

**Sexual Orientation and Employment Discrimination in Kenya: A
Critical Analysis of Article 27 of the Constitution and Section 5 of
the Employment Act**

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DECLARATION

I, **ANNETTE KAMUMBUMUINDI** do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date:

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:.....

[Supervisor's Name]

ABSTRACT

The main objective of this paper is to investigate if Article 27 of the Constitution and Section 5(4) of the Employment Act protects LGB persons in Kenya. The other objectives include interrogating the legal framework governing LGB persons in Kenya as well as comparing the Kenyan legal framework to that of USA and South Africa. The scope of this paper is focused on LGB employment discrimination in Kenya. This paper has made use of secondary sources such as books and journal articles. It has also used case law from Kenya and other countries. The major finding of this paper is that sexual minorities are not protected under Article 27(4) of the Constitution and Section 5(4) of the Employment Act. Thus, to this end the paper recommends amending the Constitution and the Employment Act to protect sexual minorities and passing LGB anti-discriminatory laws among other recommendations.

LIST OF ABBREVIATIONS

| | |
|-------|--|
| ACK | Anglican Church of Kenya |
| CKRC | Constitution of Kenya Review Commission |
| ICCPR | International Convention on Civil and Political Rights |
| LGB | Lesbian, Gay, Bisexual |
| USA | United States of America |

LIST OF CASES

Australian Case Law

Toonen v. Australia, CCPR Comm No. 488/1992 (1994).

American Case Law

Kimberly Hively v Ivy Tech Community College of Indiana (2017), United States Court of Appeals for the Seventh Circuit.

Lawrence v Texas (2003), Supreme Court of the United States.

Romer v Evans (1993), Supreme Court of the United States.

Canadian Case Law

Andrews v Law Society of British Columbia (1989), Supreme Court of Canada.

South African Case Law

National Coalition for Gay and Lesbian Equality v Minister of Justice (1999), Constitutional Court of South Africa.

Strydom v. Nederduitse Gereformeerde Gemeente Moreleta Park, Equality Court of South Africa (2008), High Court of South Africa.

Kenyan Case Law

EG v Non- Governmental Organisations Co-ordination Board & 4 others (2015) eKLR.

EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae) (2016) eKLR.

LEGAL INSTRUMENTS

International Instruments

Constitution of South Africa (1997).

Constitution of the United States of America, (1868).

Declaration of Independence, United States of America, 1776.

Executive Order 12968 of 1995 of the United States of America.

Executive Order 13087 of 2012 of the United States of America.

International Covenant on Civil and Political Rights (1976).

Mathew Sheppard and James Byrd Jr Act of the United States of America (Act of 2009).

Prevention of Unfair Discrimination Act of South Africa (Act No 4 of 2000).

Rental Housing Act of South Africa (Act No 50 of 1999).

Universal Declaration of Human Rights, 1948.

National Instruments

Constitution of Kenya, 2010.

Employment Act (2007).

NGO Regulations (Act 19 of 1992).

Penal Code of Kenya (Chapter 63 of 2012).

CHAPTER 1

1.1 Background to the Study

Freedom from discrimination is enshrined in the Universal Declaration of Human Rights. It provides that all human beings are born free and equal in dignity and rights.¹ Additionally, they are entitled to all the rights and freedoms set forth without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.² This echoes the United States Declaration of Independence which highlights that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness.³

Lesbians, Gays and Bisexuals (LGB), face a high rate of discrimination at work.⁴ This discrimination ranges from being denied employment opportunities for being LGB,⁵ being forced to hide their sexual orientation, or, if their employer becomes aware they are not heterosexual, having their employment terminated.⁶ This situation is further aggravated by the fact that most countries do not have laws expressly prohibiting discrimination based on sexual orientation either generally, or specifically to employment.⁷

Consequently, LGB persons have a higher unemployment rate than their heterosexual counterparts. Due to the high stigmatization and discrimination that LGB persons face, they

¹ Article 1, *Universal Declaration of Human Rights*, 1948.

² Article 2, *Universal Declaration of Human Rights*, 1948.

³ Declaration of Independence, *United States of America*, 1776.

⁴ Weinberg J, 'Gender Nonconformity: An Analysis of Perceived Sexual Orientation and Gender Identity Protection under the Employment Non-Discrimination Act' 44 *University of San Francisco Law Review* 1, 2009, 3.

⁵ Kenya Human Rights Commission, *The Outlawed amongst Us*, 2011,26.

⁶ Wangui J, 'Court rejects out-of-court settlement of ACK gay case' Daily Nation, 6 February 2019 <https://www.nation.co.ke/news/New-twist-in-ACK-gay-case/1056-4969398-e5ash0/index.html> on 10 February 2019.

⁷ Human Rights Watch Country Profiles: Sexual Orientation and Gender Identity, 23 June 2017 <https://www.hrw.org/news/2017/06/23/human-rights-watch-country-profiles-sexual-orientation-and-gender-identity> on 10 February 2019.

are more likely to suffer from depression and are more likely to commit suicide.⁸ This paper will focus mainly on Lesbian, Gay and Bisexual (LGB) people. Transgender people will be omitted from this study as it will mainly deal with discrimination based on sexual orientation not gender identity.

1.2 Statement of the Problem

Article 27 of the Constitution of Kenya guarantees freedom from discrimination where it states that no one will be discriminated 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.⁹ Similarly, Section 5 of the Employment Act also provides that no employer shall discriminate based on race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status.¹⁰

Sexual orientation is neither expressly provided for in the Constitution, nor in the Employment Act, as illustrated above. This raises the question of whether the above provisions protect sexual minorities. This ambiguity has had negative consequences on sexual minorities in Kenya as some have faced employment discrimination.¹¹ This discrimination includes being discharged from duty when their sexual orientation is discovered. Additionally, others have suffered a discriminate refusal of promotion, hostile working environment, ridicule and humiliation at the work place.¹² Therefore, the problem statement that this research paper wishes to investigate is: to what extent does Article 27(4) of the Constitution and Section 5(4) of the Employment Act protect LGB persons from employment discrimination on the basis of sexual orientation.

1.3 Research Questions

The main research question this paper seeks to answer is:

⁸ Human Rights Watch Country Profiles: Sexual Orientation and Gender Identity, 23 June 2017 <https://www.hrw.org/news/2017/06/23/human-rights-watch-country-profiles-sexual-orientation-and-gender-identity> on 10 February 2019.

⁹ Article 27(4), *Constitution of Kenya*, 2010.

¹⁰ Section 5(4), *Employment Act* (2007).

¹¹ Kenya Human Rights Commission, *The Outlawed amongst Us*, 2011,26.

¹² Kenya Human Rights Commission, *The Outlawed amongst Us*, 2011,26.

To what extent does Article 27(4) of the Constitution and Section 5(4) of the Employment Act protect LGB persons from employment discrimination on the basis of sexual orientation?

Thus, from this, the following secondary research questions may be drawn:

What is the legal framework governing LGB persons in Kenya?

How have other countries ensured protection of sexual minorities from employment discrimination within their legal frameworks?

1.4 Hypotheses

This research paper seeks to test the following hypotheses:

- a) That Article 27 of the Constitution and Section 5(4) of the Employment Act do not adequately protect LGB persons in Kenya.
- b) That there is no specific legal framework protecting LGB persons from employment discrimination in Kenya.
- c) That other countries have ensured protection of sexual minorities from employment discrimination within their legal framework.

1.5 Objectives of the Study

The general objective of this study are to:

Investigate whether Article 27 of the Constitution and Section 5(4) of the Employment Act protects LGB persons in Kenya.

The specific objectives of the dissertation will be to:

- a) Interrogate the legal framework governing LGB persons in Kenya.
- b) To compare and contrast the Kenyan legal framework with South Africa and the USA on LGB protection.

1.6 Theoretical Framework

This study will adopt one framework in order to investigate to what extent Article 27(4) of the Constitution and Section 5(4) of the Employment Act protect LGB persons from employment discrimination on the basis of sexual orientation. This is **The Theory of Equality**.

1.6.1 Theory of Equality

The theory of equality has two categories, formal and substantive. Formal equality pertains to treating similar cases similarly.¹³ The argument, which was first proposed by Aristotle, is that people who are within the same class or race or intellectual standing should be treated the same. For example, those in Group A should be treated equally and those in Group B equally. However, individuals from the different groups are treated differently. This is manifest in our society today where we see heterosexuals being treated the same, for instance they have the right to marry each other.¹⁴ Lesbians and gays, including bisexuals who are dating someone of the same gender, are denied this right. In this way all LGB persons are treated the same way.

Formal equality has been criticised for failing to account for the diversity of preferences, characteristics and capabilities of people.¹⁵ Additionally, it promotes discrimination where one group of people are treated differently than another. This is justified by the fact that everyone in that group is being treated in the same way, just differently from the other group.¹⁶

Substantive equality on the other hand, means equal treatment, at least in law, to give people the same choices hence allowing them to maximize their well-being.¹⁷ It means treating persons in the same way but also requires special measures in the facilitation of differences.

¹³ Lyons D, 'The Weakness of Formal Equality', University of Chicago Press Journals, 1966, 146-
<https://www.jstor.org/stable/pdf/2379322.pdf?refreqid=excelsior%3A68d6cb3e481a9d1b15f5b7d69e6b54e1> on 3 February 2019.

¹⁴ Article 45(2), *Constitution of Kenya*, 2010.

