UNIWERSYTET ZIELONOGÓRSKI

DYSKURS PRAWNICZY I ADMINISTRACYJNY 4/2024 ISSN 2657-926X

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# Constitutional Underpinning of Same-Sex Marriage in Kenya under Personal Law and Beliefs

**Keywords:** same-sex marriage; homosexuality, criminalization, constitutional penumbra; liberty; human dignity; privacy; family

**Summary.** Human rights in Kenya are recognized by Article 19 of the Constitution to belong to each individual and that they are not granted by the state. As such, even though the state's police power is preserved, the Constitution still entrenches the liberty of individuals against violence, inhuman and degrading treatment as well as psychological torture both from the public (state) and private sources (society). These entrenched rights are at the core of human dignity, which is also the basis of recognizing all human rights. In addition to liberty and human dignity, the Constitution also) recognizes the right to marry but limits it under Article 45(2 to persons of opposite sex. However, Article 45(4) mandates the recognition of other marriages concluded under personal law, traditions and systems of beliefs adhered to by those seeking to marry under them. Article 45(4) does not therefore limit such recognition to marriages contracted between persons of the opposite sex, unlike Article 45(2). The two sections are equally separated by a provision on equality of parties to a marriage, thereby restricting a consequential or conjunctive reading of the two as referring to only one and the same type of marriage. Such differential reading spurs a conflict as to whether same-sex marriage is either permissible only under Article 45(4) and not Article 45(2) or both. This tension is further convoluted by the prohibition of same sex conduct under Sections 162, 163, and 165 of the Penal Code. In order to resolve this legal gap, this paper proposes two approaches to entrenching marital rights to same sex individuals. The first approach is to adopt an interpretation that gives effect to Article 45(4) by recognizing the liberty of all individuals to marry a person of their choice as expressed under common law and in line with Article 20(3). The second approach is by employing the doctrine of constitutional penumbras through the interpretation of the right to liberty, privacy, expression, association and property so as to create shadows of the right of all individuals regardless of their sexual orientation to marry a person of their choice. To achieve this, this paper analyses the contents, nature and extent of the right to liberty and security of the person alongside notions of equal protection, due process and inherent dignity as understood in the American and Kenyan contexts. Based on the analysis of some of the recent decisions of Kenyan courts touching on homosexuality, this paper concludes that the same sex marital rights are entrenched in the constitution by virtue of common law and have been affected by the courts as freedom of association, liberty, non-discrimination and privacy.

## Podstawy konstytucyjne małżeństw osób tej samej płci w Kenii w świetle prawa osobistego i przekonań

**Słowa kluczowe:** małżeństwa osób tej samej płci; homoseksualizm, kryminalizacja, półcień konstytucyjny; wolność; godność człowieka; prywatność; rodzina.

**Streszczenie.** Prawa człowieka w Kenii są uznawane na mocy artykułu 19 Konstytucji za przysługujące każdej jednostce i nie są przyznawane przez państwo. W związku z tym, pomimo zachowania uprawnień policyjnych państwa, Konstytucja nadal chroni jednostki przed przemocą, nieludzkim i poniżającym traktowaniem, a także torturami psychicznymi, zarówno ze strony podmiotów publicznych (państwa), jak i prywatnych (społeczeństwa). Te głęboko zakorzenione prawa leżą u podstaw godności ludzkiej, która jest również podstawą uznania wszystkich praw człowieka. Oprócz wolności i godności człowieka, Konstytucja uznaje również prawo do zawarcia małżeństwa, ale ogranicza je na mocy artykułu 45(2) do osób płci przeciwnej. Jednakże artykuł 45(4) nakazuje uznawanie innych małżeństw zawartych na podstawie prawa osobowego, tradycji i systemów wierzeń, których przestrzegają osoby pragnące zawrzeć małżeństwo na ich podstawie. Artykuł 45(4) nie ogranicza zatem takiego uznania do małżeństw zawartych między osobami płci przeciwnej, w przeciwieństwie do artykułu 45(2). Te dwa artykuły są równo rozdzielone przepisem o równości stron w małżeństwie, co ogranicza ich interpretację następczą lub łączną jako odnoszącą się tylko do jednego i tego samego rodzaju małżeństwa. Taka rozbieżna interpretacja prowadzi do konfliktu co do tego, czy małżeństwo osób tej samej płci jest dopuszczalne tylko na mocy artykułu 45(4), a nie artykułu 45(2), czy też obu. To napięcie jest dodatkowo zaostrzone przez zakaz kontaktów między osobami tej samej płci na mocy artykułów 162, 163 i 165 Kodeksu karnego. Aby rozwiązać tę lukę prawną, niniejszy artykuł proponuje Dwa podejścia do ustanowienia praw małżeńskich dla osób tej samej płci. Pierwsze podejście polega na przyjęciu interpretacji, która nadaje moc prawną Artykułowi 45(4) poprzez uznanie wolności wszystkich osób do zawarcia małżeństwa z osobą przez siebie wybraną, wyrażonej w prawie zwyczajowym i zgodnie z Artykułem 20(3). Drugie podejście polega na zastosowaniu doktryny konstytucyjnych półcieni poprzez interpretację prawa do wolności, prywatności, ekspresji, zrzeszania się i własności, tak aby stworzyć cień prawa wszystkich osób, niezależnie od ich orientacji seksualnej, do zawarcia małżeństwa z osobą przez siebie wybraną. Aby to osiągnąć, niniejszy artykuł analizuje treść, charakter i zakres prawa do wolności i bezpieczeństwa osobistego, a także pojęcia równej ochrony, należytego procesu i przyrodzonej godności, rozumiane w kontekście amerykańskim i kenijskim. Na podstawie analizy niektórych niedawnych orzeczeń kenijskich sądów dotyczących homoseksualizmu, niniejszy artykuł stwierdza, że prawa małżeńskie osób tej samej płci są zapisane w konstytucji na mocy prawa zwyczajowego i zostały zagwarantowane przez sądy jako wolność zrzeszania się, wolność, niedyskryminacja i prywatność.

## Introduction

The right to marry may outrightly be provided for in some constitutions but not all. In those constitutions without such express provisions, the right to marry is conferred or recognized in different ways[1]. In such instances, some two ways of entrenching the right to marry relevant to this discussion include recognition of such rights through precedence and common law, and through constitutional pe-

[1] See, Keith J. Bybee, and Cyril Ghosh. (2009), 'Legalizing public reason: The American dream, same-sex marriage, and the management of radical disputes,' Sarat, A. (ed.) *Studies in Law, Politics and Society* (*Studies in Law, Politics, and Society, Vol. 49*), Emerald Group Publishing Limited, Leeds, pp. 125-156. https://doi.org/10.1108/S1059-4337(2009)0000049008.

numbra, especially in broadly worded constitutional provisions and principles of general application[2]. Both pathways complement each other and are not mutually exclusive. In considering the right to marry as conferred by common law, one looks at both ancient statutory provisions and decided cases which have informed the refined version of the rights in modern constitutions[3]. Such provisions include the Cod. 5, 5, 2 (the Justinian Code)[4] which recognized the centrality of free will in contracting marriages[5]. The free will and the right not to be compelled to marry a person against one's choice is the hallmark of liberty and autonomy reflected in modern day notion of freedom and security of the person[6]. The Code also limited the police power of the State and society in policing marriages by entrenching the understanding that the unrestrained power of dissolving and contracting marriage cannot be rendered a matter of necessity[7].

Nonetheless, history is replete with attempts to restrict marriages only to certain classes of society. In most early societies, slaves could not legally marry[8] neither could inter-class marriage between free citizens and slaves be sanctioned[9]. The restrictions spread to prisoners[10], interracial couples[11], and even same sex individuals[12]. The latter category of same sex individuals was rendered a necessity on the basis of sodomy, buggery, and crime-against-nature statutes[13] as criminalizing certain relations between men and women and between men and men[14]. Even then, history

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[2] Kimberly N. Chehardy, 'Conflicting Approaches: Legalizing Same-Sex Marriage Through Conflicts of Law.' *Conn. Pub. Int. LJ* 8 (2008), p. 131. Avaliable at: https://cpilj.law.uconn.edu/wp-content/uploads/sites/2515/2018/10/8.2-Conflicting-Approaches-Legalizing-Same-Sex-Marriage-Through-Conflicts-of-Law-by-Kimberly-N.-Chehardy.pdf [Accessed on: 25.10.2025].

