
FIRMING UP THE ‘OTHER’ GENDER: DISCOURSE ON SEXUALITY AND SEXUAL MINORITIES IN KENYA

¹*Donald Oluchina Wandere, PhD

¹Department of Sociology, Psychology and Anthropology, Moi University, Eldoret, Kenya

*Email of corresponding Author: donwandere2@yahoo.com

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Abstract

Premised on Gayle Rubin’s model, this paper explores the development and positioning of ‘transgressive sexualities’ (from the African standpoint) along the “Blessed” versus “Damned” sexualities continuum in The Sex Hierarchy. While the African political and socio-cultural terrain provides the background to the discourse herein, the main conversations around the topic are pigeon-holed on the Kenyan case. The paper recognises the conjoined relationship between gender and sexuality; distinct yet layered and overlapping one another and at the same time, endowed with the capacity to prescribe and proscribe sexual relationships and expressions in different contexts. The paper takes the reader through sexuality journey in Africa, and interrogates the notion of an essentialized and monolithic ‘African sexuality’ that is intolerant to other sexual identities and orientations, save for its ‘Africanist’ heteronormativity. Zeroing on Kenya, the paper gives an analysis of how a new constitutional dispensation threw a lifeline in the rights of sexual minorities across the country. Using a number of cases mainly drawn from the print media, the paper highlights the struggles of an energised sexual minority (and lobby groups) in pursuit of legitimacy and recognition in an otherwise hostile social frame.

Keywords: *Sexuality, The Sex Hierarchy, Sexual minorities, LGBTI, Kenya, Africa, Culture*

Introduction

American anthropologist on sex and gender politics, Gayle Rubin, constructed a model of ‘The Sex Hierarchy’ which attempts to classify sexual behaviour into a sexual value system commonly used by societies to rank what would be considered ‘good’, ‘normal’ and ‘natural’ sex, against the ‘bad’, ‘abnormal’ and ‘unnatural’ sex. Based on the value system of the

American society, Rubin stated that the ‘good’, ‘normal’, and ‘natural’ – and hence ‘blessed sexuality’, ought to be “heterosexual, married, monogamous, procreative, non-commercial, in pairs, in a relationship, same generation, in private, bodies only, vanilla”. On the other hand the ‘bad’, ‘abnormal’ and ‘unnatural’ – and hence ‘damned sexuality’ would be “homosexual, unmarried, promiscuous, non-procreative, commercial, alone, in groups, casual, cross-generational, in public, pornography, with manufactured objects and sadomasochist” (Rubin 2007:153). ‘Blessed Sexuality’ is found within Rubin’s ‘charmed circle’ of The Sex Hierarchy, while ‘Damned Sexuality’ is located within the ‘outer limits’ of the circle. Sexual expressions that are ‘blessed’ enjoy privileges and concrete benefits from society while the ‘damned’ ones face legal and social sanctions.

Rubin’s model greatly influenced latter thinking, particularly so among scholars of gender and sexuality studies. With American sex culture considered comparatively more permissive than is the case with most societies worldwide, the model by Rubin is not only seen to mirror the binary positive versus negative dichotomy in sexual behaviour universally, but the ranking system seem a copy and paste reflection of the same, save for a few cases and details. For instance, within the typical African socio-cultural milieu, most of the elements in Rubin’s charmed circle resonate well with many societies. However, there are certain elements that clearly differ. For example, in some societies in Africa, polygyny is legitimate and therefore located in the charmed circle. This is the case with virtually all indigenous ethnic groups in Kenya. Also, cross-generational sex was ‘charmed’ and acceptable among a number of African societies. John Mbiti (1988) catalogues what in African societies would constitute sexual offences, to include adultery, fornication, incest, rape, homosexual relations and bestiality. In Rubin’s classification, these would comprise ‘damned sexuality’ and hence within the outer limits of the charmed circle.

Therefore, sexual hierarchies are important features of most cultures. The sexual hierarchy as postulated by Rubin resembles a class system, in which different sexual practices, identities, expressions and communities are ranked, from the most normative and socially approved, to the most stigmatized and despised, i.e., legitimate versus illegitimate sexuality. In another context, Rubin projects another aspect of The Sex Hierarchy: the need to draw and maintain an imaginary line between ‘good’ and ‘bad’ sex. In the thesis, most of the discourses on sex – whether religious, political, psychiatric or popular – delimit a very small portion of human sexuality capacity as sanctifiable, safe, healthy, mature, legal, or politically correct; and hence ‘good’ sex. These, he says, include heterosexuality, married, monogamous, reproductive and, at home. The ‘line’ distinguishes this from other erotic behaviours thought to be the work of the devil, dangerous, psychopathological, infantile or politically repressible; the ‘bad’ sex that include transvestites, transsexuals, fetishes, sadomasochists, for money, and cross-generational. Arguments are then advanced on where to draw the line and to determine what other activities may be permitted to cross over into acceptability. Contestable sexual areas on part of the ‘line’ they ought to fall include unmarried heterosexual couples, promiscuous heterosexuals, masturbation, long-term stable lesbians and gay couples, lesbians in the bar, promiscuous gay men at the baths or in the park. And, according to Rubin, unmarried couples living together (in Kenya, they are referred to as ‘come we stay’), solitary sex, and some forms of homosexuality are moving in the direction of respectability, and hence acceptability (Rubin 2007: 152).

