

**Misinterpretation of the Methodology for Determining the Breach of the Core of a
Right by Kenyan Courts**

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By

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DECLARATION

I, CHIRCHIR MICHELLE JEMUTAI, 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:16th April 2025

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

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LIST OF CASES

Municipal Cases (Kenyan Cases)

Joseph Otieno Oruoch v Kenya Medical Practitioners Pharmacists & Dentists Union & another [2021]

Jacqueline Okuta & Jackson Njeru v Attorney General, Director of Public Prosecution & Article 19 of East Africa [2017]

Okiya Omtatah Okoiti v Attorney General & 2 others (2013)

County Government of Kisii v Kenya Medical Practitioners Pharmacists & Dentists Union (KMPDU) & another (2024)

County Government of Makueni & another v Kenya Union of Clinical Officers (KuCO) & 6 others (2021)

County Government of Machakos v Kenya Union of Clinical Officers (2024)

County Government of Kakamega & another v Kenya National Union of Nurses & another (2017)

Kenya Human Rights Commission 8 others v Koome Nchebere Law Society of Kenya 2 others (2024)

Okiya Omtatah Okoiti v Communication Authority of Kenya & 8 others (2018)

Kenya Human Rights Commission 8 others v Koome Nchebere Law Society of Kenya 2 others (2024)

Foreign Cases

Kart v Turkey (2009) European Court of Human Rights.

Matthews v United Kingdom (1999) European Court Of Human Rights.

Al-Dulimi and Montana Management Inc. v Switzerland (2016) European Court of Human Rights.

Eskom Holdings Ltd v National Union of Mineworkers and Others (2011) Supreme Court of Appeal of South Africa.

In National Union of Mineworkers v Essential Services Committee and Others (2019) Labour Court of South Africa.

LIST OF LEGAL INSTRUMENTS

Constitution of the of Kenya, 2010

Labour Relations Act 14 of 2007

Supreme Court Act (No.59 of 2011)

LIST OF ABBREVIATIONS

LRA - Labour Relations Act

ELRC - Employment and Labour Relations Court

ABSTRACT

This study examines the methodology employed by Kenyan courts in determining whether the core of a fundamental right has been derogated from, focusing on the tension between the exclusionary and integrative approaches within Kenya's legal framework. The primary objective is to establish the appropriate methodology for determining whether a right's core has been breached as provided under Article 24(2)(c) of the Kenyan Constitution, and to evaluate the courts' adherence to this framework. The scope of the study is confined to Kenya's legal jurisdiction, with foreign sources used as secondary materials to complement the analysis of primary constitutional provisions and judicial decisions. The methodology adopts a doctrinal approach, utilizing primary sources such as Kenya's constitution and case law, alongside secondary sources including journal articles, institutional reports, and scholarly literature. Case studies illustrate the application of the integrative approach and inform recommendations for aligning judicial practice with constitutional requirements. The findings revealed that Kenyan courts have frequently applied the integrative approach, which relies on a proportionality test to determine core breaches, despite the constitutional preference for the exclusionary approach. This approach, which excludes proportionality and focuses on whether a limitation threatens a right's existence, is provided for by Article 24(2)(c) and aligns with the Constitution as the grundnorm, per Hans Kelsen's theory. The courts' reliance on the integrative approach undermines the efficacy of Article 24(2)(c)'s protection, diminishes the significance of rights, and risks arbitrary judicial decision-making. Conclusions highlight an inconsistency between judicial practice and constitutional mandates, eroding public trust in the judiciary. Recommendations include adopting the exclusionary approach consistently, as it offers stronger protection for fundamental rights by safeguarding their essence.

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CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background

The concept of the core or essence of a right, sometimes referred to as the minimum, essential, or absolute core, represents the untouchable aspect or inner circle of a fundamental right that cannot be diminished, restricted, or breached.¹ Any such restriction would cause the right to lose its value, either for the right holder or for society as a whole.² Early origins of the concept can be traced back to the effort by the Committee on Economic, Social and Cultural Rights (CESCR) to drive the realisation of socio-economic rights.³ The CESR is a supervisory body responsible for monitoring the implementation of the International Covenant on Economic, Social, and Cultural Rights (ICESCR) by its State Parties.⁴ It was developed as a fundamental aspect of the standard of "progressive realization," and the CESCR stated it as follows: "On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States parties' reports, the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party."⁵

The concept's use has been extended as a restriction on limitations of rights. Countries like Germany are equipped with general constitutional clauses on the requirement for limitations not to violate the essence of rights.⁶ While in other cases, like Italy, France, or the European Convention on Human Rights, protection of the essence is guaranteed for specific rights (in opposition to general clauses). Kenya has a general constitutional clause on the requirement that limitations on rights ought not to derogate from the core or essential content of any right.⁷

¹ Brkan M, 'In search of the concept of essence of EU fundamental rights through the prism of data privacy' University of Maastricht, 2017-01, 2017, 3—<https://ssrn.com/abstract=2900281> on 26 October 2024.

² Brkan M, 'In search of the concept of essence of EU fundamental rights through the prism of data privacy' University of Maastricht, 2017-01, 2017, 3—<https://ssrn.com/abstract=2900281> on 26 October 2024.

³ *Committee on Economic Social and Cultural Rights (CESCR) General Comment No 3, The Nature of States Parties' Obligations*, 14 December 1990, par 10.

⁴ The Committee on Economic, Social and Cultural Rights (Archive), Fact Sheet No. 16 (Rev. 1), 1991, 15.

⁵ *CESCR General Comment 3*, par 10.

⁶ Article 19, Constitution of the Federal Republic of Germany (1949).

⁷ Article 24(2)(c), *Constitution of Kenya* (2010).

