The Kenyan Constitution 2010, gay sex (or gay rights?), and the Eric Gitari ruling of 2019.

By Joshua Malidzo Nyawa

They flutter behind you, your possible pasts
Some bright eyed and crazy, some frightened and lost
a warning for anyone still in command
of their possible future to take care

Pink Floyd "Your Possible Pasts"[1]

Introduction

The idea of a transformative constitution[2] is closely related to the metaphor of a 'bridge'[3]. They both mean crossing over from one side to a different side, moving 'forward' and not 'backward'. They both mean progress from an untenable *status quo* to crossing over to a desired destination. These two ideas carry with them a dream of non-retrogression.

Henk Botha[4] in his '**Metaphoric Reasoning and Transformative Constitutionalism'** and Wessel le Roux[5] in his '**Bridges, Clearings and Labyrinths: The Architectural Framing of**

[1] From the album *The Final Cut*, subtitled "A Requiem for the Post War Dream" (1983 ©Pink Floyd Music Publishers Ltd); lyrics by Roger Waters.

[2]Klare K 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146, 147. transformative constitutionalism is defined to mean

[A] Long-term project of constitutional enactment, interpretation, and enforcement committed … to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law

[3] A notion that is propagated by Etienne Mureinik in A Bridge to Where? Introducing the Interim Bill of Rights (1994) *10 SAJHR 32* Who argues that

If the new Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification - a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion.

[4] See H Botha 'Metaphoric Reasoning and Transformative Constitutionalism (Part 1)' (2002) *TSAR* 612; H Botha 'Metaphoric Reasoning and Transformative Constitutionalism (Part 2)' (2003) *TSAR* 20; J van der Walt *Law and Sacrifice* (2005)

[5] W le Roux 'Bridges, Clearings and Labyrinths: The Architectural Framing of Post-Apartheid Constitutionalism' (2004) 19 *SAPL* 629

Post-Apartheid Constitutionalism' have built up on the notion of the transformative bridge as a metaphor to reject the traditional notion of the bridge as meaning 'crossing from one side of the bridge to another'. To them the traditional notion is misleading, a position that I agree with, the idea of the notion bridge should not mean a known destination but it should mean a continuous change to the unknown (unspecified future).

Furthermore, as Langa puts it that the traditional notion of the metaphoric bridge seems to suggest that transformation is a temporary event (rather than a permanent ideal), that at some point we will reach the other side of the bridge. Transformation then ends because we have reached our desired destination. On his part, Andre van der Walt in his '**Dancing with Codes'**[6]faults this traditional notion by noting that:

> '[i]n this vision of transformation there is no longer room for imagining that things could be different, that there might be further options and more complex alternatives to the two places between which we have chosen to choose.'

Therefore the bridge should be a space between 'an unstable past and an uncertain future' and the value of the bridge lies in remaining on it, crossing it over and over to remember, change and imagine new[7] and better ways of being[8]. When understood this way, transformation must be sustained and as the world changes, thinking and judicial reasoning must also change.

The neologism transformative must therefore mean change and with a possibility and potential of change, it must anticipate the notion and necessity of transformation as a continuous process,

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[6] Van der Walt, 'Dancing with codes - Protecting, developing and deconstructing property rights in a constitutional state', 118 (2) J. *S. APR. L*. 258 (2001)

[7] Wessel Le Roux has also argued that the significance is not in the bridge itself but in the act of bridging- the linking of the past and the future reality and imagination to create new ideas in the present.

[8]Justice Pius Langa, Transformative Constitutionalism, Prestige Lecture delivered at Stellenbosch University on 9 October 2006.

and not transformation as an occurrence or single event. The bridge (transformative constitution), should be able to adapt to change, speaking to the past and the future, laying a template to new era. This is the reason for the following statement by Van der Walt that:

> "However, even when we trade the static imagery of position, standing, for the more complex imagery of dancing, we still have to resist the temptation to see transformation as linear movement or progress – from authoritarianism to justification, from one dancing code to another, or from volkspele jurisprudence to toyitoyi jurisprudence... I suggest that we should not only switch to a more complex metaphorical code such as dancing when discussing transformation, but that we should also deconstruct the codes we dance to; pause to reflect upon the language in terms of which we think and talk and reason about constitutionalism, about rights, and about transformation, and recognize the liberating and the captivating potential of the codes shaping and shaped by that language.