This paper, whose content is drawn from secondary data, examines the situation of sexual minorities in Kenya with a view of interrogating their relative admissibility and acceptability within the larger body-politic of the nation-state. The crux of the argument here is that, in this society whose value system coalesces around the traditional definition of sex and gender along its binary male-female relationship, do recent socio-political and legal events suggest a rethinking of this conceptualization away from this normative position? Quite apparently, lately, there has been an increasing visibility, in the Kenyan public sphere, of individuals and groups that proclaim ‘other’ sexual and bodily experiences. These elements are aided and energised by a relatively loosened socio-cultural fabric, augmented by a recent constitutional dispensation that is more responsive to the rights issue. Rubin Gayle’s model of ‘The Sex Hierarchy’ is germane to the discussion and forms the basis on which the entire discourse is contextualized.

Conceptualising gender, sexuality and sexual minorities

Gender and *sexuality* are conventionally seen as separate but overlapping categories; both are social and cultural constructs. In addition, gender and sexuality are about values and meanings, and are concerned with norms that permit and constrain certain forms of social and sexual expression. On its own, gender largely refers to the socially constructed roles, behaviours/characteristics, activities, and attributes that a given society considers appropriate for males and females. Gender has even been conceptualized as an individual's inner sex or psychological sense of being a male or female (like in the case of the transgender and transvestite) irrespective of one's outer sex identity as determined by one's sexual organs. Both gender and sexuality, ultimately, are about power (Runenborg 2008). That notwithstanding, gender provides the critical and analytical lens through which any data on sexuality must logically be interpreted – what Tamale (2011) would refer to as ‘gendered sexualities’. Hence, the conjoined relationship between gender and sexuality extend to profile the kinds of sexual relationships that are permitted and proscribed in different contexts. In a nutshell, the duo touch some of the most intimate and personal aspects of a human beings’ social and emotional existence.

Sexuality is largely conceptualized as a multi-dimensional category with an array of attributes and essences. Spheres of operations of sexuality include gender, reproduction, the family, love, intercourse and socialization (Padgug 2007). But still, some analysts tend to define sexuality within the limits of biology, the individual and the private; the public sphere being that of culture, society and history. The counterargument here is that *biological sexuality* is only but a precondition of *human sexuality*. It is “...a set of potentialities, which is never unmediated by human reality, and which becomes transformed in qualitatively new ways in human society” (Padgug 2007: 19). Human sexuality cannot be compared with that of other species because of its richness and the potential for other social institutions and relations layered upon it, thus making it distinguishable from animal sexuality which appears limited and predefined in a narrow, constricted physical sphere.

So, although the foundation of sexuality is its essentialist being, biology, it is generally shaped by extraneous forces. Core to this are the social contexts within which individuals operate. Biology, therefore, sets a limitation to what is ‘naturally’ possible; but in itself, it does not determine sexuality as such. Sexuality is shaped (and also shapes) by social forces and institutions that include race, ethnicity, class, gender, religion, nationality, and other social identities and relationships (Epprecht 2009). Within these institutional frameworks, are various

dimensions of sexuality that include sexual knowledge, beliefs, values, attitudes, and behaviours as well as, procreation, sexual orientation, and personal and interpersonal sexual relations (Tamale 2011). The social forces and dimensions vary from one society to another and eventually mould and condition an individual's erotic possibilities. Hence, the forms, content, and context of sexuality always differ. There is no abstract and universal category of 'the erotic' or 'the sexual' applicable without change to all societies (Padgug 2007).

The World Health Organization (WHO) offers a comprehensive working definition of the term 'sexuality' in "Defining Sexual Health" (2002):

Sexuality is a central aspect of being human throughout life and encompasses sex, gender identities and roles, sexual orientation, eroticism, pleasure, intimacy and reproduction. Sexuality is experienced and expressed in thoughts, fantasies, desires, beliefs, attitudes, values, behaviours, practices, roles and relationships. While sexuality can include all of these dimensions, not all of them are always experienced or expressed. Sexuality is influenced by the interaction of biological, psychological, social, economic, political, cultural, ethical, legal, historical, religious and spiritual factors.

The definition underscores the human-ness as well as the social essence of sexuality. It further underlines the fundamental importance of sexuality in the lives of all human beings. According to Anna Runeborg, although sexuality constitutes a natural part of human life;

It is often neglected and mainly dealt with in relation to reproduction, disease, violence and oppression. Sexuality related issues are often fraught with unease, shame, and conflict due to cultural, religious, political, social, economic and other factors outside the control of individuals particularly those who have less powers in societies" (Runeborg 2008:1).