There are theories that have been identified that courts have used in determining whether the core of a right has been breached, which have also been applied by Kenyan courts.⁸ The first theory, known as the relative theory, determines whether the core of a right has been derogated from based on a proportionality test, in the context of limitation of rights.⁹ If a measure restricting a right is disproportionate to its objective, then the core of the right is considered to have been derogated from, and conversely, if the measure is proportionate, the core remains intact. The relative theory has also been referred to as the “integrative” approach in determining whether the core of a right has been breached because it seeks to integrate the concepts of essence and proportionality.¹⁰

The second theory is the absolute theory, which draws a clear distinction between the inviolable aspects (core) of a right and the peripheral aspects of a right which may be subject to limitation or compromise.¹¹ Therefore, the core of a right will have been breached if the inviolable aspects of the right are limited. However, the absolute theory does not provide for how these inviolable aspects of a right are to be identified.¹² It does not specifically state how to establish that something is the essence of a right and consequently, determining whether it has been breached becomes a challenge.¹³ Despite this challenge, other methods of identifying whether the core of a right has been breached, based on this theory, have been suggested. The first being, if the limitation on the right risks extinguishing the right or threatens the very existence of the right.¹⁴ The second being, if a limitation is found to have breached the core of a right without being subjected to a proportionality assessment.¹⁵ The absolute theory has also been referred to as the

⁸ Brkan M, ‘The Concept of Essence of Fundamental Rights in the EU Legal Order: Peeling the Onion to its Core’ 14 *European Constitutional Law Review* 2, 2018, 360.

⁹ Scarcello O, ‘Preserving the ‘Essence’ of Fundamental Rights under Article 52(1) of the Charter: A Sisyphean Task?’ 16 *European Constitutional Law Review* 4, 2020, 649.

¹⁰ Brkan M, ‘The Concept of Essence of Fundamental Rights in the EU Legal Order: Peeling the Onion to its Core’, 359.

¹¹ Scarcello O, ‘Preserving the ‘Essence’ of Fundamental Rights under Article 52(1) of the Charter: A Sisyphean Task?’ 648.

¹² Scarcello O, ‘Preserving the ‘Essence’ of Fundamental Rights under Article 52(1) of the Charter: A Sisyphean Task?’ *European Constitutional Law Review*, 2020, 648.

¹³ Scarcello O, ‘Preserving the ‘Essence’ of Fundamental Rights under Article 52(1) of the Charter: A Sisyphean Task?’ 653.

¹⁴ Dawson M, Lynskey O, and Muir E, ‘What is the Added Value of the Concept of the “Essence” of EU Fundamental Rights?’ 20 *German Law Journal* 1, 2019, 772.

¹⁵ Scarcello O, ‘Preserving the ‘Essence’ of Fundamental Rights under Article 52(1) of the Charter: A Sisyphean Task?’ 649.

“exclusionary” approach because it sees the essence and proportionality as two mutually exclusive concepts.¹⁶

The term “exclusionary” has been preferred over “absolute” and “integrative” over “relative” because they more accurately describe the relationship between essence and proportionality, clearly indicating whether the two tests function independently or are interconnected.¹⁷ This study will also adopt the terms “exclusionary” and “integrative” over “relative” and “absolute” as they illustrate the distinct methodologies that the theories use in determining whether the core of a right has been derogated from.

Kenya's constitutional framework suggests that the exclusionary approach should be applied when determining whether the core of a right has been derogated from in the context of their limitation. Accordingly, Kenyan courts, as interpreters of the Kenyan Constitution, are expected to employ the exclusionary approach in such determinations. However, several superior Kenyan courts seem to have applied the integrative approach in determining whether the core of particular rights have been breached thereby setting misleading precedents suggesting its constitutional validity. This study aims to highlight this inconsistency within the legal system and illustrate the significance of the exclusionary approach in protecting rights.

1.2 Statement of the problem

The Kenyan courts have failed to adopt the proper methodology for determining whether the core of a right has been violated, contrary to Kenya’s constitutional framework. Kenya’s constitutional framework suggests that the methodology that should be applied in determining whether the core of right has been violated is the exclusionary approach. However, the Kenyan courts seem to have employed the inclusionary approach. Consequently, the significance of the rights to which the inclusionary approach has been subjected to has been diminished.

¹⁶ Brkan M, ‘The Concept of Essence of Fundamental Rights in the EU Legal Order: Peeling the Onion to its Core, 359.

¹⁷ Brkan M, ‘The Concept of Essence of Fundamental Rights in the EU Legal Order: Peeling the Onion to its Core, 359.

1.3 Purpose of the study

This study fundamentally aims to show that the exclusion of the proportionality test in determining whether the core of a right has been breached (exclusionary approach), plays an independent and distinct role in protecting rights that should be protected. This protection is one that the integrative approach does not offer. It posits that the exclusionary approach represents the appropriate approach for determining whether the core of a right has been derogated from, as will be substantiated herein. The study will illustrate how the exclusionary approach aligns not only with the principles of justice but also with the text of the supreme law of the land. Furthermore, the study will elucidate on the implications of applying the integrative approach on the ability to safeguard rights effectively. Lastly, it will critically examine existing judicial precedents that have implicitly and explicitly relied on the integrative approach, thereby raising a cautionary note regarding its continued application in judicial practice.

1.4 Research Objectives

1. To determine what the appropriate methodology is for determining whether the core of a right has been derogated from, based on Kenya's constitutional framework.
2. To show that Kenyan courts have employed the integrative approach of determining whether the core of a right has been derogated from, contrary to the constitutional framework on the core of rights.
3. To show what the Kenyan courts could have done instead of employing the integrative approach.
4. Lessons and recommendations from other Kenyan courts.

1.4 Research Questions

1. What is the appropriate methodology for determining whether the core of a right has been derogated from, based on Kenya's constitutional framework?
2. Have Kenyan courts determined the core of rights using the integrative approach, contrary to the constitutional framework on the core of rights?
3. What could the Kenyan courts have done instead of applying the integrative approach?
4. What lessons and recommendations can be drawn from other Kenyan courts?

1.5 Hypothesis

The Kenyan courts have failed to adopt the proper methodology for determining whether the core of a right has been violated, contrary to Kenya's constitutional framework. Kenya's constitutional framework suggests that the methodology that should be applied in determining whether the core of right has been violated is the exclusionary approach. However, the Kenyan courts seem to have employed the inclusionary approach. Consequently, the significance of the rights to which the inclusionary approach has been subjected to has been diminished.