On whether the Kenyan constitution is transformative or not is beyond peradventure. Our courts have already declared themselves on this position[9]. This has been supplemented by academicians[10] and it needs no more ink. However, I will provide expressions on this notion by the Supreme Court of Kenya in its two decisions. In *Speaker of The Senate & Another* [11] , the court noted that

[9] See *Joseph Kimani Gathungu v Attorney General & 5 others* [2010] eKLR, Constitution Reference 12 of 2010, Where Ojwang J(as he then was) expressed himself thus
'A scrutiny of the several Constitutions Kenya has had since Independence shows that, whereas the earlier ones were designed as little more than a regulatory formula for State affairs, the Constitution of 2010 is dominated by a "social orientation", and as its main theme, "rights, welfare, empowerment", and the Constitution offers these values as the reference-point in governance functions.'
[10] Prof. Yash Pal Ghai in '*Chimera of constitutionalism: State, economy and society in Africa'*
[11]*Speaker of The Senate & Another vs. Hon. Attorney-General & Another & 3 Others* Advisory Opinion Reference No. 2 of 2013 [2013] eKLR

"Kenya's Constitution of 2010 is a transformative charter. Unlike the conventional "liberal" Constitutions of the earlier decades which essentially sought the control and legitimization of public power, the avowed goal of today's Constitution is to institute *social change* and *reform*, through values such as *social justice, equality, devolution, human rights, rule of law, freedom and democracy.* This is clear right from the preambular clause which premises the new Constitution on – *"RECOGNISING the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law."* And the principle is fleshed out in Article 10 of the Constitution, which specifies the "national values and principles of governance", and more particularly in Chapter Four (Articles 19-59) on the Bill of Rights, and Chapter Eleven (Articles 174-200) on devolved government. The transformative concept, in operational terms, *reconfigures the interplays between the States majoritarian and non-majoritarian institutions*, to the intent that the desirable goals of governance, consistent with dominant perceptions of *legitimacy*, be achieved".[12]

The Supreme Court also expressed itself in *Samuel Kamau Macharia*[13] that 'A Constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest ofits legitimate object of rendering political goods.' However, Transformative

[12]*Luka Kitumbi & Eight Others v. Commissioner of Mines and Geology & Another, Mombasa* HCCC No. 190 of 2010], Ojwang J has remarked that:
'I take judicial notice that the Constitution of Kenya, 2010 is a unique governance charter, quite a departure from the two [1963 and 1969] earlier Constitutions of the post-Independence period. *Whereas the earlier Constitutions were essentially programme documents* for regulating governance arrangements, in a manner encapsulating the dominant political theme of centralized (Presidential) authority, the new Constitution not only departs from that scheme, but also lays a foundation for values and principles that must imbue public decision-making, and especially the adjudication of disputes by the Judiciary.'
[13]*Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others* [2012] eklr No. 2 of 2011 at paragraph 62

constitutions cannot propel themselves, they require courts which should be creative, progressive and pro-active[14], this is what Moseneke terms "Transformative Adjudication".

Justice Dikgang Moseneke, has argued that any transformative jurisprudence must support a commitment to substantive equality, contextualize violations within actual societal conditions, re-order systemic and entrenched disadvantages, optimise human development, espouse the concept of the indivisibility and interrelatedness of rights, inclusive of SERs, as well as seek the attainment of the collective good through redistributive fairness[15] and therefore judges should search for substantive justice which is to be inferred from the foundational values of the constitution and further that the constitution has 'reconfigured the way judges do their work….it invites us into a new plane of jurisprudential creativity and self-creativity and self-reflection about legal method, analysis and reasoning consistence with its transformative rules.

Similarly, Eric *Kibet and Charles Fombad*[16] have argued that whereas the constitution is the vehicle, it cannot drive itself, they argue that

> While the text of the Constitution is the vehicle for political, economic and egalitarian social transformation, the judiciary enjoys the powerful and influential position of being the driver of this vehicle. Thus, the potential of change through the Constitution cannot amount to much unless the courts live up to the task in the adjudication of rights and their enforcement in real cases[17].

[14] See Walter Khobe, The supreme Court and the obligation to forge new tools and shape innovative remedies
[15] See also D Moseneke 'The fourth Bram Fischer memorial lecture: Transformative adjudication' (2002) 18 *South African Journal on Human Rights* 309, at 316-19
[16]E Kibet & C Fombad 'Transformative constitutionalism and the adjudication of constitutional rights in Africa' (2017) 17 *African Human Rights Law Journal* 340-366
http://dx.doi.org/10.17159/1996-2096/2017/v17n2a1
[17] see E Christiansen 'Transformative constitutionalism in South Africa: Creative uses of Constitutional Court authority to advance substantive justice' (2010) 13 *Journal of Gender, Race and Justice* 575.