It has been mentioned elsewhere here that there is no monolithic way of experiencing sexuality, and that sexuality is a group of essences. The plurality and 'essences' of sexuality are nuanced within two major, but distinct forms of categories; *orientations* and *identities*ⁱ. The formations are represented through organized groups, generically initialized as LGBTI's (Lesbian, Gay, Bisexual, Transgender, Intersex), LGBTIQ's (Lesbian, Gay, Bisexual, Transgender, Intersex, Queer), and so on. These and other peripherally related groups are generally referred to as *sexual minorities* – a term that connotes their marginal position in the sexual arena. In many societies, these groups and individual members are challenged with family and social legitimacy, thereby driving them to solitude lives and exposing them to self and social risks and dangers.

Discrimination of LGBTI can be in form of criminalization of homosexuality, institutionalized homophobia, abuse in state institutions, pathologizing, forced medications and cruel treatments, neglect of the existence and needs of the LGBTI people with disabilities, diminished access to health-care, work place discrimination and violence and harassment from official state representatives including execution. Social repression with or without state tolerance can be manifested in form of verbal abuse, silence, ridicule, hate crimes, corrective rape of lesbians, honor related violence, and forced marriages (Samellius and Wagberg 2005: 21).

Sexual minorities in the African context

In Kenya, just like in many other parts of the African continent, sexual and gender minorities face challenges in social and legal legitimacy and acceptability. Generally, issues to do with sexuality are highly criminalized and stigmatised. For instance, in regard to homosexuality – one of the most disdained form of sexuality – over 33 African countries have criminalized this sexual orientation, with a number of them (including Sudan, Somali, Somaliland, Mauritania, and Northern Nigeria under the *sharia* law) enacting laws that prescribe death penalty for offenders. In others, such as Uganda, Tanzania, and Sierra Leone, such offenders may receive a lifetime in jail. As a result of social and state disdain towards sexual minorities, many such individuals have been profiled and suffer open discrimination, stigma, arrests and even violent attacks within their own societies. This is the case in such countries like Kenya, Zimbabwe, Uganda, Algeria, Cameroon, Sudan, Egypt, Libya, Malawi, Morocco and Nigeria. In the countries that criminalize same sex erotic relationships, such activities are often regulated through sodomy laws in which anal intercourse is punishable. However, in spite of the efforts by state instruments to clamp down on illegal sexual expressions, sexual minorities continue to assert their presence and in some countries, are organized into embryonic groups that seek to have their rights recognized and respected. Such LGBTIQ groups include LeGaBiBo (Botswana), GALZ (Zimbabwe), GALCK (Kenya), Behind the Mask Sister (Namibia), SMUG (Uganda) and the Coalition of African Lesbians (CAL).

South Africa has been credited as having taken lead on the African continent in recognizing other erotic expressions outside heteronormativity. The 1996 post-apartheid South African constitution includes the right of privacy and the right to dignity. It states; “.....the state may not unfairly discriminate directly or indirectly against any one on one or more grounds, includingsexual orientation”. Despite this legal backing, South Africa stands out as one of the nations whose social body has been slow to embrace sexual minorities. A report by ActionAid researchers reported that South Africa “is now witnessing a backlash of crimes targeted specifically at lesbian women who are perceived as representing a direct and specific threat to the status quo. This violence always takes the form of ‘corrective’ rape – a way of punishing and ‘curing’ women of their sexual orientation”. Such violent attacks, not just in South Africa, but also in other countries, are frequently couched as defences on what is traditionally African from a contaminating Western influence. In spite of this resistance, we still witness enhanced visibility, in the public sphere, of individuals who associate themselves with ‘alternative sexuality’ away from the conventional ‘African sexuality’. Even in policy circles, a more responsive and liberal approach towards the course of multiple sexual variants is becoming acceptable. Lately, in June 2020, Gabonese lawmakers in the lower parliamentary chamber voted to decriminalise same sex relationships. In June 2019, a High Court in Botswana ruled in favour of decriminalising homosexuality, which had been outlawed in the country’s 1965 penal code.

The notion of a single ‘African sexuality’ – which some feminists would tag as ‘African sexual slavery’ – has continued to preoccupy discourses on the direction sexuality in Africa should take. Imminently, debates on sexual rights as demanded by sexual minorities, human rightists, and other like-minded people have strong undertones of a ‘natural’, singular sexuality that is in sync with African culture. The contention of an ‘African sexuality’- thought to be the natural order - has been blamed on earlier epidemiological studies that, apparently, reiterated colonial stereotypes about a monolithic sexuality in the continent that was devoid of homosexual and

bisexual ‘adulteration’ until when introduced through foreign influence. More theoretically informed research has steadily chipped away such stereotypes, showing the existence of plural nature of homosexuality in different contexts (various in Epprecht 2009:3).

Advocates of ‘African sexuality’ are however critiqued for ‘monolising’ and ‘essentializing’ a wide range of behaviours, practices and relationships associated with sexuality in different parts of Africa. Even in transsexual identity, behaviour considered relatively recent in the African sexual scenario, “...it is detrimental to assume that African communities historically had no transsexual people in their midst and that one’s assigned sex was immutable” (Mbugua 2011:242). The argument here is that all kinds of love found in the world are also to be found in Africa, “unless there is something unimaginably aberrant about Africans” (Ratele 2011: 407).