1.6 Significance of the study

It is important to point out the failure by Kenyan courts to apply the appropriate methodology in determining whether the core of a right has been derogated from to show that the courts were being arbitrary. The courts in these cases were expected to apply the exclusionary approach in determining that the core of rights had been derogated from in accordance with Article 24(2)(c) of the Constitution.¹⁸ Article 20(3)(b) provides that “[i]n applying a provision of the Bill of Rights, a court shall adopt the interpretation that most favours the enforcement of a right or fundamental freedom.”¹⁹ Article 24(2)(c) is among the provisions in the Bill of Rights and the interpretation that most favours the enforcement of a right or fundamental freedom is the exclusionary approach of determining whether the core of a right has been derogated from in the context of their limitation. This is because Article 24(1) already provides for a proportionality test, and a stronger protection of the right would be for the court to protect a right in the face of the proportionality test.²⁰ Article 24(2)(c) of the Constitution provides that the methodology that ought to be applied in determining whether the core of a right has been derogated from is the exclusionary approach and the expectation is that these courts would follow suit.²¹ The failure by the Kenyan courts to apply this methodology seems arbitrary as a result and this awareness can aid future courts in applying the appropriate methodology; the exclusionary approach.

It is important to note the failure by Kenyan courts to apply the exclusionary approach in determining whether the core of a right has been derogated from because it shows that the courts

¹⁸ Article 24(2)(c) *Constitution of Kenya* (2010).

¹⁹ Article 20(3)(b) *Constitution of Kenya* (2010).

²⁰ Article 24(1) *Constitution of Kenya* (2010).

²¹ Article 2(3) *Constitution of Kenya* (2010).

were not making a law in line with the Constitution. This is important for legal practitioners and adjudicators who rely on judicial precedent for their decisions to represent clients and decide cases respectively. The argument that the Kenyan courts were making law in using the exclusionary approach in determining whether the core of a right has been derogated from would be unconstitutional.²² This is because for provisions related to the Bill of Rights—which Article 24(2)(c) is among—the court is obliged to interpret them in a way that most favours the enforcement of a right or fundamental freedom.²³ The interpretation that most favours the enforcement of a right or fundamental right in the context of Article 24(2)(c) of the Constitution would be the exclusionary approach rather than the integrative approach that the courts applied. This is because Article 24(1) of the Constitution already provides for a proportionality test, and a stronger protection of a right would be for the court to exclude the proportionality test, following the exclusionary approach. However, instead of the courts employing this approach in protecting rights the courts have adopted the integrative approach when limiting rights, which is a duplication of the proportionality test. Therefore, Kenya being a common law country, their attempt at making a law, that is, applying the integrative approach in determining whether the core of a right has been derogated from, would have no constitutional basis, and therefore, unlawful.

It is important to point out the inconsistency between the fact that Article 24(2)(c) of the Kenya Constitution provides for the exclusionary approach in determining whether the core of a right has been derogated from and the courts that applied the integrative approach in order to safeguard public trust in the judicial system. The courts cited Article 24(2)(c) as the constitutional basis for their application of the integrative approach.²⁴ However, Article 24(2)(c) does not provide for the application of this methodology.²⁵ The misinterpretation of the methodology that should be applied under Article 24(2)(c) casts doubt on the court's ability to correctly interpret the Constitution. This study aids in highlighting this inconsistency enabling

²² Article 20(3)(b) *Constitution of Kenya* (2010) gives the court the authority to make law through interpreting the Constitution.

²³ Article 20(3)(b) *Constitution of Kenya* (2010).

²⁴ *County Government of Kakamega & another v Kenya National Union of Nurses & another* (2017) eKLR.

²⁵ Article 24(2)(c) *Constitution of Kenya* (2010).

the courts that applied the integrative approach to reflect on their decision and act as a warning for future users of these decisions as precedent.

It is critical to have highlighted the Kenyan courts' failure to adopt the exclusionary approach in determining whether the core of a right has been derogated from because the courts' reliance on the methodology diminishes the efficacy of Article 24(2)(c) to protect rights subject to limitation.²⁶ The integrative approach determines whether the core of a right has been breached through a proportionality test which is a separate test already provided for under Article 24(1) of the Constitution of Kenya.²⁷ Consequently, the integrative approach is a duplication of the proportionality test and has the same effect a proportionality test would. On the other hand, the exclusionary approach excludes the proportionality test in determining whether the core of a right has been breached and instead considers it breached once the rights existence is threatened regardless of whether the absence of the right threatens the exercise of a more important right.²⁸ This, in turn, protects rights based on their inherent significance rather than their ability to protect more important rights, which the proportionality test already addresses.

1.7 Scope of the study

This research centers on an analysis of the constitutional framework that underpins the methodology for determining whether the core of a right has been derogated from, alongside an examination of the Kenyan courts' omission in applying this methodology in its deliberations. The scope of the study is confined to the legal jurisdiction of Kenya, with foreign sources used as secondary materials to supplement the primary analysis.

1.8 Theoretical Framework

1.8.1 Hans Kelsen's Theory of the "Grundnorm"

Hans Kelsen, a distinguished jurist and legal philosopher, introduced the concept of the Grundnorm or Basic Norm, which he described as the foundational statement from which all other normative obligations derive their legitimacy.²⁹ The Grundnorm serves as the bedrock of a

²⁶ Article 24(2)(c) *Constitution of Kenya* (2010).

²⁷ Scarcello O, 'Preserving the 'Essence' of Fundamental Rights under Article 52(1) of the Charter: A Sisyphean Task?' 649.

²⁸ Dawson M, Lynskey O, and Muir E, 'What is the Added Value of the Concept of the "Essence" of EU Fundamental Rights?' 772.

²⁹ Swarup M, 'Kelsen's Theory of Grundnorm' *Manupatra*, 2010, 2.

legal system, providing the ultimate basis for validating norms.³⁰ According to Kelsen, a norm's validity is determined by its alignment with an authorizing norm.³¹ Thus, a specific norm gains legitimacy if it can be subsumed under a broader, more general norm. Kelsen's resolution is that every legal order features a traceable hierarchy of "ought" statements, leading back to a fundamental, initial "ought"—the Grundnorm—upon which the validity of all subsequent norms ultimately depends.³² He posited that while the Grundnorm varies across legal systems (e.g., it might manifest as a written constitution in one system or a dictator's will in another), its presence is universal.³³ Importantly, the Grundnorm is not synonymous with the constitution itself; rather, it is a theoretical presupposition that the constitution ought to be obeyed.³⁴

In Kenya, the Constitution is the grundnorm and the expectation, following this theory, is that it ought to be followed. This study posits that the methodology that ought to be employed for determining whether the core of a right has been derogated from is the exclusionary approach as opposed to the integrative approach. The endorsement of the exclusionary approach is based on the fact that the Constitution being the Grundnorm, provides for this methodology for determining whether the core of a right has been derogated from under Article 24(2)(c) of the Constitution.³⁵ Therefore, in endorsing the exclusionary approach, this study relies on the idea of the Constitution being the perceived bearer of authority, as it is the approach provided for under Kenya's Constitutional framework.