[3] See, Patricia Bauer (2025) *Same-sex marriage and the law*, *Encyclopædia Britannica*. Available at: https://www.britannica.com/topic/same-sex-marriage/Same-sex-marriage-and-the-law [Accessed on: 11.04.2025]; Andrew T. Bikrkan, D. C. L, 'Marriage in Roman Law.' XVI (5) *Yale LJ* (1907) 306-307. Avaliable at: https://openyls.law.yale.edu/bitstream/handle/20.500.13051/10593/42_16YaleLJ303_1906_1907_.pdf [Accessed on: 10.04.2025].

[4] *The Civil Law*, XIII, Cincinnati, 132. https://droitromain.univ-grenoble-alpes.fr/Anglica/CJ5_Scott.htm [Accessed on: 5.04.2025].

[5] *Ibid*., Section 12:- *"The policy of the law does not permit that even a son under paternal control shall be compelled to marry against his consent..."*

[6] See, *Loving v. Virginia*, 388 U.S. 1 (1967).

[7] *Ibid*., Section 14:- *"No one can be compelled either to contract marriage in the beginning, or to renew it after it has once been dissolved. Therefore you understand that the unrestrained power of dissolving and contracting marriage cannot be rendered a matter of necessity."*

[8] See, Bauer (n 3) above; Bikrkan (n 3) above, at 325.

[9] *Ibid.*

[10] See, *Turner v. Safley*, 482 U. S. 78, 95 (1987), at 95-96.

[11] See, *Loving v. Virginia*, 388 U.S. 1 (1967).

[12] See, *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003).

[13] See, the English criminal laws passed in the first instance by the Reformation Parliament of 1533.

[14] See, *e.g.*, Joel Prentiss Bishop, *Criminal Law § 1028* (1858); Joseph Chitty, *Criminal Law 47-50* (5th Am. ed. 1847); Robert Desty, *A Compendium of American Criminal Law 143* (1882); J. May, *The Law of Crimes § 203* (2nd ed. 1893).

demonstrates that such laws were not intended to gag consensual adult intimacy and neither were they enforced exclusively against homosexuals[15]. Unfortunately, modern discussions have created the impression that such statutes limit any and all right of homosexuals whether just the right to marry or engage in consensual intercourse or to have the same exhibited in artistic work[16]. Such understanding persists in most decisions of state actors in Kenya who rely on the sodomy laws in Sections 162, 163 and 165 of the Penal Code to derogate, unjustifiably restrict or infringe on the liberty, privacy and dignity of same sex individuals[17]. Thus, the prohibition on same sex individuals' right to marry a persona of their choice is said to have been embedded in the Constitution through the constituent power of citizens during constitution making process[18].

The second methodology of conferring same sex liberty to marry a person of their choice therefore originates from the artificial conflict of laws created in the restrictive interpretation of sodomy laws such as Sections 162, 163 and 165 of the Penal Code of Kenya. This method emphasizes the holistic interpretation by the courts from the right to liberty, privacy, and equality alongside the overarching principles of inherent human dignity, due process and non-discrimination as creating zones for inferring rights that although not expressly listed in the Constitution, naturally flow from the pursuit of happiness, and the notions of basic civil rights and orderly democratic societies[19]. This examination of several provisions as mirroring and complementing each other while shadowing other rights is what is termed the doctrine of constitutional penumbra[20].

This paper adopts the two methodologies in examining the extent to which courts must develop the provision of Article 45(4) of the Constitution of Kenya as giving effect to the common law liberty to marry a person of one's choice within the provisions of Articles 19(2) and (3), 20(2) and (3), alongside the provisions

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[15] See, *e.g.*, *King v. Wiseman*, 92 Eng. Rep. 774, 775 (K.B. 1718) (interpreting "mankind" in Act of 1533 as including women and girls).

[16] See, *EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)* [2019] KEHC 11288 (KLR); *Wanuri Kahiu & another v CEO – Kenya Film Classification Board Ezekiel Mutua & 2 others; Article 19 East Africa (Interested Party) & Kenya Christian Professionals Form (Proposed Interested Party*) [2020] eKLR; *NGOs Co-ordination Board v EG & 4 others; Katiba Institute (Amicus Curiae)* (Petition 16 of 2019) [2023] KESC 17 (KLR) (Constitutional and Human Rights) (24 February 2023) (Judgment) (with dissent – MK Ibrahim & W Ouko, SCJJ); *Bowers v. Hardwick*, 478 U.S. 186 (1986).

[17] *Ibid.*; See also, *COI & another v Chief Magistrate Ukunda Law Courts & 4 others*, [2018] eKLR.

[18] See generally, Dissenting Opinions in *NGOs Co-ordination Board v EG & 4 others* (above).

[19] See, Sueann Caulfield. 'The recent Supreme Court ruling on same-sex unions in Brazil: A historical perspective.' *International Institute Journal* 1.1 (2011). Available at: http://hdl.handle.net/2027/spo.11645653.0001.103. [Accessed on: 25.10.2025].

[20] See, *Griswold v. Connecticut*, 381 U.S. 479 (1965).

of substantive rights to life, liberty, privacy, property, expression, association and family. In other words, how does the court surmount the sexist language in Article 45(2) that limits marriage to adults of opposite sex into recognizing the personal law and belief systems of individuals guaranteed in Article 45(4) of the same Constitution? In answering this central question, this paper adopts a comparative study of the American jurisprudence on the topical issues of criminalization of same sex intercourse, privacy, equal protection, liberty and due process clauses of the American Constitution. The second part of the paper then narrows the study to similar constitutional provisions in the Constitution of Kenya, 2010 while at the same time considering the jurisprudence of the Kenyan courts on the issues of liberty, association, artistic expression, privacy and due process guarantees in the context of homosexuality.

Lastly, the last part of this paper considers the nature and extent of the individual rights and how the right to marry a person of one's choice shadows and is mirrored in inherent dignity, liberty, privacy, equality, association and expression among other constitutional guarantees. Competing arguments on procreation, protection of children from 'harmful' contents, finality of prohibition of same sex unions by the citizens' constituent power and legislature, as well as cultural mores are equally considered. In conclusion, the paper highlights the high possibility of licensing and recognizing same sex-marriages conducted under personal law and system of beliefs as contemplated under Article 45(4) of the Constitution.

## A. Comparative Study of the Recognition of Marital Rights in USA

The recognition of marital rights of same-sex couples in the United States of America spans many years of gradual recognition of the fundamentals of liberties on individuals of the Union. Several cases demonstrate the way such rights have come to be finally accepted and accorded protection by the U.S. Supreme Court. This paper is limited to highlighting only some of these decisions. In particular, the analysis focuses on about six key cases that revolve around prohibition of same sex sodomy and the exercise of related rights by free citizens with homosexual tendencies over the years. It must be understood that the analysis focuses on the protection at federal rather than state level. This approach allows the discussion to focus on general principles and uniform practice imposed upon all states rather than the specific laws and constitutions of the states. Nonetheless, the cases analysed arose from individual states and concerned their specific legislations and the diverse practices, attitudes and general mores of their societies.

The first case of these is *Pierce v. Society of Sisters*[21], in which the United States Supreme Court considered the effect of the Oregon Compulsory Education Act[22] on the protection granted to citizens by the Fourteenth Amendment. The Act compelled parents to enrol their children in public school. This compulsory enrolment of children denied parents the choice and liberty to make decisions for their children. Section 1 of the Fourteenth Amendment bars States from enacting laws that deprive citizens of their privileges and immunities while equally barring States from depriving any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. By a majority, the Court held that the law violated the liberties of parents under the Due Process Clause of the Fourteenth Amendment because it directed how parents may educate their children, infringing upon parents' fundamental right to rear their children as they see fit. Justice James Clark McReynolds delivered the opinion of the Court. Fundamentally, the Court noted that:

> [t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations[23].

