4 Queer lawfare in Kenya: Shifting opportunities for rights realisation

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1 Introduction

Democratisation and the new transformative Constitution of 2010 have significantly improved the protection, promotion and fulfilment of human rights in Kenya. Yet some populations still face discrimination due to conservative socio-cultural and religious norms, attitudes, and practices detrimental to the enjoyment of their rights. This includes sexual and gender minorities whose rights to equality, non-discrimination, autonomy and bodily integrity are routinely violated, due in part to laws criminalising same-sex sexual conduct, as Kenya still maintains a Victorian Penal Code that criminalises 'carnal knowledge against the order of nature' in section 162.[1]

These rights violations have become a central point of political contestation. A multitude of actors in support as well as in opposition of queer rights, are engaging a range of strategies to achieve their objectives. Key protagonists advocating for rights protection for sexual orientation and gender identity minorities have been organisations such as Ishtar MSM, Gay and Lesbian Coalition of Kenya (GALCK), the National Gay and Lesbian Human Rights Commission (NGLHRC), Transgender Education and Advocacy (TEA), Minority Women in Action (WMA) among others. These have been in the forefront of advocacy, campaigns, and litigation for the protection of LGBTIQ+ rights and have been supported by progressive civil society actors such as Kenya Human Rights Commission, Kenya National

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1 Amnesty International UK 'Mapping anti-gay laws in Africa' (2015) https://www.amnesty.org.uk/lgbti-lgbt-gay-human-rights-law-africa-uganda-kenya-nigeria-cameroon (accessed 9 October 2021).

Commission on Human Rights, Katiba Institute, CRADLE, among others. The antagonists are mainly Christian and Muslim clerics and organisations, most centrally the Kenya Christian Professional Forum. Antagonism and advocacy against LGBTIQ+ rights has also emanated from politicians, playing to conservative socio-cultural and religious sentiments to mobilise support from voters.

The protagonists have employed multiple advocacy strategies, including lawfare – the strategic use of rights, law, and courts to advance contested political and social goals against recalcitrant states and adverse popular cultures, beliefs and value systems.[2] Kenyan advocates have adopted strategic litigation to achieve legal recognition of non-heteronormative gender identities as well as to challenge legislation that criminalises same-sex sexual conduct.[3] The litigation and rights-based advocacy strategies also aims to influence socio-cultural, religious, and political norms, attitudes, and practices. Litigation strategies have achieved some level of success, as detailed in the discussions below, with several cases being positively determined to provide legal recognition of diverse gender identities and rights protection of some vulnerable sexual and gender minority groups. The antagonists have, however, also mobilised with counter advocacy and active opposition to LGBTIQ+ rights in the courts, proposed legal reforms for more stringent laws against sexual minorities, and adverse political rhetoric against sexual minority rights by senior political figures in the Executive and the Legislature. At the same time, there is greater awareness of and visibility for queer lives and concerns, and increased tolerance in some areas.

This chapter maps the use of lawfare by Kenya's LGBTIQ+ protagonists and antagonists, as they respond and adapt their strategies to shifting political, legal and social *opportunity structures*. As discussed in the introductory chapter to this volume, the concept of opportunity structure refers to actors' potential for achieving their aims through different courses of action – such as political lobbying, litigation or street action – and the gains and risks associated with each strategy. If chances are good for success via the political process, for example through building political alliances for legal reform to advance queer rights, it means that the *political opportunity structure* is open. If social norms are strongly anti-queer, so that media campaigns and street demonstrations are unlikely to

2 S Gloppen 'Conceptualising lawfare: A typology and theoretical framework' (2018) 1-31 https://www.academia.edu/35608212/Conceptualizing_Lawfare_A_Typology_and_Theoretical_Framwork (accessed 12 July 2022). See also the introduction to this volume.

3 A Ibrahim 'LGBT rights in Africa and the discursive role of international human rights law' (2015) 15 *African Human Rights Law Journal* 263 at 264 & 272-273.

make any impact, and risk triggering counter-mobilisation, for example by church leaders, the *social opportunity structure* is closed. If, in this context, the cause could potentially be advanced by bringing cases to court, the *legal opportunity structure* is comparatively open. Multiple factors combine to determine how open each aspect of the opportunity structure is for actors to advance specific causes. For queer activists, the legal opportunity structure depends among others on the nature of the law (are same-sex relations criminalised, is discrimination on the basis of sexual orientation prohibited?); rules regarding legal standing (can organisations bring cases to court on behalf of others or only affected individuals on their own behalf?); the costs and procedural barriers involved; access to legal assistance and financial support; the courts' jurisprudence on similar issues; and the extent to which judgments are implemented. It should be noted that the different opportunity structures are relative to each other – even if the legal opportunity structure is relatively closed for queer activists in country A compared to country B, it may still be open compared to the political and social opportunity structure in country A, and hence the best course of action. Actors' opportunity structures are also dynamic and may shift because of external developments – electoral alternations, constitutional changes, social mobilisation, judicial appointments, and the like – or in response to actions taken by the activists themselves, for example court cases that create new enabling jurisprudence (or bad precedents), or that create new alliances (or strengthen opponents). When analysing actors' lawfare strategies the opportunity structure serves as a heuristic tool that helps organise the various considerations that weigh on their decisions.[4]

In this chapter, we argue that for queer activists, a positive shift in the legal opportunity structure with the adoption of the 2010 Constitution, followed by an adverse shift in the political climate, diminishing opportunities for political reform, has rendered litigation a critical tool. In the face of governmental recalcitrance and conservative socio-cultural, political, and religious attitudes towards queer issues and populations, litigation has been key to overcoming some important legal and policy bottlenecks. We show how, in Kenya, successful LGBTIQ+ lawfare drew strength from the vibrancy of a civil society and social movement enabled and emboldened by a successful campaign for the reintroduction of multiparty politics in the 1990s, and the successful clamour for a new and progressive constitution in the 2000s resulting in the promulgation

4 For a more in-depth discussion, see for example S Gloppen 'Conceptualizing abortion lawfare' *Revista Direito GV* 17 (2021) https://www.scielo.br/j/rdgv/a/7CV9SGHgDphL6L9TFTN6S8q/ (accessed 12 July 2022). See also the introductory chapter to this volume.

of the 2010 Constitution of Kenya. Other factors that have favourably shifted their legal opportunity structure include: reforms to the judiciary; appointment of progressive judges and chief justice; simplification of court standing rules through the Constitution allowing for representative suits and public interest litigation; and the adoption of the Chief Justice Practice Rules for the Protection of Human Rights and Fundamental Freedoms easing the procedural requirements for human rights litigation.

These critical changes altered the nation's institutional arrangements and power structures and credibly established lawfare as a new, self-reinforcing way of challenging the state and remedying previous harms. The reform of institutions through a referendum process and the subsequent transformation of the judiciary,[5] increased the legitimacy of the courts enabling them to serve as a critical space for contestation of controversial societal disagreements. With better conditions for favourable court decisions, litigation became a more promising strategy to transform substantive normative values and principles of governance and protection of fundamental rights, including the protection of rights relating to sexual orientation and gender identity.[6]

This chapter is divided into five sections starting with the introduction. Section two looks at the socio-legal and political situation in Kenya and the cases determined before the promulgation of the 2010 Constitution. Section three analyses the post 2010 period, the shift in opportunity structures created by the new Constitution, legal mobilisation from LGBTIQ+ protagonists, the court decisions, and the resulting counter mobilisation and political backlash. Section four discusses some effects of lawfare strategies for sexual and gender minority rights protection in Kenya, while section five concludes the chapter.

2 Pre-2010 legal and socio-political dynamics

2.1 The socio-legal and political situation

Kenya's 1963 Constitution, with its many limitations on fundamental rights in substance and procedures to the point of it being termed a 'Bill of

5 Reforms included the formation of the new Supreme Court, the expansion and empowerment of the Judicial Service Commission (JSC), and the establishment of the judiciary fund. The appointment of more liberal and human-rights minded judges also created space for pro-LGBTIQ+ actors.

6 Advocacy can help softening hard societal stances, making it possible for courts to make more progressive rights-enabling judgments such as that in the South African case of *Minister of Health and Others v Treatment Action Campaign and Others* [2002] ZACC 15.

Limitations' did not create a conducive environment for rights revolutions through lawfare.[7] Its equality and non-discrimination provision in section 26 did not have 'sex' or 'gender' as prohibited grounds of direct or indirect discrimination.[8] This was extremely strange as the same Constitution in article 14, which detailed that every person was entitled to the rights and fundamental freedoms in the Constitution, indicated that the rights were to be enjoyed irrespective of a person's sex. Though amendments to the Constitution in 1997 added 'sex' to the list of objectionable grounds in section 82 of the Constitution that was now the equality and non-discrimination clause due to several amendments to the Constitution,[9] the amendment's efficacy was compromised by section 82(4) which offered exemptions that allowed for sex-based discrimination in certain circumstances, especially in relation to culture, religion, family and marriage.[10] The normative limitations were accompanied by technical and procedural limitations in undertaking rights-based strategic litigation, including a conservative legal culture and a judiciary unwilling to undertake rights-based adjudication. Procedural technicalities regarding who could bring a case before the courts, and an opaque system of access to courts for constitutional litigation due to the failure of the Chief Justice to promulgate Human Rights Practice Rules constrained possibilities for public interest litigation, as did the high costs of litigation and scarcity of human rights organisations willing to support strategic litigation. Socio-cultural, political and religious conservatism made difficult any societal dialogue on the rights of sexual minorities.