1.9 Literature Review

1.9.1 Introduction

Scholarly literature specifically addressing the Kenyan courts' failure to employ the appropriate approach for determining whether the core of a right has been derogated remains elusive. Nevertheless, numerous contributions have enriched the discourse surrounding the concept.

³⁰ Rachuonyo, J. O, 'Kelsen's Grundnorm in Modern Constitution-Making: The Kenya Case,' 20 *Verfassung Und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* 4, 1987, 416.

³¹ Swarup M, 'Kelsen's Theory of Grundnorm' Manupatra, 2010, 2.

³² Swarup M, 'Kelsen's Theory of Grundnorm' Manupatra, 2010, 2.

³³ Rachuonyo, J. O, 'Kelsen's Grundnorm in Modern Constitution-Making: The Kenya Case,' 416.

³⁴ Swarup M, 'Kelsen's Theory of Grundnorm' Manupatra, 2010, 2.

³⁵ Article 24(2)(c) *Constitution of Kenya* (2010).

1.9.2 The existence of a two distinct tests under Article 24(1) and 24(2)(c) of the Constitution of Kenya

In ‘*A Critical Analysis of Article 24 on the Limitation of Rights and Fundamental Freedoms Under the Constitution of Kenya 2010*’, the author distinguishes the requirement for a limitation not to derogate from the core of a right from the proportionality test under Article 24(2)(c) by stating that, “[t]he limitations imposed ought not to violate any rights at stake. They should not conflict with the minimum core rights and that, limitations ought to respect the principle of proportionality.”³⁶ The author suggests that the two tests are separate tests under Article 24, following the exclusionary approach. This study therefore endeavours to show how courts in Kenya have merged these tests.

1.9.3 Contribution of the courts that applied the integrative approach to balancing the rights to strike and healthcare services

In ‘*The Delicate Balance: Exploring the Interplay Between the Right to Healthcare Services and the Right to Strike for Medical Practitioners in Kenya*’, the author referenced one of the Kenyan cases that applied the integrative approach for determining the breach of the core of rights; *Joseph Otieno Oruoch v Kenya Medical Practitioners Pharmacists & Dentists Union & another (Joseph Otieno)*.³⁷

The author discussed *Joseph Otieno* in a context different from the one discussed in this study. The court in this case found that the outright prohibition of the right to strike for essential service workers derogates from the core of the right.³⁸ Apart from this finding, the court mandated a limitation on the right to strike that, in its view, balanced the right to strike and to healthcare services which were in conflict due to the medical workers’ strike.³⁹ This limitation is the minimum services requirement.⁴⁰ The concept of ‘minimum service’ allows a number of workers in an industry designated as an essential service to strike while other workers maintain a level of service at which the life, personal safety or health of the whole or part of the population will not

³⁶ Syekonyo P, ‘A Critical Analysis of Article 24 on the Limitation of Rights and Fundamental Freedoms under the Constitution of Kenya 2010’ unpublished LLB Thesis, Strathmore University, Nairobi, 2017, 32.

³⁷ *Joseph Otieno Oruoch v Kenya Medical Practitioners, Pharmacists & Dentists & another* (2017) eKLR.

³⁸ *Joseph Otieno Oruoch v Kenya Medical Practitioners, Pharmacists & Dentists & another* (2017) eKLR.

³⁹ *Joseph Otieno Oruoch v Kenya Medical Practitioners, Pharmacists & Dentists & another* (2017) eKLR.

⁴⁰ *Joseph Otieno Oruoch v Kenya Medical Practitioners, Pharmacists & Dentists & another* (2017) eKLR.

be endangered.⁴¹ Ultimately, the author only discussed *Joseph Otieno* in light of the fact that it balanced the right to strike and healthcare services through the minimum services requirement.⁴²

While the author points out valuable insights from the court, the author did not highlight the methodology used by the court in finding that the minimum services requirement was the appropriate limitation on the right to strike as opposed to a complete prohibition. The court approved the minimum services requirement based on the fact that it does not violate the core of the right to strike.⁴³ The minimum services requirement does not violate the core of the right to strike because it is proportionate to its objective of maintaining public health.⁴⁴ As previously stated, the minimum services requirement only requires a number of medical workers to remain on duty as opposed to all of them during strike action.⁴⁵ This is so that both rights are safeguarded as opposed to the previous limitation which completely prohibited medical practitioners from going on strike.⁴⁶ The problem that this paper endeavours to illustrate in this decision is how the court arrived at its finding that a complete prohibition of the right to strike derogates from its core. This finding was based on a proportionality test.⁴⁷ This study posits that based on Kenya's constitutional framework, the finding of whether the core of a right has been breached is not based on a proportionality test, but rather, whether the limitation threatens the existence of the right.⁴⁸

1.9.4 Identification of the Integrative Approach in Determining the Breach of the Core of a Right

This study endeavours to show how Kenyan courts have applied the integrative for determining when the core of a right has been breached contrary to Article 24(2)(c) of the Constitution. It has therefore identified authors who have made a similar analysis, that is, of how courts have applied the integrative approach. In *'Preserving the 'Essence' of Fundamental Rights under Article 52(1) of the Charter: A Sisyphean Task?'* The author identified the application of the integrative

⁴¹ *Joseph Otieno Oruoch v Kenya Medical Practitioners, Pharmacists & Dentists & another* (2017) eKLR.

⁴² Kipkoech N, 'The Delicate Balance: Exploring the Interplay Between the Right to Healthcare Services and the Right to Strike for Medical Practitioners in Kenya' 8 *Strathmore Law Review* 1, 2023, 157.

⁴³ *Joseph Otieno Oruoch v Kenya Medical Practitioners, Pharmacists & Dentists & another* (2017) eKLR.

⁴⁴ *Joseph Otieno Oruoch v Kenya Medical Practitioners, Pharmacists & Dentists & another* (2017) eKLR.

