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A counter-majoritarian dilemma? Interrogating the decisions of Kenya's Superior Courts on sexual minorities

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Abstract: *Before promulgating the Constitution of Kenya in 2010, the process was marked by controversies over sexual minority rights. Specifically, the religious elites and culturalists opposed it, fearing that the new Constitution would promote LGBTIQ rights. Some proponents of the new Constitution contended that it safeguarded majoritarian values, which are assumed to be anti-LGBTIQ rights. This pre-constitutional promulgation debacle raises three key questions. The first question is whether Kenya's transformative Constitution protects LGBTIQ rights, and if so, to what extent? The second question is whether it creates a counter-majoritarian dilemma in adjudicating sexual minority rights. The third question is whether sexual minority rights can be fully realised within Kenya's constitutional democracy in the face of majoritarian intolerance. This paper explores these questions by analysing six decisions concerning the rights of sexual minorities from Kenya's Superior Courts. As doctrinal legal research, the paper relies on primary data from sources, including the Constitution, case law, and statutes. It also draws from secondary data from wide sources, including published papers and books. It finds that, like all other rights, the Constitution of Kenya fully protects the rights of sexual minorities to the extent that limitations are legally justifiable, legitimate, and necessary. It also finds that, in its architecture, the Constitution of Kenya is counter-majoritarian in that it protects vulnerable and minority members of society. Similarly, a counter-majoritarian dilemma has not emerged in the judicialisation of sexual minorities, unless Parliament enacts anti-sexual minority legislation, which again must pass constitutional muster.*

Keywords: *religion; culture; counter-majoritarianism; constitutional democracy.*

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1. Introduction

Before the promulgation dust settled on the Constitution of Kenya (2010), three petitions were lodged before the High Court on lesbian, gay, bisexual, trans, intersex, and queer (LGBTIQ or sexual minority) rights in quick succession. It was not an inconceivable scenario given the contention that surrounded sexual minority rights during the 2010 constitutional-making process. These petitions, therefore, sought to enforce LGBTIQ rights and clarify the extent to which sexual minorities would enjoy their rights under the Constitution. In the first petition, the High Court was invited to determine whether sexual minorities have the right to associate and form an organisation (*EG v. Non-Governmental Organisations Co-ordination Board & 4 others* 2015), which it concurred with. The decision eventually reached the Court of Appeal (*Non-Governmental Organizations Coordination Board v. EG & 5 Others 2019*) and the Supreme Court (*NGOs Co-ordination Board v. EG & 4 others 2023*) through appeals. The Court of Appeal and the Supreme Court upheld the High Court decision. In the second petition, the High Court was invited to determine the constitutionality of penal provisions criminalising same-sex activities (*EG & 7 Others v. Attorney General* 2019). Its decision, which affirmed anti-sodomy laws, is pending appeal. In the third case, petitioners sought the High Court to determine the constitutionality of a non-consensual anal medical examination to prove homosexual-related charges. Its decision (*COI & Another v. Resident Magistrate - Kwale Court & 4 Others* 2016), which affirmed an anal examination as part of a medical examination to find evidence was not a violation, was overturned in the Court of Appeal (*COI & another v Chief Magistrate Ukunda Law Courts & 4 others* 2018).

Using the aforementioned decisions, this paper adopts doctrinal legal research grounded in case law analysis to examine the extent to which the Constitution protects sexual minorities rights. It also assesses whether the Superior Courts experienced counter-majoritarian difficulty. It concludes with propositions on how sexual minority rights can be realised in Kenya's constitutional democracy despite the intolerant majoritarian environment. To achieve its objectives, the paper is divided into seven sections as follows.

After this introduction, section two shifts the focus to how religion and culture interplayed during the constitutional-making process. It spotlights some arguments and positions taken during the constitutional review process and the referendum. The paper in section three examines the extent to which the new Constitution protects the rights of sexual minorities. Sections four and five discuss the six cases related to sexual minority rights while examining how courts navigated through the majoritarian cultural and religious undertones to safeguard or constrain sexual minority rights. It also illuminates the existing opportunities. Section six interrogates the constitutional architecture, particularly whether it creates a counter-

majoritarian dilemma. Section seven, which is the conclusion, summarises the above discussion and findings to make some recommendations.

