenya Human Rights Commission (KHRC) establishes that Kenyan laws only consist of a male or female dichotomy therefore excluding the intersex and transgender people that have no legal recognition in the law. Moreso, schools ban LGBTIQ+ students and rental houses often do not admit persons from this community because of their perceived sexual orientation. The hand of the law fails to administer prosecution of perpetrators of violence or violators of LGBTIQ+ rights (“KHRC,” 2011, p. 2). Below are some of the laws in Kenya that forbid discrimination and the international human rights ratified by Kenya to include ‘other status’ that otherwise could refer to the LGBTIQ+ community (UN Human Rights office, 1948).

The Constitution of Kenya under Article 2 of the Supremacy of this Constitution number 5 and 6 respectively state that; “The general rules of International law shall form part of the law of Kenya” and “Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution”. Article 10 of National values and principles of governance 2 (b) includes human dignity, equity, social justice, inclusiveness, equality, human rights, non-

discrimination, and protection of the marginalized. Chapter four of the Kenyan Constitution of rights and freedoms, section 27 (4); says that the state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, dress, language or birth (“The Constitution of Kenya” 2010). There is a violation of the said laws in Kenya that excuse LGBTIQ+ violence and discrimination (“NGLHRC,” 2022).

The “United Nations Gay Rights Protection Resolution” was a vital departure point for the inclusion of LGBT persons in the framework of International human rights (Ibhawoh, 2014, as cited in Ibhawoh, 2014, p.621). The resolution served as a vital breakthrough in the fight for equality, inclusion, and international acknowledgment of LGBT people who are entitled to the same inherent rights as all other human beings (Ibhawoh, 2014, as cited in Ibhawoh, 2014, p.621).

In this thesis, the international laws ratified in Kenya that support LGBTIQ+ include, the Universal Declaration of Human Rights (UDHR), The International Covenant on Civil and Political Rights (ICCPR), and the African Charter on Human and People’s Rights.

Universal Declaration of Human Rights of 1948 declares that “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political, or other opinion, national or social origin, property, birth or other status” (United Nations, 1948). ‘Other status’ here includes LGBTIQ+ persons who should enjoy all rights and freedoms according to the declaration as the law is ratified in Kenya (United Nations, 2011). The purpose of enacting the UDHR is to uphold inherent basic universal rights and freedoms for all where all humans are entitled to full participation by virtue of humanity (Ibhawoh, 2014, p.617).

The International Covenant on Civil and Political Rights (ICCPR) under articles 2 and 26 respectively declare that (2) (1) “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” and (26) “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (UN Human Rights office,1976). The United Nations Human Rights committee interpreted the ‘sex’ in ICCPR instrument to include sexual orientation (“KHRC,” 2011, p.9). There is a breach in this law as Kenya does not uphold all its citizens’ rights, especially LGBTIQ+ persons as they still face discrimination both by the state and gender-conforming citizens.

African Charter on Human and People’s Rights under articles 2 and 3 respectively state that “Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group,

color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status”, (3) (1)“Every Individual shall be equal before the law ” and (3)(2), “Every individual shall be entitled to equal protection of the law’ (African Union, 1981). LGBTIQ+ community is not protected by the law of Kenya which exposes them to violence and discrimination.

Despite the vow of inclusion of all human rights as stated in the International Bill of Rights, there are still reservations and oppositions to upholding these laws (Ibhawoh, 2014, 614). Therefore, not all people enjoy these rights (Ibhawoh, 2014, 614) and especially the LGBTIQ+ community in Kenya. Below, the literature review will explore the factors that limit the extension of LGBTIQ+ rights. These factors prevent the legislative committees in Kenya from enacting LGBTIQ+ protective laws.

LITERATURE REVIEW

The literature below has indicated that dogmatic religious beliefs, outdated colonial-era laws, strong sexual hierarchies, and culture are some of the reasons presently hindering legislative committees in Kenya from passing LGBTIQ+ protective laws.