To argue that Africans who engage in same sex copy foreign, un-African activities is to claim a different, marginal and otherworldly identity for Africa in the world – an identity of Africans who do not experience the same kinds of feelings and thoughts as people on other parts of the continents (Ratele 2011:414).

The notion of a unique ‘African sexuality’ has been linked to a racist, colonial mentality and conception about the African body, erotic desires and closeness to nature. By the onset of colonial conquest, Africans were considered as an inherently degenerate group whose sexuality was unsophisticated and next to bestiality. Using the evolutionary stages of humankind and culture, of which anthropologists were greatly involved in propagating, the African was essentialized as ‘natural’, subhuman, uncivilized and could only be but a heterosexual in his/her sex life (Lewis 2011). According to Busangokwakhe Dlamini (2006), because the African man “was perceived to be close to nature, ruled by instincts, and culturally unsophisticated, he had to be heterosexual; his sexual energies and outlets devoted exclusively to their ‘natural’ purpose – biological reproduction” (Pg: 132).

Pro-homoerotic Africanists have been at the forefront of dismissing the colonial originated, skewed thinking that depicts African sexuality as mono-sexual and reproduction driven. According to them, gays have always been part of the African sexual order. Historical records indicates that from the 16th century onwards, European missionaries, adventurers and officials witnessed homosexuality in some parts of Africa and used this evidence to justify the cleansing of African societies through the indulgence of Christianity. For instance, the Portuguese who were among the first Europeans to come to Africa noted the range of sexual relations in African societies and referred to the ‘unnatural damnation’ of male to male sex in the Congo. Among the Pangwe of Cameroon and Gabon, homosexuality was practiced among males of all ages; the Sudanese Zande tribe had a tradition of warriors marrying boys; and Shaka Zulu too encouraged the same of his warriors in Southern Africa (Bernardine Evaristo 2014). A number of other authors document same sex erotic relationships among African men (Moodie et. al 1988; Kleinbooi 1994; Mclean and Ngobo 1994; Nkoli 1994; Epprecht 2005). Homosexuality is therefore considered to be as old as the African society itself and that, in pre-colonial Africa, the matter of sexual orientation was not generally contentious...”In fact the hatred of gay people and homophobia that are exhibited in Africa today has virtually no basis in African culture” (Mutua 2011:456)

So, if gays were part of the African social matrix, why do we experience cases of homophobia, disdain and violence against people having same sex relationships within the continent? It has

been widely recognized that attitudes towards homosexual behaviour are cultural specific, and have varied enormously across different cultures and through various historical periods. Ratele (2011) says that the fact that as many non-African countries such as U.S.A., China, Latvia, Poland, India, are as homophobic as African states should put to rest the argument that homosexuality is 'unAfrican'. According to Leo Igwe, history tells us that Africans have been traditionally tolerant of people with same-sexual orientation prior to the introduction of criminal provisions based on the alien religions of Christianity and Islam. This line of argument, paradoxically, blames foreign institutions in form of Western religion for the aetiology of homophobic feelings in Africa. Secondly, it has also been argued that discourses on national identities tend to anchor familial scripts and the inventions of nations as biological families. Constitutions of modern African nation-states often define the family within the context of normative biological relationships and heteronormativity. In so doing, heterosexuality is given a moral high ground and social legitimacy among the body-politic of African nation-states.

The quest for sexual determination in Kenya: A new epoch

Studies on human sexualities tend to be unanimous in concluding that erotic speciation, in form of sexual identities and orientations, are historically and culturally specific. Jeffrey Weeks (2004) for instance opines that homosexuality received a distinct identity in the 19th century when it became politicized and ideologized, although indeed erotic relations of same sex had existed in all times and cultures. On the same homosexual behaviour, Gayle Rubin says that this form of orientation has always been present among humans. However, "...in different societies and epochs, it may be rewarded or punished, required or forbidden, a temporary experience or a lifelong vocation" (Rubin 2007:155). Social constructionists would, in this regard, argue that orientations and identities are chosen from a variety of other sexual possibilities.

Kenya is now witnessing an increased tempo, on the part of sexual minorities, in demanding for space in mainstream, socially legitimised gender matrices. These communities are emboldened by a new constitution that was put in place in 2010, and which was seen to entrench greater rights and freedoms of individuals in society. Article 27 in the Bill of Rights of the constitution, for instance, guarantees to every Kenyan the full and equal enjoyments of all rights and fundamental freedoms, free from discrimination on any ground. This is further strengthened by Article 19 (2) that gives all individuals the right to realise their full potential. These clauses that have the potential to work towards the entrenchment of the LGBTI's in Kenya are, however, countered by other statutes in the laws of Kenya. For instance, sections 162 and 165 of the Penal Code are inconsistent with Articles 27 and 19 of the Bill of Rights. These sections, considered relics of colonial laws, are the main reference areas in judicial convictions of individuals engaged in non-heterosexual behaviour.