2. Religion and culture during the constitution-making process

As noted in the introduction, the constitutional clauses perceived as promoting the rights of sexual minorities became highly contentious during Kenya's 2010 constitutional-making process, with the contention spilling over to the subsequent referendum.

In the first formal constitutional review conference, various speakers held divergent views over homosexuality (Constitution of Kenya Review Commission Report 2003). One speaker alluded that homosexuality negated public morality (Constitution of Kenya Review Commission Report 2003, 130). Another speaker blamed the "American traditional liberal" notion for labelling blacks, lesbians, gays, and gypsies as minorities, when "being gay is behaviour, and race is not" (Constitution of Kenya Review Commission Report 2003, 22). However, another appeared to counter these arguments by framing homosexuality as one of the evolving societal ideas (Constitution of Kenya Review Commission Report 2003, 247). These three speeches set the tempo on the contentions over sexual minority rights during the drafting and, inevitably, the final constitutional document. As a result, some of the constitutional clauses that came into scrutiny were the equality and non-discrimination clause (Article 27), the family clause (Article 45), and the reproductive health right clause (Article 43).

On the equality and non-discrimination clause, the contention was whether "sexual orientation" should be explicitly listed in the prohibited grounds for discrimination under Article 27(4) of the Constitution. Although it was finally not explicitly listed, the language and framing of Article 27(4) of the Constitution suggested that the listed non-discrimination grounds were non-exhaustive. The open-ended nature of this clause, coupled with the inclusion of the ground "sex" on the list, gave opponents of the new Constitution the grounds to argue that it promoted gay rights.

On the family clause, the contention was whether it outlawed same-sex unions. During the constitutional review process, some delegates had proposed that women-to-women unions that culturally existed in some Kenyan communities be protected, while other same-sex unions be outlawed (Constitution of Kenya Review Commission Final Report 2025, 120, 401, 421). At the end, Article 45(2) of the Constitution only explicitly recognised heterosexual marriages but did not outlaw same-sex unions. Those opposing its passage were not comfortable with its framing. Indeed, as this author argues (Nyabuti 2024, 7), the language and

framing of Article 45(2) of the Constitution, which reflects the outcome of negotiations and compromise, does not outlaw same-sex marriages, as the Ugandan Constitution does.

As would be expected, most of those who were opposed to the passage of the new Constitution cited religious and cultural reasons, particularly on family values. Their religious and cultural stance had another dimension to it. Based on numerical strength and centrality in Kenyan societies, religion and culture constitute critical demographic constituents in Kenya's democratic process. Kenya's population is approximately 47.5 million (KNBS 2020, 21). About 85.5% of these are Christians, while 11% are Muslims and 2% include Hindus, Sikhs, and Baha'is (USDOS 2023, 2). A significant 5% of Kenyans also adhere to various forms of traditional beliefs (USDOS 2018, 2).

Against Kenyans' high religiosity (The Network for Religious and Traditional Peacemakers 2019, 9) and conservative cultural inclinations, the political class opportunistically teamed up with the church leadership to oppose the passing of the new Constitution. The church urged its followers to reject the new constitution for promoting gay rights contrary to religious and cultural values (Orago et al. 2022, 124). Despite this opposition from the church leadership and a section of the political class, the Constitution was overwhelmingly passed by 67% while 30% voted against it (Kenga 2016, 14). Although the Constitution was promulgated and operationalised, the majoritarian religious and cultural undertones continue to play out during the adjudication of sexual minority rights.

3. Does the Constitution safeguard the rights of sexual minorities?

This paper argues that the 2010 Constitution protects and promotes sexual minority rights. For starters, it incorporates the international law regime as part of Kenya's laws (Articles 2(5) and 2(6)). The international human rights law leads in recognising and protecting the rights of sexual minorities. For instance, the Human Rights Committee, which monitors and enforces the International Convention on Civil and Political Rights (ICCPR), has interpreted the right to privacy under the ICCPR to prohibit discrimination based on sexual orientation and protect the sexual autonomy of individuals, including sexual minorities (*Toonen v. Australia*).