The decision is hailed as having grounded the right to privacy of Americans. According to Masci and Merriam, the decision is equally significant because Justice James Clark McReynolds went on to list other rights guaranteed by the Due Process Clause, including:

> [t]he right of the individual … to marry, establish a home and bring up children … and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men[24].

Generally, the explanation on the breadth of liberty may have been a restatement of the decision of the court in *Meyer v. Nebraska*[25], and which has been restated other cases[26].

The second case is *Griswold v. Connecticut*[27], where the Supreme Court once again determined whether the U.S. Constitution protects the right of marital privacy against state restrictions on a couple's ability to be counselled in the use

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21 268 U.S. 510 (1925).
22 Oreg. Ls., § 5259.
23 P. 268 U. S. 535.
24 David Masci, and Jesse Merriam (2009) *The constitutional dimensions of the same-sex marriage debate*, *Pew Research Center*. Available at: https://www.pewresearch.org/religion/2009/07/09/the-constitutional-dimensions-of-the-same-sex-marriage-debate/ [Accessed on: 11.042025].
25 262 U.S. 390 (1923).
26 See, *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Ingraham v. Wright*, 430 U.S. 651 (1977).
27 381 U.S. 479 (1965).

of contraceptives. The Court held that the Connecticut statute forbidding use of contraceptives violates the right of marital privacy which is within the penumbra of specific guarantees of the Bill of Rights[28]. This case is praised as establishing the constitutional right to privacy where the said right is not explicitly listed in the Constitution. Of significance is the right of matrimonial privacy which formed the gist of discussion in the case. In order to arrive at such a specific right to matrimonial privacy, the court adopted an analysis of whether the specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Extending the penumbra on matrimonial privacy would logically encompass the recognition of the related rights of married couples whether or not to have children. The concurring opinion of Mr. Justice Goldberg emphasized that "the concept of liberty protects those personal rights that are fundamental and is not confined to the specific terms of the Bill of Rights". Thus, "the concept of liberty is not so restricted and that it embraces the right of marital privacy though that right is not mentioned explicitly in the Constitution"[29].

Thirdly, in *Loving v. Virginia*[30], the Supreme Court unanimously held that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause under the Fourteenth Amendment. According to the Court, the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the "basic civil rights of man", fundamental to very human existence and survival[31]. The State law which prohibited interracial marriages was therefore held to be unconstitutional and struck down.

Moreover, in *Lawrence v. Texas*[32], the Supreme Court held that a Texas law criminalizing consensual, sexual conduct between individuals of the same sex violated the Due Process Clause of the Fourteenth Amendment[33]. The Court considered whether petitioners were free as adults to engage in private conduct in the exercise of their liberty under the Due Process Clause. According to the Court, laws criminalizing homosexual conducts have more far-reaching consequences, touching upon the most private human conduct, sexual behaviour, and in the most private of places, the home. They seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals. Thus, the Court held that the liberty

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[28] *Griswold*, at pp. 381 U. S. 481-486.
[29] *Ibid*., at p. 486.
[30] 388 U.S. 1 (1967).
[31] See also, *Skinner v. Oklahoma,* 316 U. S. 535, 316 U. S. 541 (1942); *Maynard v. Hill,* 125 U. S. 190 (1888).
[32] 539 U.S. 558 (2003).
[33] *Lawrence*, at pp. 564-579.

protected by the Constitution allows homosexual persons the right to choose to enter upon relationships in the confines of their homes and their own private lives and still retain their dignity as free persons[34].

Similarly, the Supreme Court has equally considered the effect of restricting marriage to be between one man and woman, thereby excluding same-sex couples from contracting marriages as envisaged in Section 3 of the Defence of Marriage Act (DOMA). In both the *United States v. Windsor*[35], and *Obergefell v. Hodges*[36], the Supreme Court held that the Fourteenth Amendment requires a state to license a marriage between two people of the same sex[37] and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state[38]. The Court noted that the fundamental liberties protected by the Fourteenth Amendment extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs[39].

The Court in *Obergefell v. Hodges*, laid four principles and traditions demonstrating that marriage is fundamental under the Constitution and apply with equal force to same-sex couples. The first principle is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. Under this principle, the Court establishes the abiding connection between marriage and liberty. Hence, decisions about marriage are among the most intimate that an individual can make, and this liberty extends to all persons, whatever their sexual orientation.

The second principle is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals[40]. Thus, same-sex couples have the same right as opposite-sex couples to enjoy intimate association, a right extending beyond mere freedom from laws making same-sex intimacy a criminal offence[41]. The right of association inherent in marriage encompasses the protections, benefits and obligations conferred by civil marriage to two individuals of the same sex who wish to marry[42]. The State thus has an obligation to recognize this association or union of individuals by issuing marriage licenses to them even where conventionally, the law only recognizes un-

[34] *Lawrence,* at pp. 564-567.
[35] 570 U.S. 744 (2013).
[36] 576 U.S. 644 (2015).
[37] *Obergefell v. Hodges*, at pp. 10-27.
[38] *Ibid.*, at pp. 3-28.
[39] See, *e.g., Eisenstadt* v. *Baird*, 405 U. S. 438; *Griswold* v. *Connecticut*, 381 U. S., pp.479-486.
[40] See, *Griswold* v. *Connecticut*, 381 U. S., at 485; & *Turner*, *supra,* at p. 95.
[41] See *Lawrence, supra*, at p. 567.
[42] *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003).

ions between opposite sex as man and woman. Otherwise, condemning a lifestyle is not a "constitutionally adequate reason" for denying marriage benefits[43].

The third principle is that it safeguards children and families and thus draws meaning from related rights of childbearing, procreation, and education[44]. The Court advanced the argument that treating same-sex union as of lesser pedigree and denying the benefits associated with marriages between opposite sex couples constitute stigma to children of same-sex couples. According to the Court, without the recognition, stability, and predictability marriage offers, children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated to a more difficult and uncertain family life. The marriage laws at issue thus harm and humiliate the children of same-sex couples. However, it is to be noted that procreation alone is not the core of the right of either opposite sex or same sex to marry. The Constitution is to be understood to protect the right of a married couple not to procreate. Hence, the right to marry cannot be conditioned on the capacity or commitment to procreate[45]. If it were so, then a law barring fathers delinquent on child-support payments from marrying would be justifiable even though such laws have been held to be unconstitutional[46].

The fourth principle is that marriage is a fundamental institution of the society and therefore is a keystone of the Nation's social order[47]. The fundamental character of marriage concerns its centrality in many facets of the legal and social order, which have been recognized by States in their statutes since time immemorial. Nonetheless, even though there is no difference between same-sex and opposite-sex couples with respect to this principle[48], same-sex couples are denied the constellation of benefits that the States have linked to marriage and are consigned to an instability many opposite-sex couples would find intolerable. This unequal treatment is demeaning and offends the Equal Protection Clause of the Fourteenth Amendment[49].

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43 *Goodridge*, 798 N.E.2d at p. 948.

44 See, *Pierce* v. *Society of Sisters*, 268 U. S. 510.

45 See *Windsor*, *supra.*

46 *Zablocki* v. *Redhail*, 434 U.S. 374.

47 See *Maynard* v. *Hill*, 125 U.S. 190.

48 Gerard V. Bradley, Three Liberal-But Mistaken Arguments for Same-Sex Marriage (July 10, 2017). S. Tex. L. Rev. 50 (2008): 45, Notre Dame Law School Legal Studies Research Paper No.1729, Available at: https://ssrn.com/abstract=2999930 (Accessed on: 25.10.2025].

49 Pp. 12-18.

## B. Constitutional Basis for Same-sex Marriages in Kenya

The Constitution of Kenya, 2010 is reflective of the interlocking nature of the constitutional safeguards on the right to marry as a fundamental right inherent in the liberty of the person, their privacy and the protection of due process and equal Protection by the law, on the one hand and prohibition of sodomy under the Penal Code. Article 19 of the Constitution lays a basis for the protection of fundamental human rights and provides that:

> […] purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings[50].

Besides, rights under the Constitution are recognised on an individual basis and are not granted by the State.