Section 162 states:

"Any person who-

- a. Has carnal knowledge of any person against the order of nature; or*
- b. Has carnal knowledge of an animal; or*
- c. Permits a 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.*

Section 165 describes the indecent practices between males as;

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

Quite apparently therefore, Sections 162 and 165 criminalize homosexual relations (including the bisexuals), in particular, in the Republic of Kenya. Though providing latitude of rights and freedom for its people, still, the constitution does not envisage same sex relationships, and is quite clear on this. Article 45 (1) and (2) is explicit; it provides that every adult has the right to marry a person of the *opposite sex* based on the free consent of the parties. Hence among the varying sexual formations, homosexual relations (specifically, gayism) stick out as the most offending type. This is because, unlike transgenders and the intersex which are considered a Gender Identity Disorder (GID), homosexuality and bisexuality are sexual orientations and necessarily entail sexual relations; a sensitive act that is rigidly scripted to follow a particular line of thinking and practice. Religion and culture, whose dominance on African and by extension, Kenyan lives, constitute major catalysts in enabling the rules of engagement.

On the other hand, the Kenyan legal system gives recognition to the intersex and provides certain safeguards to suchlike individuals when incarcerated. The Persons Deprived of Liberty Act (2014) is the first to define intersex as ‘a person certified by a competent medical practitioner to have both male and female reproductive organs’. The shallow conceptualization notwithstanding, the Act was seen as a major milestone in defining gender beyond the traditional male-female dualism. This way, it was seen as a culmination of struggles by advocacy groups and individuals who for a long time used judicial platforms to make cases for a ‘marginalised’ and ‘discriminated’ intersex group. The Intersex Persons Society of Kenya (IPSK), a non-governmental organization, was at the forefront of advocating for the rights of these individuals. The pinnacle in this recognition occurred when the Kenya government sought to statistically quantify the numbers of the intersex through the national population census that was held in August of 2019. The result was that, 1,524 persons were captured in the census as being intersex. Being the first such exercise, this conservative number was within range because the stigma and shame associated with the intersex in Kenya would have discouraged many more people of this nature from admitting their status to the enumerators. All said and done, the step taken by the Kenyan government was heralded as Africa’s first, and a clear intent of classifying the intersex as a ‘third gender’. Germany became the first European country to legally recognise intersex children as from November 1st, 2013. Other non-European countries that have laws recognizing intersex include Australia, India, Nepal, and Pakistan.

Though homosexual relations and the intersex (being manifest biological conditions) seem familiar in traditional African systems and with their existence, clear rules of social modus operandi to boot, transgender identities are a more recent public phenomenon. In Kenya, the fact that the 2010 constitution did not have sheer regard and recognition for this group may attest to their invisibility on the socio-demographic map. Though lumped with homosexuals and bisexuals as LGBT’s, transgender people in Kenya have for quite a while been struggling to cut their own niche away from these sexual communities. Audrey Ithibu Mbugua, the head of

Transgender Education and Advocacy (TEA) and a confessed transgender herself, is the face of these struggles in Kenya. On this, she says:

The transgender community exists within the LGBT movement not because of their sexual practices or sexual orientation, but because of their gender identity. If people cannot respect that fact and cease calling transgender people gays, MSM's and lesbians, then these groups should separate. The pecking order of LGBT should simply be dismantled(Mbugua 2011: 243).

And to demonstrate the resolve that the transgender path is distinct from sexual orientations, in November 2014, Audrey Mbugua filed a suit in a Kenyan High Court seeking to be delinked in a case by gays and lesbians. The homosexuals had moved to court to compel the government to register the National Gay and Lesbians Human Rights Commission and had roped in transgender people and bisexuals in their arguments. In the suit that was also enjoined by the intersex, they argued:

The continued classification of lesbians, gays and bisexuals together with transgender and intersex in these proceedings has created and continues to create an impression in the minds of the public that they are one and the same persons, which is to the detriment of the transgender and intersex persons (Standard; 4th November, 2014. Page 13).

In Kenya, the year 2010 seem to be that historical defining moment that marked a new dawn in the self-consciousness of the sexual minorities. Buoyed by the upcoming new constitution that was greatly hinged on the rights issue, the minorities felt emboldened to come out and state their case. In May 2010 (before the 27th August, 2010 promulgation of the new constitution), the LBGTI's under the banner of Gay and Lesbian Coalition of Kenya (GALCK) met in October at the National Museums of Kenya in Nairobi and for the very first time publicly proclaimed their existence and uniqueness. They were celebrating the International Day of Homophobia and Transphobia that occurs on the 17th May each year. Going forward, sexuality discourses and proclamations were thrust in public forums, and the Kenyan social body began to entertain thoughts of sexualities beyond the 'normal' amongst it. Both print and electronic media, whether consciously or unconsciously, became avenues of public awareness and sensitization on the activities and plight of people with sexual orientations and identities other than heteronormativity. Courts became arenas of contests for individuals and groups seeking for 'liberties' and 'rights' in sexual and bodily expressions. Indeed, a new reawakening was in the making, where the country was put on the edge of a cultural crossroad regarding the role and position of 'other' sexualities in the nation's socio-cultural terrain. The dawn of a new sexual epoch was nigh in Kenya, presumably.