The Constitution also introduces human rights norms into the national values and principles (Article 10) that should constitute Kenya's moral, social, and political fabric. The national values and principles are particularly important in creating "constitutional morality," which, this paper argues, overrides social majoritarian morality. In this context, the constitutional morality standard is derived from constitutional obligation to the State, its organs, and officials to promote dignity, equity, social

justice, inclusiveness, equality, human rights, non-discrimination, and protection of the marginalised.

The Bill of Rights also appreciates that fundamental rights and freedoms belong to each individual (Article 20). Sexual minorities enjoy them as individuals. It recognises other rights and fundamental freedoms (this includes sexual minority rights) not in the Bill of Rights (Article 19). The Bill of Rights outlaws arbitrary limitations of human rights (Article 24). It also provides for the protection of vulnerable groups (Article 21). Since the framing of Article 21(3) of the Constitution is non-exhaustive on the groups, this paper argues that the sexual minority group forms part of the vulnerable groups whose needs the State is bound to address.

Significantly, the Constitution protects sexual rights. Firstly, the rights to equality and non-discrimination on grounds including sex (Article 27). This paper argues that "sex" in this respect imputes different sexualities and sexual orientations. Secondly, the Constitution protects a person's inherent dignity (Article 28). Constraining the rights of sexual minorities without legal justification, legitimacy, and necessity robs them of their dignity as human beings. Thirdly, it protects a person's privacy and expression (Articles 31 and 32). Fourthly, it protects the right to the highest attainable reproductive and sexual rights (Article 43). Finally, while it provides for the right to marry a person of the opposite sex through consent (Article 45), it does not outlaw same-sex unions. The paper has singled out and classified these as sexual rights because they have been construed and applied to promote sexual minority rights by different courts in the Global South. For instance, the High Court of Antigua and Barbuda has expanded the language and meaning of freedom of expression to encompass the sexual choices of consenting adults, while its St. Christopher and Nevis counterpart expanded expression rights to include having sexual intercourse. In the same way, the High Court of Botswana held that criminalising the only mode of sexual expression for sexual minorities through anti-sodomy laws deprive them of their self-worth, thus infringing their right to dignity (Nyabuti 2024, 7).

In the Kenyan discourse, scholars also proffered diverse interpretations regarding the protection of sexual minorities. Mutua (2009) argued that the Constitution's silence on homosexuality does not imply outlawing it. It was, thus, inevitable that cases on some of these provisions were to be lodged before the Superior Courts, to test the varying arguments relating to sexual minority rights. Otherwise, the protections would remain meaningless and unenforceable. In this respect, the next two sections delve into decisions of the Superior Courts, in which these arguments have been presented, to assist in gauging the extent to which the Constitution protects sexual minorities.

4. The decisions of the Superior Courts on the rights of sexual minorities

This section recapitulates the decisions of the Superior Courts on sexual minorities. It captures the brief background, the arguments, the issues, and the courts' determination. At the periphery, it summarises the court's reactions to religious and cultural undertones.

4.1. *EG v. Non-Governmental Organisations Co-ordination Board & 4 others* [2015] eKLR

The petitioner applied for the registration of non-governmental organisations (NGOs) dealing with matters of LGBTIQ persons. The NGO Board rejected the proposed name reservation for three reasons. Firstly, the proposed name was inconsistent with Section 162 of the Penal Code, which criminalises gay or lesbian liaisons. Secondly, sexual orientation was not listed as a prohibited ground of discrimination in Article 27(4) of the Constitution. Thirdly, same-sex marriage was not permitted by the Constitution. The petitioner sought the intervention of the High Court to enforce sexual minorities' rights to non-discrimination and association under Articles 27(4) and 36 of the Constitution, respectively.

In a three-judge bench (Lenaola, Mumbi, and Odunga J.A.) decision, the High Court held that "every person" in Article 36 of the Constitution includes all persons, despite their sexual orientation. The respondents contravened Article 36 of the Constitution in failing to accord just and fair treatment to sexual minorities seeking registration of an association of their choice. Finally, it held that the non-discrimination grounds under Article 27(4) are not exhaustive. Sexual orientation can, thus, be construed as a non-discrimination ground. The High Court directed the NGO Board to reserve and register the petitioner's NGO.