The role of these judges is therefore not constant, not from one particular point to another, but it should be continuous, thinking of a new innovation each day and each moment a judge is met with a case.

Unfortunately, **Eric Gitari 2[18] runs in the opposite direction, it washes away all the gains that have been made since the promulgation of the 2010 constitution. It entrenches retrogression and status quo-ism in Kenya and exposes conservatism. The decision is at war with the leitmotifs of the constitution. Instead of enforcing the constitution, the Judges decided to sit an 'ivory tower like an Olympian' closing their eyes uncaring for the problems faced by the minorities in Kenya. Three judge bench failed to exercise its judicial powers with courage, creativity and circumstances complemented by vision, vigilance and practical wisdom, [19]because this was such a circumstance.**

It is because of this that the commentary suffices. With such a background, this paper considers the lies, misinterpretations and the flawed arguments by the court. This paper will seek to show that the impugned provisions of the penal code cannot be sustained under the 2010 constitution of Kenya. It will fault the regrettable finding made by the court that section 162 and 165 of the penal code do not violate the right to dignity, the right to privacy and the right to equality and the freedom from discrimination. This paper will also make a short commentary on the continued reliance of *Anarita* precedent.

I. The Eric Gitari 2; A brief of the facts

[18] EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)
[19] *Judicial Activism And Public Interest Litigations*, available at *shodhganga.inflibnet.ac.in/bitstream/10603/20809/13/13_chapter%205.pdf*

The common thread in the two Petitions was that they both challenge the constitutionality of sections **162(a) (c)** and **165** of the Penal Code. It was the petitioners' claim that the provisions of the penal code: *a. Violate Articles **27** (Equality and freedom from discrimination), Article **28** (Human dignity), Article **29** (Freedom and security of the person), Article **31** (Privacy) and Article **43** (Economic and social rights-specifically health);b. contravene common law and constitutional principles (including Articles **10** and **50** of the Constitution) relating to legal certainty on account of their vagueness and uncertainty and consequently, cannot operate to create criminal penalties.* The impugned provisions provided as follows;

162) *any person who---*

*a) Has carnal knowledge of any person against the **order of nature**; or*

b) Has carnal knowledge of an animal; or

*c) Permits a male person to have carnal knowledge of him or her **against the order of nature**, is guilty of a felony and is liable to imprisonment for fourteen years.*

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

I. the offence was committed without the consent of the person who was carnally known; or

ii. The offence was committed with that person's consent but the consent was obtained by force or by means of threats or intimidation of some kind, or by fear of bodily harm, or by means of false representations as to the nature of the act.

On the other hand section 165 of the Penal Code provides that:-

Indecent practices between males

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

II. Whether the provisions were vague and uncertain?

The court proceeded by noting that the penal code does not define *"Unnatural offences,"* and *"against the order of nature."*[20] and proceeded to note that ' Having established that the impugned phrases have been clearly defined in law dictionaries and in a catena of judicial pronouncements, it is our considered view that lack of definitions in the statute *per se* does not render the impugned provisions vague, ambiguous or uncertain. Accordingly, we decline the invitation to declare the said provisions unconstitutional on grounds of vagueness, uncertainty, ambiguity and over broadness.[21] The court therefore noted that the phrases had been defined in case law and the legal dictionaries and they were therefore not broad or uncertain. However the court either deliberately or unknowingly didn't consider the constitutional test. This cannot go without a comment.

The petitioners had alleged a violation of Article 50 of the constitution, this is mostly referred to the principle of legality. Article 50(n) of the constitution provides that an accused person has the right to not to be convicted of an act or omission that at the time it was committed or omitted was not a crime in Kenya[22]. Over the years, this was a common law principle. It has been said to

[20] Eric Gitari 2 at para 263
[21] ibid para 278.
[2222] See also Article 15 of the International Covenant on Civil and Political Rights.

encompass three fundamental principles, the principle of non-retroactivity, the principle of specificity and the principle of analogy.