The *de facto* spokesperson for these individuals and groups that were in search of sexual independence was the transsexual Audrey Mbugua. Not shying away from publicity and controversy, Mbugua had in December 2008 already founded Transgender Education and Advocacy (TEA), an agency that she would use to propel her (and her ilk) struggles for sexual disentanglement and emancipation away from the rigid gender categorizations. Often hitting the headlines, her story was captivating inasmuch as her condition was perceived as utterly counter-cultural.

Audrey Mbugua's battles for identity variation started when, at the age of 19 years, she started cross-dressing; first by plaiting her hair and later, her wardrobe. This dialectical conflict associated with Gender Identity Disorder (GID) drew restiveness among her family members and from within her larger social circle. As a university student admitted under a male name, Andrew, Mbugua's physical transformations became, yet again, a source of her mental anguish as a result of constant taunting and being shunned by the campus community. The internal contradictions coupled with being socially ostracised, took a toll on Mbugua resulting to her doing heavy alcohol and, as would be expected, contemplating suicide. In fact, eventually, after a sustained situation of systemic discrimination, she could not bear the frustrations and actually attempted to take her own life late in 2008 (*Standard*; 4th June, 2013. Page 3). Against this backdrop, we see the embryonic formation of her Transgender Education and Advocacy organization that was propped up to mitigate cases of the transgender and other sexual minorities.

Mbugua's journey for social recognition and legal legitimacy first came to public limelight in the year 2013 when Kenya's local dailies documented her struggles in court to alter her names and gender in her educational certificates (*Standard*, 29th May, 2013; *Star*, 29th May, 2013). In this unprecedented suit, Mbugua argued that she had written a letter to the Kenya National Examination Council (KNEC) in December of 2010 (tellingly, shortly after the promulgation of the new constitution) requesting change of names and gender on her certificates, but the request was declined. She was thus seeking the indulgence of the court to compel KNEC to recognise her new gender and to have her names on the certificates changed from 'Andrew' to 'Audrey' – a change in names having been legally effected through a deed poll and gazette notice in 2012. Later, in a landmark ruling in July 2019, Mbugua's prayers were given and she was eventually issued with a new Kenya Certificate of Secondary Education certificate that bore her desired name. Not done yet, in February 2020, together with two other transgender persons – Maureen Muiya and Arnest Thaiya – Mbugua yet again sued the state to change the names and gender of all their identification documents so as to be in tandem with their transitioned gender (*Standard*, 3rd February, 2020. Page 7).

Mbugua's run-ins with the law and society epitomized a new era on the visibility of the Kenyan sexual and gender minorities. Her victories emboldened other like-sexualities to resolutely demand for a recognisable and legitimized niche in the sexual world. In one of the interviews, she says:

“I am now a very happy woman. All my struggles have finally paid off, not only for me but I am able to assist tens of other ladyboys who are struggling with similar predicament. I am their mother; they call me Mama T (Transgender)”.(*Nation*, 14th December, 2019. Page 12)

Audrey's successes opened the public place to new players professing what would be considered taboo sexualities within the Kenyan culture. In October of 2013, Jonathan Kariuki (previously Dorcas Wangui) who was named, raised and made to believe that he was a woman by his parents, petitioned the High Court to determine his gender. Kariuki wanted the court to issue an order to change his name to identify him as a man as he had grown masculine features and had undergone medical tests that had, indeed, established him as male (*Standard*, 23rd October, 2013).

Page 13). In June 2016, one, James Karanja hit the headlines when he claimed to have been raised as a girl but was in fact a man. Born and brought up as Mary, Karanja's entire school life was in a girls' school due to what he considered a "wrong gender assignment at birth" (*Standard*, 2nd June, 2016. Page 1). Karanja's predicament caught the attention of a nominated legislator representing the minorities, one, Isaac Mwaura, who promised to petition parliament over the plight of people with gender disorder. In yet another incidence that caught the public eye, Shieys Chepkoskei, an athlete who had been arraigned in court for impersonation as a female nurse in a public national hospital, openly claimed to be a transgender. In another first, Chepkoskei petitioned the court to give an interpretation on the kind of cells where transgender people should be detained. She claimed to have been isolated from other women in prison ostensibly because she was a man (*Nation*, 28th June 2019. Page 3; *Standard*, 19th June, 2019. Page 4). To further consolidate her identity, the court later ruled that the prosecution should cease referring to Ms. Chepkoskei by her masculine name. This was after Chepkoskei complained that the charge sheet referred to her as alias to a male name, Hilary Kiprotich (*Nation*, 8th October, 2020. Page 22).