In dismissing the majoritarian religious and cultural undertones, the High Court observed that "the Constitution reigns supreme, regardless of popular views", and that "(to) cite religious beliefs as a basis for imposing limitations on human rights would fly in the face of Article 32 of the Constitution." It also noted that there existed a "right to assemble even of those whose sexual orientation that is not socially accepted" and it had the duty "not to substitute these views and beliefs with constitutional provisions." or rely on "the moral convictions" or "the moral and religious views of Kenyans."

4.2. *Non-Governmental Organizations Co-Ordination Board v EG & 5 others* [2019] eKLR

The High Court decision was appealed to the Court of Appeal. The five Court of Appeal Judges wrote separate judgments. Three judges concurred

(Waki, Koome, and Makhandia J.J.A.) with the High Court, while two dissented (Musinga and Nambuye, J.J.A.).

Justice Waki agreed with the High Court that the right to associate under the Constitution is enjoyed by every person, including sexual minorities. He observed that LGBTQ people are persons. He did not delve into non-discrimination issues. But he made two other significant observations. Firstly, the Penal Code does not criminalise LGBTIQ persons. It only criminalises "unnatural offenses," "attempts to commit unnatural offenses," and "indecent practices between males" (sections 162, 163 and 165). Secondly, it would be living in denial if Kenyans assume that there is no significant share of LGBTIQ persons. He recommended an honest conversation that reflects the society that the Constitution constructs as an "open and democratic society based on human dignity, equality, equity, and freedom."

Justice Koome agreed with the High Court's finding. The learned judge found that "every person" encompasses persons who are gay and lesbian. There is no justifiable legal limitation to restrict their right to associate. Firstly, being gay or lesbian is not a criminal offence. Secondly, heterosexuals can commit the penal offence of carnal knowledge against the "order of nature" (section 162). Finally, the penal provisions were enacted to criminalise homosexuality. There could be heterosexuals and homosexuals who decide not to have sex. She wondered who supervises consenting adults, including heterosexuals, on how they go about such personal matters as sexual intercourse! She dismissed arguments influenced by religious and cultural majoritarianism as absurd, one-sided, and selective. She also observed that LGBTIQ is not responsible for moral decadence and family breakdowns (violence, divorces, and separations).

Justice Makhandia concurred with the High Court's interpretation of Article 27(4) of the Constitution to include sexual orientation as grounds for non-discrimination. He also agreed that every person under Article 36 of the Constitution includes sexual minorities. The learned judge held that the Constitution protects marginalised groups who cannot defend themselves through democratic processes. The Bill of Rights protects both people we like and dislike. Similarly, the homosexual state is not criminalised, but sexual acts that are against the order of nature.

Justice Nambuye dissented. The learned judge held that the right to association is not absolute. It is subject to limitations such as the Penal Code. Finally, she disagreed that the grounds for non-discrimination under Article 27(4) of the Constitution can be construed to include sexual orientation. She suggested that the same can only be introduced through constitutional amendments.

Justice Musinga also dissented. He held that Article 27(4) of the Constitution excluded sexual orientation as a non-discrimination

ground for the purpose. Some sexual orientations, like paedophilia, are not permitted under the law. He held that the right to association is not absolute. Since sodomy and lesbianism are criminalised, the NGO Board's decision was justified. He proposed that deep-seated constitutional, moral, and religious ideologies on the decriminalisation of sodomy and lesbianism can only be decided by referendum or Parliament.

4.3. *NGOs Co-ordination Board v EG & 4 others; Katiba Institute (Amicus Curiae) (Petition 16 of 2019)* [2023] KESC 17

The Court of Appeal decision was appealed to the Supreme Court. Three judges concurred with the High Court and Court of Appeal decisions (Mwilu, Wanjala and Njoki S.C.J.J.) while two judges dissented (Ibrahim and Ouko S.C.J.J.).