The growth, in the 1990s, of a strong civil society movement pursuing rights-based advocacy for the re-introduction of multiparty politics in Kenya, and their active engagement in the decade-long agitation for a new constitutional dispensation, paved the way for lawfare as a political strategy. The role of civil society in these processes coupled with the agency and networks of practice that were developed, generated a vibrant civil society forcefully undertaking advocacy for good governance,

7 C Moyi 'Protection of fundamental rights and freedoms vis-à-vis preservation of national security: Analysis, review and appraisal of the legal framework' (August 2016) 16.

8 Kenya's Independence Constitution, 1963 http://kenyalaw.org/kl/fileadmin/pdfdownloads/1963_Constitution.pdf (accessed 20 June 2022).

9 The Constitution of Kenya 1963, as amended (revised edition 2008) http://kenyalaw.org/kl/fileadmin/pdfdownloads/Constitution%20of%20Kenya%20(Repealed).pdf (accessed 20 June 2022).

10 The limitation in section 82(4) of the amended Constitution was not new, as it was already part of section 26(4) of the Independence Constitution, which limited the applicability of the equality and non-discrimination clause in the context of non-citizens, adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law.

democratisation, and the protection of fundamental rights for all sectors of society, including vulnerable and marginalised groups like sexual and gender minorities.

Equally important, the HIV/AIDS epidemic, and efforts to address it from a human rights perspective opened avenues to advocate for the protection of the health rights of men who have sex with men (MSM). Clinics providing specialised care to the MSM community – identified as a group in need of special programming in HIV Prevention and Response Policies – became points of organising, agitation and advocacy.[11] Following Ishtar MSM's production of the play 'Cleopatra' at the Kenya National Theatre in 1997, which created an entry point for public discussions of non-heteronormative sexuality and gender identities, the community's mobilisation took place in the spaces provided by MSM health clinics.[12] Besides providing health information and services to underserved groups affected by the HIV/AIDS crisis, the clinics provided activists with the space to build networks and learn about western gender and sexual identity terminology and the associated political organising tactics.[13] According to Mung'ala and De Jong the clinics allowed LGBT organisations to form and register as community-based organisations with the Ministry of Social Services and later the NGO Coordination Board. Ishtar MSM, for example, was registered in 2002 as a self-help group for MSM.[14]

Mobilisation through these clinics was, however, uneven. The focus of the government and donors was the exposure only to HIV of men having sex with men. Thus, the needs of lesbians, intersex and transgender communities were overlooked.[15] The lesbian group Minority Women in

11 LW Mung'ala & A de Jong 'Health and freedom: The tense interdependency of HIV/AIDS interventions and LGBTIQ activism in Kenya' (2020) 6 *Kohl: A Journal for Body and Gender Research* 133.

12 C Mugo 'Now you see me, now you don't – A study of the politics of visibility and sexual minority movement in Kenya' (2009) 42 https://open.uct.ac.za/bitstream/handle/11427/26147/Mugo_Cynthia_Now_You_see_me_now_you_don_039_t_2009_1%20%281%29.pdf?sequence=4&isAllowed=y (accessed 20 June 2022).

13 A Currier *Out in Africa: LGBT organizing in Namibia and South Africa* (2012); R Lorway et al 'Going beyond the clinic: Confronting stigma and discrimination among men who have sex with men in Mysore through community-based participatory research' (2014) 24 *Critical Public Health* 73; A Currier & T McKay 'Pursuing social justice through public health: Gender and sexual diversity activism in Malawi' (2017) 9 *Critical African Studies* 71.

14 Mung'ala & De Jong (n 11).

15 Openly gay men from Nairobi, for example, took a more prominent role in this community than did male or female sex workers in Nairobi, Kisumu, and Mombasa. EK Igonya 'My brother's keeper? Care, support and HIV support groups in Nairobi,

Action (MWA) was formed in opposition to the continued male dominance in LGBTIQ+ organisations and causes, and the intersex and transgender communities also went on to form their own organisations, championing their particular concerns and rights. This has contributed to a separation of the intersex and transgender activism from the larger movement.

In June 2006, Ishtar MSM along with several other LGBTIQ+ groups formed the Gay and Lesbian Coalition of Kenya (GALCK).[16] In December the same year, GALCK participated in the World AIDS Day march, bringing nationwide attention to the group. The following year, at the 2007 World Social Forum in Nairobi, GALCK drew international attention with its workshop on 'Sexuality and Social Justice', focusing on the social and political integration of sexual minorities.[17] LGBTIQ+ organising thus moved beyond healthcare to the larger human rights and political action arena, and the struggle for a new constitutional dispensation became a focal point. MWA and its members were involved in the 'Warembo ni Yes' Campaign (Beautiful Girls Vote Yes Campaign) in favour of constitutional reform.[18]

The open advocacy for the recognition and protection of LGBTIQ+ rights in the context of the constitution-making process, in line with the precedent set by the South African Constitution that had recognised sexual orientation and gender identity as prohibited grounds of discrimination, did not go unnoticed by Kenya's conservative socio-cultural and religious actors. Opposition grew to the point where some conservative groups actively opposed both the 2005 and 2010 Draft Constitutions for protecting sexual orientation and gender identity rights, arguing that they allowed a leeway that could be utilised to promote these rights.[19] During the 2010 national referendum, Christian churches campaigned against the passage of the Constitution, among other reasons for including gay rights.[20] Members of the Committee of Experts on Constitutional Review, when

Kenya' PhD thesis, University of Amsterdam: Amsterdam Institute for Social Science Research (UVA-AISSR), 2017; BDM Wilson et al 'The sexual health needs the of sexual minority women in Western Kenya: An exploratory community assessment and public policy analysis' (2019) 14 *Global Public Health* 1495.

16 Mung'ala & de Jong (n 11).

17 Mung'ala & de Jong (n 11).

18 AM Ocholla 'The Kenyan LGBTI social movement: Context, volunteerism, and approaches to campaigning' (2011) 3 *Journal of Human Rights Practice* 93.

19 A Wanga 'The Kenyan constitutional referendum of 4th August 2010: A case study' (2011) 1-10 https://www.democracy-international.org/sites/default/files/PDF/Publications/2011-04-28_kenyareferendum.pdf (accessed 20 June 2022).

20 D Parsitau "Law, religion, and the politicization of sexual citizenship in Kenya" (2021) 36 *Journal of Law and Religion* 105.

forced to respond to this opposition, effectively backtracked and stated that despite appeals by British MPs, 'gay rights would not be included [in the Constitution] because doing so would lead to a majority of Kenyans rejecting the draft'.[21] This reality of conservative socio-cultural, religious and political opposition to the equal protection of sexual minority rights in Kenya, rendered constitutional and legislative reform unlikely. This motivated the adoption of alternative lawfare strategies, including strategic litigation as part of the arsenal of LGBT organisations in their pursuit of effective protection, promotion, and fulfilment of the fundamental rights of sexual minorities in Kenya.

2.2 Pre-2010 court cases

The seminal pre-2010 court case, which addressed the rights of intersex people, was *RM v Attorney General* filed in 2007.[22] In 2005, RM was arraigned in court for robbery with violence, a capital offence.[23] While in remand before trial, the police discovered RM to be intersex. Unsure as to whether to hold RM in a male or female facility, the officers referred the matter to the local Magistrates' Court, who ordered a medical confirmation to determine RM's sex and subsequently ordered that they be held in a separate room in the police station during trial.[24] Upon trial and conviction, RM was committed to Kamiti Maximum Prison where RM was kept in an all-male prison facility and shared cells, beddings and sanitary facilities with male inmates and was exposed to constant abuse, mockery and ridicule.[25]

In 2007, RM petitioned the High Court for rights violations resulting from the abuse suffered while detained at the correctional facilities, due in part to the lack of provision in the Prison Act for the separation of intersex persons in boarding facilities. It was argued that this violated RM's right to human dignity, equality, and non-discrimination as well as privacy, and was in breach of the Constitution as well as international human rights law.[26] RM's case also challenged the legality of the Births and Deaths Registration Act that only recognised the male-female sex binary and provided no legal recognition for intersex as a third gender.

21 M Ringa 'Kenya: Review team rejects push for gay rights' *Daily Nation* 18 October 2009 allafrica.com/stories/200910190496.html (accessed 20 June 2022).