⁴⁵ *Joseph Otieno Oruoch v Kenya Medical Practitioners, Pharmacists & Dentists & another* (2017) eKLR.

⁴⁶ *Joseph Otieno Oruoch v Kenya Medical Practitioners, Pharmacists & Dentists & another* (2017) eKLR.

⁴⁷ *Joseph Otieno Oruoch v Kenya Medical Practitioners, Pharmacists & Dentists & another* (2017) eKLR.

⁴⁸ Article 24(1), 24(2)(c) *Constitution of Kenya* (2010).

approach if the courts in question only conducted a proportionality test prior to a finding that the core of a particular right has been breached.⁴⁹ The author, however, does refer to the integrative approach as the relative theory, which the background of the study had earlier made reference to.⁵⁰

This study has taken a similar approach in identifying the Kenya courts that have employed the integrative approach both explicitly and implicitly.

1.9.5 Identification of the Exclusionary Approach in Determining the Breach of the Core of a Right

As articulated in the study's background, the exclusionary approach, also termed the absolute theory, is designated as such to delineate its distinction from the integrative approach in assessing whether a right's core has been violated. This exclusionary approach, or absolute theory, excludes the application of the proportionality test when evaluating derogation from a right's core, relying instead on the identification of inviolable elements inherent to a right that remain impervious to limitation. However, as previously stated, this framework lacks precise criteria for determining what constitutes the essence of a right, thereby complicating efforts to prevent the core's derogation. Alternative methodologies, however, have been proposed by scholars who advocate for this approach. Lenaerts does not propose a method to define the substantive content of the "essence" of the fundamental right being limited.⁵¹ Instead, he proposes a method of identifying a breach of the core based on the risk of extinguishing the right—a threat to the "very existence" of the right.⁵² Defending this approach, he stated that it may be too difficult to identify a specific method to define the substantive content of the notion of "essence" that would apply to the diverse range of fundamental rights that the EU legal order is designed to protect.⁵³

⁴⁹ Scarcello O, 'Preserving the 'Essence' of Fundamental Rights under Article 52(1) of the Charter: A Sisyphean Task?' 663.

⁵⁰ Scarcello O, 'Preserving the 'Essence' of Fundamental Rights under Article 52(1) of the Charter: A Sisyphean Task?' 663.

⁵¹ Dawson M, Lynskey O, and Muir E, 'What is the Added Value of the Concept of the "Essence" of EU Fundamental Rights?' 772.

⁵² Dawson M, Lynskey O, and Muir E, 'What is the Added Value of the Concept of the "Essence" of EU Fundamental Rights?' 772.

⁵³ Dawson M, Lynskey O, and Muir E, 'What is the Added Value of the Concept of the "Essence" of EU Fundamental Rights?' 772.

Similarly, this study identifies the application of the integrative approach by courts in Kenya that have found the core of a right to be derogated from based on a limitation's attempt to completely deny the right for a portion of the right-holders.

1.10 Research Methodology

This study is a doctrinal investigation that incorporates both primary and secondary sources. The primary sources consist of an examination of Kenya's legal framework on the methodologies for determining whether the core of a right has been breached whereas the secondary sources include a wide range of existing literature such as journal articles, research and working papers, institutional reports, and other pertinent online materials relevant to the study. The case studies have been used to illustrate how courts in Kenya have employed the integrative approach in determining whether the core of a right has been breached and the same have been used in giving solutions to the failure of these courts in applying the appropriate methodology.

1.11 Chapter Breakdown

Chapter one gives the general introduction to the study by indicating an overview of the research topic. It provides the background of the study, objectives of the research and puts forward the research questions that the study seeks to answer.

Chapter two analyses the constitutional framework in Kenya giving validity to the exclusionary approach for determining the breach of the core of rights with reference to cases from the European Court of Human Rights. It does this based on a contextual and substantive reading of the provisions of the constitution relevant to the concept of the derogation of the core of rights.

Chapter three analyses how Kenyan courts have employed the integrative approach in determining whether the core of rights have been breached contrary to the Kenyan constitutional framework. Particularly, it illustrates how the courts explicitly and implicitly employed the integrative approach.

Chapter four provides for what the Kenyan that employed the integrative approach could have done instead of applying it, with Kenyan case law as points of reference. It proposes solutions tailored to solving the explicit and implicit applications of the integrative approach used by the courts.

Chapter five concludes the research and makes recommendations based on the findings.

CHAPTER TWO
KENYAN CONSTITUTIONAL FRAMEWORK ON THE EXCLUSIONARY
APPROACH FOR DETERMINING THE BREACH OF THE CORE OF RIGHTS

2.1 Introduction

This section seeks to demonstrate that Kenya’s constitutional framework, particularly with reference to Article 24 of the Constitution, establishes that the exclusionary approach should be employed as the operative principle when determining whether the core of a right has been derogated from in the context of their limitation, as opposed to the integrative approach.

2.2 Constitutional Framework on the core of rights

The Kenyan courts that applied the integrative approach in determining whether the core of a right has been derogated from relied on Article 24 of the Constitution of Kenya (the Constitution) as the legal basis for the approach.⁵⁴ Consequently, this study starts by examining Article 24(1) and (2)(c) to evaluate whether the integrative approach was the constitutionally appropriate framework for the court to adopt. Article 24(1) and (2)(c) read as follows:

“(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right or fundamental freedom;*
- (b) the importance of the purpose of the limitation;*
- (c) the nature and extent of the limitation;*
- (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and*
- (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.*

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—

⁵⁴ Article 24 *Constitution of Kenya* (2010).

(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.”

In examining the appropriate methodology for determining when the core of a right is breached pursuant to Article 24(1) and 24(2)(c) of the Constitution of Kenya, this chapter’s first argument will hinge on the general principles governing the interpretation of constitutional provisions in Kenya, before analysing the specific interpretive approach applicable to Article 24 as a part of the Bill of Rights.