The ICTY has explained this principle and in particular the sub-branch of specifity to mean that: [T]he […] Chamber must further satisfy itself that the criminal conduct in question was sufficiently defined and was sufficiently accessible at the relevant time for it to warrant a criminal conviction and sentencing under the criminal heading chosen by the Prosecution[23] while on the other hand the European Court on Human Rights noted in *Sunday Times vs United Kingdom*, that *"(A) norm cannot be regarded as "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able- if need be with appropriate advice- to foresee, to a degree that is reasonable in the circumstances, the consequences which a given situation may entail."*[24]

Where the specific statute does not define the terms, the terms are subject to different definitions by the courts. This in itself makes the provisions vague. In considering the constitutionality of section 29 of the provided for the offence of the misuse of telecommunication devices, Justice Mumbi Ngugi noted in *Geoffrey Andare*[25]that:

> " *I have considered the words used in the section. I note that there is no definition in the Act of the words used. Thus, the question arises: what amounts to a message that is 'grossly offensive', 'indecent' obscene' or 'menacing character'" Similarly, who determines which message causes 'annoyance', 'inconvenience', 'needless 'anxiety'" Since no definition is offered in the Act, the meaning of these words is left to the*

[23]*Vasilijević*, TJ ¶ 193.
[24]*Sunday Times vs United Kingdom* Application No 65 38/74 para 49,
[25]*Geoffrey Andare v Attorney General & 2 others* [2016] eKLR

subjective interpretation of the Court, which means that the words are so wide and vague that their meaning will depend on the subjective interpretation of each judicial officer seized of a matter.. It is my view, therefore, that the provisions of section 29 are so vague, broad and uncertain that individuals do not know the parameters within which their communication falls, and the provisions therefore offend against the rule requiring certainty in legislation that creates criminal offences"[26].

On the other hand, in the *Cord Case*, a 5 judge bench of the High Court pointed out the constitutionality test to be ,'the principle of law with regard to legislation limiting fundamental rights is that the law must be clear and precise enough to enable individuals to conform their conduct to its dictates'.

The Court of Appeal on the other hand (speaking through Justice Kathurima M'Inoti) noted in *Mtana Lewa*[27]that the limiting law must be clear enough and devoid of ambiguity, for if a guaranteed constitutional right is to be limited, the limitation must be specific enough for the citizen to know the nature and extent of the limitation, his or her rights and obligations under the right as limited and the law supplying the limitation must be easily accessible to the citizen.

It is my view that the retreat of the court to legal dictionaries and case law to look for a definition and in which they failed to obtain a common definition is a clear indication that the provisions violated the constitutional standards because they were not accessible, unambiguous, narrowly drawn and with precision to enable individuals to foresee whether a particular action is unlawful[28]and they were not formulated with sufficient precision to enable one, if need be, with

[26] ibid at paras 77-78.
[27]*Mtana Lewa V Ngala Mwagandi*, CA. No. 56 of 2014. This was reiterated by the Court of Appeal in Seventh Day Adventist EA versus AG.
[28]*The Johannesburg Principles: National Security, Freedom of Expression and Access to Information.* London: Article 19, 1996. Principle 1.1.

appropriate advice, to foresee to a degree that is reasonable, the consequences a given action may entail.[29]

The court should have at least been guided by the immortal words of the Canadian Federal Court of Appeal decision. In *Reluscher & Deputy Minister, Revenue, Canada, Customs & Excise*, 17 D. L. R (4th) 503, where it was said that;

> *"[O]ne of the first characteristics of a reasonable limit prescribed by law is that it should be expressed in terms sufficiently clear to permit a determination of where and what the limit is. A limit which is vague, ambiguous, uncertain, or subject to discretionary determination is, by that fact alone, an unreasonable limit. If a citizen cannot know with tolerable certainty the extent to which the exercise of a guaranteed freedom may be restrained, he is likely to be deterred from conduct which is, in fact, lawful and not prohibited. Uncertainty and vagueness are constitutional vices when they are used to restrain constitutionally protected rights and freedoms. While there can never be absolute certainty, a limitation of a guaranteed right must be such as to allow a very high degree of predictability of the legal consequences."*

III. The Roaring of the ugly face of the Anarita precedent.

When we thought that the Anarita was buried and forgotten, it roared its head again in this decision[30]. *Walter Khobe*[31] has correctly identified the purpose of Article 22, 159 and the famous

[29] *Margareta and Roger Andersson v. Sweden* (1992) Series A No 226 para75; *Tolstoy Miloslavsky v. the United Kingdom* Judgment of 13 July 1995, Series A No. 316-B [37].
[30] para 299
[31] Walter Khobe, The Court of Appeal is failing to give effect to Constitutional aspirations (2016) 13/14 , the platform pp.85-91, he further argues that
However, the 2010 Constitution demands a break from the chains of this enduring legalistic mentality. The approach to constitutional adjudication in *Anarita Karimi* is dogmatic legalism and anti-2010 Constitution logic at its worst. Thus judges should not believe that they are shackled by the medieval chains of the *Anarita Karimi* principle.