There has been a shallow understanding of sexuality and sexual orientation in Kenya which has paved way for LGBTIQ+ community harassment as well as structural discrimination (Ocholla, 2010, p.124). Religion, sociocultural and institutional barriers are the main challenges to the inclusion of LGBTIQ+ rights (Ibhawoh, 2014, p.620s). Additionally, LGBTIQ+ rights have been infringed and suppressed following the domineering religious beliefs upheld by religious leaders in Kenya, the outdated colonial-era laws that we have maintained since colonization, strong sexual hierarchies, etc. (Ocholla, 2010, p.124). This structural discrimination towards the LGBTIQ+ communities and marginalized groups, in general, has hindered talks and discussions about how well to integrate and accept them in society (Ocholla, 2010, p.124). Sexual hierarchies described by anthropologist Gayle Rubin resemble to a class system where sexual practices, identities, expressions, communities, etc. are ranked from the most socially approved to the most despised and condemned (Ocholla, 2010, p.124). Sexual hierarchy is therefore a vital tool in recognizing how a culture evaluates relationships of different kinds, sexual behaviors, expressions, etc., (Miller & Vance, 2004, as cited in Ocholla, 2010, p.124). LGBTIQ+ rights have been restrained since time immemorial as the Kenyan Penal code criminalizes it under sections 162, 163, and 165. The Kenyan penal code section 162 under “unnatural offenses” criminalizes sex against the “order of nature” which is commonly known to be sex between men or men who have sex with men (MSM). Section 163 emphasizes section 162 involving attempts to commit unnatural offenses while section 165 points out indecent practices between males (“Penal Code,” 2012). Failure to uphold these laws leads to imprisonment for up to fourteen years. These colonial-era laws are not only outdated but also exclude subcategories such as transgender and intersex in the LGBTIQ+ community. For example, what laws are supposed to be used in governing transgender and intersex people? Where does the Kenyan law place them? (“KHRC,” 2011, p. 42). These subcategories still face tribulations, physical, mental and sexual abuse, dismissals from the workplace, and arrests by police on grounds that they are imitating the opposite sex, etc., (Ocholla, 2010, p. 124). The same law that vows to protect everyone to live a life of dignity (“Constitution of Kenya,” 2010), is the same law that proves vague and discriminatory (“Penal code,” 2012).

Extension of universal human rights in certain countries has been denied based on the protection of ‘culture’ (“KHRC,” 2011, p.3). Cultural relativism has been conflicting with the universality of human rights as the ideology of human rights is linked with the association of an individual claiming fundamental rights and freedoms (“KHRC,” 2011, p.13). The UDHR has been accepted globally, ratified in the majority of the states, and adopted in national laws (Louis Henken, 1989, as cited in KHRC, 2011, p.13). Cultural relativism on the other hand refutes these assertions denying association between the human rights and cultural connection. Moreover, cultural relativism asserts that universal human rights can work independently as a legal instrument internationally without interfering with the cultural aspects (Prof. El Obaid Ahmed El Obaid.,

2002, as cited in KHRC, 2011, p.14). Domestic cultures have deeply resisted other rights such as religious rights, ethnic and sexual equality, etc. based on the virtue that despite being universal, the perspectives change significantly according to different cultures (“KHRC,” 2011, p.14). Through the cultural relativism lens, human rights are not universal but vary from culture to culture (Diana Ayton-Shenker., 1995, as cited in KHRC, 2011, p.14).

LGBTIQ+ practices have been noticed and experienced in pre-colonial Africa and especially in Kenya where traces go as far as acknowledging woman marriage or a marriage that involves a female husband (Cadigan, 1998, p.91). The same way a man marries a woman and gains control over her and her children; is the same way that this woman marriage works. A woman marries another woman for various reasons such as barrenness, rich women getting more wives as a sign of prestige (just as the men do in polygamous marriages for status) and as a sign of wealth, etc. (Cadigan, 1998, p.90) The woman who marries another woman is then referred to as the ‘female husband’ and the married one is just the wife. Therefore, the female husband assumes her responsibility as the man and takes over his wife and children (Cadigan, 1998, p.91). Marriage rites in this context are also keenly observed as per man-to-woman marriages. Dowry is paid by the female husband to the wife’s father and divorce rules are also observed normally as in the marriage of a man to a woman. Woman marriage was practiced in Kenya to increase a lineage or give barren women rights over children produced from such relationships. This was also applicable to widows. Barren women were considered outcasts and a ‘failure’ where the only way to redeem oneself was to marry another woman who could bear children on her behalf to restore her prestige and honor in the community as well as maintain and uphold her marriage to her husband who in this case is a man. The female husband would then assume the male’s role in her marriage to the wife. This was common among the Nandi in Kenya. Moreover, this woman-woman marriage was also practiced among the Kamba community in Kenya. There is a lot of stigmatization and seclusion that is associated with barren women and especially the single ones in the Kamba community. Therefore, such women also decided to enter into woman-to-woman marriages that would restore their honor in the community and bring prestige to both the male and female husband (Cadigan, 1998, p. 89-91). As we can see through these examples, same-sex unions were rampant in the olden days. LGBTIQ+ behaviors were already being practiced in the African set-up even before colonialism and the spread of the western culture far and beyond the Kenyan borders.