In the majority decision, the Supreme Court held that every person under Article 36 of the Constitution included LGBTIQ persons. They could not be denied the right to associate unreasonably. The NGO Board failed to demonstrate how LGBTQI persons were criminals or were the only persons capable of committing the offence of unnatural acts. Similarly, the Penal Code did not distinguish between homosexual and heterosexual offenders (sections 162, 163 and 165). The NGO Board's limitation of the LGBTIQ persons' right to associate based on sexual orientation is unconstitutional. "Sex" under Article 27(4) of the Constitution connotes sexual orientation of any gender; whether heterosexual, lesbian, gay, intersex, or otherwise. The grounds are also not exhaustive. Non-discrimination grounds can be construed to include sexual orientation, too.

Justice Ibrahim reasoned as follows. Laws are a reflection of societal morals. The Director had the discretion to reject the reservation of a name that is inconsistent with the laws. The Penal Code criminalises homosexual relationships (sections 162 and 165). The proposed LGBTIQ NGO promotes banned activities. Thus, refusing to reserve the name was not illegitimate as long as the penal provisions remained valid. He proposed that the decriminalisation of same-sex activities can only be done through amending the law or the constitution. Finally, based on the history of the constitutional-making process, sexual orientation was a contentious issue. It cannot be read now under Article 27(4) of the Constitution.

Justice Ouko found that the Director of the NGO Board did not breach Article 36 of the Constitution as long as they decided in good faith by rejecting the proposed names owing to a prevailing penal system that outlawed acts associated with the proposed names. The learned judge reasoned that "sex" as used under the Constitution refers to a person's sexual anatomy based on sex chromosomes; a state of being male or female. Article 27(4) prohibits discrimination on the grounds of sex, not sexual orientation.

There is one issue the court appeared to agree on unanimously. The case was not on the morality or constitutionality of same-sex marriage. It was about the right to association and non-discrimination of sexual minorities. Unlike the Superior Courts beneath it, the Supreme Court steered off from religious and cultural undertones.

4.4. *COI & another v Resident Magistrate - Kwale Court & 4 others* [2016] eKLR

In this petition, the petitioners faced criminal charges before the Subordinate Resident Magistrate Court at Kwale (Criminal Case No. 207 of 2015), which gave orders for their anal examination. The charges included practicing an "unnatural offense" contrary to section 162(a) as read with section 162(c) of the Penal Code and committing an "indecent act" with an adult contrary to section 11(a) of the Sexual Offences Act.

In its decision, the High Court held as follows. Firstly, neither the Penal Code nor the Sexual Offences Act was on trial. Secondly, the mouth and anus are alimentary canal systems; not sexual organs. Thirdly, it observed that if the "modern man and woman" find these body parts to be sexual, then medical science has to rediscover new methods of accessing other body parts for medical forensic and curative examination. Until then, medical examination over heterosexual or sodomite sexual offences will be carried out on those parts of the body most connected with; the sexual act with the vagina, or sodomy with the anus. Finally, the court observed that even in defilement and rape cases, a medical examination is done on the vagina to establish penetration. This is not only intrusive too but also the vagina is an intimate part of the victim's body. In the end, the High Court dismissed the petition.

Interestingly, the judge's inference to "modern man and woman" and "medical science or knowledge" together with his expressed attitude and tone when determining whether the anus and mouth are sexual organs while at the same time admitting his "limited knowledge in biology" may point out to his subconscious inclination to majoritarian religious and traditional dispositions that might have influenced his reasoning.

4.5. *COI & another v Chief Magistrate, Ukunda Law Courts & 4 others* [2018] eKLR

The two petitioners appealed against the High Court to the Court of Appeal. In a three-judge-bench unanimous decision (Koome, Karanja and Visram J.J.A.), the Court of Appeal framed issues for determination as whether the anal medical examination was lawful and violated the appellant's rights, and whether such obtained evidence can be admissible during trial. To determine the lawfulness of the anal examination, the Appellate Judges discussed extensively the right to dignity, which is central to every human being,

regardless of status, position, mental, or physical condition. They interlinked the rights to dignity and privacy with unlawful searches and forced medical examinations. The Appellate Judges held that, firstly, section 36 of the Sexual Offences Act is limited to sexual offences. Secondly, the anal medical examination was done about the penal offence of unnatural acts (section 162). Thirdly, the appellants were not arrested for the unnatural act. There were neither complaints nor reasonable explanations as to why they were suspected of committing the offence. Finally, the trial court had no reason to make the order for the appellants' anal medical examination. The examination was unconstitutional, unnecessary, and unreasonable. The issue of consent was neither here nor there. The appellants' consent did not even qualify to be voluntary. It allowed the appeal and set aside the High Court decision.