Moreover, Article 19(3)(b) contemplates additional rights not explicitly stated in the Constitution but either recognized or conferred by law. This contemplation of other rights under Article 19(3) seems to envisage the appropriation of rights by constitutional penumbra. That is to say, the exercise of one or several rights either build up to the existence of a related right not expressly mentioned or clarify the extent of a competing right mentioned in the Constitution.

The Constitution equally provides for equality and freedom from discrimination at Article 27; human dignity at Article 28; freedom and security of person at Article 29; privacy; freedom of conscience, religion, belief, and opinion; and freedom of expression at Articles 31, 32 and 33 respectively. Freedom of association is entrenched in Article 36 whereas the protection of property is provided for in Article 40. Other rights such as the rights of children and by extension the right of procreation is protected under Article 53. All these rights have a bearing on the enjoyment of the fundamental right to marry generally and, particularly, the right of same-sex couples in Kenya to individually and collectively exercise their right to marry a person of their choice.

However, the Constitution equally provides explicitly for the right to family and to marry under Article 45. The right to marry is stated to be the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State[51]. The Constitution also states that every adult has the right to marry a person of the opposite sex, based on the free consent of the parties[52]. Nonetheless, the Constitution mandates Parliament to

[50] Art. 19(2), Constitution of Kenya, 2010.
[51] Art. 45(1), Constitution of Kenya, 2010.
[52] Art. 45(2), Constitution of Kenya, 2010.

enact legislation that recognizes (a) marriages concluded under any tradition, or system of religious, personal or family law; and (b) any system of personal and family law under any tradition, or adhered to by persons professing a particular religion, to the extent that any such marriages or systems of law are consistent with this Constitution[53].

The controversy of same-sex relations and criminalization is not new in the Kenyan courts. In *COI & another v Chief Magistrate Ukunda Law Courts & 4 others*[54], the Court of Appeal considered the constitutionality of forced anal examination and whether such examination violated the constitution specifically human dignity, privacy, right against self-incrimination and freedom. In that case, the Appellants were charged with the offence of engaging in homosexual acts contrary to Section 162(a) of the Penal Code which classified same sex intercourse as unnatural acts. The alternative charge of engaging in indecent act with adults was also pressed under the Sexual Offences Act. To prove that the Appellants engaged in same sex intercourse, the State requested and were granted leave by the Magistrates court to conduct anal examination which was subsequently done. The Appellants challenged the legality of the anal examination and how it was conducted but lost before the High Court prompting the appeal.

The Court of Appeal examined several constitutional provisions to determine whether forced anal examination violated the Bill of Rights and other constitutional protections. In a unanimous decision, the Court of Appeal agreed with the Appellants that their rights were violated. The Court stated the centrality of human dignity in recognition and protection of fundamental freedoms and rights as underscored under Article 19(2) of the Constitution[55]. The Court then concluded that regardless of one's status or position or mental or physical condition, one is, by virtue of being human, worthy of having his or her dignity or worth respected[56]. Explaining the contents and extent of the right to human dignity, the Court cited with approval from the South African Constitutional Court in *Mayelane vs. Ngwenyama and Another*[57], which stated that:

> […] the right to dignity includes the right-bearer's entitlement to make choices and to take decisions that affect his or her life – the more significant the decision, the greater the entitlement. Autonomy and control over one's personal circumstances is a fundamental aspect of human dignity[58].

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53 Art. 45(4), Constitution of Kenya, 2010.
54 [2018] eKLR.
55 *COI & another,* at par. 22.
56 *Ibid*., at par. 26.
57 (CCT 57/12) [2013] ZACC 14.
58 *COI & another,* at par. 26

Turning to the right to privacy in the context of homosexual conduct, the Court held that the right not to have one's privacy invaded by an unlawful search of the person, is closely linked to the right to dignity. Therefore, the right to dignity and privacy extend to a person not being compelled to undergo a medical examination[59]. The final disposition was that the State's conduct in subjecting the petitioners to anal examinations violated the Petitioners' rights under Articles 25, 27, 28 and 29 of the Constitution. This decision cements the liberty of individuals by reaffirming the inviolability of dignity of homosexuals through violence and torture as reflected in Article 25. If the State and the society are permitted to ambush every suspected homosexual couples wherever they spot them even in public merely on suspicion of being gay as indeed happened in this case, the courts would be entrenching not just brutality but extra judicial abrogation of rights without the due process.

The finding of violation of equal protection and non-discrimination clause in Article 27 is equally very important. The petitioners in this case were ambushed in a public place on mere suspicion that they were engaging in unnatural acts or sodomy contrary to the provisions of Section 162, 163 and 165 of the Penal Code. These sections as will be demonstrated in the next section apply to both heterosexual and homosexual sodomy and were never intended to gag consensual sex among adult in the first place. Nonetheless, the discriminative application of the anti-sodomy law is born by the fact that heterosexual couples displaying affection publicly have never been ambushed and ordered to submit to anal examination in order to convict them under Sections 162, 163 and 165 of the Penal Code.

Even if heterosexual couples were to be ambushed for testing on engaging in sodomy in a similar fashion, the basis for the exercise of police power at that point would be irrational since they are neither caught in the act nor is there a complainant alleging to have been harmed in the process. Additionally, the fact that so many such heterosexual couples might be implicated outweigh the benefits of outlawing such conduct. Lastly, the application of such law among heterosexual might disadvantage women who will be the victims of such forced anal tests while their male counterparts remain with their privacy and dignity intact. The Court was thus right in stating that there was no reasonable basis for granting orders for anal examination.

The above rationale of prohibiting forced anal tests among homosexuals is further augmented by the finding of violation of the right to dignity. As aptly stated by the court, dignity in the circumstances equipped the homosexuals with the right to choose how to engage in their sexual intercourse, whether the said conduct is recognized by law or not. Dignity is inherent and may not be taken away by the

[59] *Ibid.*, at par. 27.

State nor society. It is impossible to imagine the resources a State might employ to supervise how couples choose to engage in intercourse in order to enforce the anti-sodomy laws. In the circumstances of this case, the worth of homosexuals is infringed when their most private affairs done in secrecy are subjected to public ridicule thereby exposing them to psychological torture as rightly observed by the Court. In the context of marital rights, the petitioners enjoy imprescriptible inherent freedom to consensually choose to please each other sexually. Such freedom is antecedent to the law and cannot be taken away even in light of Sections 162, 163 and 165 of the Penal Code[60]. Similar arguments of liberties and freedom to choose how to privately engage in intercourse suffice as regards Article 29 on freedom and security of the person. The contents of the rights to human dignity, privacy and liberty mirror each other and create shadows of freedom not only to marry but to engage in the pursuit of happiness consistent with such intimate association including engaging in sexual intercourse without hindrance from the State or society. More about the nature and extent of the right to marry are discussed in the next section.

The second case is the decision in *Wanuri Kahiu & another v CEO - Kenya Film Classification Board Ezekiel Mutua & 2 others; Article 19 East Africa (Interested Party) & Kenya Christian Professionals Form (Proposed Interested Party)*[61], in which the court was asked to interpret the extent that freedom of expression and artistic creativity alongside other constitutional rights could be exercised in relation to homosexual conduct. The Petitioner challenged the restriction of her film "Rafiki" for containing classifiable elements such as homosexuality which the state stated that run a foul Kenyan law as well as the culture of the Kenyan people. The court disagreed that the freedom of artistic expression as granted under Article 33 of the Constitution was violated. The court noted that the State through the Film Classification Board validly exercised its margin of appreciation, by considering the values, principles and culture of Kenya, as provided by the constitution and different legislations and therefore correctly exercising its mandate by declining to grant a certification of approval[62].

This decision is relevant to the contents of marital rights in the sense that rights manifest in expression of the same. Freedom of expression shadows marital rights when couples express their love in different ways including holding out each other in public as intimate partners. The inclusion of partners in social protection schemes is equally an expression of intimate association. The impugned film depicted the

[60] See, Art. 41(1) of the Constitution of Ireland 1937 (rev. 2015) – *stating that the institution of family possesses inalienable and imprescriptible rights, antecedent and superior to all positive law.*

[61] [2020] eKLR.