PROBLEM STATEMENT

Kenyan laws are discriminatory against LGBTIQ+ people as explained below. The LGBTIQ+ community is denied basic human rights as well as fundamental freedoms which limits their functioning as human beings. In Kenya, LGBTIQ+ persons have been continuously deprived of their rights to health services, right to education as LGBTIQ+ persons are banned from schools, police brutality and arrests on false charges as well as physical and sexual abuses, etc. This research explores these conflicts in the laws in Kenya as well as in the context of the international sphere and internationally recognized human rights.

Section 162 of the Kenyan penal code under ‘unnatural offenses’ criminalizes homosexuality with up to fourteen years of imprisonment. Section 163 of attempts to commit unnatural offenses specified in 162 above is charged with a felony of up to seven years of imprisonment. Indecent practices between males under section 165 are punishable by serving up to five years of jail time (“Penal Code,” 2012). Section 158 of adoption applicants (3)(c) of the Kenyan statute prohibits the adoption of children by homosexuals (“Children Act No.8 of 2001,” 2019). All these restrictions limit LGBTIQ+ freedoms and their wishes to lead lives that they cherish. According to Amartya Sen, these kinds of limitations inhibit a person from leading a good human life as one has to have a threshold of capabilities to function as utterly human (Schafer et al. 2017: 12-13).

In Kenya, Chapter four (no.19), of the Kenyan constitution under the Bill of rights; in the rights and fundamental freedom section 2, states that; ‘The purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings’ (“Constitution of Kenya,” 2010). LGBTIQ+ persons are faced with violence and discrimination that straight people in Kenya do not encounter. This inhibits them from living up to their full potential. Section 27, of the same chapter, under Equality and freedom from discrimination (1), proposes that everyone is equal before the law and has the right to equal protection and equal benefit from the law. Section 27 (4); says that the state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, dress, language or birth. Section 27 (5); A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4) (“Constitution of Kenya,” 2010).

However, in Kenya, we still have cases of mob justice/beatings, sexual assaults, verbal insults, and police brutality amongst many other vices structured towards LGBTIQ+ people (“KHRC,” 2011). Cases brought to light of the lived experiences of this community clearly show the discrepancies in Kenyan law. Two men from Kwale county were subjected to forced anal examinations to prove that they are homosexuals, LGBTIQ+ students were banned from boarding schools (“NGLHRC,” 2022), Kisumu gay and transwomen seeking medical assistance at night because they feel safer to come out and get the necessary health services (ProudVision, 2019), etc. Such examples show that human dignity has been undermined and degraded. The basic human rights of LGBTIQ+ persons are hindered and as such, a violation of the same law that is supposed to govern every citizen of Kenya.

RESEARCH OBJECTIVES

1. To find out the causes of structural discrimination against the LGBTIQ+ community in Kenya.
2. To explore ways the Kenyan law can include everybody regardless of their sexual orientation.
3. To have a wider understanding of LGBTIQ+ rights internationally.

RESEARCH QUESTIONS

1. What proves that there is LGBTIQ+ discrimination in Kenya?
2. What stand does the constitution of Kenya have concerning LGBTIQ+ persons? And how (if any) is it lacking?
3. What are the consequences faced by LGBTIQ+ persons for not abiding by the law?
4. What are some of the reasons that are presently hindering the legislative committees in Kenya from passing laws that are LGBTIQ+ friendly and protective?

THEORETICAL FRAMEWORK

This research will look into four theories i.e., Natural law, Social learning theory, Social interacting theory, and Pure Theory of Law. These theories are relevant as they seek to link the behaviors of different actors throughout the research. For example, Natural Law prohibits religious leaders from condemning LGBTIQ+ practices in Kenya since they are not God. Social learning and social interaction theories explore reasons for aggressive actions which cause violence structured toward the LGBTIQ+ community. The pure theory of Law describes the interconnectedness of laws in the same legal system. The pure theory of Law has been used to explain the connection between national and international laws used in this research which shapes our understanding of LGBTIQ+ rights globally.

Briefly, the laws explain the following. The natural law explains that God is the lawmaker and overall judge of mankind and as such LGBTIQ+ people should be judged by God. Social learning theory explores how people learn aggression that leads to violence. Also, it is useful in understanding homophobic people that exercise violence against LGBTIQ+ persons. The social interacting theory explains aggression actions used as corrective measures on the victims which highlights why LGBTIQ+ persons encounter violence and sexual abuse from gender-conforming citizens. The pure theory of law describes the authority of law as well as exploring laws under the same legal system. This is particularly vital in explaining the significance of international laws ratified by Kenya and the power these laws possess. These theories will help understand structured violations against the LGBTIQ+ community and show how Kenyan law can fully adopt international laws into the constitution.