In this appeal, there were no cultural and religious undertones. Neither did the Appellate Judges delve into the unfamiliar territory of science like the High Court Judge. It was purely based on human rights. Importantly, the decision was not appealed against. So, it remains the ruling jurisprudence in Kenya.

4.6. *EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)* [2019] KEHC 11288 (KLR)

In this case, the petitioners challenged the constitutionality of sections 162 and 165 of the Penal Code that criminalised homosexuality. The arguments and counter-arguments intersect science, philosophy, religion, culture, and human rights. The parties contested whether the penal provisions violated Articles 27 (equality and freedom from discrimination), Article 28 (human dignity), Article 29 (freedom and security of the person), Article 31 (privacy), and Article 43 (economic and social rights, specifically health) of the Constitution.

In the three-judge-bench decision (Aburili, Mwita, and Mativo J.J.), the High Court first admitted that the Penal Code does not define the phrases "unnatural offenses" and "against the order of nature." However, they held that the phrases have been clearly defined in law dictionaries and judicial pronouncements. Thus, the provisions were not vague, ambiguous, or uncertain. The High Court also drew other conclusions. Firstly, sections 162 and 165 of the Penal Code do not target LGBTIQ. Secondly, no evidence was adduced to support how these penal provisions violated the LGBTIQ's right to non-discrimination and the highest attainable health, even though they probably may have been. Thirdly, the court held that decriminalisation of adult consensual same-sex activities would contradict Article 45(2) of the Constitution, which recognises marriage of the opposite sex. The judges clinched their reasoning as follows: "(In as much) as the Court of Appeal in the EG case agreed with the High Court that sexual orientation could be read in Article 27(4) of the Constitution as one

of the prohibited grounds for discrimination, the Court was emphatic that the reading would depend on the circumstances of each case. In our view, the circumstances of this case do not permit the reading because to do so would defeat the purpose and spirit of Article 45(2) of the Constitution."

The judges did not delve into issues of culture and religion. The High Court decision has been appealed against the Court of Appeal. The appeal will possibly end at the Supreme Court.

5. Taking stock of the decisions of the Superior Courts

This section discusses three aspects of the decisions of the Superior Courts in light of their success, misses, and opportunities they pose.

5.1. Successes

The decisions have made significant achievements in the protection of sexual minority groups.

Firstly, they shed light on the enjoyment of the Bill of Rights for sexual minority groups. The Supreme Court has now set a binding precedent that LGBTIQ persons have the right to join or form associations. It paves the way for the registration of their NGO with preferred names and objectives. Such NGOs will, no doubt, carry out activities that promote and champion their rights. It would not be surprising to see Gay Pride events in Kenya soon. The Supreme Court also included sexual orientation as a ground for non-discrimination. Sexual minorities can now demand non-discrimination through public and private institutional policies, laws, and actions based on their sexual orientation. This might lead to the mainstreaming of sexual minorities as opposed to exclusion. Finally, investigative agencies and medics can now not conduct anal examinations since it infringes the right to privacy, dignity, and interrelated rights.

Secondly, the Court of Appeal decision in the *COI* case was not appealed. It remains the law. It binds all courts except the Supreme Court and perhaps the Court of Appeal. Critically, the decision renders sections 162, 163, and 165 of the Penal Code redundant. Even before the decriminalisation of same-sex activities, sexual minorities could not be intimidated by obsolete penal offences.

Thirdly, it is evident that almost all Superior Court decisions on sexual minorities have been a success. It speaks to the progressiveness and liberal attitude of the majority of Superior Court Judges.

Finally, the grey areas on the enjoyment of constitutional rights by sexual minority groups are being eliminated; the human rights approach tone is being set, and counter-majoritarian difficulty is minimised.