[62] *Wanuri Kahiu & another,* at par. 134.

different expressions of love among homosexuals as well as the related concepts of home life, recognition among peers and intimacy, all of which constitute the exercise of liberty and dignity inherent in family life. It is therefore irrational to interpret the right of freedom of expression as exclusive to other rights, including the right to marital unions among individuals regardless of their sexuality.

Moreover, in *EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)*[63], the constitutionality of Sections 162, 163 and 165 of the Penal Code were challenged. The High Court dismissed the Petition, stating that looking at the impugned provisions *vis a vis* Article 45(2), the provisions do not offend the right to privacy and dignity espoused in Articles 28 and 31 of the Constitution[64]. The Court referred to the historical context of the constitution making process and the fact that marriage union was reserved for adults of the opposite sex[65]. The Court noted that it is common ground that during the Constitution making process, the issue of same-sex marriage was one of the issues raised, discussed, and a recommendation was made outlawing same-sex marriage.

Furthermore, the Final CKRC Report at paragraph 8.7 (h) on Family and Marriage recommended the recognition of marriage only between individuals of the opposite sex and the outlawing of same sex unions[66]. Based on the historical analysis, the Court noted that Article 45(2) only recognizes marriage between adult persons of the opposite sex. Hence, decriminalizing same sex on grounds that it is consensual and is done in private between adults, would contradict the express provisions of Article 45 (2)[67]. The decision has been appealed to the Court of Appeal and a judgement is yet to be delivered on the same.

The decision in this case correctly draws a correlation between criminalization of consensual same sex intercourse and marital rights. Indeed, as will be discussed in the next section, criminalization of sex has far-reaching consequences on the privacy and dignity of the individuals pursuing happiness through the said conduct as well as their liberties and the expression of such liberty manifest in marital association. It is difficult to agree with the court on their finding that Kenyans in unison prohibited same sex unions and that there is no avenue for recognition of same sex unions in the Constitution other than their prohibition in Article 45(2). The judgement fails to address the correlation of same sex intercourse with marriage under personal law and system of beliefs manifest in Article 45(4). Even granting that a section of Kenyans rejected same sex union as purported, Article 19 still

63 [2019] KEHC 11288 (KLR).
64 *EG & 7 others,* at par. 405.
65 *Ibid.,* at par. 392.
66 *Ibid.*, at par. 390.
67 *Ibid.,* at par. 396.

recognizes marital rights on an individual basis. Thus, the correct imputation is that same sex intercourse is best considered under personal law and belief systems rather than the societal concerns expressed in Article 45(2).

Moreover, Article 45 was never intended to only apply to the selected groups who contributed to its wording, neither was it subjected to referendum as a separate and independent question. The purported overwhelming support on prohibiting same-sex marriage not buttressed by a separate vote from other provisions can therefore be said to be nothing but a fuss. In any event, the democratic legitimacy of the Constitution is such that it applies to both those who voted for its approval and those who were against it. Once passed, its provisions apply to both the majority and minority regardless of their respective positions before and at the referendum. The courts are required under Article 20(5) and 21(3) to protect and address the needs of the vulnerable groups, the members of minority and the marginalized arising out of divisions even at the referendum. From the court's restatement of the deliberations during constitutional making process, those who supported inclusion of same sex unions constituted the minority, were vulnerable and marginalized. Consequently, upholding anti-sodomy law perpetuates this vulnerability and marginalization against the fundamental principles of the very Constitution.

Lastly, upholding only the will of the majority in every constitutional provision is not only a recipe for anarchy but in essence waters down the constitution making process as a compromise and obviates the principle of equal protection in the event the draft constitution is promulgated by the majority into law. Again, the failure of the court to employ the doctrine of constitutional penumbra means that the court failed to recognize the shadows of inequality, inhumane and degradable treatment, state-sponsored violence as well as psychological torture that the criminalization of same sex consensual intercourse meted out on the marginalized, vulnerable and minority group of homosexuals. The said homosexuals have been placed outside the protection of the law by a select group who hijacked the constitutional making process for personal interest. The interpretation adopted by the court equally discriminates on the basis of personal belief system by elevating the religious and cultural beliefs of the majority above those held by the marginalized homosexuals even though Article 19 recognizes rights on an individual basis rather than by groups. Even where marriage is to be considered as an association thereby connoting a group, the said association can only be construed as formed on the basis of free will of individuals and not otherwise.

Lastly, the Supreme Court in *NGOs Co-ordination Board v EG & 4 others; Katiba Institute (Amicus Curiae) (Petition 16 of 2019)*[68], considered whether homosexuals

[68] [2023] KESC 17 (KLR) (Constitutional and Human Rights) (24 February 2023) (Judgment) (with dissent – MK Ibrahim & W Ouko, SCJJ).

enjoyed freedom of association to register an organization to champion for their rights. The Court considered whether it was unconstitutional to limit the right to associate through denial of registration of an association on the basis of sexual orientation; whether the same amounted to discrimination and whether the right to form, join or participate in the activities of an association of any kind in Article 36 of the Constitution included associations whose activities were contrary to the law. The court agreed with the petitioners that their right to association was violated.

According to the Court, a literal reading of Article 36 of the Constitution was that the LGBTQI group was not excluded from the definition under Article 36[69]. Besides, there was no evidence placed before the NGO Board to demonstrate that persons who professed to be LGBTQI were criminals or that it was only them who were capable of committing the offence of unnatural acts[70]. The Court then observed that even though Sections 162, 163, and 165 of the Penal Code prohibited any person from committing acts that went against the order of nature, those sections did not distinguish between heterosexual or homosexual offenders. Thus, the sections did not limit the perpetrators of such acts to persons who were LGBTQI as indeed, the words, any person, connoted a potential offender under those sections who could very well be heterosexual, homosexual, intersex or otherwise[71].

On equal protection before the law, the Court observed that use of the word "sex" under Article 27(4) of the Constitution did not connote the act of sex *per se* but referred to the sexual orientation of any gender, whether heterosexual, lesbian, gay, intersex or otherwise. Further, the word "including" under the same article was not exhaustive, but only illustrative and would also comprise freedom from discrimination based on a person's sexual orientation. Further, the court observed that allowing discrimination based on sexual orientation would be counter to the constitutional principles. Hence, the States's refusal to reserve a name for the intended NGO on the ground that Sections 162, 163 and 165 of the Penal Code criminalized gay and lesbian liaisons was discriminatory in view of Section 27(4) of the Constitution[72].

The two dissenting opinions disagreed with the majority that there was any right of association enjoyed by same sex persons. The dissenting opinion noted that that Sections 162, 163 and 165 of the Penal Code remain valid edicts of the law as upheld in *EG & 7 others v Attorney General; DKM & 9 others (Interested Parties)* case[73]. Accordingly, as long as, Sections 162, 163 and 165 of the Penal Code remain

[69] *NGOs Co-ordination Board,* at par. 72.
[70] *Ibid*., at par. 60.
[71] *NGOs Co-ordination Board,* at par. 63.
[72] *Ibid.,* at par. 79.
[73] *Ibid.,* at para. 102-104.

valid laws, then the actions of the NGO Board in refusing to allow the reservations of names which include the terms "gays" and "lesbians", cannot be considered unreasonable, irrational or illegitimate[74].

The two dissenting justices considered the history of the Constitution of Kenya and noted that the issue of same-sex marriages and homosexuality arose in several instances and is mentioned in the CKRC report at several stages. Referring to page 100, at the tail end of chapter 8, the learned judges note that the commission, from the views and profiles of Kenyan communities, recommended that in family and marriage, same-sex unions should be outlawed[75]. Additionally, the learned judges were of the view that the repeal of the sections of the Penal Code could only be done through parliament and not the court.

The problem or even fallacy in the argument that Kenyans approved the prohibition of same sex union as though the same received a separate vote during the referendum have been stated extensively under the *EG & 7 others v Attorney General; DKM & 9 others (Interested Parties)* case and there is no need to restate the same. The Constitution applies to all regardless of their choices or contributions during the referendum. All the court is mandated to promote is equal protection of the law and due process as opposed to upholding only the views, belief systems and personal laws of the majority. Such would amount to discrimination on the basis of belief systems more so when the views of the majority are superimposed by the state through the courts on the vulnerable marginalized homosexual minorities who could not openly voice their opposition to the proposal fearing intimidation and criminalization under the Penal Code. The context of the deliberation in view of historical state-sponsored violence through criminalization hindered any meaningful and honest deliberations and expression of opinions in support of same sex unions. In the circumstances, the opinion of the so-called 'majority' would be irrelevant in the protection of the vulnerable homosexuals other than to demonstrate that the homosexuals formed the minority and were thus marginalized and deserving of equal protection of the law within the meaning of Articles 20(5)(b) and 21(3).