22 *RM v Attorney General* [2010] eKLR http://kenyalaw.org/caselaw/cases/view/72818 (accessed 20 June 2021).

23 *RM v Attorney General* (n 22) para 5.

24 *RM v Attorney General* (n 22) para 6.

25 *RM v Attorney General* (n 22) para 7.

26 *RM v Attorney General* (n 22) paras 7 & 40-41.

RM argued that the Act was discriminatory because it limited intersex persons' ability to acquire birth certificates, national identity documents and travel passports, which in turn caused further violation of rights to nationality, privacy, healthcare, education, movement, employment and political participation.[27] In its response, the state, while admitting that the Prison Act was silent on the provision of separate prison facilities for intersex persons, denied the human rights violations alleged by RM and argued that arrangements could be made administratively for secure detention.[28] It also pointed to Parliament as the appropriate authority for deciding if intersex persons were to be recognised as a third gender, and for adopting a legal framework to protect intersex rights.[29]

Interestingly, the Centre for Rights Education and Awareness for Women (CREAW), as an interested party in the case, argued for the legal recognition and protection of intersex person's rights based on Christian theology. They argued that intersex persons are similar to persons born with disabilities and should not be discriminated against based on socio-cultural constructs and pointed out that the Bible gives no strict or rigid definition of gender/sex.[30] Hence, CREAW asked the Court to issue orders that would 'heal relations between biological sex, gender identity, and cultural influences in Kenya, to safeguard the constitutional rights of intersex persons'.[31] CREAW's theologically phrased plea to do justice and manifest love by embracing intersex persons as a marginalised category of people in society illustrates the political and normative differences between intersex issues and LGBT matters in the Kenyan context.[32]

CREAW's linking of intersex with disabilities not only pathologised the identity, but also ignored the ways disabilities themselves are socially constructed hierarchies designed to disassociate from stigma.[33] The negative effects of pathologising sexual orientation and gender identity were especially evident in the United States during the 1950s and 1960s when homosexuality was included in the Diagnostic and Statistical Manual of Mental Disorders (DSM). American psychoanalysts, informed by sexologists, argued that homosexuality was an unpleasant yet curable

27 *RM v Attorney General* (n 22) paras 16-25 & 30-33.

28 *RM v Attorney General* (n 22) para 11.

29 *RM v Attorney General* (n 22) paras 11 & 67-76.

30 *RM v Attorney General* (n 22) para 55.

31 *RM v Attorney General* (n 22) para 56.

32 *RM v Attorney General* (n 22) para 57.

33 S Linton *Claiming disability: Knowledge and identity* (1998); R Kunzel 'The rise of gay rights and the disavowal of disability in the United States' in MA Rembis, CJ Kudlick & KE Nielsen (eds) *The Oxford handbook of disability history* (2018).

mental illness.[34] As a result, psychiatric professionals promoted the use of lobotomy, electroconvulsive shock, aversion therapy, hormone therapy and psychotherapy to cure homosexuality.[35] The effects of such pathologising extended beyond the medical realm; it effectively sanctioned stigmatising cultural attitudes and disenfranchising criminalising laws. Sexual psychopath laws, for example, criminalised non-normative, especially homosexual, sex.[36] The association with mental instability also led to homosexuals being barred from employment and immigration benefits.[37] CREAW's argument despite advocating for non-discrimination, therefore, left space for future stigmatisation of sexual minorities and should thus not be encouraged despite its outward support for sexual minorities.

Ignoring CREAW's religious arguments for the legal recognition of intersex persons, the Court focused its judgment on two key issues: whether RM had been denied legal recognition and, whether RM's rights had been violated when incarcerated.[38] Indicative of the Court's male-female binary conceptualisation of sex, it defined intersex as an abnormal condition of varying degree regarding a person's sex constitution.[39] While acknowledging that RM was an intersex person, the Court refused to take judicial notice of intersex persons as a group.[40] It based this decision on the reasoning that no medical or statistical evidence was placed before it to substantiate it and that there were not enough intersex persons in Kenyan society to constitute a representative class of public interest. The Court concluded that RM's condition was rare and should be treated as an isolated case.[41]

The Court furthermore held that the Births and Deaths Registration Act neither excluded nor discriminated against RM, arguing that since RM's physiology was more male than female, RM's mother had properly identified RM as being male at birth.[42] Thus, the Court did away with RM's claims of violation of rights to equality before the law, equal treatment, non-discrimination on the grounds of sex, right to education, work, housing and political rights. Further, the Court refused to broadly interpret the word 'sex' in the Constitution and in the relevant statutes

34 As above.

35 J Marmor *Homosexual behavior: A modern reappraisal* (1980).

36 As above.

37 Kunzel (n 33).

38 *RM v Attorney General* (n 22) para 98.

39 *RM v Attorney General* (n 22) para 109.

40 *RM v Attorney General* (n 22) para 111.

41 *RM v Attorney General* (n 22) paras 112-118.

42 *RM v Attorney General* (n 22) paras 128-133.

to include intersex persons. It made three arguments against this: first, that the word 'sex' strictly refers to male and female, and that all intersex persons fell within the category of being either male or female depending on their dominant physiological features;[43] secondly, that it was not within the mandate of the Court to introduce a third sex called intersex, rather this was the responsibility of the Legislature; and thirdly, that Kenya was not ready to scientifically relativise sexual identities due to its conservative traditional cultures.[44]

The Court's conservatism and its conflation of gender identity with sexual orientation that came through in the judgment was a push back to the legal recognition and protection of the fundamental rights of intersex persons in Kenya. This conflation – grouping intersex persons with LGBT in a way that raises barriers for their cause – appears to be one of the reasons for the attempts by intersex and transgender activists in Kenya to delink from the larger LGBTIQ+ struggle as discussed below.

Another noteworthy pre-2010 case is *FO v Republic.*[45] In 2006, FO had been convicted and imprisoned for six years for 'carnal knowledge against the order of nature', contrary to section 162 of the Penal Code.[46] He was convicted not because evidence had been produced to prove the charges brought against him but based on his own plea of guilt.[47] On his first appeal to the High Court in Kericho, the sentence was increased from six to 14 years imprisonment.[48] However, the enhanced sentence was, rescinded by the Court of Appeal in 2011, stating that the High Court had no mandate to enhance the sentence without an application for the same from the Attorney-General.[49] FO was thus sentenced to 6 years, still based on his plea of guilt.[50]

This case arose in the context of a still nascent and largely Nairobi-based LGBTIQ+ organising and activism that was largely unknown in the remote rural and conservative town of Kericho where the case was first heard. Hence, FO did not get the necessary legal support, guidance, and representation to protect him from self-incrimination. The case was

43 Despite international recognition that sex includes intersex persons.

44 *RM v Attorney General* (n 22) paras 130-132.

45 *FO v Republic* [2011] eKLR http://kenyalaw.org/caselaw/cases/view/74205/ (accessed 30 June 2021).

46 *FO v Republic* (n 45) para 1.

47 *FO v Republic* (n 45) paras 2-3.

48 *FO v Republic* (n 45) para 3.

49 *FO v Republic* (n 45) paras 5-6.

50 *FO v Republic* (n 45) para 6.

also determined in the context of the old Constitution and its limitations in the protection of human rights and fundamental freedoms. Efforts to rescind the damage resulting from the prosecution of FO in the subsequent appeals, taking place within the new constitutional dispensation, could only address the enhanced sentence in the High Court, and not challenge the findings of the Magistrates' Court, where the ground for conviction was FO's plea of guilt, which in all likelihood was obtained due to a lack of legal guidance and representation. The limitations exposed by the case have subsequently been addressed by the new Constitution and with legal support being provided by the LGBTIQ+ network and civil society allies. How this has changed the situation for persons accused of sodomy is illustrated in in the COL case discussed below.

3 2010 and beyond: Legal and socio-political dynamics

3.1 The socio-legal and political situation

The 2010 Constitution recognises the need to redefine and rearrange societal relations to right past wrongs, including gender inequalities.[51] It entrenches a progressive Bill of Rights as an integral part of Kenya's democratic state, providing the framework for economic, social and cultural policies.[52] It underscores that the purpose of the Bill of Rights is the preservation of human dignity, promotion of social justice and enhancement of self-fulfilment, aimed at enabling every person to enjoy their right to the greatest extent consistent with the nature of the right.[53] The courts are required to develop the law to the extent that it does not give effect to entrenched rights,[54] and state officials and organs are obliged to address the needs of vulnerable groups within society, including members of minority and marginalised groups.[55] It further improves organisations' access to the courts to undertake strategic litigation through its progressive access rules that enables class action and public interest litigation, and empowers the courts to issue remedies that enhance the vindication of rights.[56]

Article 27 provides for equality and non-discrimination:

51 The Constitution of Kenya, 2010 http://kenyalaw.org/kl/index.php?id=398 (accessed 10 June 2021).

52 Article 19(1) of the Constitution of Kenya 2010.

53 Articles 19(2) as read with 20(2) of the Constitution of Kenya 2010.

54 Article 20(3)(a) of the Constitution of Kenya 2010.

55 Article 21(3) of the Constitution of Kenya 2010.

56 Articles 22 & 23 of the Constitution of Kenya 2010.

(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
(5) Any person shall not discriminate directly or indirectly against another person on any grounds specified or contemplated in clause (4).