¹⁵ Equal Rights Trust, 'The Ideas of Equality and Non-Discrimination: Formal and Substantive Equality' 8 Nov 2007,
<http://www.equalrightstrust.org/ertdocumentbank//The%20Ideas%20of%20Equality%20and%20Nondiscrimination%2C%20Formal%20and%20Substantive%20Equality.pdf>, on 4 February 2019.

¹⁶ Baer J, 'Reclaiming the 14th Amendment' in Baer J *Equality Under the Constitution*, Cornell University Press, New York, 1983, 12.

¹⁷ Kameri-Mbote P, 'Fallacies of Equality and Inequality: Multiple exclusions in Law and Legal Discourses' *International Environmental Law Research Centre*, 2013, 8.

Additionally, it entails providing equal opportunities as another person would have due to an allowance being made for any material evidence in their suitability.¹⁸

Substantive equality asks, what is the substance of that particular inequality? Its core idea is that inequality is always a social relation of rank ordering. This ordering is typically on a group or categorical basis of higher and lower, clean and dirty, served and serving, appropriately rich and appropriately poor, superior and inferior, dominant and subordinate.¹⁹

Therefore, substantive equality recognises straight privilege, the placing heterosexual over homosexual in a hierarchy of supremacy.²⁰ For example in formal equality, a person can find that anti-gay marriage law does not discriminate against homosexuals based on sex because both men and women equally cannot marry persons of their own sex. However, a substantive equality approach, alters the conditions that are recognised as giving rise to equality questions. Substantive equality principles transform inequality by identifying substance, the reality of inequality, as what it is.²¹

Substantive equality would thus be the most appropriate theoretical framework for this paper. This is because it highlights how discrimination is usually faced by those who rank below the social order or those who are different from the majority. This clearly explains why sexual minorities experience discrimination as they are not part of the heterosexual majority. Furthermore, it will assist in demonstrating specifically why sexual minorities face employment discrimination.

1.7 Literature Review

In *Toonen v Australia*,²² Nicholas Toonen, a gay man from Tasmania, sent a message to the Human Rights Committee, at a time where same-sex conduct was criminalized in Tasmania, arguing that this violated his right to privacy under Article 17 of the International Covenant on Civil and Political Rights (ICCPR). He also argued that because the law discriminated against homosexuals on the basis of their sexuality, it violated Article 26 of the ICCPR which provides

¹⁸ Bernard C, 'Substantive Equality' 59 *Cambridge Law Journal* 3, 2000, 566.

¹⁹ Mackinnon C, 'Substantive Equality: A Perspective' 96 *Minnesota Law Review* 1, 2011, 6.

²⁰ Mackinnon C, 'Substantive Equality: A Perspective,' 3.

²¹ Mackinnon C, 'Substantive Equality: A Perspective,' 27.

²² *Toonen v. Australia*, CCPR Comm No. 488/1992 (1994).

that all people are equal before the law and that discrimination on any ground is prohibited.²³ As a result of his complaint to the Human Rights Committee, Toonen lost his job. The Human Rights Committee found that because of Tasmania's law, Australia had breached its duties under the treaty. Further, the Committee held that Toonen's firing constituted discrimination based on sexual orientation.²⁴

Additionally, in *Kimberly Hively v. Ivy Tech Community College of Indiana*,²⁵ Hively a lesbian, was teaching as a part-time professor at Ivy Tech Community College's. She applied for at least six full-time positions and was unsuccessful. Later, her part-time contract was not renewed. She believed that the college was rejecting her because of her sexual orientation. The Court of Appeals for the Seventh Circuit held that Kimberly had experienced discrimination based on her sexual orientation. Further, they held that discrimination on the basis of sexual orientation is a form of discrimination based on sex.²⁶

The above two cases are relevant to this study as they are examples of instances where LGB persons have experienced discrimination on the basis of sexual orientation, instituted proceedings and won. Further, Kenya, like Australia, is a party to the ICCPR.²⁷ Therefore, the ruling by the United Nations Human Rights Committee has implications on Kenya as a party to the ICCPR.

According to Shahar Dillbary and Griffin Edwards in their article, *An Empirical Analysis of Sexual Orientation Discrimination*, discrimination, based on sexual orientation, takes two forms. The first is where a person does not conform to the stereotypes of that gender. For example, a woman who walks, talks and acts like a man or a man who has characteristics that are stereotypically female. This could lead to discrimination based on perceived sexual orientation as lesbians are thought to be very manly while gay men are thought to be very

²³ Article 26, *International Covenant on Civil and Political Rights* (1976).

²⁴ *Toonen v. Australia*, CCPR Comm No. 488/1992 (1994).

²⁵ *Kimberly Hively v Ivy Tech Community College of Indiana* (2017), United States Court of Appeals for the Seventh Circuit.

²⁶ *Kimberly Hively v Ivy Tech Community College of Indiana* (2017), United States Court of Appeals for the Seventh Circuit.

²⁷United Nations Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=en&mtdsg_no=IV-4&src=IND on 10 February 2019.

effeminate. This discrimination could take place whether the person is part of the LGB community or not as they are discriminated based on their perceived sexual orientation. The second form is where a person, who does not fit the stereotypes above is discovered to be gay or lesbian.²⁸

Moreover, according to them, once an LGB individual faces discrimination in employment, they hardly ever come forward or institute lawsuits against their employer for numerous reasons. Firstly, it would involve putting their sexual orientation on trial. This would mean having to prove that he or she is attracted to persons of the same sex, which can be a humiliating process. Secondly, in places where homosexual acts are illegal, this could invite criminal accusations and harassment from law officials. Lastly, it could also mean outing themselves to friends and family which could lead to being ostracized.²⁹

The above article is applicable to the study as it highlights the types of discrimination faced by LGB persons everywhere. In addition, it outlines the reasons why LGB persons will not come forward with employment discrimination based on sexual orientation. This paper will contribute to the existing literature by contextualising it in Kenya. It will do this by examining the reasons why sexual minorities experience employment discrimination in Kenya, it will interrogate whether the law protects sexual minorities and it will propose possible solutions to this problem.

1.8 Methodology

This paper shall employ the use of secondary sources such as books and journal articles. It shall also use case law from Kenya and other countries.

1.9 Chapter Breakdown

This paper will be divided into 5 Chapters.

²⁸ Dillbary, J and Edwards, G, 'An Empirical Analysis of Sexual Orientation Discrimination' *The University of Chicago Law Review*, 86(1) 2019, 20, <https://www.jstor.org.ezproxy.library.strathmore.edu/stable/26554392> on 9 February 2019.

²⁹ Dillbary, J and Edwards, G, 'An Empirical Analysis of Sexual Orientation Discrimination', 18.

Chapter One will introduce the topic of study, give a basic background of the research question and discuss the problem statement, hypotheses, literature review and methodology of the research study.

Chapter Two will tackle the theoretical framework by discussing the Theory of Equality.

Chapter Three will respond to the statement problem of to what extent does Article 27(4) of the Constitution and Section 5(4) of the Employment Act protect LGB persons from employment discrimination on the basis of sexual orientation.

Chapter Four will draw a comparative framework between Kenya, South Africa and The United States.

Chapter Five will conclude the study and provide appropriate recommendations.

CHAPTER 2

THEORETICAL FRAMEWORK

2.1 Introduction

In the previous chapter, the proposed topic of this paper was introduced. This entailed providing a background to the problem that the paper will be tackling, stating the problem itself, providing the research question and hypothesis of the paper as well as briefly discussing the theoretical framework. The aim of the first chapter was to justify the need of this study by highlighting the gap in the law and investigating the current knowledge on the area through a brief literature review.

This chapter aims to lay the foundation of the rest of the paper by discussing its theoretical framework. In this chapter, the Theory of Equality will be discussed. The two variations of the theory, Formal Equality and Substantive Equality, will be compared and contrasted in order to highlight which is more suitable for the topic at hand.

2.2 Theory of Equality

Equality, over the years has acquired different definitions depending on the situation with which it is used. Generally, equality is based on the principle that everyone not only deserves the same rights, but that everyone actively has access to them.³⁰ Equality a descriptive concept and a normative concept.³¹

In the former, equality is defined as the relationship among bodies that are similar.³² As a normative concept, it refers to not only the sameness of human beings but also to the special treatment they are entitled to because of their differences.³³ Preferential treatment may mean

³⁰ Parelta P, 'The Theory of Equality: Because it was never meant to be a question' *The Odyssey*, 21 May 2016 <https://www.theodysseyonline.com/the-theory-of-equality> on 19 August 2019.

³¹ Capaldi N, 'The meaning of equality' *Michigan Press*, 2001, 1 http://media.hoover.org/sites/default/files/documents/0817928626_1.pdf on 2 July 2019.

³² Capaldi N, 'The meaning of equality', 1.

³³ Capaldi N, 'The meaning of equality', 1.

ensuring same treatment, or it may mean differential treatment to restore them to or to assist them in living a good life.³⁴

It is argued that the first proponent of equality was Aristotle.³⁵ According to him, equality was the “similar treatment of similar persons”.³⁶ Over time, his idea of equality morphed and has been incorporated in religion. For example, Christianity declared the equal worth of all persons in the eyes of God.³⁷ From a Utilitarian approach, Jeremy Bentham proposed that the Theory of Equality provides that everyone counts as more than the other and that the interests of all should be treated equally.³⁸ John Locke’s view on the theory was that equality is the equal distribution of resources.³⁹ The definition of equality that this paper will employ is that equality refers to the right of people to have similar social positions and receive the same treatment.⁴⁰

From these, we can derive that the Theory of Equality has two main facets: Formal Equality and Substantive Equality.