Mutunga Rules[32] , he argues that the enactment of these provisions of law was to cure the ills of the past and it is time that courts embrace a shift towards a 'liberal (even informal)' approach to proceedings. There is a need for the courts to apply caution when the Anarita ghost is relied upon by the respondent. The High Court (Speaking through the celebrated Justice Louis Onguto) refused to be bound by the Anarita principle in *Kevin Turunga Ithagi*[33]and held that the said principle was only to be applied with caution.

> "In my view, the ratio of Anarita Karimi Njeru –v- Republic (*Supra*) should be applied by the court with caution and prudence. Thus where the pleadings filed and documentation availed reasonably take the trajectory of Constitutional interpretation or application then that should suffice to have the Petition admitted and determined on its merits."

On a similar note, the late Justice Joseph Onguto[34] refused to follow the Anarita principle, *Walter Khobe* argues that the late justice appreciated the 'changed dynamic', this changed dynamic can clearly be attributed to the promulgation of the 2010 constitution and the enactment of the Mutunga rules. The late justice started off from the fact the Anarita case was decided nearly one quarter prior to the promulgation of the constitution[35], as a progressive judge, the late Justice Onguto was prepared to accept the new position. On the applicability of the Ratio decidendi in Anarita[36], the late Justice Onguto rendered himself thus

[32]Rule 10(3) & (4) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice & Procedure Rules 2013
[33]*Kevin Turunga Ithagi v Fred Ochieng & 5 others* [2015] eKLR at para 47
[34] see *Fazleabbas Mohammed Chandoo vs A.I Hussein - Kadhi, Kadhi's Court & 4 Others*, Petition Number 374 of 2015
[35] ibid at para 30
[36]ibid at para 31

"Article 22(3) of the Constitution enjoins the Chief Justice to make rules providing for court proceedings relating to the Bill of Rights. Such rules are required to satisfy the norm that formalities relating to proceedings are kept to the bare minimum and in particular the fact that the Court is enjoined, if necessary to entertain proceedings on the basis of informal documentation. This clause read together with Article 258 of the Constitution leads to the more prudent conclusion that the rigorous requirements set out by the Court in the *Anarita Karimi Njeru's* case need deeper reflection before being applied to any given case.''

Finally, while sitting as three justices, the High Court (Justices Joel Ngugi, Mumbi Ngugi, and George Odunga)[37] correctly appreciated the changed dynamic, but however fell short from overruling the principle[38], the court refused to worship at the altar of formal fetishism[39], the learned justices held that

"45. We must point out that *Anarita Karimi Njeru* was decided under the Old Constitution. The decision in that case must now be reconciled and be brought into consonance with the new Constitution. In our view, the present position with regard to the admissibility of petitions seeking to enforce the Constitution must begin with the provisions of Article 159 on the exercise of judicial authority. Among other things, this Article stipulates that: (d) justice shall be administered without undue regard to procedural technicalities; and (e) the purpose and principles of this Constitution shall be protected and promoted….This being a constitutional issue of immense public importance and interest, we refuse to worship at the altar of formal fetishism on this issue and hold that the controversy at issue

[37] *Trusted Society of Human Rights Alliance vs Attorney General & 2 Others,* Petition 229 of 2012
[38] ibid at para 46
[39] ibid at para 45 and 47

has been defined with reasonable precision to warrant a proper judicial determination on merits."

The Judges should have been guided by the spreading bush fire and applied the Anarita precedent with caution. The Anarita precedent can only be sustained in post-2010 constitutional dispensation if it is accompanied by sufficient modifications.

IV. Violation of the right to equality and freedom from discrimination

The grounds of discrimation or the list enumerated under Article 27 of the constitution is non-exhaustive and sexual orientation can be one of the grounds. In *Eric Gitari 1*[40], the high court and the majority of the court of appeal, appreciated this and noted that 'First, the absence of sexual orientation as one of the prohibited grounds in Article 27(4) does not assist the Board or give the state free reign to discriminate against people. The word used in the Article is ***"including"*** the grounds listed therein; the list in Article 27(4) is thus not closed, and is subject to interpretation to include such grounds as the context and circumstances demonstrate are a ground of discrimination.'

In Eric Gitari 2, the high court seems to have confused direct discrimination and indirect discrimination. Whereas sect 162 uses the term every person, the court failed to consider the effects of the enforcement of that provision[41]. The court failed to note that the main targets of the act was the homosexuals. Furthermore, the court could not remember article 27(4) which secures the protection of the individuals from discrimination which can be directly or indirectly[42]. A law

[40] PETITION NO 440 OF 2013
[41] See the court of appeal in *Mohamed Fugicha v Methodist church in Kenya (suing through its registered trustees) & 3 others* [2016] eKLR
[42] see court of Appeal in Eric Gitari 1 (Nambuye J)

can be seen to be non-discriminatory on its face but its enforcement or implementation can be discriminatory.