Though this provision does not expressly include sexual orientation and gender identity as prohibited grounds of discrimination, it has been argued these could be read into the provision as analogous grounds.[57] The reason for this is that article 27(4) is based on the protection of identity and human dignity, with the expressly prohibited grounds of discrimination being drawn from the need to protect all persons regardless of their physical, economic, psychological, social or sexual characteristics. Since the need to protect sexual orientation and gender identity also has its basis on the protection of identity and human dignity broadly speaking, it can be argued that sexual orientation and gender identity are equally protected under article 27 as analogous grounds of prohibited discrimination, as the list contained in article 27(4) is not exclusive considering the provision's reference to the term 'including'.

Despite these Constitutional provisions, LGBTIQ+ persons continue to face stigma, discrimination, limited access to public services, exclusion, and homophobic violence, with a detrimental effect on their physical and psychological wellbeing, and economic and social inclusion. This continuing discrimination, despite the progressive constitutional framework has been a driver for queer lawfare as discussed below.

Under the new Constitution, LGBTIQ+ groups have organised and networked to advance their rights more effectively. In 2010, the Kenya Human Rights Commission (KHRC) in collaboration with GALCK organised Kenya's first public celebration of the International Day against homophobia and transphobia.[58] This was a concerted effort to engage the wider public in dialogue that would both deconstruct stereotypes of

57 J Oloka-Onyango 'Debating love, human rights and identity politics in East Africa: The case of Uganda and Kenya' (2015) 15 *African Human Rights Law Journal* 47.

58 Kenya Human Rights Commission *The outlawed among us: A study of the LGBTI community's search for equality and non-discrimination in Kenya* (2011) 6 http://www.khrc.or.ke/mobile-publications/equality-and-anti-discrimination/70-the-outlawed-amongst-us/file.html (accessed 20 February 2021).

LGBTIQ+ persons and highlight the negative linkage between homophobia and the spread of HIV/AIDS. The event led to increased positive press, stronger alliances with other parts of civil society and improved tolerance in some sections of society.[59] To further increase awareness, KHRC and MWA published research papers highlighting the community's legal and social status, while GALCK consulted international LGBTIQ+ activists to identify the most effective strategies for decriminalisation of same-sex sexual conduct.[60] As a result, Kenyan activists started to build long-term litigation strategies by looking for good ways to incorporate evidence and documentation into their court cases to create precedents that could serve as steppingstones in the move towards decriminalisation.[61]

In this period, LGBTIQ+ organising grew and became part of mainstream social justice and human rights work. Organisations working on various aspects of LGBTIQ+ rights were registered as NGOs, while other organisations, more overtly directed towards queer activism, were denied registration. In 2012, the newly formed National Gay and Lesbian Human Rights Commission (NLGHRC), sued the NGO Board and the Attorney-General for refusing to register LGBT organisations as discussed below.

In parallel, there was a counter-mobilisation, feeding off the conservative socio-cultural, religious and political environment of Kenya. The then Prime Minister, Raila Odinga, called for the police to arrest homosexuals,[62] and when the Minister of Special Programmes called for Kenyan society to learn how to live with the MSM community, some religious leaders called for her resignation.[63] Deputy President William

59 As above.

60 As above. Minority Women in Action 'Breaking the silence: Status of women who have sex with women in Kenya' (2013) 1-51 https://www.icop.or.ke/wp-content/uploads/2016/07/Breaking-the-Silence-Status-of-Kenyan-WSW-2013-first-version.pdf (accessed 20 June 2021).

61 JW Thirikwa 'Emergent momentum for equality: LGBT visibility and organising in Kenya' in N Nicol et al (eds) *Envisioning global LGBT human rights: (Neo)colonialism, neoliberalism, resistance and hope* (2018) 307.

62 'Kenya: PM orders the arrest of gay couples' *All Africa* 28 November 2010 https://allafrica.com/stories/201011290110.html (accessed 20 June 2021). The Prime Minister, on the basis of national and international pressure, however, later clarified that he had not given orders for gay couples to be arrested, but had only indicated that same sex unions were unlawful in Kenya, see 'Raila denies gays arrest order' *Daily Nation* 4 December 2010 https://nation.africa/kenya/news/politics/raila-denies-gays-arrest-order-747866 (accessed 20 June 2021).

63 The remarks were made at a National HIV/AIDS Symposium targeted towards gays, lesbians and sex workers. The government continued to view the group as a risk group in need of services.

Ruto, during the 2013 Deputy Presidential Debates equated homosexuals to dogs,[64] and during US Secretary of State John Kerry's visit to Kenya in 2015, he declared that Kenya is a republic that worships God and that there was 'no room for gays and those others'.[65] When President Obama visited Kenya in July 2015, President Uhuru Kenyatta declared sexual minority rights as 'a non-issue'.[66] This negative political rhetoric may be linked to a more visible LGBTIQ+ community and organisation, but rather than seeing the counter-movement primarily as a backlash to domestic developments, it should also be understood in the context of the then prevalent political climate in the region, with several African presidents adopting incendiary rhetoric against sexual minorities and 'standing up' against western attempts to bring about pro-LGBTIQ+ changes.

The Christian caucus in Parliament, was central to the counter-mobilisation. In 2014, a group of parliamentarians launched a caucus against homosexuality that lobbied for stricter enforcement of sodomy laws, including calls for citizens to arrest suspected gays and lesbians, and triggering anti-gay protests.[67] The Republican Liberty Party proposed a law that would sentence foreigners to death for homosexuality and Kenyans to life-imprisonment.[68] Again, it should be noted that this was part of a regional trend of proposing – and in some cases adopting – harsher anti-LGBTIQ+ laws.[69] In several countries, including Uganda, Nigeria and The Gambia anti-gay bills were brought to Parliament, and resulted in persecution, prosecution and increased stigmatisation of the LGBTIQ+ community even where they eventually were not adopted.[70] In Kenya, the

64 C Stewart 'Protest over Kenyan claim that homosexuals = dogs' *76 Crimes* 15 February 2013 https://76crimes.com/2013/02/15/protest-over-kenyan-claim-that-homosexuals-dogs/ (accessed 20 June 2021).

65 '"No room" for gays in Kenya, says Deputy President' *Reuters* 4 May 2015 https://www.reuters.com/article/kenya-gay-idUSL1N0XV08M20150504 (accessed 30 June 2021).

66 UK Home Office 'Country Policy and Information Note – Kenya: Sexual orientation and gender identity and expression – Version 3.0' (April 2020) https://www.justice.gov/eoir/page/file/1269491/download (accessed 30 June 2021).

67 W Oloo 'Kenya anti-gay activists, lawmakers eye Uganda-like law' *Anadolu Agency* 26 February 2014 https://www.aa.com.tr/en/world/kenya-anti-gay-activists-lawmakers-eye-uganda-like-law/179151 (accessed 20 June 2021).

68 This was based on the conceptualisation of homosexuality as a foreign concept that was being perpetuated in Kenya by foreigners, and that heavier punishment against foreigners was to stop the spread of homosexuality.

69 J Kushner & A Langat 'Africa: Anti-LGBTI groups are making inroads across East Africa' The Ground Truth Project (15 June 2015) https://thegroundtruthproject.org/anti-lgbt-groups-are-making-inroads-across-east-africa/ (accessed 18 June 2021).

70 As above.

bill was not tabled in Parliament, as the majority leader argued that the new Constitution and Penal Code were sufficient to address homosexuality.[71]

Against this background, in response to the difficult political and socio-cultural/religious opportunity structure, and the somewhat more promising legal opportunity structure resulting from the new constitutional framework, several LGBTIQ+ activists embarked on incremental litigation. We will now show how separate strands of lawfare developed, focusing on specific groups, with transgender and intersex persons being the first to adopt litigation as a tool for the enhanced protection of rights, followed later by litigation for the protection of the rights of gay men and lesbians.

3.2 Recognition of gender identity: Intersex and transgender

Due to legal frameworks entrenching the male-female binary – such as the Kenyan Births and Deaths Registration Act – most intersex individuals are assigned arbitrary sex markers or undergo unnecessary corrective surgeries at birth without the opportunity to make an informed determination of their sex. In Kenya, the human rights violations resulting from the failure to recognise intersex as a third sex has led to litigation to enhance the registration and issuance of identity documents as well as the provision of health services specific to intersex persons.