2.3 Formal Equality

Formal equality refers to, as Aristotle put it, the treatment of like people in a similar manner and unlikes unlike.⁴¹ For Aristotle, equality was a moral virtue and a form of justice. Aristotle took the view that, where citizens rule and are ruled, any law that puts one citizen above the other is unjust. Thus, when a state is being formed, equality means that all who are similar in

³⁴Capaldi N, ‘The meaning of equality’, 1.

³⁵Aristotle, *Politics*, translated by Benjamin Jowett, in *Britannica Great Books*, vol. 9 (Chicago: 1952), VII, 14.

³⁶Aristotle, *Politics*, translated by Benjamin Jowett, in *Britannica Great Books*, vol. 9 (Chicago: 1952), VII, 14.

³⁷The Jerusalem Bible, Galatians 3:26–29.

³⁸Gosepath, S and Edward N, ‘Equality’, <https://plato.stanford.edu/archives/spr2011/entries/equality/> on 13 Aug 2019.

³⁹ Gosepath, S and Edward N, ‘Equality’, <https://plato.stanford.edu/archives/spr2011/entries/equality/> on 13 Aug 2019.

⁴⁰ The Oxford Dictionary, 12th edition.

⁴¹Lyons D, ‘The Weakness of Formal Equality’, *University of Chicago Press Journals*, 1966, 146-
<https://www.jstor.org/stable/pdf/2379322.pdf?refreqid=excelsior%3A68d6cb3e481a9d1b15f5b7d69e6b54e1> on 30th June 2019.

being citizens should enjoy similar privileges.⁴² However, this model is twofold in the sense that the item being compared can only be "like" or "unlike". There is no third option.⁴³

Today, legal formal equality is understood as applying exactly the same rules to everyone.⁴⁴ In law, this takes the form of an express provision on discrimination based on a particular characteristic.⁴⁵ In a constitution, it takes the form of "protected class" status. Hence, if a person does not fall within this protected class, according to Formal Equality, they are not entitled to legal protection.⁴⁶

2.3 Criticisms of Formal Equality

The Aristotelian approach to equality tends to reproduce inequality by seeing the products of social hierarchy as 'difference'.⁴⁷ It is blind to socially constructed hierarchies thus it reinforces social inequality. These social hierarchies include: higher and lower, more and less, top and bottom, better and worse, clean and dirty, served and serving, appropriately rich and appropriately poor, superior and inferior, dominant and subordinate, justly forceful and rightly violated or victimized, commanding and obeying, among others.⁴⁸

Formal equality does well to correct inequalities among the same class of people and if society were structured equally, this approach would work.⁴⁹ However, as society is not constructed this way, formal equality can be regressive because it renders inequalities as differences which can be the basis for treating marginalised groups, unlikes, unlike.⁵⁰

⁴²Lyons D, 'The Weakness of Formal Equality', 146.

⁴³ Sarmas L, 'A Step in the Wrong Direction: The Emergence of Gender "Neutrality" in the Equitable Presumption of Advancement' *Melbourne University Law Review* 19,1994, 758.

⁴⁴Graycar Rand Morgan J, 'Examining Understandings of Equality: One Step Forward, Two Steps Back?' *Australian Feminist Law Journal* 20, 2004.23.

⁴⁵ Katie Eyer, 'Brown, Not Loving: Obergefell and the Unfinished Business of Formal Equality', *Yale Law Journal Forum* 125 (2015-2016): 1

⁴⁶ Levit N, 'A Different Kind of Sameness: Beyond Formal Equality and Antisubordination Strategies in Gay Legal Theory', 61 *Ohio State Law Journal* 2, 2000, 867

⁴⁷ Mackinnon C, *Sex Equality*, 3ed, Foundation Press, Michigan, 2015, 12.

⁴⁸ Mackinnon C, *Sex Equality*, 11.

⁴⁹ Mackinnon C, *Sex Equality*, 12.

⁵⁰ Mackinnon C, *Sex Equality*, 12.

Formal equality, in relation to LGB equality is inappropriate as it perpetuates the belief that sexual minorities are ‘less than’ because they are different from their straight counterparts.⁵¹ As formal equality theory has been based on heterosexual norms, this has meant that anything and anyone not heterosexual is the ‘other’ or ‘abnormal’.⁵² A second fault of formal equality is tied to the dependence on heterosexual norms. This is because if respect for LGB persons is derived only from their resemblance to their straight counterparts, how can these laws alter peoples’ biases against LGB persons?⁵³

Another limitation of formal equality, in relation to legal decisions that address issues affecting the LGB community, is that it cannot begin to comprehend the difficulties of sexual orientation stereotyping that are unable to be remedied under law. Formal equality theory fails to make out important dissimilarities between heterosexuals and the LGB.⁵⁴

2.4 Substantive Equality

Substantive equality requires special measures to be made in the accommodation of differences.⁵⁵ It entails providing equal opportunities as another person due to an allowance being made for them based on their circumstances.⁵⁶ This theory was set out in *Andrews v Law society of British Columbia*.⁵⁷ In this case, Andrews had been denied admission to the Canadian bar because he was not a citizen of Canada. The court used a 3-part test to determine whether a person’s rights, pertaining to substantive equality, have been violated. The court asked: whether there was actual or differential treatment, if so, was it on the basis of one of the prohibited grounds under law and lastly, whether it is discrimination based on an imposed

⁵¹ Levit N, ‘A Different Kind of Sameness: Beyond Formal Equality and Antisubordination Strategies in Gay Legal Theory’,867.

⁵² Levit N, ‘A Different Kind of Sameness: Beyond Formal Equality and Antisubordination Strategies in Gay Legal Theory’,867.

⁵³ Levit N, ‘A Different Kind of Sameness: Beyond Formal Equality and Antisubordination Strategies in Gay Legal Theory’,867.

⁵⁴ Levit N, ‘A Different Kind of Sameness: Beyond Formal Equality and Antisubordination Strategies in Gay Legal Theory’,867.

⁵⁵ Kameri-Mbote P, ‘Fallacies of Equality and Inequality: Multiple exclusions in Law and Legal Discourses’, 8.

⁵⁶ Bernard C, ‘Substantive Equality’ 59 *Cambridge Law Journal* 3, 2000, 566.

⁵⁷ *Andrews v Law Society of British Columbia* (1989), Supreme Court of Canada.

burden or a denied benefit. If the answers to these questions are yes, then a person's rights under substantive equality have been violated.⁵⁸

Additionally, according to Sandra Fredman, substantive equality is a multidimensional concept.⁵⁹ She emphasises that it has four objectives: redressing disadvantage, addressing stigma, stereotyping, prejudice and violence, facilitating participation and accommodating difference which includes structural change.⁶⁰ These in their various dimensions will be discussed below.

The redistributive dimension is geared at redressing disadvantage. Here, substantive equality, has several advantages. Firstly, it includes the view of indirect discrimination and recognizes that equal treatment can be a breach of substantive equality especially if there is unequal impact. Lastly, it encourages affirmative action to redress previous disadvantage.⁶¹

The recognition dimension purposes to highlight the relationship between the right to equality and dignity.⁶² It specifies that the wrongs to be addressed are stigma, stereotyping, prejudice and violence based on a protected characteristic.⁶³ The participative dimension obligates decision makers to hear and respond to the voices minorities rather than imposing decisions. Consequently, this also has the effect of imparting positive obligations on the state to ensure that those affected by certain decisions can take part meaningfully.⁶⁴

The transformative dimension provides that different identities and characteristics should be respected and even celebrated. Additionally, it promotes the view that difference should not attract harm, nor should conformity to the majority be required as a condition for the right to equality. This in turn might require structures to be modified and transformed to accommodate differences. For example, in sex discrimination, rather than requiring women to submit to male

⁵⁸ *Andrews v Law Society of British Columbia* (1989), Supreme Court of Canada.

⁵⁹ Fredman S, '*Discrimination Law*', 2nd ed, Oxford University Press, London, 2011, 25–33.

⁶⁰ Fredman, S, '*Discrimination Law*', 33.

⁶¹ Fredman S, 'Emerging from the Shadows Substantive Equality and Article 14 of the European Convention on Human Rights' *Human Rights Law Review* 16, 2016,273.

⁶² McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' *European Journal of International Law* 1, 2008, 655.

⁶³ McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights', 655.

⁶⁴ Fredman S, 'Emerging from the Shadows Substantive Equality and Article 14 of the European Convention on Human Rights,'273.

norms, substantive equality requires transformation of present male-oriented institutions to cater for the different needs of women.⁶⁵

2.5 Substantive Equality and LGB Persons

Formal equality alone cannot deal with rooted social, economic and cultural challenges.⁶⁶ Substantive equality would therefore be more suitable for this paper. This is due to the fact that it provides for the accommodation of differences and encourages the taking of active steps in the protection of people disadvantaged by those differences. LGB persons are disadvantaged in that, in society, their sexual orientation is the minority and because of this, they face discrimination in including employment.

The four different components of substantial equality will be able to highlight and address the legal problem that this paper will address. For example, the redistributive dimension recognises discrimination, prejudice and the violence that occurs to LGB persons due to homophobia/biphobia. The recognition and participative dimension compels the state to recognise the discrimination faced by LGB persons and take positive steps to redress them in law. The transformative dimension encourages employment structures to change and cater for LGB persons such as having policies expressly prohibiting any form of discrimination against them. The *Andrews case*, will also be of use to this paper. It will help highlight that LGB persons have faced actual/ differential treatment based on their sexual orientation.