In a similar provision in the South African Constitution, Langa D.P (later CJ) in the case of ***CITY COUNCIL OF PRETORIA*** [43]held that;

"The inclusion of both direct and indirect discrimination, within the ambit of the prohibition imposed by section 8(2) [our Article 27(4)] of the Constitution, evinces a concern for the consequences rather than the form of conduct. It recognizes that conduct which may appear to be neutral and non-discriminatory may nonetheless result in discrimination and, if it does, that it falls within the purview of section 8(2) [our Article 27(4)] of the Constitution."

The Canadian Judge Dickson (later CJ) expressed himself in *R –vs- BIG M. DRUG MART LTD*[44]thus *"both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation [or any policy]."*[45]The Court of Appeal (Justices Waki, Nambuye, and Kiage) in *Fugicha* noted that 'The framers of the 2010 Constitution and the people in promulgating it were alive to this all-important distinction between direct and indirect discrimination and were careful to proscribe both forms in express terms in **Article 27(4).** For a court to fail to enquire into that aspect, especially where, as here, the indirect character of the discrimination is cited and submitted on, is a serious non-direction and amounts to a reversible error of law'. Indirect discrimination is therefore important to incorporate in equality rights adjudication as it gives recognition to the

[43]*CITY COUNCIL OF PRETORIA V WALKER* [1989] ZACC 1
[44]*R –vs- BIG M. DRUG MART LTD* [1985] 1 S.C.R. 295
[45]See also *Naz Foundation v. Govt. of NCT of Delhi*, 160 Delhi Law Times 277 (Delhi High Court 2009).

reality that not all people are on the same playing field. As a former justice of the Constitutional Court stated:[46]

Although the long term goal of our constitutional order [the South African Constitution] is equal treatment, insisting upon equal treatment in established inequality may well result in the entrenchment of that inequality.

An example of indirect discrimination can be found in the South African case of *S v Jordan* , in this case, the law penalized the recipient of the reward of prostitution, Even though, the law used the word person, O'Regan and Sachs in their dissenting opinion found that the section constituted unfair discrimination based on sex as it applied only to the conduct of the prostitutes who are overwhelmingly female, and patrons [who] are overwhelmingly (though not exclusively) male [and are] relatively more powerful and socio-economically privileged.

In *The National Coalition For Gay And Lesbian Equality Versus The Minister Of Justice* which decriminalised homosexuality in South Africa, Sachs J was quick to point out that 'Thus, it is not the act of sodomy that is denounced by the law, but the so-called sodomite who performs it; not any proven social damage, but the threat that same-sex passion in itself is seen as representing to heterosexual hegemony'. and further he declared his resistance to legal stereotypes writing that 'prejudice spawns prejudice, and stereotypes produce limitations that confirm the stereotype on which they are based, a history of unequal treatment requires sensitivity to the prospect that its vestiges endure ... as in many important legal distinctions, "a page of history is worth a volume of logic"'.[47]

[46]*President of the Republic of South Africa v Hugo* 1997 (4) SALR 1 (CC) 41 para 112 (*per* Justice O'Regan).
[47]*National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517 (CC) para 127

Therefore, the three judge bench should have at least asked itself what it was being criminalized, the act or the person. Then secondly, what is the enforcement or what is the impact of the enforcement. Section 162 indirectly discriminates against the LGBTI people.

Section 165 is discriminatory at least on the face of it, leave alone the indirect impact. It makes it an offence for any 'indecent act' between men. But it not an offence when the same is committed as between a man and woman, absurd. Sex is one of the grounds of discrimination under article 27(4) and therefore the court should have found the provision as discriminatory just on its face.

V. Violation of the right to dignity and right to privacy

In Kenya today, human dignity is both a value[48] and enforceable right[49] and as it has been correctly observed there is a connection between an individual's right to privacy and the right to dignity[50]. Privacy fosters human dignity insofar as it is premised on and protects an individual's entitlement to a "sphere of private intimacy and autonomy."[51]The rights of equality and dignity are closely related, as are the rights of dignity and privacy.[52]The Supreme Court of South Africa in ***President of the Republic of South Africa v. Hugo***[53] observed that the prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups but also that at the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order

[48] Article 10 of the constitution of Kenya
[49] Article 28 of the constitution of kenya
[50]*M W K v another v Attorney General & 3 others* [2017] eKLR at para 55
[51] As the court noted in *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and another* 2014 (2) SA 168 (CC) at para 64:
[52]*National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998Y
[53] 1997) 6 B.C.L.R. 708 (CC)

is the establishment of a society in which all human beings will be accorded equal dignity and respect, regardless of their membership of particular groups