NATURAL LAW

Natural law is teleological (Dimock, 1999, p.2). This means that perhaps all things have the common good as the end goal and without this end goal/ function, then we cannot make any reference to these things or understand them. Similarly, the natural law believes that law has an end goal that is good, and we can therefore not comprehend that law without that end goal in the picture i.e., its function (Dimock, 1999, p.3). Thomas Aquinas gives four types of laws which are eternal law, natural law, human law, and divine law (Dimock, 1999, p.8). Through the lens of Aquinas, God is the supreme lawmaker of the universe and is not limited to or a subject of time therefore, the law is called eternal law (Dimock, 1999, p.9). God is the governor of His creation and hence all His creations rational or not are bound by the eternal law. God being the lawmaker, is the law, and these two cannot be separated, therefore making the end goal/function of this law to be God (Dimock, 1999, p.9).

God has put in all nature the principles or tools for proper action in both rational and irrational creatures (Dimock, 1999, p.9). Rational creatures have the proper actions through the divine commandments whilst irrational ones are through divine providence. Therefore, all creatures under God are questioned under the external law (Dimock, 1999, p.9). Aquinas drew on Romans 2:14 to highlight the question of those that had not heard or read the divine commandments, in which he asserted that all have the natural law in them to help distinguish good from bad (Dimock, 1999, p.10). Psalms 4:6; was also drawn upon by Aquinas to further emphasize that rational beings have the “light of natural reason” and for this matter can discern what is right as guided by the natural law (Dimock, 1999, p.10). All rational beings are therefore able to decide for themselves regardless of whether they believe in God or not, whether they heard or read such divine commandments or not. According to Aquinas, God wants us to have good things according to the natural law and hence we have a natural intuition to want the best things by God’s plan (Crash Course, 2016, Nov 8).

SOCIAL LEARNING THEORY

Human aggression is any behavior directed towards another individual that is carried out with the immediate intent to cause harm. Additionally, the perpetrator must believe that the behavior will harm the target and that the target is motivated to avoid the behavior (Bushman & Anderson 2001, Baron & Richardson 1994, Berkowitz 1993, Green 2001, as cited Anderson & Bushman, 2002, p.28). Extreme harm with death as its main aim facilitated by aggression is referred to as violence (Anderson & Bushman, 2002, p. 29). Aggression in social learning theory is a learned behavior. The same way people learn complex constructs of social behaviors through experience or observation; is the same way people learn aggressive responses. The theory is useful in explaining beliefs, and expectations that control social behavior and instrumental aggression (Anderson & Bushman, 2002, p.31). Instrumental aggression is proactive and is well thought through beforehand to achieve other goals that are not necessarily to harm the target (Anderson & Bushman, 2002, p.29). In this research, for instance, the social learning theory could explain how heterosexuals learn LGBTIQ+ discrimination. This could be a learned behavior from society by watching what is aired by the media involving homophobic citizens harassing LGBTIQ+ persons for example.

SOCIAL INTERACTION THEORY

This theory maintains that a person uses coercive actions or aggressive behavior to cause a change in the victim's behavior (Tedeschi & Felson, 1994, as cited in Anderson & Bushman, 2002, p.32). This aggression towards a victim can be used to extract something valuable from them like say money, sex, etc., or to administer punishment for perceived wrongdoings or to express self-identities that one desires (Anderson & Bushman, 2002, p.32). The aggressor is the final decision maker who is encouraged by the rewards he gets, the chances of a different outcome after their actions, and the costs involved in that time (Anderson & Bushman, 2002, p. 32). The theory explains aggression with long-term goals as well as immediate goals e.g., hostile aggression. Hostile aggression also known as affective, impulsive, or reactive aggression is based on unplanned, anger-driven harm to a target that occurs as a response to a perceived provocation (Anderson & Bushman, 2002, p.29). In this research, for example, I have captured an incident where homophobic citizens are assaulting LGBTIQ+ persons as a corrective measure to reduce the chances of such practices happening in the future and to correct them back to normality (ProudVision, 2019).

PURE THEORY OF LAW

In this section, I will address Kelsen's Pure theory of law through the lens of Joseph Raz (1979). According to Raz, 1979, Kelsen has two underlying axioms, however flawed, that describe how a system of law is comprised of a set of laws (Raz, 1979, p.123). These laws get their authority as a law from other laws granting that authority. In other words, a law granting authority to another law; must belong to the same legal system (Raz, 1979, 126). Otherwise, the first law would not have the authority to make the second law valid. Therefore, ALL laws in one system; must come from one basic, fundamental, underlying law. Either directly, or indirectly. "Two laws belong to one chain of validity if one authorizes the other or if there is a third law authorizing both." (Raz, 1979, p.126). The basic norm for Kelsen, according to Raz, is the basic law that offers authority to all other laws through a chain or link, of validity (Raz, 1979, p.124-125). The challenge with this is figuring out where basic law gets its authority. Basic law does not have to be written down; but can exist as tradition/customs, or an unwritten norm (Raz, 1979, p.124). As Kelsen sees it, this fact is a logical necessity. A constitution gives all other laws in that system their authority. But what gives authority to the constitution? This authority is given by the basic norm (a non-positive norm). It does not, according to Kelsen, get its authority from anywhere, it just has that authority (Raz, 1979, p.126).