The *Baby 'A' (suing through the Mother EA) v Attorney General* was the second intersex case to be determined by the courts.[72] Baby A was born in May 2009 with both male and female genitals.[73] This made their birth registration problematic according to the binary Births and Deaths Registration Act. Unsure how to proceed, hospital staff marked the baby's sex with a question mark ('?').[74] The lack of a sex marker led to the refusal by the Registrar of Births and Deaths to issue a birth certificate to Baby A, limiting her ability to access medical care, school admission, a passport or employment.[75] Baby A's case was taken up by John Chigiti, a human rights advocate, supported by CRADLE, a Children's Rights NGO. The case was filed in 2013 and the legal argument focused on the right to legal recognition, to be registered immediately after birth and to have a

71 As above.

72 *Baby 'A' (Suing through the Mother E A) v Attorney General* [2014] eKLR http://kenyalaw.org/caselaw/cases/view/104234/ (accessed 20 May 2021).

73 *Baby A* case (n 72) para 1.

74 As above.

75 As above.

name under national[76] and international law.[77] It was also argued that sex assignment surgery without the child's express informed consent violated their right to physical integrity and self-determination and should not be allowed.[78] The Court was requested to order the state to develop guidelines for corrective surgery and consent for this purpose.[79]

The government, through the Attorney-General, denied receiving any application for Baby A's registration and that any change in the male-female gender dichotomy in the Births and Deaths Registration Act had to be done by Parliament, and not the courts.[80] The state further argued that the Births and Deaths Registration Act effectively provided for the registration of intersex children, as they could be registered using their dominant sex as either male or female and could thus enjoy all their fundamental rights.[81]

In making its determination, the Court focused on two issues: whether Baby A was an intersex person who was not recognised; and the need for rules and guidelines for corrective surgeries for intersex children.[82] The Court found that Baby A could be properly categorised as an intersex person due to the ambiguous genitalia.[83] Further, the Court found that article 27(4) of the Constitution prohibited discrimination on all grounds, including the character of being intersex, and therefore, intersex persons ought not to be discriminated against in any way, including in the issuance of identity documents.[84] The Court then ordered Baby A's mother to make an application for a birth certificate and report to the Court within 90 days on the progress made.[85] The Court, however, refused to make orders

76 Article 53 of the Constitution of Kenya, 2010.

77 Relevant international law relied on included articles 7-8 of the UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol 1577, p 3; and article 6 of the (OAU), African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990).

78 Relevant international law provisions relied on included articles 2, 3, 12, and 37 of the UN Convention on the Rights of the Child; and articles 3 and 4 of the African Charter on the Rights and Welfare of the Child.

79 *Baby A* case (n 72) paras 4-6.

80 *Baby A* case (n 72) paras 8-12 & 20.

81 *Baby A* case (n 72) para 13-15.

82 *Baby A* case (n 72) para 40.

83 *Baby A* case (n 72) para 52-53.

84 *Baby A* case (n 72) para 61.

85 *Baby A* case (n 72) para 71(iv).

on the recognition of intersex as a third gender, stating that this was the responsibility of the Legislature.[86]

The Court acknowledged the need for rules and guidelines surrounding corrective surgeries, but again insisted that this was under the Legislature's purview since the courts neither had the mandate nor the technical capacity to decide such matters.[87] The Court, therefore, ordered the state, through the Legislature and with the participation of relevant stakeholders, to develop a comprehensive legislative framework to enhance the recognition and registration of intersex children as well as develop guidelines for corrective surgeries for intersex children.[88] The state had 90 days to report on the progress it had made in developing the necessary legislative and policy frameworks on intersex children.[89] The state was also ordered to designate an agency or institution to collect statistical data on intersex persons to enhance policy creation and decision-making on the rights of intersex persons.[90] The decision of the Court was implemented with the Registrar of Births and Deaths registering and issuing a birth certificate to Baby A, though the gender marker that was used remained confidential to protect the identity of the baby.[91] The 2019 Census was also used to collect data on intersex persons, with a total of 1 542 people identifying themselves as intersex during the Census.[92] With this, Kenya became the first African nation to officially document the intersex population for purposes of policy formulation and service delivery.[93]

The *Baby A* decision has led to more focused advocacy for the rights of intersex persons, with the Legislature holding a public forum on the rights of intersex persons; engaging with other civil society stakeholders to draft legislation on protection of the rights of intersex persons; and promising to prioritise and fast-track the draft legislation when it is presented before Parliament. The *Baby A* case and the undertaking from Parliament led to the establishment of a Taskforce on Policy, Legal, Institutional and

86 *Baby A* case (n 72) para 62.

87 *Baby A* case (n 72) para 65.

88 *Baby A* case (n 72) para 66-67.

89 *Baby A* case (n 72) para 71(iii).

90 *Baby A* case (n 72) paras 68 & 71(ii).

91 This was confirmed by the Kenya National Commission on Human Rights, who were uncomfortable revealing the gender marker used due to lack of permission to do so by the mother of the baby.

92 N Bhalla 'Kenyan census results a "big win" for intersex people' *Reuters* 4 November 2019 https://www.reuters.com/article/us-kenya-lgbt-intersex-trfn-idUSKBN1XE1U9 (accessed 24 June 2021).

93 As above.

Administrative Reforms Regarding Intersex Persons – a multi-agency taskforce established by the Attorney-General in May 2017.[94] The Taskforce released its report in December 2018.[95] Despite these efforts, the Kenyan government has yet to produce a draft of the legislation or guidelines it is obliged to enact.

Another category of gender identity cases concerns transgender persons, with lawfare being used as a strategy for legal recognition as well as the protection and remediation of fundamental rights. The seminal case here was *Republic v Kenya National Examination Council: Ex-Parte Audrey Mbugua Ithibu*.[96] Mbugua changed her first name from Andrew to Audrey through a gazetted deed poll.[97] On 10 December 2010, Mbugua then wrote to the Kenya National Examination Council (KNEC) requesting her academic certificates to reflect the name change.[98] The Council initially appeared to agree but later dismissed the request.[99] Mbugua then moved to court. In their defence, KNEC argued that the certificate was issued in accordance with the registration particulars 'under which Mbugua had registered for the examination'.[100] The KNEC also questioned whether Mbugua's gender transition was sanctioned by law. It argued that it had no legal mandate to change the names of those who had transitioned because this had the potential to create fraudulent certificates.[101]

In its decision, the High Court stated that Audrey, as a transgender person, had unique characteristics and was entitled to differentiated treatment. A name change on her academic certificates would affirm her human dignity, autonomy and sexual/gender self-determination.[102] The Court acknowledged that the law allowed KNEC to withdraw and

94 Kenya Law Reform Commission 'Taskforce on Policy, Legal, Institutional and Administrative Reforms Regarding Intersex Persons in Kenya' (undated) https://www.klrc.go.ke/index.php/projects/on-going-projects/612-taskforce-on-policy-legal-institutional-and-administrative-reforms-regarding-intersex-persons-in-kenya (accessed 24 June 2021).

95 Office of the Attorney General 'The Taskforce Report on Policy, Legal, Institutional and Administrative Reforms Regarding the Intersex Persons in Kenya' (December 2018) https://www.klrc.go.ke/images/TASKFORCE-REPORT-on-INTERSEX-PERSONS-IN-KENYA.pdf (accessed 24 June 2021).

96 *Republic v Kenya National Examinations Council: Ex-Parte Audrey Mbugua Ithibu* [2014] eKLR http://kenyalaw.org/caselaw/cases/view/101979/ (accessed 15 June 2021).

97 *Ex-Parte Audrey Mbugua Ithibu* (n 96) para 4.

98 *Ex-Parte Audrey Mbugua Ithibu* (n 96) para 5.

99 *Ex-Parte Audrey Mbugua Ithibu* (n 96) paras 5-7.

100 As above.

101 As above.

102 *Ex-Parte Audrey Mbugua Ithibu* (n 96) paras 10-11.

amend academic certificates where necessary, which gave KNEC enough mandate to make the necessary changes to Mbugua's certificates.[103] The Court also noted that having gender marks in academic certificates was not a legal requirement, and thus issued an order compelling the KNEC to issue Mbugua with new academic certificates that did not include gender markers within 45 days.[104]

The Court noted the importance of human dignity as the cornerstone of a democratic society and the equal enjoyment of human rights. By affirming and making the connection between gender identity, autonomy and human dignity, the Court adopted a progressive interpretation of the law that had been envisaged by the new Constitution as a transformative document. This 2014 decision went a long way in affirming the legal recognition of transgender persons and increasing their access to public services. The decision was also not in vain, as its directive has been implemented by the Kenya National Examination Council issuing Ms Audrey new academic papers capturing her new gender identity.[105] She expressed her joy at finally achieving justice by stating as follows:[106]

> I am happy KNEC complied with the orders of the court and issued me with a new certificate. I urge other transgender people who have changed their names to apply for new certificates. I thank all those who supported me and my transgender family. You chose the side of winners, and you definitely chose justice.

Such positive enforcement outcomes encourage the adoption of lawfare as a strategy to achieve positive social justice outcomes for sexual and gender minorities in Kenya.