It can be added that the right to privacy is indeed at the core of human dignity. Human dignity cannot exist where the right to privacy has been excessively and unjustifiably limited. In *Robert K. Ayisi*[54] the court referred to human dignity as a prerequisite right that must be accorded for one to be able to enjoy every other right or freedom deserving of any citizen of a democratic state or put differently, if a person enjoys the other rights in the Bill of Rights, the right to human dignity will automatically be promoted and protected and it will be violated if the other rights are violated[55]. This therefore means that when considering a claim for a violation of a right, judges have to consider this essential value.*Michele Finck*[56] shows the link between dignity and being classified as a homosexual in the following terms

> As a concept devoid of a precise legal meaning, yet widely appealing at an intuitive level, dignity- can be easily manipulated and transposed into a number of legal contexts. With regard to the rights of lesbian and gay individuals, dignity captures what Nussbaum described as the transition from "disgust" to "humanity." Once looked at with disgust and considered unworthy of some rights, there is increasing consensus that homosexuals should no longer be deprived of the benefits of citizenship that are available to heterosexuals, such as the ability to contract marriage, on the sole ground of their sexual orientation. Homosexuals are increasingly considered as "full humans"

[54]*Robert K. Ayisi v Kenya Revenue Authority & another* [2018] eKLR at para 105
[55] see ibid at para 115
[56]The role of human dignity in gay rights adjudication and legislation: A comparative perspective, Michele Finck, International Journal of Constitutional Law, Volume 14, Jan 2016, page no.26 to 53

> disposing of equal rights, and dignity functions as the vocabulary that translates such sociocultural change into legal change.

Similarly In ***Law v. Canada (Minister of Employment and Immigration)***[57] capturing the essence of dignity, the Supreme Court of Canada has made the following observations:-

> Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognise the full place of all individuals and groups within Canadian society.

In ***Planned Parenthood of Southeastern Pa. v. Casey***[58], the United States Supreme Court had opined that such matters which involve the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.

In the 1998 decision of *NCGLE v. Minister of Justice* ("*NCGLE Sodomy* case"), the South African Constitutional Court decriminalized consensual same-sex sexual activity between adult males.[59]Writing for the unanimous Court, Justice Ackermann held that the common law and statutory offenses of sodomy violated the equality, dignity, and privacy rights provided in the

[57] 1999 1 S.C.R. 497
[58] 505 U.S. 833 (1992)
[59]*NCGLE Sodomy* 1999 (2) SA 1 (CC)

South African Constitution.[60]The European Court of Human Rights has correctly, in my view, recognised the often serious psychological harm for gays which results from such discriminatory provisions which in turn touches on the dignity of an individual,

> "[o]ne of the effects of criminal sanctions against homosexual acts is to reinforce the misapprehension and general prejudice of the public and increase the anxiety and guilt feelings of homosexuals leading, on occasions, to depression and the serious consequences which can follow . . ."[29]

On the other hand, the supreme court of India when faced with the same question as was in Kenya, in *Navtej Singh Johar*[61], the court was quick to point the interconnectedness of the rights, on dignity, the court pointed out that

> "From the aforesaid, it has to be appreciated that homosexuality is something that is based on sense of identity. It is the reflection of a sense of emotion and expression of eagerness to establish intimacy. It is just as much ingrained, inherent and innate as heterosexuality. Sexual orientation, as a concept, fundamentally implies a pattern of sexual attraction. It is as natural a phenomenon as other natural biological phenomena. What the science of sexuality has led to is that an individual has the tendency to feel sexually attracted towards the same sex, for the decision is one that is controlled by neurological and biological factors. That is why it is his/her natural orientation which is innate and constitutes the core of his/her being and identity. That apart, on occasions, due

[60]*NCGLE Sodomy* 1999 (2) SA 1 (CC) at para. 30 (S. Afr.).
[29]*Norris v Republic of Ireland* (1991) 13 EHRR 186 at 192 para 21 quoting with approval the finding of an Irish judge.
[61]The Supreme Court Of India In *Navtej Singh Johar & Ors Versus Union Of India* Writ Petition (Criminal) No. 76 Of 2016

to a sense of mutuality of release of passion, two adults may agree to express themselves in a different sexual behaviour which may include both the genders"[62]

Therefore one is not stripped off his dignity because he is a prisoner or a homosexual[63], the dignity is inborn and it runs all through his life despite the change of sex orientation.