Kelsen claims that legal theory must be value-free, so that it can perform its task (Raz, 1979, p.132). It can therefore not have moral value. If so, then how do we grant authority to laws and norms? Kelsen here leans on the philosophy of Kant (even though Kant adopted a version of natural law) (Raz, 1979, p.132). To interpret an act as legal, and its product as binding norms; is only possible if the basic norm is presupposed as a valid norm. "How is it possible to interpret without recourse to meta-legal authorities, like God or nature, the subjective meaning of certain facts as a system of objectively valid legal norms? (Raz, 1979, p.133) - The qualified answer according to the Pure Theory of Law is: "By presupposing the basic norm that one ought to

behave as the constitution prescribes." (Raz, 1979, p.133). In this way, the legal theory remains value-free.

He further claims that the concept of "social normativity" is not a concept of normativity. Laws should not be interpreted as imposing one's will, imposing obligations, granting power/rights, etc. This would make law the same as mob rule, or the same as a group of gangsters imposing their will on people in certain areas (Raz, 1979, p.136). Only justified normativity can explain the true character of legal systems as normative systems. Kelsen, therefore, regards law as an ideology (Raz, 1979, p.136). He also regards law as valid (normative) only if one ought to obey it (Raz, 1979, p.137). Law is not justified in an absolute sense according to Kelsen, as he is a moral relativist (Moral opinions are a matter of personal preference) (Raz, 1979, p.137). The individual may not consider the law to be just. The anarchist will refuse to speak of lawful, or legal duties as he perceives this to be a process of forcing him/her to behave in conformity with the law's wishes. In other words, the anarchist refuses to presuppose the basic norm (Raz, 1979, p.137). People are not likely to take on this norm as their basic norm. It is more likely that they appeal to a greater power like God, or appeal to nature or some other moral norm as their basic norm. This is, however, not relevant to the legal branch of knowledge, who has its unique point of view, that of the legal man. The legal man embraces this point of view in a unique professional sense of embracing. Legal science necessitates in the special sense, this specific basic norm, for it is only concerned as a science only with positive law (Joseph Raz p.143).

Positive law and morality are two independent systems of norms (Raz, 1979, p.143). The jurist does not consider morality. Likewise, the moralist does not consider positive law. These are therefore two mutually independent systems of norms. This does not mean that positive law cannot have laws that are morally right (Raz, 1979, p.143). As previously mentioned, Kelsen is a moral relativist. He does not believe in absolute good or bad, or right or wrong. He does not believe something is right or wrong because it is self-evident. Nor does he believe laws come from God (Raz, 1979, p.143).

National and international law are parts of a single system, as they must be seen from one point of view. This point of view is referred to as "the legal man" by Kelsen. If the legal man accepts both the authority of international law, and the authority of national law, they must be part of the same legal system (Raz, 1979, p.144). Therefore, International laws ratified by Kenya form part of Kenyan laws.

EMPIRICAL ANALYSIS

This section analyses four cases that showcase the discrimination and violence against LGBTIQ+ persons in Kenya. One has led to death while others have led to mistreatment, abuse, violence, and violation of the basic rights of LGBTIQ+ persons.

CASE ONE: SHEILA LUMUMBA

There have been many cases revolving the discrimination and violence toward the LGBTIQ+ community in Kenya. Some cases have been brought to light whilst others have been covered under the blanket (KHRC, 2011). This structural discrimination has been toward the LGBTIQ+ because of their sexual orientation or gender identity (Human Dignity Trust, 2022). Most recently, this has been the case with a twenty-five-year-old nonbinary Kenyan lesbian by the name of Sheila Adhiambo Lumumba. Sheila was found murdered in their home on the seventeenth of April 2022, in Karatina, North of Kenya (Kilbride, 2022).

The postmortem from Karatina sub-county hospital revealed that Sheila was sexually assaulted, stabbed in the chest, face, neck, and eyes alongside being hit by a blunt object on the head (Kilbride 2022). The family decided to investigate further by performing a toxicology test as they hoped that she was unconscious during the attack. Also, Sheila's family decided to take up the matter because they felt that the police did not take an urgent response to this case as they ought to. Kilbride reports that the family members claimed to have found a knife and razor blade in the bedroom while a family friend found CCTV footage of Sheila alive and being escorted by three men the previous night before her demise. These findings by family and friends are despite being assured that the police had searched the crime scene completely. Following this tragic incident, LGBTIQ+ activists stood in solidarity with Sheila to seek justice using the thread #justiceforsheila that trended in Kenya in this period (Kilbride, 2022).