## C. Validity of Same-Sex Marriages Under Article 45(4) of the Constitution

In order to establish the validity of same sex-marriages in Kenya, one has to consider the nature of the right, the related rights and the nature and extent of expression of the said rights. Unlike the American Constitution, the Constitution

[74] *Ibid.,* at par. 107.
[75] *Ibid.*, at par. 118.

of Kenya just like its Brazilian[76] and Ireland counterparts[77] defines marriage and specifically provides for the right to found family at Article 45. Nonetheless, it would be incorrect to read the said Article in isolation. As noted in the different cases above, general principles and rights to human dignity, equal protection and non-discrimination, due process, liberty, privacy, association, health and freedom of expression are all implicated in issues of enjoyment marital rights by same sex individuals. However, the first principle to note in the Kenyan Constitution is the basis for enjoyment of rights which are stated to belong to each individual and not granted by the State[78]. In other words, no individual is a "creature of the State"[79] whether construed in regard to the society and its interests or with regards to the legislative and executive power.

The second and most important principle is that the rights listed under the Constitution are not exclusive of other rights and fundamental freedoms not in the Bill of Rights but recognized or conferred by law[80]. This article is primarily concerned with the conferment of the right to marry upon same-sex couples based on the recognized inherent right to dignity and the principles of liberty, equality and non-discrimination, privacy, and due process among other rights. In other words, the paper seeks to answer whether the entrenched principles create constitutional penumbras that confer a right to marry a person of one's choice under personal law, as stated under Article 45(4) of the Constitution. If there is such a right to marry a person of one's choice by same sex individuals then to what extent is the said right permitted in relation to the sodomy laws, protection of children, culture and the morals of the State in upholding an orderly society.

It is important to note at this point that the Kenyan courts have already entrenched the dignity, privacy and equal treatment of homosexuals in different contexts as discussed in the previous section. The extent of the right to dignity is elaborated to include the right-bearer's entitlement to make choices and to take decisions that affect his or her life – the more significant the decision, the greater the entitlement. Autonomy and control over one's personal circumstances is a fundamental aspect of human dignity[81]. But the autonomy envisaged is also an aspect of both liberty and privacy.

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[76] Article 226, Constitution of the Federative Republic of Brazil (3rd ed., 2010) Avaliable at: https://www.oas.org/es/sla/ddi/docs/acceso_informacion_base_dc_leyes_pais_b_1_en.pdf [Accessed on: 25.10.2025].

[77] Article 41, of the Constitution of Ireland, 1937 (rev. 2015).

[78] Art. 19 (3)(a), Constitution of Kenya, 2010.

[79] See, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925): held that: "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations".

[80] Art. 19(3)(b), Constitution of Kenya, 2010.

[81] See, *COI & another v Chief Magistrate Ukunda Law Courts & 4 others,* par. 26.

Therefore, in considering the proper interpretation to be accorded to Article 45 of the Constitution, one must ask whether both heterosexual and homosexuals alike retain the freedom to choose their partners freely or whether they are compelled by law to only choose a person of the opposite sex. If Article 45(2) which defines the right to marry a person of opposite sex is taken literally to mean a bar to homosexuals to freely choose their partners, it follows then that the free consent of the parties and the choice inherent in their dignity is watered down. There is no free consent where the choice is predetermined only on one aspect, while the autonomy entitlement to make choices and to take decisions that affect his or her life is left intact under their inherent dignity and liberty under Articles 28 and 29 of the Constitution. The Constitution guarantees free will to both heterosexuals and homosexuals to marry a person of their choice, not to be compelled to marry a person against their choice, and to terminate the marriage by choice. Interpreting the right as limiting the right to only opposite sex denies homosexuals equal protection of the law. Such an interpretation is contra Article 24(1) which requires any limitation of a right to be based on human dignity, equality and freedom.

Even if one were to reason that Article 45 limits marriage to opposite sex, one has to contend with the extent of the liberty of all citizens as directed in Article 24(1). At least, it is safe to state that unlike Article 45(2), Article 29 is not drafted in a sexist manner. It confers upon every person the right to freedom and security of the person. It is not clear why Kenyans did not seek to limit the liberties of homosexuals during the constitutional making process in the manner it is claimed that Kenyans limited marriage to opposite sex[82]. Failure to limit the liberty and inherent human dignity of homosexuals creates shadows of marital rights in favor of homosexuals to pursue their happiness through intimate relationships of their choice and to freely choose without State and societal hindrance whether or not to have sexual intercourse in their private spaces even against the order of nature. If it remains true that Kenyans intended to entrench liberty to all regardless of their sex, gender, and sexual orientation, then the purported recommendation in the constitutional making process which recommended that in family and marriage, same-sex unions should be outlawed[83], cannot hold in light of Articles 28 and 29 of the Constitution.

Article 29 recognizes freedom or liberty and security of every person, including the security from any form of violence from either the State or fellow citizens as a society, psychological torture, and inhuman or degrading treatment. In other words, Article 29 reinforces the inherent dignity of every person stated in Article 28.

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[82] See, *EG & 7 others v Attorney General* case; & the dissenting opinions in *NGOs Co-ordination Board v EG & 4 others* case.

[83] *NGOs Co-ordination Board,* at par. 118.

Thus, every person must be treated with dignity and not in an inhumane or degrading manner. Interpreting Article 45(2) as outlawing same sex unions constitutes violence against the dignity of homosexuals, and subjects them to psychological torture, and inhuman or degrading treatment, as shall be discussed shortly. At this point, however, it is important to first demonstrate the contents and extent of the liberty or freedom contemplated under Article 29.

As early as 1923, common law had well recognized liberty of the person in *Meyer v. Nebraska*[84], in which the US Supreme Court held that it has not attempted to define with exactness the liberty thus guaranteed under the Constitution. According to the Supreme Court, such liberty denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men[85]. Throughout the Kenyan cases, it is uncontested that free men and women pursue sexual happiness both in marital set up and as unmarried persons. It is equally common knowledge that people with homosexual tendencies, including bisexuals, have married, or engaged in marital affairs and brought up children either in the heterosexual family or with their same-sex partners.

Thus, the finding on the breadth of liberty of the person as including the right to marry a person of one's choice regardless of one's sexuality is not spurious but is grounded in several previous and subsequent court decisions forming a trail of common law practice. The cases include: *Slaughter-House Cases*[86]; *Butchers' Union Co. v. Crescent City Co.*[87]; *Minnesota v. Barber*[88]; *Allgeyer v. Louisiana*[89]; *Lochner v. New York*[90]; *Twining v. New Jersey*[91]; *Chicago, Burlington & Quincy R.R. Co. v. McGuire*[92]; *Truax v. Raich*[93]; *Adams v. Tanner*[94]; *New York Life Ins. Co. v. Dodge*[95]; *Truax v. Corrigan*[96]; *Adkins v. Children's Hospital*[97]; and *Wyeth v. Cambridge Board*

[84] 262 U.S. 390 (1923).
[85] *Meyer v. Nebraska*, at page 262 U.S. 400.
[86] 16 Wall. 36.
[87] 111 U.S. 746; Yick Wo v. Hopkins, 118 U.S. 356.
[88] 136 U.S. 313.
[89] 165 U.S. 578.
[90] 198 U.S. 45.
[91] 211 U.S. 78.
[92] 219 U.S. 549.
[93] 239 U.S. 33.
[94] 244 U.S. 590.
[95] 246 U.S. 357
[96] 257 U.S. 312.
[97] 261 U.S. 525.

*of Health*[98]. The established doctrine in common law as held by the Court is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect. In any event, determination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts[99].