2.3 Contextual Interpretation of Article 24(2)(c)

Article 259 of the Constitution provides for how the Constitution should be construed and under subarticle 4 it provides that:

“In this Constitution, unless the context otherwise requires—

(a) if a word or expression is defined in this Constitution, any grammatical variation or cognate expression of the word or expression has a corresponding meaning, read with the changes required by the context.”⁵⁵

Article 260 of the Constitution establishes definitions for various terms employed within its text. It commences with the statement, “In this Constitution, unless the context requires otherwise,” before proceeding to enumerate the specific meanings assigned to the terms utilized throughout the document.⁵⁶

Articles 259(4)(a) and 260 of the Constitution indicate that terms within the Constitution ought to be read within their context. However, the term “core” lacks a definition within the text, which might suggest that the obligation to interpret the term in its context is not directly derived from the Constitution itself. Nevertheless, the Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* held that constitutional provisions

⁵⁵ Article 259(4)(a) *Constitution of Kenya* (2010).

⁵⁶ Article 260 *Constitution of Kenya* (2010).

ought to be interpreted in a holistic manner, encompassing the provisions being analysed in this chapter within that interpretive mandate.⁵⁷ Particularly:

*“This Court has in the past set out guidelines for such matters of interpretation. Of particular relevance in this regard, is our observation that the Constitution should be interpreted in a holistic manner, within its context, and in its spirit.”*⁵⁸

The court also cited the supreme court in *In the Matter of the Kenya National Human Rights Commission* to elaborate on what a ‘holistic’ interpretation of the constitution is.⁵⁹ Given that the Constitution does not explicitly define the scope of ‘context,’ this chapter looks to an alternative, yet higher authority—the Supreme Court—in comparison to the courts which applied the integrative approach in determining the core of rights. Article 163(7) provides that *“All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court.”*⁶⁰ The courts that applied the integrative approach were the high court and courts that ranked equally in status as the High Court. Consequently, the interpretive framework articulated by the Supreme court, should bind courts lower than it, including those courts that applied the integrative approach. Having established that, the Supreme Court’s Advisory Opinion in *In the Matter of the Kenya National Commission on Human Rights* defined what a holistic interpretation is as follows: ⁶¹

“But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in the light of its history, of the issues in dispute, and of the prevailing circumstances.”

⁵⁷ Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (Petition 14, 14A, 14B & 14C of 2014 (Consolidated) (2014) eKLR.

⁵⁸ Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (Petition 14, 14A, 14B & 14C of 2014 (Consolidated) (2014) eKLR.

⁵⁹ Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (Petition 14, 14A, 14B & 14C of 2014 (Consolidated) (2014) eKLR.

⁶⁰ Article 163(7) *Constitution of Kenya* (2010).

⁶¹ *In the Matter of the Kenya National Commission on Human Rights, Supreme Court Advisory Opinion Reference No. 1 of 2012* (2014) eKLR.

Although the definition of ‘context’ by the Supreme Court was articulated in an Advisory Opinion, it is noteworthy that Section 13(6) of the Supreme Court Act provides that an advisory opinion has the same binding effect as any other decision of the court.⁶² Accordingly, the court held that reading the Constitution in its context is reading it alongside and against other provisions so as to maintain a rational explanation of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances.

Following the court’s directive to interpret the Constitution within its contextual framework, this analysis commences with a reading of Article 24(2)(c)—the article that establishes the concept of the derogation of the core of a right in Kenya’s jurisdiction—alongside and against other provisions so as to maintain a rational explanation of what the Constitution’s intended meaning. Specifically, Article 24(1) emerges as the provision that should be read alongside and against Article 24(2)(c) in order to give it its rational meaning. Article 24(1) would be the appropriate context to consider as it is necessitated by the text of Article 24(2)(c), which stipulates: “*Despite clause (1), a provision in legislation limiting a right or fundamental freedom— (c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.*” The explicit reference to "despite clause (1)" within Article 24(2)(c) mandates the inclusion of Article 24(1) as an integral part of the interpretive context.

Article 24(1) delineates a proportionality test, in the context of limitation of rights.⁶³ Proportionality functions as a doctrinal instrument for the resolution of conflicts between a right and an opposing right or interest, with its central component being the balancing phase, which necessitates a careful weighing of the right against the competing right or interest.⁶⁴ The court in *Kenya Human Rights Commission v Communications Authority of Kenya & 4 others* (Kenya Human Rights Commission case) provided a four-part test establishing proportionality:⁶⁵

- a. Does the legislation (or other government action) establishing the right’s limitation pursue a legitimate objective of sufficient importance to warrant limiting a right?
- b. Are the means in service of the objective rationally connected (suitable) to the objective?

⁶² Section 13(6) *Supreme Court Act* (No.59 of 2011).

⁶³ Article 24(1) *Constitution of Kenya* (2010).

⁶⁴ Möller K, ‘Proportionality: Challenging the critics’ 10 *International Journal of Constitutional Law* 3, 2012, 710.

⁶⁵ *Kenya Human Rights Commission v Communications Authority of Kenya & 4 others* (2018), eKLR.

- c. Are the means in service of the objective necessary, that is, minimally impairing of the limited right, taking into account alternative means of achieving the same objective?
- d. Do the beneficial effects of the limitation on the right outweigh the deleterious effects of the limitation?

Thus, to demonstrate that Article 24(1) establishes a proportionality test, a comparative analysis will be conducted between the four-part test articulated by the court in the Kenyan Human Rights Commission case above and the provisions of Article 24.

Part (a) of the test evaluates whether the legislation (or other government action) imposing a restriction on a right pursues a legitimate objective of sufficient importance to warrant such a limitation. Article 24(1)(a) and (b) of the Constitution stipulate that the *nature of the right or fundamental freedom* and the *importance of the purpose of the limitation* ought to be taken into account when limiting rights. The importance of the purpose of a limitation is evident in the prioritisation of certain rights over others.⁶⁶ Consequently, consistent with part (a) of the test, a limitation's legitimate objective may involve safeguarding a right deemed more important, under specific circumstances, as reflected in Article 24(1)(a) and (b) of the Constitution.⁶⁷ Thus, part (a) of the test provided by the court therefore corresponds to Article 24(1)(a) and (b).

Part (b) of the test examines whether the means in service of the objective are rationally connected to the objective.⁶⁸ Similarly, Article 24(1)(e) stipulates that one of the factors that must be considered when limiting rights is “the relation between the limitation and its purpose”.⁶⁹ Both part (b) of the test and Article 24(1)(e) mandate that the limitation be reasonably connected to its intended purpose.