In summary, substantive equality alters the circumstances that are identified as giving rise to equality questions in the first place as it begins by asking, what is the substance of this particular inequality, and are these facts an instance of that substance? Its core awareness is that inequality, substantively speaking, is always a social relation of rank ordering, as was previously mentioned. Substantive equality, rather than requiring that reality fit existing legal equality interpretation, transforms inequality by recognizing substance, the reality of inequality, as what it is.⁶⁷ This is why it is suitable for this paper.

⁶⁵ Fredman S, 'Emerging from the Shadows Substantive Equality and Article 14 of the European Convention on Human Rights,' 273.

⁶⁶ Kameri-Mbote P, 'Fallacies of Equality and Inequality: Multiple exclusions in Law and Legal Discourses,' 8.

⁶⁷ Mackinnon C, 'Substantive Equality: A Perspective' 6.

2.6 Conclusion

This chapter begun by introducing the theory of Equality and its proponents. It then discussed the two forms of the theory; Formal Equality and Substantive Equality. The reasons why Formal equality would be unsuitable for this paper were discussed. Substantive equality was then introduced and reasons why it is suitable for the problem this paper will address were given and justified. The problem that this paper will address will be discussed in detail in the next chapter.

CHAPTER 3

LGB DISCRIMINATION AND EMPLOYMENT LAW IN KENYA

3.1 Introduction

In the previous chapter, the theoretical framework, Theory of Equality, was discussed. The benefits and criticisms of Formal equality and Substantial equality were analysed. Lastly, Substantial equality was concluded as the guiding theory of this paper.

In this chapter, the paper will respond directly to the problem statement: to what extent does Article 27(4) of the Constitution and Section 5(4) of the Employment Act protect LGB persons from employment discrimination on the basis of sexual orientation. In order to do this, the paper will provide a background to the problem. It will then seek to answer the problem statement then provide reasons for the answer. Lastly, it will discuss the challenges that lie therein.

3.2 Contextualizing LGB Discrimination in Kenya

As will be discussed later in the chapter, a majority Kenyan's are opposed to LGB rights in the country. As the law does not operate in a vacuum, it is imperative to understand the reasons for this opposition. There are numerous reasons for their disapproval which will be discussed in this part of the chapter.

The main argument that is always proposed in the opposition of LGB rights is religion.⁶⁸ In Christianity for example, the verse that is often cited is:

*'If a man lays with another man as with a woman, both men have committed a detestable act. They must both be put to death, for they are guilty of a capital offense'*⁶⁹

Similarly, both Christianity and Islam share the story of Sodom and Gomorrah. According to Islamic scripture, the Prophet Lot had warned his people of 'immorality', for they did 'approach men with desire, instead of women'. Consequently, the people tried to expel their

⁶⁸ *EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)* (2016) eKLR.

⁶⁹ Leviticus 20:13, *The new King James Bible*.

Lot from the city, and went as far as trying to sexually assault the angels who came down in the guise of men. Consequently, God destroyed the people of Lot with a huge natural disaster, only saving the prophet and his family.⁷⁰ Most conservative Christians and Muslims take this story as a justification to denounce Lesbians, Gays and Bisexuals.⁷¹

Another reason for the denial of LGB rights is that it is seen as ‘un-African’, not part of African values or ‘western influence’. There are several thinkers who are convinced that homosexuality was non-existent among indigenous Africans.⁷² Specifically, anthropologists Steven Murray and Will Roscoe highlighted that colonisers thought that ‘the negro race in Africa was untainted by sodomy’.⁷³ Other writers in African literature viewed homosexuality as a phenomenon of European and American expatriates and thus a symbol of ‘cultural trauma’.⁷⁴ Some writers have taken this further and called same sex attraction one of the immoralities introduced by colonialism.⁷⁵

Lastly, the misconceptions and stereotypes that many Kenyan’s have against LGB persons has contributed to the denial of their rights. Some of these include: it is unnatural to be attracted to persons of the same sex, same sex attraction is learned behaviour that can be unlearned through therapy, gay people are paedophiles and rapists that attack children, overly feminine men and very masculine women are gay and that gay people have been possessed by demons.⁷⁶

Unfortunately, due to these reasons, sexual minorities are not expressly protected in Kenyan law. What makes matters worse is that upon a brief examination of these arguments, they can be discredited.

⁷⁰ The Holy Quran, 07:80.

⁷¹ Akyol M, ‘What does Islam say about being gay’ The New York Times, 28 July 2015 <https://www.nytimes.com/2015/07/29/opinion/mustafa-akyol-what-does-islam-say-about-being-gay.html> on 29 September 2019.

⁷² Dlamini B, ‘Homosexuality in the African Context’ 2 *Agenda: Empowering women for gender equity* 67, 128.

⁷³ Murray S and Roscoe W, ‘*Bay-Wives and Female Husbands: Studies of African Homosexualities*’, St Martinin’s Press, New York, 1998, 50.

⁷⁴ Murray S and Roscoe W, ‘*Bay-Wives and Female Husbands: Studies of African Homosexualities*’, 50.

⁷⁵ Akyol M, ‘What does Islam say about being gay’ The New York Times, 28 July 2015 <https://www.nytimes.com/2015/07/29/opinion/mustafa-akyol-what-does-islam-say-about-being-gay.html> on 29 September 2019.

⁷⁶ Anonymous, ‘A Homosexual Teacher's Argument and Plea’ 2 *The Phi Delta Kappan* 59, 1997, 95.

The religious argument has been called to question by numerous scholars. According to Dr Idan Deshorwitz, a biblical scholar, before the writings of Leviticus, prohibitions about sexual minorities were unheard of in the ancient world.⁷⁷ Apparently, sections in Leviticus were added a century later from when the book was originally written. Earlier editions of the text have been silent on the matter of sex between men. In fact, there is good evidence which demonstrates that it permitted sex between men.⁷⁸ The additions were made to hide that same-sex relations had once been permissible.⁷⁹

Similarly, in Islam many scholars have called to question the Quranic story of Lot and the destruction of Sodom and Gomorrah. The Imam, Muhsin Hendricks, proposes that it would not be correct to single out male-to-male sex as the main reason for the destruction of Sodom. According to him, in the entire Quranic parable, there is no allusion to sexual orientation thus it can't be used as a blanket condemnation of same-sex attraction.⁸⁰

Same sex attraction was not unknown in Africa before colonisation.⁸¹ What was foreign was the identity of being gay, lesbian and bisexual.⁸² However, their acts, and emotions were not foreign. In South Africa, for example, there are instances where same-sex relations were associated with religious and spiritual significance. Sexual expression was considered a spectrum of activity spanning the life of a person rather than a distinct and separate identity like in the west.⁸³ In fact, homophobia is more likely to qualify as un-African than same sex attraction. The homophobia and biphobia that is experienced in Africa can be attributed to colonisation as the ideas that brought about homophobia and biphobia were introduced by the colonialists.⁸⁴

⁷⁷ Deshorwitz I, 'The Secret History of Leviticus', *The New York Times*, 21 July 2018, 2.

⁷⁸ Deshorwitz I, 'Revealing Nakedness and Concealing Homosexual Intercourse: Legal and Lexical Evolution in Leviticus 18' *Hebrew Bible and Ancient Israel* 6, 2017, 5

⁷⁹ Deshorwitz I, 'Revealing Nakedness and Concealing Homosexual Intercourse: Legal and Lexical Evolution in Leviticus 18' *Hebrew Bible and Ancient Israel* 6, 2017, 5.

⁸⁰ Hendricks M, 'Islamic Texts: A Source for Acceptance of Queer Individuals into Mainstream Muslim Society' *5 The Equal Rights Review*, 2010, 35.

⁸¹ Dlamini B, 'Homosexuality in the African Context', 125.

⁸² Dlamini B, 'Homosexuality in the African Context', 125.

⁸³ Dlamini B, 'Homosexuality in the African Context', 125.

⁸⁴ Dlamini B, 'Homosexuality in the African Context', 125.

Lastly, the misconceptions and stereotypes are misinformed. For starters, same-sex attraction is well documented in the animal kingdom in over 1500 species.⁸⁵ Being LGB is not learned behaviour, it is a natural variation of sexuality just like heterosexuality.⁸⁶ It cannot be ‘unlearned’ or ‘changed’ by therapy and any attempt to do so is considered by many psychologists as abuse.⁸⁷

In relation to the claim that homosexuals are paedophiles, it has been statistically proven that a child is over 100 times more likely to be sexually molested by a heterosexual relative than by a homosexual person. Additionally, paedophiles are motivated by power and control, not by sexual desire and they do not distinguish between male and female victims.⁸⁸ 90% of all paedophiles identify themselves as heterosexuals.⁸⁹ Some LGB people can be identified by stereotypical mannerisms and characteristics. However, many heterosexuals also display these same characteristics, such as that of the ‘tomboy’ or the ‘effeminate’ male and therefore this should not be used as a method of stereotyping LGB people.⁹⁰

3.3 Legal Background on LGB Discrimination in Kenya

Article 27 of the Constitution of Kenya guarantees freedom from discrimination where it provides that no one will be discriminated 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.⁹¹ When this article was being drafted, before the promulgation of the Constitution, numerous things were considered.

The mandate of the Constitution of Kenya Review Commission (CKRC), was to cure the deficiencies of the Independence Constitution. One of the deficiencies was that rights could be suspended at any time and for any reason.⁹² To this end, the commission had its mission as

⁸⁵ Cziko G, ‘The Things We Do: Using the Lessons of Bernard and Darwin to Understand the What, How, and Why of Our Behavior’ *MIT Press*, 200, 25.