The cases on legal recognition and protection of intersex and transgender people show the potential of litigation for improving minority rights. But despite their successes, they also illustrate limitations of litigation strategies in producing broad-based socio-legal transformation. Especially when based on individual test cases, litigation has a reductionist nature, pushing cases to be argued on narrow grounds, rendering them unlikely to produce substantive reforms. For example, the landmark *Mbugua* case, did not clarify or elaborate a legal framework for the provision of critical

103 *Ex-Parte Audrey Mbugua Ithibu* (n 96) para 12.

104 As above.

105 A Wako 'Transgender activist Audrey Mbugua gets updated KCSE certificate' *Nairobi News* 16 September 2019 https://nairobinews.nation.africa/transgender-activist-audrey-mbugua-gets-updated-kcse-certificate/ (accessed 20 June 2021).

106 As above.

health services, such as corrective or gender affirming surgeries. Litigation is thus more effective when linked to broader civil society advocacy strategies.

3.3 Right to freedom of association

The ability to associate, organise and express oneself in a legally recognised organisation is key to advocating for oppressed and marginalised communities.[107] Efforts to have sexual minority rights organisations registered in the face of recalcitrant and unwilling governmental agencies formed a second arena of battle in Kenyan activists' queer lawfare. The first case that addressed this challenge was the judicial review case, *Republic v NGO Coordination Board and the Attorney General: Ex-Parte Transgender Education and Advocacy*.[108] The Transgender Education and Advocacy (TEA) wanted the Court to order the NGO Coordination Board to register them as a non-governmental organisation, after the Board had denied their application.[109] The NGO Board argued that they did not refuse to register TEA but waited for the Court to decide on the name change of one of the organisation's officials, Audrey Mbugua Ithibu, who was the applicant in *Republic v KNEC, Ex-Parte Audrey Mbugua Ithibu*, discussed above.[110]

The High Court, in its July 2014 decision, held that the NGO Coordination Board, despite its discretionary power, had acted in an unreasonable and unlawful manner by not properly justifying its refusal to register TEA.[111] The Court also held that discrimination and infringement of rights of association based on sexual orientation and gender identity was unconstitutional.[112] As a result, the Court issued an order compelling the NGO Board to register TEA, whose objective was national and international advocacy and education on the rights of transgender persons.[113] TEA's success informed the National Gay and Lesbian Human Rights Commission's case for registration.

107 Oloka-Onyango (n 57) 54.

108 *Republic v Non-Governmental Organizations Co-ordination Board: Ex-parte Transgender Education and Advocacy* [2014] eKLR http://kenyalaw.org/caselaw/cases/view/100341/ (accessed 20 June 2021).

109 *Ex-parte Transgender Education and Advocacy* (n 108) paras 1-7.

110 *Ex-parte Transgender Education and Advocacy* (n 108) paras 8-15.

111 *Ex-parte Transgender Education and Advocacy* (n 108) paras 35-37.

112 *Ex-parte Transgender Education and Advocacy* (n 108) para 36.

113 *Ex-parte Transgender Education and Advocacy* (n 108) para 38.

The *Eric Gitari v NGO Board* case, filed in 2013,[114] challenged the NGO Board's refusal to register the NGLHRC, an organisation that proposed to advocate and lobby for gay and lesbian persons' rights.[115] Gitari argued that the NGO Board violated the organisation's members' right to freedom of association contrary to article 36 of the Constitution as well as the rights to human dignity, equality and non-discrimination.[116] The state's argument was that freedom of association was not absolute but was subject to limitation in accordance with the law. Further, they stated that the Penal Code, in criminalising same-sex sexual conduct, had legitimately limited the right to freedom of association as against gay and lesbian persons in Kenya.[117] Katiba Institute, in its *amicus curiae* brief argued that both the Constitution and international law require that freedom of association be respected and exist without limits, unless adequately justified.[118]

It is worth noting that the lodging of the *Eric Gitari* case created a fissure in LGBTI organising, networking and collective advocacy, with some activists seeking to separate gender identity contestations from sexual orientation contestations. Audrey Mbugua – who had won the school certificate case and was central in the TEA registration court case – feared that linking LGB and transgender issues would threaten TEA's registration. With other intersex and transgender activists, she petitioned the court in the *Eric Gitari* case to not consider the transgender and intersex persons as being part of the LGB group.[119] They argued that 'sexual orientation is a *choice* whereas transgender and intersex people are faced with a *medical condition*'.[120] The breaking of ranks by transgender and intersex persons in the context of this case may have been informed by the differences in societal perceptions – with intersex and transgender persons receiving more political, social and religious sympathy and acceptance due to the supposed physiological, hormonal and biological nature of gender identity, while gay and lesbian persons continue to face exclusion due to the perceived 'choice factor' in sexual orientation. This perception of sexual orientation as a 'choice factor' sees same-sex sexual orientation and conduct as a learned behaviour or an acquired lifestyle which has

114 *Eric Gitari v Non-Governmental Organisations Co-ordination Board* [2015] eKLR http://kenyalaw.org/caselaw/cases/view/108412/ (accessed 20 June 2021).

115 *Eric Gitari v NGO Board* (n 114) para 1-2.

116 *Eric Gitari v NGO Board* (n 114) para. 3 & 19-29.

117 *Eric Gitari v NGO Board* (n 114) paras 4, 11-17, 32-36 & 42-46.

118 *Eric Gitari v NGO Board* (n 114) paras 47-55.

119 *Eric Gitari v NGO Board* (n 114) paras 38-41.

120 As above.

nothing to do with the human genetic makeup, to the detriment of the protection of the rights of the LGBTIQ+ communities.[121]

In its 2015 determination, the High Court held that the case was neither about marriage nor morality, but about constitutional guarantees of freedom of association, non-discrimination, and equality before the law for sexual minorities.[122] The Court stated that everyone, regardless of gender or sexual orientation, has the right to form any association, and this right could only be limited in accordance with article 24 of the Constitution.[123] Freedom of association is inviolable even if the views expressed by the organisation are unpopular or unacceptable to the majority in society.[124] The Court, therefore, affirmed that the NGLHRC had the right to be registered and that the NGO Board, by failing to do so, was in breach of the Constitution.[125] In reaching this decision the Court held that cultural or religious norms were not legitimate reasons for the limitation of rights because they are not 'law' as required by the limitation clause in article 24.[126] The Court further held that the NGLHRC rights had been violated because the Constitution prohibited discrimination on any grounds. It stated that even though article 27, which prohibits both direct and indirect discrimination, did not contain sexual orientation as an express prohibited ground of unfair discrimination, it affirmed that the listed grounds in the article were not exhaustive and could be interpreted to include other grounds.[127]

The public uproar emanating from the High Court determination of the *Gitari* case in 2015, led to the Attorney-General appealing the case, arguing that the High Court made a mistake in law by: identifying sexual orientation as an innate attribute without sufficient medical evidence; failing to note that freedom of association could be legitimately limited to achieve societal values such as moral, religious and cultural preferences as contained in the Preamble of the Constitution; failing to uphold the provisions of the Penal Code that criminalises homosexual behaviour; and reading in sexual orientation as a prohibited ground of discrimination in the Constitution.[128]

121 *Eric Gitari v NGO Board* (n 114) para 96.

122 *Eric Gitari v NGO Board* (n 114) paras 56-58 & 99.

123 *Eric Gitari v NGO Board* (n 114) paras 71-76.

124 *Eric Gitari v NGO Board* (n 114) para 88-96.

125 *Eric Gitari v NGO Board* (n 114) paras 103-118.

126 *Eric Gitari v NGO Board* (n 114) paras 119-125.

127 *Eric Gitari v NGO Board* (n 114) paras 129-138 & 147.

128 *AG v Eric Gitari* – Memorandum of Appeal (on file with authors).

In response, Gitari and the NGLHRC argued that since sexual orientation was not the key issue in the High Court case, it should not be so in the Court of Appeal. They argued that the issue determined by the High Court was that freedom of association applied to all persons regardless of their sexual orientation.[129] The Respondents asserted the Constitution's affirmation of diversity, noting that the right to autonomy and self-determination allowed individuals to determine their own destiny unconstrained by the morality, culture or religious beliefs of the majority in the society. The Appeal Court in its 2019 judgment upheld the High Court's decision, compelling the NGO Board to register the organisation.[130]

This case shows the usefulness of litigation for advancing the rights of sexual minorities. The legal opportunity structure was sufficiently open due to associative capacity, enabling constitutional/legal frameworks and responsive judicial institutions. The court victory in the *Eric Gitari v NGO Board* case caused optimism in the LGBTIQ+ community, reinforcing the belief in litigation, and fuelled efforts to decriminalise homosexuality.

The case, however, also showed the risks of sexual minority lawfare through strategic litigation in homophobic contexts. The societal backlash against sexual minority rights in the aftermath of the 2015 High Court decision caused considerable concern. *The Weekly Citizen* newspaper, for example, published the names and photographs of 12 leading LGBTIQ+ activists, exposing them to harassment, intimidation and ostracism.[131] One of the activists stated:[132]

> If homophobes were looking to target people, if the police were looking to arrest people, if anti-gay youths were looking to attack some teens they assume are gay, they now have a face and a name.