Part (c) of the test assesses whether the limitation minimally impairs the right being limited, taking into account alternative means of achieving the same objective.⁷⁰ Article 24(1)(e) requires that the least restrictive means are used in achieving the purpose of the limitation.⁷¹ Article 24(e)

⁶⁶ *Joseph Otieno Oruoch v Kenya Medical Practitioners, Pharmacists & Dentists & another* (2017) eKLR.

⁶⁷ Article 24(1)(a)(b) *Constitution of Kenya* (2010).

⁶⁸ *Kenya Human Rights Commission v Communications Authority of Kenya & 4 others* (2018), eKLR.

⁶⁹ Article 24(1)(e), *Constitution of Kenya* (2010).

⁷⁰ *Kenya Human Rights Commission v Communications Authority of Kenya & 4 others* (2018), eKLR.

⁷¹ Article 24(1)(e), *Constitution of Kenya* (2010).

reflects part (c) of the test in that they both require that the limitation restrict the right as least as possible.

Part (d) of the test assesses whether the beneficial effects of the limitation on the right outweigh the deleterious effects of the limitation.⁷² Article 24(1)(a) stipulates that the nature of the right or fundamental freedom being limited be evaluated when limiting rights. Should the right in question be limited to protect a more significant right under the given circumstances, the beneficial effects of the limitation on the right would outweigh its deleterious effects.⁷³ Accordingly, part (d) of the test corresponds to Article 24(1)(a) of the Constitution.

Having demonstrated that Article 24(1) embodies the components of the proportionality test, this contextual framework can inform the interpretation of Article 24(2)(c). Article 24(2) begins with the statement: “*Despite clause (1), a provision in legislation limiting a right or fundamental freedom...*” and then goes on to provide for the other conditions that must be met in order for a limitation to be constitutional and pertinent to this study is the requirement that the limitation “**shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.**”⁷⁴

The background to the study introduced the two theories that are used to determine whether the core of a right has been derogated from. The integrative approach, which uses the proportionality test in this assessment and the exclusionary approach which establishes the core through an identification of the most important aspect of a right. These theories are relevant as they determine whether the core of a right has been interfered with and therefore pertinent to Article 24(2)(c). Following the prior discussion on the context that Article 24(1) creates, that is, a proportionality test, what is the appropriate approach to be applied in determining whether the core of a right has been breached?

In Maya Brkan’s article, “The Concept of Essence of Fundamental Rights in the EU Legal Order: Peeling the Onion to its Core,” the author posits that the exclusionary approach(absolute theory)

⁷² *Kenya Human Rights Commission v Communications Authority of Kenya & 4 others* (2018), eKLR.

⁷³ *Joseph Otieno Oruoch v Kenya Medical Practitioners, Pharmacists & Dentists & another* (2017) eKLR.

⁷⁴ Article 24(2) *Constitution of Kenya* (2010).

can find support through a textual interpretation.⁷⁵ Particularly, Brkan suggests the endorsement of the exclusionary approach in Article 52(1) of the Charter of Fundamental Rights of the European Union(the Charter).⁷⁶ Under Article 52(1) of the Charter, the requirement that any limitations on rights respect their essence is provided for in a different statement from the requirement that such limitations adhere to the principle of proportionality.⁷⁷ Brkan interprets this separation as support for the exclusionary approach.⁷⁸ Similarly, Article 24 separates the requirement that a limitation should not derogate from the core of the right being limited under Article 24(2)(c) and the requirement that the limitation be subject to a proportionality test, illustrated under Article 24(1), suggesting the application of the exclusionary approach in determining whether the core of a right has been breached.⁷⁹

This analysis on the contextual interpretation of Article 24(2)(c) of the Constitution does not provide a substantive application for the exclusionary approach of determining whether the core of a right has been violated. Consequently, the subsequent section will contend, on substantive grounds, that the exclusionary approach is the appropriate methodology for determining whether the core of a right has been breached.

2.4 Substantive Interpretation of Article 24(2)(c)

Article 20 of the Constitution provides for the application of the Bill of Rights. Article 20(3)(b) provides that “*In applying a provision of the Bill of Rights, a court shall adopt the interpretation that most favours the enforcement of a right or fundamental freedom.*”⁸⁰ As a provision under the Bill of Rights, Article 24(2)(c) falls under this directive.⁸¹ This provision implies that when interpreting a law, courts should prioritise the interpretation that most effectively promotes and protects the rights and freedoms guaranteed in the Constitution. The provision of the Bill of Rights relevant in this study is Article 24(2)(c), which provides for the requirement that

⁷⁵ Brkan M, ‘The Concept of Essence of Fundamental Rights in the EU Legal Order: Peeling the Onion to its Core’, 360.

⁷⁶ Brkan M, ‘The Concept of Essence of Fundamental Rights in the EU Legal Order: Peeling the Onion to its Core’, 360.

⁷⁷ Article 52(1) Charter of Fundamental Rights of the European Union (2000).

⁷⁸ Brkan M, ‘The Concept of Essence of Fundamental Rights in the EU Legal Order: Peeling the Onion to its Core’, 360.

⁷⁹ Article 24(2)(c) *Constitution of Kenya* (2010).

⁸⁰ Article 20(3)(b) *Constitution of Kenya* (2010).

⁸¹ Article 24(2)(c) *Constitution of Kenya* (2010).

limitations ought not derogate from the core of the right being limited.⁸² There are two theories of determining when the core of a right has been violated, as discussed in the background of the study, and the task for the courts, by virtue of Article 20(3)(b), is to identify which of the two theories most effectively promotes and protects rights subject to limitation. To determine which approach most effectively protects rights, this section will first elucidate on how each approach determines when the core of a right has been breached, followed by an evaluation of which one more effectively safeguards rights during their limitation. To best show which of the two theories best protects rights, two cases will be referenced where the Kenyan courts each applied the two theories to a similar set of facts.