5.2. Misses

However, the Superior Courts have missed some marks too. For instance, the High Court in *EG & 7 others* failed to decriminalise adult consensual same-sex conduct. They failed to appreciate that Article 45(2) of the Constitution provides for marriage, and not relationships or conduct. It is silent on adult consensual same-sex conduct. Worse, the unanimity of the decision by the judges, who were considered bold, progressive, and liberals, set a bad tone for the impending appeal(s). The High Court dented its reputation for creating ground-breaking jurisprudence. It worries more that the three-judge bench took an originalist interpretative approach. It is also inconceivable why the High Court failed to adhere to the doctrine of *stare decisis*. The Court of Appeal's *COI* case decision had rendered sections 162 and 165 of the Penal Code obsolete. No criminal charges can be sustained based on the section because anal medical examination evidence is not allowed. As the Court of Appeal pointed out, it is unimaginable how one can go to supervise adults in their bedroom for evidence! The High Court was bound to at least follow the decision, if not take a cue from the Appellate Judges' line of reasoning. Finally, almost all the Superior Courts made missteps in overly emphasising that same-sex "acts" are different from same-sex "states." This approach leaves room for the continued criminalisation of same-sex acts, even when, in light of the *COI* case, the penal provisions became redundant.

5.3. Opportunities

In the same breath, the decisions of the Superior Courts create opportunities for the rights of sexual minorities and social movements.

Firstly, there exists an opportunity before the Court of Appeal to decriminalise same-sex conduct. The Supreme Court and the Court of Appeal have set the pace in this regard. Both the *EG* case (that ended up at the Supreme Court) and the *COI* case set good jurisprudential trajectories. The High Court Judges in the *EG & 7 others* case argued that the Court of Appeal found that non-discrimination on sexual orientation depends on circumstances. The Supreme Court was unequivocal. The Court of Appeal has the opportunity to set the record straight. Of course, the composition of the bench will be critical.

Secondly, the Superior Court decisions have provided a glimpse of the judges' philosophies and inclinations. In the Supreme Court, it is easier to know the originalists and conservative-inclined judges. Some more judges may retire or quit. Appellants must be strategic in the timing of appeals.

Finally, the Superior Court's decisions on sexual minorities provide fodder for how to navigate against majoritarianism.

6. Does the Constitution create a counter-majoritarianism dilemma?

The counter-majoritarian dilemma relates to the tension between democratically elected representatives in the legislature and unelected judges when exercising powers to nullify legislative actions (Daniels and Brickhill 2006, 376). Ideally, the elected representative's legislative actions reflect the people's will. The sovereign people hold these representatives accountable every five years through the elections. However, the challenge with majoritarian representatives is that they often ignore minority interests during the execution of legislative functions. It thus sets judicial officers, who are unelected, in a dilemma when they protect the minority interests through judicial reviews (Daniels and Brickhill 2006, 377). Hutchinson (2005) agrees that judicial review conflicts with the concept of democracy. It allows unelected judges to invalidate actions taken by representative branches of Government. Daniels and Brickhill observe that the tension is aggravated since judicial decisions are final unless they are countered through subsequent legislative amendments or a higher judicial overrule. This constitutionalism, they argue, is akin to anti-democracy.

There are other perspectives on the discourse. For instance, Daniels and Brickhill also argue that counter-majoritarianism through the judiciary can be emancipatory to minorities. Majoritarian legislation, policy, and actions may be influenced by populism and a lack of sobriety. It thus requires judges to protect the people from their passion and violence. In the normal discourse, the majority often makes decisions that disfranchise the minorities. Racial, sexual, and ethnic minorities need protection from the majority. In this respect, the majority rule without constitutional constraints turns out to be an antithesis to democratic ideals. Mutua (2009) concurs that Constitutions are not meant to protect only individuals who are liked and to leave unprotected those who are unpopular, or those the majority may find morally objectionable. A person's identity, especially if it exposes them to ridicule, attack, or discrimination, must be the reason for constitutional protection. Constitutions protect individuals from the tyranny of the State and oppression from their fellow human beings.