⁸⁶ American Psychiatric Association, *Position Statement on Conversion Therapy and LGBTQ Patients*, 2018, 3.

⁸⁷ American Psychiatric Association, *Position Statement on Conversion Therapy and LGBTQ Patients*, 2018, 3.

⁸⁸ American Psychiatric Association, *Position Statement on Conversion Therapy and LGBTQ Patients*, 2018, 3.

⁸⁹ Seto M, ‘Is pedophilia a sexual orientation’ 6 *Archives of sexual behaviour* 41, 2012, 20.

⁹⁰ Blashille A, ‘Gay stereotypes: The use of sexual orientation as a cue for gender related attributes’ *Sex roles* 12, 2009, 789.

⁹¹ Article 27(4), *Constitution of Kenya*, 2010.

⁹² Constitution of Kenya Review Commission, *Final draft*, 2005, 40.

ensuring the protection of rights for all in the new constitution. Thus, the commission was tasked with examining and reviewing the social and cultural conditions that promote numerous forms of discrimination and make recommendations to secure equal rights for all.⁹³

The CKRC, through public participation, gathered information on what the majority of Kenyans wanted to be included in the new constitution. The CKRC Report highlighted that majority of the public did not want homosexuality to be legal.⁹⁴ In fact, both drafts of the proposed constitution, Bomas Draft Constitution and Wako's Draft Constitution, outlawed the union of same-sex couples.⁹⁵ Additionally, both drafts provided for the freedom from discrimination but made no mention of sexual orientation as a prohibited ground.⁹⁶ Similarly, Kenya's current Constitution has this provision but does not expressly provide for the protection of sexual minorities.⁹⁷

3.4 LGB Discrimination in Kenyan Law

3.4.1 LGB Discrimination Under the Constitution

As has been mentioned before, Article 27 of the Constitution of Kenya guarantees freedom from discrimination.⁹⁸ As can be noticed from the direct reading of the article, sexual orientation has not been expressly provided for as a ground of discrimination. This has led to various cases raising the question of whether sexual orientation can be read into the above Article.

In *EG v Non- Governmental Organisations Co-ordination Board & 4 others*,⁹⁹ the petitioner sought to register the names: Gay and Lesbian Human Rights Council, Gay and Lesbian Human Rights Observatory and Gay and Lesbian Human Rights Organisation. The board, informed the petitioner that the names were unacceptable. In response, the petitioner then lodged the names: Gay and Lesbian Human Rights Commission, Gay and Lesbian Human Rights Council and

⁹³ Constitution of Kenya Review Commission, *Final draft*, 2005, 43.

⁹⁴ Constitution of Kenya Review Commission, *Final draft*, 2005, 423.

⁹⁵ Article 41, *Boman's Draft Constitution* (2005) and Article 42, *Wako's Draft Constitution* (2004).

⁹⁶ Article 36, *Boman's Draft Constitution* (2005) and Article 37, *Wako's Draft Constitution* (2004).

⁹⁷ Glinz C, 'Kenya's New Constitution: a Transforming Document or Less than Meets the Eye' 1 *Law and Politics in Africa, Asia and Latin America* 44, 2011, 70

⁹⁸ Article 27(4), *Constitution of Kenya*, 2010.

⁹⁹ *EG v Non- Governmental Organisations Co-ordination Board & 4 others* (2015) eKLR.

The Gay and Lesbian Human Collective for Reservation. These were still rejected by the board. In the rejection, the court cited section 162, 163 and 165 of the penal code which criminalises gay and lesbian conduct. This was the basis of the rejection. Additionally, the board cited the NGO Regulations of 1992 as in their opinion, the names violated this provision as they were ‘repugnant to’ and ‘inconsistent with existing law’ as well as ‘undesirable’.¹⁰⁰ Lastly, the board argued that sexual orientation was not provided for as a prohibited ground of discrimination in Article 27(4) nor is same-sex marriage permitted in Article 45(2).

The issues before the court were, firstly, whether LGB persons have a right to form associations in accordance with the law. Secondly, whether the decision of the board not to register the NGO because of the name violated the petitioners right under article 27(4).¹⁰¹

Referring to the first issue, the court held that the right to associate applies to everyone, regardless of the popularity of their views or lack thereof. The court further re-iterated the Constitutional Court of South Africa in *National Coalition for Gay and Lesbian Equality v Minister of Justice*, where it found that:

*‘while the constitution recognises the right of persons to, disagree or condemn homosexual conduct, to hold and articulate such beliefs, it does not permit the state to turn these beliefs into dogma and impose them on the society.’*¹⁰²

On the second issue, the court noted that absence of sexual orientation as one of the prohibited grounds in Article 27(4) does not assist the board or give the state permission to discriminate against people. On reading the article, the court interpreted ‘including’ to mean that the list is not closed and that sexual orientation can be read into the article. Further, the court highlighted that Article 259 (4)(b) interpreted ‘including’ to mean ‘includes but is not limited to’.¹⁰³ Relying on this case alone, it would seem that sexual orientation can be read into Article 27(4) of the Constitution. However, later Kenyan case law begs to differ.

¹⁰⁰ Section 8(3)(b), *NGO Regulations* (Act 19 of 1992).

¹⁰¹ *EG v Non- Governmental Organisations Co-ordination Board & 4 others* (2015) eKLR.

¹⁰² *National Coalition for Gay and Lesbian Equality v Minister of Justice* (1999), Constitutional Court of South Africa.

¹⁰³ *EG v Non- Governmental Organisations Co-ordination Board & 4 others* (2015) eKLR.

In *EG & 7 others v Attorney General*,¹⁰⁴ the High Court was asked to rule on, among others, whether Section 162 (a) and (c) and Section 165 of the Penal Code violates Article 27, 28, 29, 31, 32 & 43 of the Constitution. Section 162 provides that any person who has carnal knowledge of any person against the order of nature or 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.¹⁰⁵ On the other hand, Section 165 states that any male person who commits any act of gross indecency with another male person whether in public or private, is guilty of a felony and is liable to imprisonment for five years.¹⁰⁶ These provisions are relevant to this paper as they deal with sexual conduct between people of the same sex and because the case dealt with whether Article 27(4) of the constitution had been violated.

The High Court argued that when dealing with any question on the interpretation of the constitution, one must ask what is the context of that provision and what purpose it is serving. The court then asked itself if the above law differentiates between persons, whether this differentiation amounted to discrimination and if this discrimination was unfair. The court found that the reading of the sections did not discriminate as it reads ‘any male person’ not ‘homosexual’ or ‘bisexual’ men. Therefore, Section 165 does not differentiate between men and that this law applied to all men equally. Moreover, the court held that Section 162 applied to both men and women and therefore did not discriminate against anyone.¹⁰⁷

Additionally, the court referred to the *Eric Gitari case*.¹⁰⁸ While it agreed with the finding of the Court of Appeal that sexual orientation should be read into Article 27(4) of the Constitution ‘where circumstances allow’, the court was not convinced that it applied in this situation. In the court’s view, holding to the context and purpose of the constitution, decriminalizing same-sex conduct would be violating the right of person to marry people of the opposite sex.¹⁰⁹ In the courts opinion, it would lead to LGB persons living together, in a way similar to marriage which would violate the spirit and purpose of the above article. As the will of the people is

¹⁰⁴ *EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)* (2016) eKLR.

¹⁰⁵ Section 162(a) and (c), *Penal Code of Kenya* (Chapter 63 of 2012).

¹⁰⁶ Section 165, *Penal Code of Kenya* (Chapter 63 of 2012).

¹⁰⁷ *EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)* (2016) eKLR.

¹⁰⁸ *EG v Non- Governmental Organisations Co-ordination Board & 4 others* (2015) eKLR.

¹⁰⁹ Article 45(2), *Constitution of Kenya* (2010).

expressed in the constitution, and seeing that the constitution does not provide for same sex marriage, the court ruled that Article 27(4) had not been violated.¹¹⁰

The above is a clear example of formal equality as the court is treating all sexual minorities, the unlikes, the same. As, according to the constitution, a person can only marry someone of the same sex.¹¹¹ Therefore the law prohibiting people from marrying someone of the opposite sex applies equally, in the court's eyes, to all sexual minorities. In addition, the court's opinion is that Section 162 and 165, applies to all men and therefore does not amount to discrimination. However, the court fails to take into account that this law mostly affects gay and bisexual men as opposed to heterosexual men.

3.4.2 LGB Discrimination in The Employment Act

Section 5 of the Employment Act provides that no employer shall discriminate based on race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status.¹¹² From a literal reading of this section, there is no express provision providing for sexual orientation. This omission has had consequences on LGB persons and on others suspected of being part of the LGB community.

According to a Report by the Kenya Human Rights Commission, sexual minorities are not protected from discrimination under Section 5(4) of the Employment Act.¹¹³ In the report, a young lesbian woman was dismissed from her place of employment because her employer allegedly had evidence to prove her sexual orientation. In her dismissal letter, gross misconduct was stated as the reason for her termination. She did not wish to sue for wrongful termination because she did not think that the Employment Act protected her from discrimination based on sexual orientation.¹¹⁴

¹¹⁰ *EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)* (2016) eKLR.

¹¹¹ Article 45, *Constitution of Kenya* (2010).

¹¹² Section 5(4), *Employment Act* (2007).

¹¹³ Kenya Human Rights Commission, *The Outlawed amongst Us*, 26.

¹¹⁴ Kenya Human Rights Commission, *The Outlawed amongst Us*, 26.