If the above rendition on the nature and extent of liberty is true and part of common law, how possible then is the arguments that Kenyans exercising their constituent powers in constitution making could interfere with the liberty of homosexuals under Article 45(2) and render that determination final and not subject to review by the courts even in light of Article 165(3)(b) and (d)? What is the guarantee that the CKRC recommendation was not influenced by only a few religious elites pursuing personal interests[100]? Furthermore, it remains unclear why only sodomy would have been regarded as unnatural act warranting prohibition by virtue of Sections 162, 163 and 165 of the Penal Code when there are other possible unnatural acts in the modern society. For example, Section 5 of the Sexual Offences Act, contemplates that sexual assault may involve any part of the body and objects. In contemporary world, it is no secret that individuals have devised different ways to sexually satisfy themselves and partners which do not lead to procreation hence are against the order of nature.

Such unnatural acts include the use of body parts such as fingers, mouth, tongue as well as sex toys. The CKRC recommendation does not explain the basis for not outlawing the importation, sale and distribution of sex toys as a threat to the institution of family neither are individuals suspected of employing any body parts other than the genitals rendered criminals on the basis that they are suspected to have breached the Penal Code. In any event, prosecution of everyone with fingers and mouth or tongue on the mere suspicion that they engaged in unnatural acts like is the case with suspected homosexuals would be a daunting task and an infringement on the liberties of the individuals.

The minority opinion is the *NGO Coordination Boad case* do not offer any insights on this aspect either. Instead, the dissenting opinions entrench the interpretation that the Penal Code bars homosexuals from enjoying any rights as long as their lifestyle is regarded as unnatural acts. The minority then faults the majority

98 200 Mass. 474.

99 See, *Lawton v. Steele*, 152 U.S. 133, 152 U. S. 137.

100 See, *NGOs Co-ordination Board v EG & 4 others case*, at par. 118. "Some delegates feared that this provision may permit homosexual marriages since the draft constitution did not specify that marriage can only take place between persons of the opposite sex. The group endorsed the recommendation of the technical working group 'b' on citizenship and bill of rights that the draft should clarify the definition of marriage to prohibit same sex marriages".

for not deferring to parliament on the issue, as though the court is helpless. It is important to underscore the fact that the duty to interpret the Constitution and to align all its provisions with the national values and principles of good governance such as human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized[101], vests in the courts. Parliament has no final say of what constitutes proper exercise of police power which interferes with the liberty of individuals, including the right of same-sex couples to marry a person of their choice.

Besides, the Constitution fetters the courts' interpretation of the Bill of Rights to develop the law to the extent that it does not give effect to a right or fundamental freedom and to adopt the interpretation that most favours the enforcement of a right or fundamental freedom[102]. It is manifest that Article 45(2) has been interpreted as outlawing or not giving effect to the right of same sex individuals to exercise their liberty to marry a person of their choice[103]. Nonetheless, the Constitution binds the courts to give effect to the liberty of homosexuals to marry based on the dicta of Article 20(2) which states that every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or freedom.

Therefore, giving effect to the right of same sex individuals is not an onerous task requiring either legislation or referendum. Article 45(4) already contemplates marriages other than those mentioned under Article 45(2) that are concluded under any traditions, or system of religious, personal or family law; any system of personal and family law under any tradition, or which are adhered to by people professing a particular religion or belief. This provision thus preserves both the dignity and liberty of all individuals, including homosexuals to contract marriage under personal law or any other system of belief of their choice. No doubt, the court's obligation is to define the liberty of all, not to mandate their own moral code or that of the societ[104]. To enforce only the beliefs of the majority as suggested by the courts amounts to discrimination on the basis of such beliefs. Article 45(4) treats all personal laws, traditions, religious and other beliefs equally and requires that they are all recognized by establishing licenses and marriage certificates for marriages contracted under such beliefs.

Equally, Article 19(3)(b) gives effect to rights such as the right to marry a person of one's choice under personal law and systems of beliefs adhered to by persons with

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101 Art. 10(2)(b), Constitution of Kenya, 2010.

102 Art. 20 (3), Constitution of Kenya, 2010.

103 See, *EG & 7 others v Attorney General* case; & the dissenting opinions in *NGOs Co-ordination Board v EG & 4 others* case.

104 See, *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 850 (1992).

homosexual tendencies and desires as long as such liberties are either recognized or conferred by law, including common law. Furthermore, the nature and extent of the right to marry are well recognized in common law. The contents include the right to 'marry, establish a home and bring up children'[105], to sexual and reproductive health, including access to and use of contraceptives[106], the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child[107]. Equally, the right to marry encompasses the fundamental right to have intercourse[108] including for homosexuals to engage in sodomy and personal bond that is more enduring, whether or not entitled to formal recognition in the law[109]. Consequently, the above references show an established awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex[110].

The Court of Appeal in *COI & another v Chief Magistrate Ukunda Law Courts & 4 others*[111], already gave effect to the above rights of homosexuals to inherent dignity to choose freely how to conduct themselves in relation to sexual intercourse, which is a fundamental component of the right to marry. In the court's consideration, the right to privacy particularly, not to have one's privacy invaded by an unlawful search of the person, is closely linked to the right to dignity. Moreover, the Supreme Court entrenched both the equal protection clause and the right of association of homosexuals in the *NGOs Co-ordination Board v EG & 4 others case*[112]. It is important to note that marriage is a union hence an association between two adults within the meaning of Article 36 of the Constitution of Kenya on the freedom of association. There is no indication that homosexuality was contemplated as a basis for limitation of the right of association, neither is it expressly listed as oner of the possible limitations under the said provision.

Restating the above position of marriage as an association, the US Supreme Court in *Obergefell v. Hodges*[113], held that:

Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way

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105 See, *Zablocki v. Redhail*, 434 U.S., at 384 (quoting *Meyer*, *supra*, at 399).

106 See, *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972), *Carey v. Population Services Int'l*, 431 U.S. 678 (1977).

107 *Eisenstadt v. Baird*, 405 U.S. 438 (1972), at 453.

108 Obergefell v. Hodges, 576 U.S. 644 (2015).

109 *Lawrence v. Texas*, 539 U.S. 558 (2003) (overturning *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

110 *Ibid*.

111 [2018] eKLR.

112 [2023] KESC 17 (KLR) (Constitutional and Human Rights) (24 February 2023) (Judgment) (with dissent –MK Ibrahim & W Ouko, SCJJ).

113 576 U.S. 644 (2015).

of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions[114].

It is evident from this definition that sexual intercourse is sacred and that it is part of the way of life in which individuals express their intimacy in their marital associations. Such a well-grounded liberty cannot therefore be infringed by the State and the society merely because homosexual lifestyle was disapproved by select groups during constitution making process. Disapproval of homosexual lifestyle cannot be a legitimate basis for police power in denying marital status and rights to same sex individuals[115].

Indeed, same-sex couples have the same right as opposite-sex couples to enjoy intimate association[116] because just like any other human being, including prisoners, their committed relationships satisfy the basic reasons why marriage is a fundamental right[117]. Thus, the right to marry dignifies couples who "wish to define themselves by their commitment to each other" by offering the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other and not abandon them to the fear of loneliness[118]. With the above nature and content of the right to liberty as inclusive of the right of same sex and opposite sex couples to enjoy intimate association, there is little room for the Supreme Court to distinguish the freedom of association under Article 36 which it entrenched in the *NGOs Co-ordination Board v EG & 4 others case*[119] with the right to marry under Article 45 as suggested in their judgement[120]. The same freedom applies to the right of same sex-couples to marry under whatever belief system recognized in Article 45(4) of the Constitution.

There is however the outstanding issue of the effect of the criminalization of same sex intercourse under sections 162, 163 and 165 of the Penal Code which the dissenting opinions held that condemns recognition of associations of homosexuals from being recognized[121]. The majority of the judges, however, held the view that the said sections do not, pursuant to the provisions of Article 24 of the Constitution, express the intention to limit LGBTQ's right to freedom of association. Likewise, the sections do not specify the nature and extent of the limitation of the freedom

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114 See, *Griswold* v. *Connecticut,* at 486.