According to a PEMA Kenya and Human Rights Watch report released in September 2015, there was an increase in attacks, threats, persecution and prosecution directed at the LGBTIQ+ community in the country by both the police and the general public, especially in the coastal region.

129 *AG v Eric Gitari* – Rebuttal of Grounds of Appeal (on file with authors).

130 *Non-Governmental Organizations Co-Ordination Board v EG* [2019] eKLR http://kenyalaw.org/caselaw/cases/view/170057/ (accessed 20 June 2021).

131 Oloka-Onyango (n 57) 56.

132 This is similar to what happened in Uganda, as described in Oloka-Onyango (n 57) 30 56-57; S Nyanzi & A Karamagi 'The socio-political dynamics of the anti-homosexuality legislation in Uganda' (2015) 29 *AGENDA* 32.

In the case of *COL v Resident Magistrate, Kwale Court* – lodged 2015, decided 2016, appeal decided 2018 – COL and another person were prosecuted for alleged consensual same-sex sexual intercourse between two consenting adults under section 162 of the Penal Code and section 11 of the Sexual Offences Act. [133] Forced anal testing was conducted as part of evidence collection to prove same-sex sexual conduct. COL argued that the practice was unconstitutional and went against the tenets of fair trial safeguards against self-incrimination.[134] They, therefore, asked the Court to declare forced anal testing as amounting to inhumane and degrading treatment due to its violation of human dignity, privacy, health and its disparate application to sexual minorities contrary to the constitutional affirmation of equality before the law.[135] The government, in response, argued that the Kenyan Sexual Offences Act, in section 36, allowed for magistrates to order those accused of sexual offences to undergo medical exams.[136] They further argued that the Applicants had consented to the tests in accordance with section 42 of the Sexual Offences Act, which states that where a person of full capacity gives consent for medical examination, state officers are immune from action resulting from injury related to the medical examination.[137]

The High Court found that the Applicants willingly agreed to the medical examination,[138] which, according to the Court, did not amount to self-incrimination according to article 50 of the Constitution.[139] It also stated that evidence-gathering in sexual offence investigations must involve some form of intrusive examination of the parts of the body most connected with the offence, be it the vagina or anus.[140] The Court held that the anal examination was in line with relevant law on sexual offences, and therefore, not a violation of the Applicants' rights.[141]

The High Court decision created international uproar, with national and international human rights actors condemning the court for its homophobic and regressive reasoning and decision-making.[142] The case

133 *COL v Resident Magistrate – Kwale Court* [2016] eKLR http://kenyalaw.org/caselaw/cases/view/123715/ (accessed 20 June 2021).

134 *COL Case* (n 133) para 1.

135 *COL Case* (n 133) paras 1 & 32-33.

136 *COL Case* (n 133) paras 21-23 & 26-27.

137 *COL Case* (n 133) paras 36-37.

138 *COL Case* (n 133) paras 38-39.

139 *COL Case* (n 133) paras 40-44.

140 *COL Case* (n 133) paras 47-51.

141 *COL Case* (n 133) paras 54-56.

142 See Human Rights Watch 'Kenya: Court to hear forced anal testing case' (3 May 2016).

was appealed to the Court of Appeal at Mombasa and was overturned in 2018, with the Court of Appeal using the rights to human dignity and privacy as anchors in declaring anal testing as being unconstitutional, unreasonable and totally unnecessary.[143] Though the High Court decision was overturned on appeal, the fear it created amongst sexual minorities of the possibility of the health system being used to gather evidence for their prosecution for same-sex sexual conduct, created fear and distrust of the health system amongst sexual minorities. This is bound to adversely affect the health-seeking behaviour of sexual minorities for a long time to come, with the fear that it would have a cumulative detrimental outcome to the health and wellness of sexual minorities in Kenya.

The stigma and ostracism directed at sexual minorities in Kenya has also been instrumentalised in other social settings, including within the church, to malign and exclude others in leadership contests. In one instance an Anglican Bishop accused opponent clerics of homosexuality and suspended them from the Church. This led the suspended clerics to sue for reinstatement (*JMM v Anglican Church* (filed 2015, decided 2016)).[144] In deciding the case, the Court held that the clerics were unfairly terminated, because their 'sexual immorality' was unproven given sections 162 and 163 of the Penal Code's requirement for proof of penetration.[145] The Court thus ordered the clerics to be reinstated as well as to have their 'back salaries' paid.[146] The Court of Appeal affirmed the reinstatement orders of the High Court and sentenced the Bishop to civil jail in July 2018 for failure to reinstate the clerics and pay their court-awarded compensations.[147] The malicious use of perceived sexual orientation in this context created stigma and animosity in the church towards the targeted clerics, leading to their exclusion from the church and subsequent persecution by the congregants.[148] The court order of reinstatement was

https://www.hrw.org/news/2016/05/03/kenya-court-hear-forced-anal-testing-case (accessed 20 June 2021).

143 *COI v Chief Magistrate Ukunda Law Courts* [2018] eKLR paras 22-27 & 32, http://kenyalaw.org/caselaw/cases/view/171200/ (accessed 20 June 2021).

144 *JMM v The Registered Trustees of The Anglican Church of Kenya* [2016] http://kenyalaw.org/caselaw/cases/view/127235 (accessed 24 June 2021).

145 *JMM* case (n 144) paras 7-12.

146 *JMM* case (n 144) para 12.

147 C Stewart 'Kenya church must reinstate 3 allegedly gay priests' *76 Crimes* 7 August 2017 https://76crimes.com/2017/08/07/kenya-church-must-reinstate-3-allegedly-gay-priests/ (accessed 30 June 2021).

148 'Anglicans not ready to take back priests accused of being gay, court told' *Daily Nation Newspaper* 28 September 2016 https://nation.africa/kenya/counties/nyeri/anglicans-not-ready-to-take-back-priests-accused-of-being-gay-court-told-1242884 (accessed 30 June 2021).

completely rejected by the Anglican church and its congregants.[149] This case evidences the deep entrenchment of homophobia in socio-cultural and religious attitudes and practices in Kenyan society. Further lawfare – especially challenging the criminalisation of same-sex sexual conduct between two consenting adults – was one of the strategies attempted to move forward.

3.4 Recognition of sexual orientation

Homophobic and transphobic attitudes are codified in the country's Penal Code, which criminalises same-sex sexual conduct. Section 162 titled 'unnatural offences' provides:

> Any person who –
>
> (a) has *carnal knowledge of any person against the order of nature*; 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.

Section 163 provides that any person who attempts to commit any of the offences specified in section 162 is guilty of a felony and is liable to imprisonment for *seven years*. Further, section 165 provides:

> 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

149 L Nyawira 'ACK Clergy facing oblique future after reinstatement court ruling' *The Standard Newspaper* 30 July 2018 https://www.standardmedia.co.ke/central/article/2001290069/ack-clergy-struck-by-gayism-rumours-fighting-for-acceptance (accessed 30 June 2021).

> male person, *whether in public or private*, is guilty of a felony and is liable to imprisonment for *five years* [our emphasis].

The law, however, does not define 'unnatural acts', 'carnal knowledge against the order of nature' or 'gross indecency'. This vagueness makes the misuse of these provisions by law enforcement officers to either extort or persecute sexual minorities possible, as was evidenced by the *COL* case discussed above.

The criminalisation provisions of the Kenyan Penal Code had not been widely used to prosecute sexual minorities in Kenya in the past.[150] However, with the increasing politicisation of homosexuality from conservative socio-cultural, religious, and political opposition, more arrest and prosecution of sexual minorities using these provisions increased. According to GALCK, there were eight prosecutions of gay men on indecency charges in the period 2012 and 2014 – all without conviction.[151] The aim of these persecutions is mainly to instil fear and silence LGBTIQ+ rights advocacy and lifestyle in Kenya. In this reality of increasing persecution and prosecution using these provisions, lawfare through litigation has been substantively adopted to challenge the constitutionality of these provisions and possibly have the courts declare the relevant sections as unconstitutional

Two decriminalisation cases were lodged in 2016: *Eric Gitari v the Attorney General* (Petition No. 150 of 2016); and *John Mathenge & 7 others v Attorney General* (Petition No. 234 of 2016), subsequently consolidated.[152] They challenged the vague and expansive nature of the Penal Code sections 162-165, arguing that they are in breach of the legal principles of certainty and of the Constitution article 23(3)(d).[153] That the sections also go against the rights of equality and non-discrimination, human dignity, bodily integrity, privacy and health.[154]

The High Court decided to focus on three issues: the criminality of private sexual conduct between two adults of the same sex; the

150 KHRC (n 58) 21-23.

151 Commonwealth Lawyers Association 'The criminalisation of same-sex sexual relations across the commonwealth – Developments and opportunities' (2016) 160 http://www.humandignitytrust.org/uploaded/Library/Other_Material/HDT_Commonwealth_Criminalisation_Report_2015.pdf (accessed 2 March 2021).