Recently, 3 Anglican Church of Kenya (ACK), priests were dismissed from their duties in the church over allegations that they were homosexuals.¹¹⁵ These allegations were later discovered to be unfounded but by then, the damage had already been done. The priests suffered emotional trauma from the ordeal and they were isolated from the community.¹¹⁶ These are a few examples of the reported cases of employment discrimination on the basis of sexual orientation. The Employment Act's failure to provide for sexual orientation as a protected ground from discrimination has discouraged sexual minorities from seeking legal assistance as they have no legal protection under the act.¹¹⁷

3.6 Challenges

Due to the lack of the express provision of sexual orientation in article 27(4) of the Constitution and Section 5(4) of the Employment Act, there have been several challenges. It is unclear as to what situations sexual orientation may be read into the Constitution and the Employment Act especially with the conflicting rulings of the *Eric gitari case* and *EG & 7 others v Attorney General*.

Secondly, mere suspicion of a person being LGB has led to the loss of employment as was the case with the ACK priests.¹¹⁸ This, together with other stories documented in the Kenya Human Rights Report: *The Outlawed Amongst Us*, is evidence of legal challenges faced due to the lack of express legal protection of sexual minorities.¹¹⁹

Lastly, because sexual orientation is not envisioned in Article 27 of the Constitution, any attempts to secure rights of sexual minorities is constantly met with the objection of permitting same-sex marriage. By conflating one with the other, opponents of the rights of sexual

¹¹⁵ Wangui J, 'ACK priests who sued church over gay claims get Sh6.8m', 20 December 2015 <https://www.nation.co.ke/counties/nyeri/ACK-priests-in-gay-case-get-Sh6-8m/1954190-4903728-fhn993z/index.html> on 4 October 2019.

¹¹⁶ Wangui J, 'ACK priests who sued church over gay claims get Sh6.8m', 20 December 2015 <https://www.nation.co.ke/counties/nyeri/ACK-priests-in-gay-case-get-Sh6-8m/1954190-4903728-fhn993z/index.html> on 4 October 2019.

¹¹⁷ Klinken A, *'Kenyan, Christian, Queer'* 1ed, The Pennsylvania University Press, University Park, 2019, 103.

¹¹⁸ Wangui J, 'ACK priests who sued church over gay claims get Sh6.8m', 20 December 2015 <https://www.nation.co.ke/counties/nyeri/ACK-priests-in-gay-case-get-Sh6-8m/1954190-4903728-fhn993z/index.html> on 4 October 2019.

¹¹⁹ Kenya Human Rights Commission, *The Outlawed amongst Us*, 26.

minorities are intentionally misrepresenting the argument thus making it harder to realise these rights.

3.6 Conclusion

The problem statement, of this paper is: to what extent does Article 27(4) of the Constitution and Section 5(4) of the Employment Act protect LGB persons from employment discrimination on the basis of sexual orientation? Based on the above, it is evident that the answer to this question is no as, according to *EG v Non- Governmental Organisations Co-ordination Board & 4 others*, sexual orientation can only be read into article 27(4) depending on the circumstances. This means that in some instances, LGB persons are not protected by Article 27(4) of the Constitution. Similarly, in Section 5(4) of the Employment Act, sexual orientation is not mentioned leading those that do face this form of discrimination in employment with no way to seek redress.

In summary, sexual orientation is not envisioned in Article 27 of the Constitution and Section 5 of the Employment Act. During the formation of the Constitution, sexual orientation was not included and in later case law, there have been inconsistencies as to whether it can be read into the constitution. The reasons why sexual minorities are denied their rights have been discussed and through counter arguments, they have been found not to hold water. Due to this gap in the law, challenges have arisen and their solutions will be addressed in Chapter 5.

CHAPTER 4

COMPARATIVE ANALYSIS

4.1 Introduction

In the previous chapter, the main legal issue in this paper, LGB discrimination in Kenya, was discussed. The problem statement of the paper is: to what extent does Article 27(4) of the Constitution and Section 5(4) of the Employment Act protect LGB persons from employment discrimination on the basis of sexual orientation? Based on the discussion in the previous chapter, it became evident that the answer to this question is no. Referring to *EG v Non-Governmental Organisations Co-ordination Board & 4 others*, sexual orientation can only be read into article 27(4) depending on the circumstances. Additionally, the constitutional and social background were given. Lastly, the challenges arising from the legal issue were discussed.

In this chapter, the legal framework in Kenya will be compared to that of South Africa and the United States. A justification as to why these countries are being compared to Kenya will be discussed. A comparison will then be drawn from the following themes: legislation on protection of sexual minorities, constitutional rights of sexual minorities and case law enforcing rights of sexual minorities. Lastly, a conclusion will be drawn.

4.2 Selection of USA and South Africa as Comparative Studies

South Africa will be used in this study for various reasons. First, according to many legal and constitutional experts, the Kenyan Constitution was heavily influenced by the South African Constitution.¹²⁰ For example, the Kenyan Bill of Rights was borrowed from that of South Africa's Constitution as, when it comes to Socio-economic Rights in Kenya, many of them were adopted verbatim from South Africa.¹²¹ Specifically, Article 27(4) of Kenya's Constitution was borrowed from Section 9 of the South African Constitution.¹²² However,

¹²⁰ Glinz C, 'Kenya's New Constitution: a Transforming Document or Less than Meets the Eye' 1 *Law and Politics in Africa, Asia and Latin America* 44, 2011, 70.

¹²¹ Glinz C, 'Kenya's New Constitution: a Transforming Document or Less than Meets the Eye', 70.

¹²² Glinz C, 'Kenya's New Constitution: a Transforming Document or Less than Meets the Eye', 70.

Sexual orientation was omitted from the Kenyan Constitution. This will be discussed in more detail in the next section.

Both countries have local government separate from the national government that deal with matters affecting specific areas.¹²³ Additionally, Kenya and South Africa are both part of the commonwealth.¹²⁴ Also, like Kenya, South Africa has an employment act. This is The Basic Conditions of Employment Act. However, unlike Kenya, majority of South Africans believe that sexual minorities should have the same rights as their heterosexual counterparts. In a recent survey it was found that over 51% of South Africans support the rights of sexual minorities.¹²⁵

Also, while South Africa has policies in place protecting sexual minorities, such as the Prevention of Unfair Discrimination Act which protects sexual minorities from employment discrimination, Kenya has none. Thus, as Kenya and South Africa are located on the same continent and have similar legal structures and similar social and cultural experiences comparing the two countries would be essential for this paper.

The United States of America (USA) will also be included in this study for various reasons. Firstly, like Kenya, USA has an employment act, the Employment Act of 1946. Secondly, while in the US constitution, sexual orientation has not been provided for, some states have been successful in ensuring protection of the rights of sexual minorities especially in matters of employment discrimination.¹²⁶ In addition to this, USA's population is much more tolerant and accepting to sexual minorities as compared to Kenya.¹²⁷ Therefore, due to their success in ensuring the protection of LGB persons, it is worth comparing both countries to learn how they have achieved this.

¹²³ Glinz C, 'Kenya's New Constitution: a Transforming Document or Less than Meets the Eye', 75.

¹²⁴ The Royal Commonwealth Society <https://www.thercs.org/international-network/africa/branches/> on 19 November 2019.

¹²⁵ The Other Foundation, *Progressive Prudes*, 2016, 5.

¹²⁶ *Kimberly Hively v Ivy Tech Community College* (2017), Court of Appeals of the United States for the Seventh Circuit.

¹²⁷ GSS Data Explorer, *Should Homosexuals Be Allowed to Marry*, 2018, 13.

4.3 Constitutional Provisions on the Protection of Sexual Minorities

Kenya, as has been discussed in the previous chapter, has no express provision in its Constitution protecting sexual minorities from discrimination. The Kenyan Constitution provides that:

*'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'*¹²⁸

However, South Africa, in 1996, became the first country in the world to explicitly outlaw discrimination based on sexual orientation.¹²⁹ The South African Constitution provides that:

*'Everyone is equal before the law and has right to equal protection and the benefit of the law. Prohibited grounds of discrimination include race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth'*¹³⁰

The USA constitution, unlike the that of South Africa, does not explicitly provide for the protection of sexual minorities from discrimination. However, the 14th Amendment provides that:

*'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'*¹³¹

¹²⁸ Article 27(4), *Constitution of Kenya* (2010).

¹²⁹ The Constitutional Court of South Africa, *Gay and Lesbian Rights* <https://www.concourt.org.za/index.php/gay-and-lesbian-rights> on 14 October 2019.

¹³⁰ Section 9, *Constitution of South Africa* (1997).

¹³¹ 14th Amendment, *Constitution of the United States of America*, (1868).

The last sentence of the above amendment is known as the Equal Protection Clause. This clause has been instrumental in securing LGB rights based on the interpretation of the courts.¹³² This will be discussed in *Lawrence v Texas* and *Romer v Evans* later in this chapter. Therefore, sexual minorities are protected from discrimination upon the literal reading of the South African Constitution and through the judicial interpretation of the USA Constitution.

4.3 Legislation Protecting Sexual Minorities

Kenya has no laws specifically prohibiting discrimination based on sexual orientation. The Employment Act of Kenya, while providing an exhaustive list of what an employer may not discriminate against in their employee, the Act fails to mention sexual orientation as a prohibited ground.