On privacy, it should be realized that criminalization of homosexuality acts amounts to the intrusion of the state into the bedroom of its citizens, Ackermann J pointed this out in *Bernstein and Others v Bester and Others NNO* that the scope of privacy had been closely related to the concept of identity and that "rights, like the right to privacy, are not based on a notion of the unencumbered self, but on the notion of what is necessary to have one's autonomous identity . . . In the context of privacy this means that it is . . . the inner sanctum of the person such as his/her family life, sexual preference and home environment which is shielded from erosion by conflicting rights of the community."

Privacy was defined in ***Dudgeon v. United Kingdom[64]*** to mean "Perhaps the best and most succinct legal definition of privacy is that given by Warren and Brandeis - it is "the right to be let alone". This "right to be left alone" should be seen not simply as a negative right to occupy a private space free from government intrusion, but as a right to get on with your life, express your personality and make fundamental decisions about your intimate relationships without penalisation. Justice Blackmun, in his dissent, in the case of ***Bowers, Attorney General of Georgia v. Hardwick et al.*** [65] , linked privacy to the right to make an individual choice. Justice Blackmun went on to observe:-

[62] ibid at para 143.
[63]Human Rights Gay Rights by Michael Kirby, Published in 'Humane Rights' in 2016 by Future Leaders
[64] [1981] 4 EHRR 149
[65]*Bowers v. Hardwick*, 478 U.S. 186 (1986)

> The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds. … In a variety of circumstances, we have recognized that a necessary corollary of giving individuals freedom to choose how to conduct their lives is acceptance of the fact that different individuals will make different choices.

Similarly, the South African Constitutional Court in ***National Coalition for Gay and Lesbian Equality and another v. Minister of Justice and others***[66] also noted on the decisional freedom as an element of privacy. It stated that privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy.

Conclusion

The legacy of othering is not in line with the spirit of our constitution. Our constitution recognises diversity in its preamble and further that Kenya is an open and democratic society[67]and idea of an open society must indeed be regarded as one of the central features of the

[66]1998 (12) BCLR 1517 (CC)
[67]*NCGLE Sodomy* 1999 (1) SA 6 (CC) at para. 107 (S. Afr.) (Sachs, J., concurring).

bill of rights[68], simply put, Ours is a multi-cultural society!. The 2010 constitution therefore calls for the culture of difference, tolerance and inclusiveness. This can be summarized in Koome JA's words that

> Allowing the appeal would be stereotyping people and expecting everybody to be the same size fits all. Like the old adage says 'we are made from the same cloth but cut in different shapes and sizes' this society is not akin to the 'Animal Farm' by George Orwell. The Constitution is the equalizer, it allows everybody to be and if some people are sinners, God will deal with them, no one can judge for Him. If others break the law, the law will take its own course against the law breakers, no one can judge them until that happens. The Constitution is the ultimate guide and liberator from the shackles of all kinds of discrimination. Its bold provisions also domesticate the International human rights law which can be called to aid in the event of a gap within our very own indigenous and rich jurisprudence

Secondly, in a multi-cultural society, it recognises diversity and the fact that there are minorities who cannot compete politically with the majority and that is why rights are put in the constitution to shield the minority from the 'popular opinion. This idea was well-captured by US Supreme Court Justice Jackson for the Court in *West Virginia Board Of Education V Barnatte*[69]

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts. One's right

[68] *S v Lawrence; S v Negal; S v Solberg* 1997 4 SA 1176 (CC) (par 146), '
[69] *West Virginia Board Of Education V Barnatte,* 319 US 624, 319 U.S. 638 (1943);

> to … freedom of worship … and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

The Eric Gitari 2 decision leaves us at unfortunate moment, it looks at us on the face and tells us, it's not yet time, it downplays all the gains that we have had so far, it replaces the smile with tears, it erodes the marvelous anti-discriminatory jurisprudence from the high court, it allows for the continual intrusion to individuals' autonomy .But one day, the smile in the constitution shall be on every citizen's face including the homosexuals as Sachs once observed

> We wanted a Constitution that was smiling to the people – but it mustn't be a sneer smile, or an insincere mask of a smile. The smile must come from inside, that people may believe in it, because it's authentic. And the smile contains tears, and sadness, and a knowledge of imperfection.[70]

The end

[70] 'Soft Vengeance: Albie Sachs on loving your enemy into defeat' *Canadian Broadcasting Corporation* (CBC) 30 September 2016 http://www.cbc.ca/radio/ideas/soft-vengeance-albie-sachs-on-loving-your-enemy-into-defeat1.3785689