152 *EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)* 2019 eKLR http://kenyalaw.org/caselaw/cases/view/173946/ (accessed March 2021).

153 *EG v AG* case (n 152) paras 1 & 58.

154 *EG v AG* case (n 152) paras 24 & 59-64.

constitutionality of sections 162 and 165 and whether they meet the threshold for limiting other rights; and the correct interpretation of these sections considering the Constitution and the rights it confers to sexual minorities.[155] The decision, delivered in May 2019, was a disappointment to the queer community who had hoped that the Court would declare these criminalising provisions to be unconstitutional, as the court failed to declare the criminalising sections of the Penal Code to be unconstitutional.[156] This, in essence, meant that same-sexual conduct remains criminalised in Kenya, with the Penal Code provisions limiting the sexuality rights of sexual minorities. Efforts to appeal the case were discussed extensively, but an appeal was not filed because the legal opportunity structure had shifted with the appointment of a more conservative Chief Justice with a strong Christian bias. Broad attacks on the judiciary by political actors targeted judicial officers and undermined the courage and independence of the judiciary.[157] This was further exacerbated by the hostility expressed against gays and lesbians by senior political figures in the country with the President indicating in several media interviews that sexual minority rights were a 'non-issue', and the Deputy President expressly speaking against sexual minority rights as discussed above. Together, this constrained the environment for strategic litigation as an avenue for the continued protection of sexual minority rights. The erosion of these opportunity structures thus necessitated a change in strategy, with LGBTIQ+ organisations and their networks engaging more in advocacy and community building to counter the increased homophobia and hostility, and consolidating previous gains made in the protection of sexual minority rights.

4 Effects of queer lawfare on the enjoyment of LGBTIQ+ rights

The most immediate effects of litigation are the legal changes ordered by the court – for example regarding gender markers and the right to register organisations, which in turn may have positive material, political and ideational effects for affected groups. Though negative court outcomes may cause setbacks, litigation processes could still have positive outcomes in terms of movement building and awareness. In the sections below we

155 *EG v AG* case (n 152) para 242.

156 *EG v AG* case (n 152) paras 278-279, 299, 308, 314 & 405-406.

157 Kenya Human Rights Commission Press Release 'We stand against President Uhuru's attacks on the Judiciary; We support the court action by Katiba Institute, ourselves among others' (8 June 2021) https://www.khrc.or.ke/2015-03-04-10-37-01/press-releases/748-we-stand-against-president-uhuru-s-attacks-on-the-judiciary-we-support-the-court-action-by-katiba-institute-ourselves-among-others.html (accessed 10 July 2021).

look at the effects of legal recognition and decriminalisation litigation in Kenya.

Lawfare strategies have played an important role in improving service delivery for sexual minorities in Kenya. Litigation has generally had a positive impact for intersex and transgendered persons. It has enhanced visibility and knowledge of the innate nature of gender identity, leading to socio-political empathy for intersex and transgender persons. Empathy and societal understanding reduced stigma and ostracism, leading to better access to necessary healthcare services and opened avenues for access to medical procedures affirming and enhancing sexual identities. In the *Baby A* case, the courts affirmed the need for legal review to ensure that intersex children can opt for consensual corrective surgeries with informed consent. The intersex cases led to the creation of the Taskforce on Policy, Legal, Institutional and Administrative Reforms regarding the Intersex Persons in Kenya**.** The Taskforce was tasked with investigating and collecting data about the Kenyan intersex community, with the aim of enhancing access to critical socio-economic goods and services, with healthcare the priority. This led to the inclusion of the intersex community in the 2019 Census, which gives the government grounds to allocate funds to the group based on their numbers. On the legal reform front, lawmakers have hinted at amending the Registration of Births and Deaths Act and the Registration of Persons Act to accommodate intersex persons as a third sex. This would ease the process of applying for government documents and accessing government services. Other proposals made by the taskforce call for the government to provide free medical insurance cover for sex-reassignment surgery for intersex persons.

Lawfare has enhanced the treatment of LGBTIQ+ persons in the context of detention. The Independent Policing Oversight Authority has called on the government to establish intersex cells in police premises. This recommendation complements the National Polices Service Standing Order that gives detained individuals the right to choose the sex of the officer who will search them. Litigation has also deemed unconstitutional forced anal examination in cases of suspected same-sex sexual intercourse. Despite these orders, there are still reports of continued harassment of LGBTIQ+ persons at the hands of the police and government officials. In October 2020, for instance, a judge in Eldoret ordered the prosecutor to respect the self-identification of an accused transgender woman who was on trial for fraudulently obtaining registration documents. The prosecutor had addressed her by her deadname – the name used prior to transitioning – which her lawyer considered as being akin to psychological torture. The court agreed and issued a directive for the prosecution to respect her gender identity.

Queer lawfare strategies have also enhanced the collective organisation through the establishment and registration of organisations and associations for the advocacy for the rights of the LGBTIQ+ community. The *TEA* case led the way, securing such rights for the transgender community and the *Eric Gitari* case for the broader LGBTIQ+ community. Collective advocacy and networking have expanded the space for the enjoyment of the human rights of the LGBTIQ+ community and has formed a platform for engagement with and response to the opposition. It has also created safe spaces for association, service delivery and socialisation for different sexual minority groups in Kenya.

5 Conclusion

Litigation has been an important tool in the fight for legal recognition and equal treatment of LGBTIQ+ persons in Kenya, and the queer lawfare trajectory in the country brings out important lessons regarding the circumstances under which lawfare strategies are useful, as well as their limitations and risks.

Of profound importance is the watershed that the 2010 Constitution represented. This carries important lessons. Firstly, the involvement of the queer community in the democratisation and constitution-making process was central to community building as well as in forging links with the broader human rights and social justice community, in Kenya and internationally. This provided an important platform and toolbox for devising effective advocacy, including diverse lawfare strategies. Secondly, the changes in the constitutional dispensation radically shifted the legal opportunity structure. Even in the absence of explicitly recognising gender identity and sexual orientation as prohibited grounds for discrimination, it provided a much more solid legal basis for queer rights litigation. The changes in the judiciary that followed, with a new and progressive chief justice, appointment of more progressive judges to courts at all levels, reforms improving judicial independence, integrity, and sensitivity, and easing of access to justice and conditions for public interest litigation, further improved the legal opportunity structure for LGBTIQ+ activists.

That the positive shifts in the legal opportunity structure coincided with a deterioration of the political environment, with increased politicisation and harsh anti-gay rhetoric, rendered litigation as the most attractive – and to some extent – the only viable strategy to advance queer rights.

However, we also see that negative shifts in the political environment over time spilled over into the legal sphere, with politicisation of the judiciary and changes to the composition of the judiciary negatively

impacting the legal opportunity structure. In this context strategic litigation of morally sensitive issues is riskier. It should, however, be noted that the politicisation of the judiciary seems to have little if anything to do with its decisions in the field of LGBTIQ+ rights, and more with its active stance in electoral politics.

More generally, while some see the politicisation as being a result of the increased visibility of the LGBTIQ+ community, and as a backlash against their successes in court, we argue that this explanation is too simple. When anti-gay sentiments rose in Kenya, around 2010 and peaked in the years up to 2015, this was at the height of anti-gay politics in the region (and beyond). Norm entrepreneurs across the continent – politicians, church leaders and journalists – at this time used the same anti-gay rhetoric and strategies, also in countries with very little domestic queer organising or visibility, which indicates that international diffusion played a very important role. Rather than seeing this as a domestic – or even regional – backlash to increased queer visibility and rights, it should be seen as a reaction by conservative actors to a global trend.

In the larger perspective, the Kenyan judiciary has led the way in enhancing the legal recognition of sexual minorities as a marginalised and excluded group that needs special protective measures to enhance the enjoyment of their rights. Through litigation, the courts have affirmed that intersex and transgender persons are a special category and that special measures in relation to registration at birth, legal framework to change names and identity documents in the process of transition, the control of non-therapeutic surgery until a child is able to make informed decisions, enhanced access to hormonal therapy in the transition process and the registration of an organisation to champion the rights of intersex and transgendered persons in Kenya have been achieved. Further, in relation to gays and lesbians, the courts have recognised the right to freedom of association. Litigation has also been employed as a tool for the de-criminalisation of consensual same-sex sexual conduct between two consenting adults, though so far without success.

The mixed outcomes of litigation in a society that remains homophobic, means that activists need to carefully consider the use of strategic litigation. It should be considered in tandem with other strategies such as sustained advocacy and public education on sexual minority rights, and to seek to do so in collaboration with mainstream human rights organisations. Currently, Kenya queer activists are reconsidering their lawfare strategies, and whether new shifts in the judiciary may again open up space for litigation.

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