Kenyan law forbids same-sex marriages and relations and is considered a criminal offense with penalties such as imprisonment ("Penal Code," 2012). The LGBTIQ+ community is not mentioned anywhere in the laws and policies against sexual and gender-based violence in Kenya. Murder is also not explicitly mentioned as a form of gender-based violence in the Kenyan National Policy on Prevention and Response to Gender-based violence (Kilbride, 2022). This then renders Sheila's case microscopic/unseen in the policies currently serving in Kenya.

CASE TWO: KWALE, COAST VIOLENCE

Two men in Kwale County, Kenya's coastal region were charged and arrested for unnatural offenses as well as promoting obscene material (Human Rights Watch, 2015). Human Rights Watch reported that the homophobic residents in these regions coerced the police to arrest them following the social media publications of photos of these men engaging in sexual misconduct. The Kenyan constitution declares under section 162 of unnatural offenses; that any person who has carnal knowledge of any person against the order of nature or permits a male person to have a carnal knowledge of him or her against the order of nature; is guilty of a felony and is liable to imprisonment for fourteen years ("Penal Code," 2012). These are among the laws prohibiting

homosexuality and same-sex relationships, all with dire consequences, and this Kwale incident is not an exception.

The police arrested these men, tried to force them into confessing their actions using violent threats, and also sought doctors to conduct anal examinations on the men to prove homosexuality between them. (Human Rights Watch, 2015). This is not only humiliating but also unfair to subject these people to forceful medical examinations without their consent.

Following this event, Human Rights Watch disclosed that the LGBTIQ+ community living in this part of Kenya resulted to flee for their lives fearing this structured violence against them. In this same period, in parts of the Kwale town like Ukunda and Diani, the residents ganged up and physically abused two other suspected gay men. These men did not report this issue to the police for fear of imprisonment and harassment by the police themselves (Human Rights Watch, 2015). We can see the sufferings of this community as they have no refuge to run to and no safe place for them to shelter.

CASE THREE: KENYAN LGBTIQ+ STUDENTS BE BANNED FROM BOARDING SCHOOLS

Kenyan LGBTIQ+ students either in college or high school have been expelled or suspended on grounds of their perceived sexual orientation or gender identity (“KHRC,” 2011, p.32). Professor George Magoha, the cabinet secretary of education, on 30th December 2021 declared that homosexual students be banned from attending boarding schools (CIVICUS, 2022). He said and I quote that, “children who are homosexual and lesbian must go to day schools close to their homes.” Furthermore, he added that “headteachers should be responsible for the greater majority and not a few individuals” (CIVICUS, 2022). These statements brought a lot of controversy leading to peaceful demonstrations in downtown Nairobi by the LGBTIQ+ students. They protested against these declarations pointing out that it is not only discriminatory to deny these students education but also places them at greater risk as it compromises their safety (Amunga, 2022).

Following these announcements from the cabinet secretary of education, made some schools take immediate action of expelling LGBTIQ+ students from school (Amunga, 2022). A protester from the demonstrations by the name of Maryliz Biubwa mentioned that so far two of the students were already chased out of school (Amunga, 2022). One of them was a final-year student in high school who was set to sit for her last examination which is Kenya’s Certificate of Secondary Education (KCSE) in March. The student had reached out to Maryliz for help as going home and failing to take her final examinations was not an option (Amunga, 2022). The protesters urged the cabinet secretary of education to withdraw his remarks and denounce all forms of discrimination against LGBTIQ+ persons (CIVICUS, 2022). At least this way, they would ensure that all the students have an easy time taking their examinations and ensure the protection of the LGBTIQ+ community in learning institutions (Teyie, 2022).