115 See, *Obergefell v. Hodges*; *Lawrence v. Texas.*

116 See, *Lawrence v. Texas,* 539 U.S., at 567.

117 See, *Turner v. Safley*, 482 U.S. 78, 95 (1987), at 95-96.

118 See, *Obergefell v. Hodges*, 576 U.S. 644 (2015).

119 [2023] KESC 17 (KLR) (Constitutional and Human Rights) (24 February 2023) (Judgment) (with dissent – MK Ibrahim & W Ouko, SCJJ).

120 *NGOs Co-ordination Board*, at para. 25, 146.

121 *Ibid*., at para. 104-108.

of association, if any. The 1st respondent's intention was to register an organization to champion for the rights of LGBTIQ, and this has no correlation whatsoever with the offences articulated under sections 162, 163 and 165 of the Penal Code[122]. Similarly, the High Court in *EG & 7 others v Attorney General* case[123], held the same view as the minority that the sections bar the recognition of the rights of homosexuals.

It is worth noting that the conduct contemplated in the said section being intercourse between same sex individuals as discussed above falls within the liberty and dignity of the individual and is thus a protected conduct for which no crime ought to arise. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons[124]. Where it is imminent that there is stigma and unreasonable condemnation of state and lifestyle of homosexuals through the criminalization of same sex conduct, Article 29's protection against violence from either the State or private citizens; physical and psychological torture and inhuman and degrading treatments are infringed.

Hence, the impugned sections do not merely violate the equal protection alone as regards their effects, but the penalties and purposes have more far-reaching consequences, touching upon the most private human conduct, sexual behaviour, and in the most private of places, the home[125]. The criminalization thus infringes the right to privacy too. The assumption that the sections were meant to try homosexuals is equally incorrect. In reality, the laws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private. A substantial number of sodomy prosecutions and convictions for which there are surviving records were for predatory acts against those who could not or did not consent, as in the case of a minor or the victim of an assault. One purpose for the prohibitions was to ensure there would be no lack of coverage if a predator committed a sexual assault that did not constitute rape as defined by the criminal law[126].

Moreover, in 1955 the American Law Institute promulgated the Model Penal Code and made clear that it did not recommend or provide for "criminal penalties for consensual sexual relations conducted in private"[127]. The reasons for non-crim-

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122 *NGOs Co-ordination Board*, at par. 64.

123 *Ibid.,* at para. 102-104.

124 See, *Lawrence v. Texas*, 539 U.S. 558 (2003) (overturning *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

125 *Ibid.*

126 *Ibid.*, citing Joel Prentiss Bishop, *Criminal Law § 1028* (1858); Joseph Chitty, *Criminal Law 47-50* (5th Am. ed. 1847); Robert Desty, *A Compendium of American Criminal Law 143* (1882); J. May, *The Law of Crimes § 203* (2nd ed. 1893).

127 ALI, Model Penal Code § 213.2, Comment 2, p. 372 (1980).

inalization of consensual sexual relations conducted in private are suggested to be three. First, the prohibitions undermined respect for the law by penalizing conduct many people engaged in. Secondly, the statutes regulated private conduct not harmful to others. Thirdly, the laws were arbitrarily enforced and thus invited the danger of blackmail[128]. These three reasons persist and are applicable to the Kenyan context. The arbitrariness of enforcing the impugned sections of the Penal Code, the blackmail by both the authorities and private citizens and the fact that majority of people engage in the conduct are manifest[129]. Furthermore, going by the facts in *COI & another v Chief Magistrate Ukunda Law Courts & 4 others*[130], it is evident that police arbitrarily enforce the impugned sections only against homosexual. This alone amounts to discrimination on the basis of sexual orientation, as held by the Supreme Court.

Lastly, the High Court in *Wanuri Kahiu & another v CEO – Kenya Film Classification Board case*[131], upheld restriction of homosexual films produced by Kenyans on the basis of protecting children from exposure to harmful content[132], and that the Board validly exercised its margin of appreciation, by considering the values, principles and culture of Kenya, as provided by the constitution and different legislations and therefore correctly exercising its mandate by declining to grant a certification of approval may not be accurate on the basis that contents depicting the same themes produced in other countries are readily accessible to children[133]. In any event, there is no right that bars children from being educated on human sexuality including for their own safety against predatory elements in the society[134]. Same sex themes within the "Rafiki" film were permissible and ought not to have been treated as violative of any right of the children warranting the children's protection from them[135].

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128 ALI, Model Penal Code, Commentary 277-280 (Tent. Draft No. 4, 1955).

129 See, *NGOs Co-ordination Board v EG & 4 others case*, at par. 60.

130 [2018] eKLR.

131 [2020] eKLR.

132 *Ibid*., at para. 77, 82 & 83.

133 *Ibid*., at par. 134.

134 See, *Brown v. Hot, Sexy, and Safer*, 68 F.3d 525 (1995) [challenged a highly explicit sex-education program]; *Fields v. Palmdale School District*, 447 F.3d 1187 (2006) [challenged educators who distributed a sexually explicit survey to their children]; *C.N. v. Ridgewood Board of Education*, 430 F.3d 159 (2005) [objected to a voluntary, anonymous survey used to gather information about drug and alcohol use as well as sexual activity].

135 See, *Parker v. Hurley*, 514 F.3d 87 (2008) [challenged the inclusion of material on same-sex marriage in a kindergarten class]; *John and Jane Parents 1 et al. v. Montgomery County Board of Education* et al., No. 8:2020cv03552, [Fourth Circuit rejected claims that a school board's guidelines for developing "student gender identity support plans" violated parents' fundamental right to raise their children]; *Mahmoud v. McKnight*, No. 23-1890 (4th Cir. 2024) [concerned books promoting transgender ideology and encouraging gender transitioning].

On the contrary, condemning homosexuals generally without paying attention to the fact that they are also parents have adverse effects on their children. The right to marry extends to the right of parents to educate their children regardless of the parent's sexuality. Court have held that without the recognition, stability, and predictability that marriage offers, the children of same sex parents suffer the stigma of knowing their families are somehow lesser[136]. The children also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. Therefore, the blanket criminalization of same sex intercourse leading to prohibition of their marriage like their heterosexual counterparts, harm and humiliate the children of same-sex couples[137].

## Conclusion

This paper has established that the right to marry is traditionally rooted in the right to liberty and the inherent dignity of the individual regardless of their sexuality. The discussion has equally highlighted the contents and nature of the common law right to marry to include related rights of childbearing, procreation, and education. As such, the paper draws the conclusion that excluding same sex individuals from the right to marry under Article 45 and on the basis that the Penal Code criminalizes homosexuals' lifestyle harm and humiliate the children of same-sex couples; burden the liberty of same-sex couples; and abridge central precepts of equality. As an alternative, this discussion proposes the adoption of an interpretation that recognizes the right of same-sex marriage as conferred by common law under Article 19(2)(b) hence giving effect to Article 45(4) on marriage under personal law. Additionally, the paper recommends the employment of the doctrine of constitutional penumbra by creating shadows of the right to marry from the nature and exercise of the right to inherent human dignity, liberty and protection against violence and torture, privacy, association, expression, equal protection and due process of the law. In this way, the courts will not only promote the beliefs of heterosexuals but equally protect the vulnerable and the marginalized same sex individuals who are threatened of being locked out of legal protection under Article 45(2) of the Constitution. The paper underscores the importance of marriage to the pursuit of happiness among heterosexuals and homosexuals alike. Among the governmental rights, benefits, and responsibilities which same-sex couples are currently denied include inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical deci-

136 See, *Obergefell v. Hodges*, 576 U.S. 644 (2015).
137 *Ibid*.

sion-making authority; adoption rights; the rights and benefits of survivors; birth and death certificates; workers' compensation benefits; health insurance; and child custody, support, and visitation rules. Same-sex couples are therefore denied the constellation of benefits that have linked to marriage by law, policy and practice even though there is no difference between same- and opposite-sex couples with respect to the constitutional principles of inherent dignity, liberty, equality and human rights. In conclusion, therefore, the proper interpretation to accord Article 45 is to the effect that Kenyans pledged to support the married couples irrespective of their sexuality, faith or tradition by offering symbolic recognition and material benefits to protect and nourish the union including for unions contracted under personal law and systems of beliefs adhered to by homosexuals.

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