Such is the dilemma that the state is grappling with in relation to the transgender. However, the intersex people have made much more strides in terms of recognition, probably due to their relatively apparent and visible anatomical complexities. The Persons Deprived of Liberty Act (2014) and the policy decision to capture their numbers through the 2019 National Population and Household Census of Kenya comprise the most significant success stories of this segment of minorities and a culmination of prior socio-political struggles. The Richard Muasya story (*Standard* 8th December, 2013. Page 22) was, perhaps, the one that lifted the lid on institutionalised structural challenges faced by the intersex in Kenya. An intersex, Muasya had been arrested in 2005 for robbery with violence, a crime he claimed not to have committed. In the interrogation room, he was stripped naked and to the utter disbelief of the investigating officers, he was found to have both male and female genitalia. With no separate cells set aside for hermaphrodites, Muasya was herded together with other male inmates, something that really terrified him. On conviction in the year 2007, and in spite of having been duly certified as an intersex by medical personnel, Muasya was harangued in a male maximum prison waiting to be hanged as sentenced by the court. In an ensuing petition (Muasya Vs the Attorney General and others, petition number 705 Of 2007), Muasya appealed against the sentence and also sued the government for having held and jailed him in a male prison both during the remand and during his prison term knowing well that he was an intersex. Though Muasya's conviction was quashed and, of significance, awarded a KShs. 500,000 compensation for wrongful confinement, still, the presiding appellant judges stated that "Kenya was not ready for the intersex" (*Star*, 18th March, 2015. Page 32).

All said and done, Muasya's landmark case laid ground for what was to be The Persons Deprived of Liberty Act (2014) which recognises the intersex and accords them certain rights while in custody. Section 10(3) of the Act provides for certain safeguards whenever it comes to body searches of the intersex in prison. It states that an intersex person has the right to decide the sex of the person by whom they should be searched. A violator of this act is liable, upon conviction, to a fine of not exceeding KShs. 500,000 or imprisonment for a term not exceeding two years, or both. It is noteworthy that the Act is a consequence of the spirit of the 2010 promulgated constitution that in The Preamble, it partly stipulates that the people of Kenya are committed to nurturing and protecting the wellbeing of *the individual*, the family, communities

and nation. This notion is further reinforced by Article 27 in the Bill of Rights that guarantees the full and equal enjoyments of all rights and fundamental freedoms, free from discrimination on any ground.

But of all the sexual minorities in Kenya that are premised within the LGBTI, homosexuals seem to have had a hard start. As alluded to earlier, being explicit sexual actions that touch on the raw nerves of moralities among social groups, homosexual behaviour is considered utterly offensive and hence heavily proscribed by culture and religion. However, egged on by a constitutional amendment in South Africa in 2006 that authorised same-sex marriages, the hitherto invisible homosexual community started making their presence known not just in Kenya, but in other parts of Africa too. The incipience of the Gay and Lesbian Coalition of Kenya (GALCK) in 2006 was borne out of the happenings in South Africa. The organisation was formed to fight for the rights of lesbians, gays, intersexuals and the transgenders against social and state discrimination. More voices, pressure and advocacy groups were set to join the fray after the 2010 promulgated constitution that was considered tolerant to the rights of minorities than the repealed one. Among the emergent advocacies' was the National Gay and Lesbian Rights Commission, a non-governmental organization that was established in 2012. In April 2015, the NGO scored a plus when the High Court compelled the Non-Governmental Organization Board to register their union following a petition by the NGO director, Eric Gitari. The board had earlier rejected the petitioner's application for registration on the basis that, "the people whose rights the proposed NGO is seeking to protect are 'gay and lesbian persons'" (*Nation*, 28th April, 2015. Page 5). The petitioner then moved to court seeking a determination on whether he is a 'person' as protected in Article 36 of the constitution, and if so, whether his right to freedom of association had been infringed. The judges ruled that the constitution allows recognition and protection of the rights of 'every person' and minority groups such as gays and lesbians.

The Kenya National Commission on Human Rights (KNCHR), a government watchdog, has also been at the forefront of advocating for the rights of the homosexuals and other sexual minorities. In a report launched in early 2012, KNCHR proposed that the government should legalise same sex relationships;

The government should decriminalise same sex relationships with a view to allow them to enjoy human rights as enshrined in the Bill of Rights (KNCHR, 2012: 104).

The report on "safeguarding sexual and reproductive health rights" was a result of public inquiry set to examine the extent and nature on how the two rights had been violated. The report also argued that sexual minorities were fast increasing and their rights needed to be respected. But, as expected, this report was vehemently opposed by a large cross-section of the clerics who argued that homosexuality is an unnatural tendency that is both socially and religiously unacceptable.

The push and pull between the religious entity and cultural purists on the one side and the 'rights' advocates on the other, has played a decisive role on the coming to naught in the advancement of homosexual interests in Kenya. Lawmakers have been slow to initiate progressive legislation on behalf of this group for fear of public reprisal. The extreme to this is underscored by the introduction of Anti-Homosexuality Bill to the Justice and Legal Affairs

Committee of parliament by one, Edward Nyakeriga, a legal secretary of The Republican Liberty Party in 2014. The bill sought to stone to death any foreigner who commits a homosexual act, and to commit to life imprisonment any Kenyan found guilty of the same. Though the Nyakeriga Bill did not see the light of the day, its prompting goes thus to underline the loathness with which homosexuality was perceived within the Kenyan social body. Public backlash by a government functionary was evident when, in October 2010, a Cabinet minister in charge of Special Programmes, Esther Murugi, when addressing a symposium at of the National Aids Control Council, suggested that Kenyans should accept homosexuality;

“We need to learn to live with men who have sex with other men...we are in the 21st century and things have changed” (*Nation* 2nd October, 2010. Pg 8).