CASE FOUR: KISUMU GAY AND TRANSGENDER PEOPLE SEEKING HEALTH SERVICES AT NIGHT

Many gay people and transwomen living in Kisumu, Western Kenya are Human Immunodeficiency Virus/ Acquired Immunodeficiency Syndrome (HIV/AIDS) positive (ProudVision, 2019). There is a lot of rape and sexual abuse structured towards these individuals in Kisumu as a corrective measure to realign them back to straightness/ normalcy. Lily Simon, a transwoman, gives her sentiments on how the people told her that she needed a doctor or someone to preach over him so that the demons making him have lady-like characters in him would be cast out (ProudVision, 2019). The documentary shares that research has it that about fifteen percent of the people in Kisumu are living with HIV. Transwomen or one out of five men who have sex with other men (MSM) in the Kisumu region is HIV positive. Sadly, many of these people are not able to access health facilities and services says Victor Shaaban, a gay and HIV-positive man living in Kisumu (ProudVision, 2019). Victor, who is the founder of Men Against Aids Youth Group (MAAYGO) points out that the reason why they have high records of HIV-positive people in this society is because of the stigmatization they face, lack of access to crucial information and knowledge that concerns them, denial of health services as well as rejection by the society that makes it even harder to address this situation (ProudVision, 2019). MAAYGO in Kisumu was formed to help the LGBTIQ+ community and marginalized groups like sex workers get access to information, health services, and basic needs. The organization finds time to educate their peers, LGBTIQ+ persons and the Kisumu people in general about Sexually transmitted diseases and infections (STDs/ STIs), and HIV/AIDS as basic health discussions while offering counseling services to its population (ProudVision, 2019). Unfortunately, due to victimization and discrimination, this organization offers LGBTIQ+ persons HIV/AIDS testing and counseling at night. This is so because it is when this minority group feels secure enough to come out in public spaces and access health services without being shown prejudice by society (ProudVision, 2019). This is very inhumane, and it shows partiality in society. It proves that there are better and worthy citizens than others to the extent that some cannot walk freely in a health institution and be treated with dignity regardless of their sexual orientation.

DISCUSSION

From the empirical analysis, there is consistency in the discrimination and violation of human rights in real life and the publications used in this paper. As drawn from case one, Sheila Lumumba was murdered, and this proves the right to life has been violated. Case two: Kwale Coast, Kenya: Two men arrested for homosexuality, police brutality takes effect. Moreover, forced anal examinations are conducted by doctors. Forceful measures are against medical ethics. Health rights in this case have been violated. Case three: Kenyan LGBTIQ+ students banned from boarding schools is evidence of a violation of the right to education. Case four: Kisumu gay and transgender people seeking health services at night, shows LGBTIQ+ rights to health are denied and compromised. These violations prove that human dignity has been underrated.

LGBTIQ+ human rights violations are systematic and highly prevalent (“KHRC,” 2011, p.1). Their rights as human beings are infringed with evictions from their rental homes, SGBV from the police and heterosexual citizens, deprivation of health services and access to relevant medication, verbal and physical abuses, false accusations and charges, murder, expulsion from learning institutions, etc. (“KHRC,” 2011). Right to life, justice, and education, access to health services, and freedom from discrimination are among the human rights that have been breached in Kenya (“Constitution of Kenya,” 2010). The laws condemn same-sex relations and provoke a distinction between LGBTIQ+ persons and heterosexual citizens in Kenya. Moreso, these laws permit violence and violations of human rights serving as a justification ground for structural discrimination and abuse (“NGLHRC,” 2022).

The Constitution of Kenya provides no legal provisions for transgender and intersex people. Kenya has a binary dichotomy of male and female neglecting intersex persons (“KHRC,” 2011, p.2). Kenya has no legal legislative framework that acknowledges intersex and transgender people or permits them to choose a gender they prefer (“KHRC,” 2011, p.42). Intersex children through corrective surgeries are made to fit in the binary dichotomy of male or female while transgender persons are invisible in the legal system binding them to a gender they least prefer (“KHRC,” 2011, p.43).

The UN Office for the High Commissioner of Human Rights (UNHCHR) issued a report about violations of human rights which have been undermined by governments that ignore discrimination and violence grounded on gender identity and sexual orientation (United Nations, 2011, as cited in Ibhawoh, 2014, p.620-621). The UNHCHR appealed to governments to revoke all laws that criminalize same-sex unions and to offer anti-discriminatory laws instead (United Nations, 2011, as cited in Ibhawoh, 2014, p.620-621). Kenya still upholds anti-homosexual laws under the Penal Code of Kenya which are discriminatory. Moreover, Kenya has ratified international laws that it upholds selectively. This selectivity is what Ibhawoh, 2014, describes as the main challenge in the international human rights system i.e., what ought to be included and excluded (Ibhawoh, 2014, p.619). Kenyan law is contradicting international law; and its national law.

Other African countries, for instance, Botswana have decriminalized same-sex unions. The ruling was based on grounds that the anti-homosexual laws were no longer serving the public

interest as they violated the privacy, liberty, and dignity of the people as well as being discriminatory (Human Rights Watch, 2019). India also a former British colony decriminalized same-sex relations on grounds that no one has control over their sexual orientation (Times of India, 2018). Given that India and Kenya were both British colonies, one could argue according to the pure theory of law that since they belong to the same inherited system that consensual adult sex is decriminalized too in Kenya (Raz, 1979).