South Africa, on the other hand, has the Promotion of Equality and Prevention of Unfair Discrimination Act (Equality Act). The SA government is obligated under this Act to promote equality as envisioned in the South Africa Constitution. This includes prevention from discrimination based on sexual orientation.¹³³ In employment matters specifically, South Africa has the Employment Equity Act. The purpose of this Act is to achieve equality at work places by removing unfair discrimination.¹³⁴ The act must also be interpreted in accordance with Section 3 of the South African Constitution.¹³⁵ The Act goes further to provide that an employer may not discriminate, either directly or indirectly, against an employee based on their sexual orientation.¹³⁶ Lastly, in housing, a landlord cannot discriminate against a prospective tenant or during the term of a lease based on sexual orientation.¹³⁷

In the USA, under federal law, there are no anti-discriminatory laws specifically prohibiting discrimination based on sexual orientation. There are also none specifically touching on employment discrimination based on sexual orientation.¹³⁸ However, there have been executive

¹³² Hall S, 'Americanism, Un-Americanism, and the Gay Rights Movement' 47 *Journal of American Studies* 4, 2013, 1130.

¹³³ Section 2(b), *Prevention of Unfair Discrimination Act of South Africa* (Act No 4 of 2000).

¹³⁴ Section 2(a), *Prevention of Unfair Discrimination Act of South Africa* (Act No 4 of 2000).

¹³⁵ Section 3(a), *Prevention of Unfair Discrimination Act of South Africa* (Act No 4 of 2000).

¹³⁶ Section 6(1), *Prevention of Unfair Discrimination Act of South Africa* (Act No 4 of 2000).

¹³⁷ Section 4, *Rental Housing Act of South Africa* (Act No 50 of 1999).

¹³⁸ Tilesik A, 'Pride and Prejudice: Employment Discrimination against Openly Gay Men in the United States' 117 *American Journal of Sociology* 2, 2011, 587.

orders prohibiting discrimination based on sexual orientation for various factors in the USA government. These include in issuing security clearance,¹³⁹ and in hiring or contracting federal employees.¹⁴⁰ Additionally, the USA has the Mathew Sheppard Hate Crimes Prevention Act which expanded the definition of hate crimes to include sexual orientation or perceived sexual orientation.¹⁴¹ It also mandates the attorney general to provide assistance in criminal investigations of crimes committed based on prejudice against sexual minorities.¹⁴² Lastly, the Act lists violence based on actual or perceived sexual orientation as criminal offences.¹⁴³

4.4 Case Law Advancing the Rights of Sexual Minorities

In 1999 South Africa, the case of *National Coalition for Gay and Lesbian Equality and another v Minister of Justice and others*,¹⁴⁴ was brought before the Constitutional Court. The issue was whether the common law provisions and other statutory provisions dealing with same-sex activity between men were discriminatory and thus unconstitutional. The court unanimously agreed and struck down the legislation. The court reasoned that those provisions were a violation of human dignity. It recognised that in the South African society, heterosexuality has been the norm and because of this, sexual minorities have been labelled as deviants. The court called the public to recognise the diversity and variability of human beings which should be celebrated. The court then noted that the constitution should expand to accommodate and accept differences, not ‘disclude’ others from it. According to Ackerman J, when focusing on the impact the law had on sexual minorities, he noted that such discrimination would only serve to reinforce societal prejudices, encourage stigma and discrimination in employment.¹⁴⁵ The above case removed the anti-sodomy laws in South Africa This was a huge step in realizing the rights of sexual minorities. The next step happened almost 10 years later.

¹³⁹ Executive Order 12968 of 1995, United States of America.

¹⁴⁰ Executive Order 13087 of 2012, United States of America.

¹⁴¹ Section 2, *Mathew Sheppard and James Byrd Jr Act of the United States of America* (Act of 2009).

¹⁴² Section 4, *Mathew Sheppard and James Byrd Jr Act of the United States of America* (Act of 2009).

¹⁴³ Section 290, *Mathew Sheppard and James Byrd Jr Act of the United States of America* (Act of 2009).

¹⁴⁴ *National Coalition for Gay and Lesbian Equality and another v Minister of Justice and others* (1999), Constitutional Court of South Africa.

¹⁴⁵ *National Coalition for Gay and Lesbian Equality and another v Minister of Justice and others* (1999), Constitutional Court of South Africa.

In *Strydom v. Nederduitse Gereformeerde Gemeente Moreleta Park*, Equality Court of South Africa,¹⁴⁶ the issue of employment discrimination was raised. The respondent, a church, had hired the plaintiff as a music teacher in one of its religious schools. When the church found out that he was engaged to another man, it terminated his contract. The grounds of termination were that a homosexual could not be a positive role model for students. The issue before the court was whether the church's right to freedom of religion and religious expression permitted a violation of the plaintiff's right to non-discrimination in employment.¹⁴⁷

The church argued that allowing a homosexual man to work in the school would have presented an 'unacceptable moral example' to students thus preventing them from teaching their doctrine effectively. The plaintiff, on the other hand, cited the Equality Act which lists sexual orientation as a protected class. The court held that by virtue of the Act and Section 9 of the Constitution, sexual minorities were protected from discrimination in employment. The court noted that the complainant's status as a contractual employee meant that he had a right to protection from discrimination based on sexual orientation.¹⁴⁸ This case cemented the protection of sexual minorities from discrimination in employment.

The above cases highlight how the South Africa enforced existing laws expressly protecting sexual minorities. Unfortunately, Kenya does not have such laws. In order to ensure protection of sexual minorities within Kenya's existing laws, it is important to look at a legal system that has achieved this without such express provisions like USA.

In 2003, *Lawrence v Texas*,¹⁴⁹ was brought before the US Supreme Court. Lawrence was arrested in his apartment when he was found engaging sexual intercourse with another man. He was charged under Texas' Sodomy Law. The issues before the Supreme Court included whether the sodomy laws of Texas violated the 14th Amendment, specifically, the Equal

¹⁴⁶ *Strydom v. Nederduitse Gereformeerde Gemeente Moreleta Park*, Equality Court of South Africa (2008), High Court of South Africa.

¹⁴⁷ *Strydom v. Nederduitse Gereformeerde Gemeente Moreleta Park*, Equality Court of South Africa (2008), High Court of South Africa.

¹⁴⁸ *Strydom v. Nederduitse Gereformeerde Gemeente Moreleta Park*, Equality Court of South Africa (2008), High Court of South Africa.

¹⁴⁹ *Lawrence v Texas* (2003), Supreme Court of the United States.

Protections Clause and whether the petitioner's criminal conviction for consensual sexual intimacy in their homes violated their right to privacy under the 14th Amendment.¹⁵⁰

Justice Kennedy, when writing for the majority, wrote that a fair understanding of the basic constitutional right to privacy, takes into account both gay and straight sexual relations. In the courts opinion, the freedom protected by the US constitution allows homosexuals as well as heterosexual persons the right to establish a personal bond with another person. Thus, the court held the sodomy laws to be unconstitutional as it penalized only acts committed by same-sex couples.¹⁵¹

In *Romer v Evans*,¹⁵² multiple municipalities in Colorado passed ordinances prohibiting discrimination based on sexual orientation. Some voters responded to this by passing a law, Amendment Two, which was aimed at preventing the government from protecting someone based on sexual orientation. The issue brought before the Supreme Court was whether it was constitutional for a state to pass a law prohibiting state and local governments from enacting anti-discriminatory legislation to protect sexual minorities. Colorado argued that Amendment 2 was justified as it put sexual minorities in the same position as heterosexuals.¹⁵³

The Supreme Court disagreed with Colorado and held that the legislation was unconstitutional. The court reasoned that the legislation was preventing laws protecting gays and lesbian from being enacted. This showed differential treatment as it forbade the reinstatement of laws that would protect their interests in both public and private sectors.¹⁵⁴ This case is significant as it established that gay men, lesbians and bisexuals possess the same rights as any group of people and are therefore entitled to protection of their rights.

More recently, in *Kimberly Hively v Ivy Tech Community College of Indiana*,¹⁵⁵ the plaintiff, an openly lesbian woman, was denied full-time positions at Ivy Tech due to her sexual orientation. The matter before the Court of Appeal was whether actions taken on the basis of

¹⁵⁰ *Lawrence v Texas* (2003), Supreme Court of the United States.

¹⁵¹ *Lawrence v Texas* (2003), Supreme Court of the United States.

¹⁵² *Romer v Evans* (1993), Supreme Court of the United States.

¹⁵³ *Romer v Evans* (1993), Supreme Court of the United States.

¹⁵⁴ *Romer v Evans* (1993), Supreme Court of the United States.

¹⁵⁵ *Kimberly Hively v Ivy Tech Community College* (2017), Court of Appeals of the United States for the Seventh Circuit.

sexual orientation are a subset of actions taken on the basis of sex. To answer this, the court asked itself: if holding all other things constant and changing only her sex, would she have been treated the same way?¹⁵⁶

The plaintiff alleged that had she been a man, married to a woman, and all other circumstances remained the same, Ivy Tech wouldn't have refused to promote her and she would not have been fired. In making its analysis, the court noted that the plaintiff failed to conform to the female stereotype as she was not heterosexual.¹⁵⁷

In the court's view, when assessing sex discrimination cases, one must ask whether there was any discomfort, disapproval or job decision based on the fact that the complainant dresses differently, dates or marries someone of the same sex. If the answer is yes, then that is a reaction based on sex. Thus, the question in the courts mind was whether sexual orientation is a form of sex discrimination. The court held that it is as discriminating on the basis of a partner's sex, in this case the plaintiff's partner, is tantamount to discrimination on the basis of sexual orientation.¹⁵⁸

These cases can be contrasted with the *Eric Gitari case* and *EG & 7 others v Attorney General* discussed in the previous chapter. Both these cases gave conflicting judgments where the former provided that sexual orientation can be read into the constitution and the latter agreeing, but only in certain circumstances which the court fails to mention. Therefore, with this confusion, there is no consistency as to whether the rights of sexual minorities are envisioned in the Kenyan Constitution.