The excitement of the spirit of the promulgated constitution may have, perhaps, pushed her to make this statement. The public was outraged. Religious leaders were livid;

Council of Imams and Preachers of Kenya organizing secretary Sheikh Mohammed Khalifa said the utterances were “satanic and contrary to African culture”....Kenya National Muslim Advisory Council chairman Sheikh Juma Ngao demanded that Ms Murugi resigns or be sacked. “*The minister and National Aids Council officials should create their own country which allows homosexual, lesbian and prostitution*”, he said (*Nation* 2nd October, 2010. Pg 8).

But homosexuals and their advocates were not deterred. In January 2014, a renowned award winning Kenyan author, Binyavanga Wainaina, caused a stir when, in a book entitled *One Day I Will Write About This Place: A Memoir*, he confessed to being homosexual. After a chorus of criticisms, Wainaina later moved to South Africa to join his lover in marriage. In February 2015, the media reported about a group of about 50 homosexuals who had intended to perform gay rituals as part of a send-off for a deceased that was one of their own. The incidence, in the Muslim dominated coastal town of Malindi was however thwarted by other mourners and heavily condemned by religious clerics. (*Standard*, 25th February, 2015. Page 18).

But the boldest attempt to engender homosexuality as legalised behaviour and identity was fronted by the National Gay and Lesbian Commission when, in January 2018, it petitioned the court to quash provisions of the law that make it illegal for consensual same sex relationships. In particular, the group sought to decriminalise sections 162 and 165 of the Penal Code which it claimed was discriminatory and contravened provisions of the constitution such as the right to equality, freedom from discrimination, human dignity, freedom and security of the person and right to privacy. To this group, the state had no right to regulate intimate matters. As would be expected, the petitioners were opposed by faith-based entities; and in this regard, The Kenya Christian Professional Forum (*Nation*, 19th January, 2018. Page 7). In a judgement that was delivered the following year, the petitioner’s prayers were dismissed and Kenya’s High Court upheld laws against same sex relations. Although this case dealt a blow to homosexual lobbyists and activists, they had however succeeded in making a bold statement over their presence and needs.

Conclusion

From a diachronic trajectory, it seems apparent that the year 2010 marked a new epoch on Kenyan sexual and gender politics. The game-changer was the anticipation and actualization of a new constitutional order that was interpreted as one that would give more provisions for sexual manoeuvres, rights and experiments. The inception of this fluid sexual field anchored in the new constitution provided an enabling environment for a previously gagged and restrained sexual minority; and thus paved way for its members to make their claims and challenge existing norms and values. Considered outsiders in a moral world, these group and their lobbyists began to have a sense of entitlement in participating and directing erotic conversations and practices. The arenas of these dialectics included the courts, symposia, workshops, conferences and other public forums. Recognition and legitimacy of these individuals and groups was gradually steadying in, as legal and other social and culturally-based hurdles got out of the way.

In the context of Gayle Rubin's model of 'The Sex Hierarchy', there seem to have been a softening and shifting of positions in regard to the Kenyan sexual value system or, at the very least, a change in the perception and attitude towards the 'other' gender. Apparently, along the Kenyan sexual continuum, certain forms of eroticism and identities that were hitherto frowned upon, did, in the new epoch, find redemption away from Rubin's 'Damned Sexuality'. While homosexuality continues to be strongly repudiated at the socio-cultural level, structural changes in advancing their positions have been achieved particularly through lobby and advocacy groups. The National Aids Control Council, the Kenya National Commission on Human Rights (KNCHR) and the National Gay and Lesbian Rights Commission have been at the forefront of these initiatives and, hence, instrumental in hauling homosexuality away from total 'damnation' in the Kenyan Sex Hierarchy. On the other hand, transgender and intersex people seem to have made significant strides in terms of acceptability within the Kenyan legal system and, to some extent, the social body. The visibility and relative accommodation of individuals with these identity challenges have been greatly aided by the Kenyan courts whose rulings in their favour have mainly benchmarked on Articles 19 and 21 in the Bill of Rights of the Constitution. The Articles provide wide latitude for individuals in their enjoyment of rights and freedoms in society. Suffice it to say that given the Kenyan contemporary scenario, and cascaded along Rubin's Sex Hierarchy, transgender and intersex identities may fittingly be located in the 'contestable' sexual area along the 'Good' and 'Bad' sexual continuum. On the other hand, homosexuality is still considered 'damned sexuality' along the hierarchy.

¹The thesis of this essay is premised to a large extent on the homosexuals (including bisexual behaviour), the intersex and the transgender. According to Samellius and Wagberg(2005), homosexual men and women (gays and lesbians, respectively) have a *sexual orientation* towards persons of the same sex. Heterosexual men and women have sexual orientation towards persons of the opposite sex. Bisexual men and women have a sexual orientation towards persons of the same as well as the opposite sex. Intersex is a person born with sexual anatomy, reproductive organs, and /or chromosome patterns that do not fit the typical definition of male or female. Transgender persons have a personal identity and gender that does not correspond with their birth sex. The opposite of this is cisgender

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