Dogmatic religious beliefs and incitement from religious leaders in Kenya contribute to LGBTIQ violence and should be revoked (“KHRC,” 2011, p.30). LGBTIQ+ persons have encountered countless stigmatization from health personnel and homophobic citizens ridiculing them to seek spiritual guidance and have religious leaders exorcise evil spirits from them (“KHRC,” 2011, p.41 & 44). Thomas Aquinas urges us to let God be the judge for everyone as he is the lawmaker (Dimock, 1999).

CONCLUSION

Human rights are a central element of the capability approach that encourages threshold capabilities of basic rights such as the right to life, education, and non-discrimination, etc. to function as fully human. The empirical cases discussed in the text, clearly prove that the members of the LGBTIQ+ community in Kenya; basic rights are being violated as well as counteracting the international laws of human rights. Despite the ratification of UDHR, ICCPR, and the African Charter on Human and People's Rights and the appeal by the UNHCHR to decriminalize homosexual laws, Kenya still upholds these laws in the Constitution which is contradictory and in breach of its laws. Therefore, LGBTIQ+ persons are unable to enjoy the rights and freedoms passed in the Kenyan Constitution as well as internationally.

The Constitution of Kenya has a lot of discrepancies that need to be addressed such as the contradiction of domestic and international laws. International laws uphold the rights of LGBTIQ+ persons which Kenya has not yet accomplished. Kenya has ratified these laws and should actively participate in promoting and executing the laws. Kenya is deemed to have a lack of jurisdiction as it does not hold any laws about transgender and intersex people hence the Constitution of Kenya is proven to be lacking in some sections. Transgender and Intersex groups have no place in the new constitution that is supposed to be all-inclusive, liberal, and progressive. There are no provisions that guide and inform these groups and as such are neglected in society and subject to harassment and discrimination of all kinds, nonetheless. How can Kenyans, therefore, trust such a constitution in administering and delivering justice to all people with such incompetence and inconsistency in its laws?

The government of Kenya is solely responsible for making and amending laws. Some of the challenges associated with decriminalizing same-sex laws by the legislative committees as explained in the literature review are mostly driven by dogmatic religious beliefs, the lack of political will to abolish discriminatory laws instigated by the colonial-era laws, culture, and strong sexual hierarchies. These hindrances limit the LGBTIQ+ community from living to their full potential as well as receiving protection against discrimination and violence. When these limitations are overcome, then sexual minority groups will be protected from the discrimination and stigmatization that places them as targets to the rest of the Kenyan population.

From the theoretical framework, I explored four theories namely, Natural law, Social learning theory, Social interaction theory, and Pure theory of law. I deduced the following.

- According to social learning theory, aggression which causes violence, is a learned behavior that can be unlearned. The Kenyan laws excuse violence against LGBTIQ+ persons. Therefore, if the laws in Kenya are changed to include LGBTIQ+ persons, then it will prohibit violent acts toward this community.
- The social interaction theory explains that aggressive actions are conducted by the aggressor to prompt a change in the target's behavior. The Kenyan Penal code explicitly prohibits homosexuality and therefore it strengthens the ability of homophobic citizens to perpetuate violence as a corrective measure against LGBTIQ+ persons. The decriminalization of such laws will render violence and other aggressive actions

forbidden and perhaps a punishable offense. This will ensure that all citizens are equal before the law and must adhere to it.

- My reason for exploring “The Pure Theory of Law”, is that it explains laws have authority. A constitution gives authority to all other laws within that system. Therefore, the Constitution of Kenya has given authority to the international laws concerning human rights and as such has the mandate of exercising the said anti-discriminatory laws of LGBTIQ+ rights. Moreover, it supports that law is value-free in nature and does not have moral values. That said, laws are not justified in an absolute sense. Kenyan laws should therefore make and pass laws that are free in nature to accommodate all its citizens and especially minority groups.
- Natural law emphasizes that God is the overall judge of all people; therefore other heterosexual rational beings should not take God’s position in administering the law. Religious bodies should also not have a say in what is morally right or wrong as they inform a huge deal of the population of Kenya, which is a Christian state. Legislative committees of Kenya should shun away laws that are discriminatory and also make laws that are unbiased and liberal as we are all under God. This theory encourages tolerance of homophobic citizens.

RECOMMENDATIONS

Inferences gathered from this research recommend the following.

- To ban all discriminatory laws according to chapter four of the Kenyan Constitution that prohibits discrimination on any ground which should include gender identities and sexual orientations.
- International laws ratified by Kenya though not legally binding should be upheld and enforced with immediate action.
- The Penal Code section 162,163 and 165 should immediately be banned. When this is achieved all citizens will be equal before the law and all rights in Kenya will be upheld and respected.
- Kenya should emulate countries that have struck out outdated laws that are no longer serving its nation just like Botswana and India.
- The Government of Kenya should reconsider amending the law to incorporate transgender and intersex people.

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