4.5 Conclusion

In summary, South Africa and USA have made strides in protecting sexual minorities. While South Africa has expressly provided for LGB right in the constitution and several legislations, the USA has expanded its existing legal framework to secure LGB rights. Case law in South

¹⁵⁶ *Kimberly Hively v Ivy Tech Community College* (2017), Court of Appeals of the United States for the Seventh Circuit.

¹⁵⁷ *Kimberly Hively v Ivy Tech Community College* (2017), Court of Appeals of the United States for the Seventh Circuit.

¹⁵⁸ *Kimberly Hively v Ivy Tech Community College* (2017), Court of Appeals of the United States for the Seventh Circuit.

Africa has sought to solidify the rights of minorities that have been enshrined in the law. Case law in the USA on the other hand has interpreted existing law in order to include sexual orientation in the existing legal framework.

Kenya stands to learn a lot from the two countries. Kenya could either amend its existing laws to incorporate sexual minorities or it could expand the existing laws to this end. In the next chapter, these possibilities will be explored. Afterwards, the recommendations of this paper will be made and a final conclusion will be drawn.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

In the previous chapter, a comparative analysis was drawn between Kenya, South Africa and the United States of America. A justification for their comparison in this paper was given and a discussion on their respective constitutional provisions, legislation and case law, in relation to the rights of sexual minorities, followed. Kenya's progress in the above areas, relating to the rights of sexual minorities, was highlighted and the chapter was concluded.

In this chapter, the analysis of this paper will come to an end. The final conclusion will be drawn and the appropriate recommendations will be discussed.

5.2 Conclusion

This paper has been guided by main research question: To what extent does Article 27(4) of the Constitution and Section 5(4) of the Employment Act protect LGB persons from employment discrimination on the basis of sexual orientation? The secondary questions that arose from this include: What is the legal framework governing LGB persons in Kenya? How have other countries ensured protection of sexual minorities from employment discrimination within their legal frameworks?

In addition, this paper sought to test the following 3 hypotheses: Firstly, that Article 27 of the Constitution and Section 5(4) of the Employment Act do not adequately protect LGB persons in Kenya. Secondly, that there is no specific legal framework protecting LGB persons from employment discrimination in Kenya. Lastly, that other countries have ensured protection of sexual minorities from employment discrimination within their legal framework.

In Chapter 2, the Theory of Equality was discussed as the guiding theory of this study. Formal Equality, the treatment of likes alike and unlikes unlike, although a form of Equality, was found to be unsuitable for this paper. This is due to the fact that it doesn't take into account discrimination faced by people within certain groups. Substantive equality, on the other hand, recognises that within a group of people, equal treatment may be the actual cause of discrimination and therefore provides for certain allowances if this is the case.

In Chapter 3, it became evident that it is still unclear if sexual minorities are protected from discrimination specifically in employment. In response to the main research question, there is no extent to which sexual minorities are protected from employment discrimination as far as Article 27(4) of the Constitution and Section 5(4) of the Employment Act are concerned. Also, in response to the secondary questions, unfortunately, there are no specific laws protecting sexual minorities from discrimination in Kenya.

The courts have also been conflicted when faced with this question. On one hand, they have read sexual orientation as a protected ground from discrimination within the Constitution and therefore have a right to assembly.¹⁵⁹ However, years later, when faced with the question of whether sexual orientation can be read into the Constitution in order to abolish Kenya's sodomy laws, the court declares that in this instance, sexual orientation cannot be read into the constitution.¹⁶⁰ These conflicting decisions, together with the hostility that many Kenyan's have towards LGB persons has had a chilling effect towards the advancement of the rights of sexual minorities.

In Chapter 4, the third research question was answered. A comparison was drawn between Kenya, South Africa and the United States of America. Here, the study found that SA has express laws protecting sexual minorities from discrimination and the judicial system has been adamant in the protection of their rights. While USA has no express laws protecting sexual minorities, this has not deterred them from securing their rights. Considering that countries, such as the USA, have managed to achieve protection for LGB persons without having express laws, shows that the same can be achieved in Kenya.

These findings confirm the hypotheses of this paper. These are that: Article 27 of the Constitution and Section 5(4) of the Employment Act do not adequately protect LGB persons in Kenya. Secondly, that there is no specific legal framework protecting LGB persons from employment discrimination in Kenya. Lastly, that other countries have ensured protection of sexual minorities from employment discrimination within their legal framework. From this, the following recommendations are advanced.

¹⁵⁹ *EG v Non-Governmental Organisations Co-ordination Board & 4 others* (2015) eKLR.

¹⁶⁰ *EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)* (2016) eKLR.

5.3 Recommendations

5.3.1 Legal recommendations

5.3.1.1 Amending Article 27(4) of the Constitution and Section 5(4) of the Employment Act

As has been mentioned in this paper, Article 27(4) provides that no one may be discriminated against based on race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. These are enumerated grounds upon which a discrimination claim can be brought forward. This paper proposes that the analogous ground of sexual orientation be introduced to the constitution. This is because the sexual orientation of a person, as was discussed in Chapter 3, cannot be changed.

According to the Constitution, an amendment can be made in relation to a provision in the Bill of Rights.¹⁶¹ An amendment can either be done through parliamentary initiative,¹⁶² or by popular initiative through one million registered voters.¹⁶³ A constitutional amendment could be made to article 27(4) to expressly provide for sexual orientation as a protected ground from which a person may not be discriminated from.

However, this is not an easy solution. It would involve convincing a majority of Kenyans, who already have misconceptions about sexual minorities, that their rights are worth protecting. Additionally, the drafters of the constitution also made the amendment process difficult in order to prevent arbitrary amendments. Alternatively, the Employment Act can be amended to include sexual orientation in Section 5(4). Parliament can introduce an amendment bill and have it pass through both houses. This would be much easier than amending the constitution.

5.3.1.2 Unambiguous and Consistent Judicial Interpretation

The judiciary needs to clearly provide whether sexual orientation can be read into Article 27(4) of the constitution. The lack of clarity raises the question as to whether sexual minorities are protected within Kenya's Bill of Rights. The judiciary can take a substantive equality approach using the case of *Andrews v Law Society of British Columbia*,¹⁶⁴ when analysing whether sexual minorities are protected from discrimination under the article. This case provided the following

¹⁶¹ Article 255(1)(e), *Constitution of Kenya* (2010).

¹⁶² Article 256, *Constitution of Kenya* (2010).

¹⁶³ Article 257, *Constitution of Kenya* (2010).

¹⁶⁴ *Andrews v Law Society of British Columbia* (1989), Supreme Court of Canada.

criteria: whether there is actual differential treatment, this treatment is based on one of the enumerated prohibited grounds in the law or one that is analogous to those grounds, which is discriminatory because of an imposed burden or denied benefit.¹⁶⁵ Sexual orientation is not an enumerated ground under Article 27(4) as it is not expressly provided for in the article. On the other hand, sexual orientation is an analogous ground as a person cannot change it. Therefore, as an analogous ground, sexual minorities are denied protection under Article 27(4) and this in itself is a form of discrimination.

However, the court can take another approach. Instead of reading sexual orientation into the article, they could expand the meaning of ‘sex’, which is already a protected ground under Article 27(4), to also mean ‘sexual orientation’. This was the approach taken by court of appeal in *Kimberly Hivley v Ivy Tech Community College*. This would be an easier approach to amending the constitution.

5.3.2 Policy and Advocacy Recommendations

5.3.2.1 Passing LGB Anti-Discriminatory Laws

Kenya could borrow from South Africa and enact legislation protecting sexual minorities. The legislation could encompass protection from discrimination in employment. This would be easier than amending the constitution. The anti-discriminatory laws would expressly provide for sexual orientation as a protected ground from discrimination in all arenas including employment.

5.3.2.1 Sensitization on LGB Persons

As the late Nelson Mandela once said:

‘No one is born hating another person because of the colour of his skin, or his background, or his religion. People must learn to hate, and if they can learn to hate, they can be taught to love, for love comes more naturally to the human heart than its opposite.’¹⁶⁶

¹⁶⁵ *Andrews v Law Society of British Columbia* (1989), Supreme Court of Canada.

¹⁶⁶ Strauss V, ‘Nelson Mandela on the power of education’ *The Washington Post*, 6 December 2013 <https://www.washingtonpost.com/news/answer-sheet/wp/2013/12/05/nelson-mandelas-famous-quote-on-education/> on 17 November 2018.

The reason for the continued homophobia and biphobia in Kenya is due to ignorance. Education on sexual orientation is key to fight the harmful misconceptions and the hateful messages that are spread about sexual minorities. This can be achieved by having a comprehensive sex education system that also teaches about sexual minorities in high schools and in university. The government can be the one to spear head this initiative as it is the body tasked with the protection of rights. As more people become informed on the rights of sexual minorities, opinions will slowly change and this will go a long way in securing the rights of LGB persons.

5.4 Conclusion

Sexual minorities form part of the Kenyan population and as such, they are entitled to equal rights. This includes freedom from discrimination, especially in employment. As Kenya is striving to attain economic growth at the level of the developed countries, it cannot afford to discriminate against its LGB working population. Every Kenyan is required to reach this goal and the best way to motivate its people is to ensure that they are protected under law.

In conclusion, this study sought to highlight the discrimination that LGB persons face and to positively contribute to the on-going discourse on their rights in Kenya.

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