The argument that can favour judicial counter-majoritarianism can also be approached from this perspective. The Government exists in three arms. The arms counter-check each other for balance and accountability. In this context, courts should check the arms' democratic processes for failure or malfunctions (Hutchinson 2005, 11). In such instances, Hutchinson argues that the courts reinforce the representation of disenfranchised and vulnerable classes. Put differently, the courts act as guardians of the vulnerable, disadvantaged, and powerless class. Indeed, there is almost a near consensus preposition that legal structures and hegemonies often reinforce inequalities, construct race, gender, sexuality, and class with prejudice, and are sluggish to change (Hutchinson 2005, 22).

Finally, Dorf (2010) theorises counter-majoritarian theory in three ways. Firstly, from the prism of representation-reinforcement, the counter-majoritarian approach protects the long-term systemic losers in the political process, often minorities and the marginalised. Secondly, the originalism approach in constitutional interpretation misses the mark. Past popular views cannot reflect the present realities. Finally, living constitutionalism paves the way for democratic experimentation. It helps to filter raw opinions from informed opinions.

Considering the above arguments, it may be difficult to suggest that the Superior Courts encountered a counter-majoritarian dilemma.

Firstly, most of the judges who made decisions that stripped sexual minority's protection took an originalist approach. As discussed, the originalist constitutional interpretation approach brings opposite results. Society is dynamic. Popular views change. Again, the raw popular views can change if the holders are informed.

Secondly, the Penal Code is Kenya's colonial inheritance, enacted in 1930. It cannot be argued that it represented popular Kenyan views at the time. At best, it reflected minority tyranny.

Thirdly, the Superior Courts were more engaged in the constitutional interpretation of the Bill of Rights (as to whether it protects sexual minorities). They were not strictly testing the constitutionality of legislative actions.

Finally, can Kenyan elected representatives be said to reflect the people's will? Some differ slightly, given the election rigging and bribery claims during the electioneering period. In parliament, these representatives are often accused of selling their votes to the highest bidder when making crucial decisions. If elements of truth exist in these arguments, the sanctity of some parliamentary legislative mandate diminishes. In such instances, the courts provide an alternative constitutional democratic means to provide checks and balances.

Nevertheless, if Parliament enacts anti-homosexuality legislation, which again must be constitutionally compliant, the Superior Court may encounter counter-majoritarian difficulty when asked to invalidate it. However, as discussed above, other interpretative approaches exist that might be useful for Superior Courts to navigate through that slippery road.

7. Conclusion

The paper sought to address tripartite questions, which may be summarised as whether the constitution safeguards the rights of sexual minorities in the face of the counter-majoritarian dilemma. It examined these questions

through six case laws on the rights of sexual minorities from Kenya's Superior Court. Consequently, it made three findings. The first finding was that the Constitution fully protects sexual minority rights to the extent that limitations are legally justifiable, legitimate, and necessary. The second finding was that, in its architecture, the Constitution of Kenya is counter-majoritarian in that it protects vulnerable and minority members of society. The final finding was that, so far, a counter-majoritarian dilemma has not presented itself in the judicialisation of sexual minorities, unless Parliament enacts anti-sexual minority legislation, which again must pass constitutional muster. Based on these findings, the paper suggests four proposals to enhance the rights of sexual minorities. Firstly, Kenya needs to have a candid conversation on the place of sexual minority groups in modern society based on human rights and democracy. While religious and cultural hegemony may control the conversation and set the rules on sexual minority issues, it must be recognised that they need legislative protections due to their unmatched numerical strength and historical disadvantages. Kenyan society needs to pursue coexistence in different forms, ways, and states. Sexual minorities need no permission under the law to live and enjoy their rights; society and the law should let them coexist. Secondly, the courts should take a proactive role in protecting the minorities and the vulnerable who are disadvantaged by democratic majoritarian processes. The counter-majoritarian approach can be a useful tool to bolster this judicial role. Thirdly, there is a need for heightened civil education and activities around the constitutional protections safeguarded through the decisions of the Superior Courts. Finally, there is a need for sustained strategic and public interest litigation on sexual minorities' rights. For instance, some decisions discussed have been significant in pronouncing their rights to association, non-discrimination, privacy, and dignity. The case for decriminalisation of same-sex relationships is pending appeal. There is a need to employ advocacy tools to influence favourable outcomes. Many more human rights issues affecting sexual minorities need to be litigated to clear the constitutional grey areas hampering their realisation of rights.

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