2.4.1 Okiya Omtata v Attorney General & 5 others : Exclusionary Approach

This section aims to show how the exclusionary approach manifests in determining whether the core of a right has been violated and will use the court in *Okiya Omtata v Attorney General & 5 others* in doing so.⁸³ The exclusionary approach, as previously stated, determines the core of a right through ascertaining what practices of a right are fundamental to it such that even in the subtraction of some practices, the practices that are considered fundamental to the right are not subject to any limitation including proportionality.⁸⁴ However, as stated in the background of the study, establishing a method for determining what the essence of a right is challenging and as a result, establishing a breach in this way, elusive. However, scholars endorsing the exclusionary approach have identified other methods through which the breach of the core of a right can be identified without having to establish the essential elements of the right. Lenaerts proposed a method of identifying a breach of the core based on the risk of extinguishing the right—a threat to the “very existence” of the right.⁸⁵ Maja Brkan noted the exclusionary approach (absolute theory) in cases by the European Court of Human Rights, though perhaps may not have been intentionally adopted.⁸⁶ The approach was noted where the court skipped the proportionality test

⁸² Article 24(2)(c) *Constitution of Kenya* (2010).

⁸³ *Okiya Omtatah Okoiti v Attorney General & 5 others* (2015) eKLR.

⁸⁴ Scarcello O, ‘Preserving the ‘Essence’ of Fundamental Rights under Article 52(1) of the Charter: A Sisyphean Task?’ 648.

⁸⁵ Dawson M, Lynskey O, and Muir E, ‘What is the Added Value of the Concept of the “Essence” of EU Fundamental Rights?’ 772.

⁸⁶ Brkan M, ‘The Concept of Essence of Fundamental Rights in the EU Legal Order: Peeling the Onion to its Core,’ 361.

where they found that the core of a right has been breached.⁸⁷ The proportionality test was skipped by the court because the right was from the outset, entirely non-existent for the applicants therefore, proceeding to proportionality balancing would be impossible.⁸⁸ In other words, when a right is entirely denied, the right itself is already so compromised that it is impossible to proceed to a proportionality assessment. The author made reference to the following cases as illustrative of the exclusionary approach (absolute theory):

In *Al-Dulimi and Montana Management Inc. v Switzerland*, the applicants' assets were frozen in Switzerland following a UN Security Council Resolution.⁸⁹ Switzerland then adopted an ordinance providing for the confiscation of the frozen assets.⁹⁰ The applicants had completely no legal means for challenging the confiscation of their assets.⁹¹ As a result, the court then held that the very essence of the applicant's right of access to a court had been impaired.⁹² Further, in *Matthews v United Kingdom*, the applicant, a resident of Gibraltar, was denied the ability to vote in the European parliamentary elections as the endeavour was limited to the United Kingdom. The court held that the very essence of the applicant's right to vote was denied. For these courts, the issue was not the degree of limitation of a right, but rather a denial of the right altogether thus leading to the conclusion that its core had been violated.

Having laid out the parameters for identifying when the exclusionary approach is being employed, a Kenyan court's decision can then be referenced. In *Okiya Omtatah Okoiti v Attorney General & 5 others*, the Respondents issued a 21-day strike notice calling for a nationwide strike in essential services.⁹³ In response to this notice, the Petitioner filed the petition challenging its legality on the basis that it contravenes Section 81(3) of the Labour Relations Act(LRA).⁹⁴ Section 81(3) of the LRA provides that, "There shall be no strike or lock-out in an essential

⁸⁷ Brkan M, 'The Concept of Essence of Fundamental Rights in the EU Legal Order: Peeling the Onion to its Core,' 361.

⁸⁸ Brkan M, 'The Concept of Essence of Fundamental Rights in the EU Legal Order: Peeling the Onion to its Core,' 361.

⁸⁹ *Al-Dulimi and Montana Management Inc. v Switzerland*, European Court of Human Rights, 2016.

⁹⁰ *Al-Dulimi and Montana Management Inc. v Switzerland*, European Court of Human Rights, 2016.

⁹¹ *Al-Dulimi and Montana Management Inc. v Switzerland*, European Court of Human Rights, 2016.

⁹² *Al-Dulimi and Montana Management Inc. v Switzerland*, European Court of Human Rights, 2016.

⁹³ *Okiya Omtatah Okoiti v Attorney General & 5 others* (2015) eKLR.

⁹⁴ *Okiya Omtatah Okoiti v Attorney General & 5 others* (2015) eKLR.

service”.⁹⁵ Despite this prayer, one of the particulars of violation cited by the Petitioner was that workers in the essential services sector were being discriminated against as their right to strike was not protected by critical legislation and policies.⁹⁶

The court found the following without undertaking a proportionality test:

1. Referring to the Labour Relations Act(LRA), “Section 81(3) and 78 (1)(f) purports to nullify the right to go on strike provided under Article 41 (2)(d) of the Constitution.”⁹⁷
2. Concerning the limitation under Section 81(3) which prohibits strikes in essential services the court found that, “This limitation is absolute and derogates from the core or essential content of the right to strike.”⁹⁸ The court found that the limitation under Section 81(3), which is similar to Section 78(1)(f), is absolute and derogates from the core or essential content of the right to strike.⁹⁹ The term “absolute” can be used to mean “without exceptions”.¹⁰⁰ The court found that the complete prohibition of the right to strike without exceptions derogates from the core of the right to strike without balancing the right to strike against any other rights.¹⁰¹

2.4.1.1 The court’s application of the exclusionary approach

As earlier illustrated that in cases where the exclusionary approach is observed, the denial of a right altogether led to the conclusion that its core had been violated without the court ever conducting a proportionality test.¹⁰² Similarly, the exclusionary approach would be observed in cases where the court found the core of a right to have been derogated from if the limitation threatens the very existence of the right in question. In *Okiya Omtata*, the court cited Section 81(3) and 78(1)(f) of the LRA, which prohibit the right to strike for essential service workers, and found that both provisions derogate from the core of the right to strike, without a undertaking proportionality test. That is, the court did not evaluate whether the complete denial

⁹⁵ Section 81(3) *Labour Relations Act* (No 14 of 2007).

⁹⁶ *Okiya Omtatah Okiiti v Attorney General & 5 others* (2015) eKLR.

⁹⁷ *Okiya Omtatah Okiiti v Attorney General & 5 others* (2015) eKLR.

⁹⁸ *Okiya Omtatah Okiiti v Attorney General & 5 others* (2015) eKLR.

⁹⁹ *Okiya Omtatah Okiiti v Attorney General & 5 others* (2015) eKLR.

¹⁰⁰ Merriam-Webster Dictionary.

¹⁰¹ *Okiya Omtatah Okiiti v Attorney General & 5 others* (2015) eKLR.

¹⁰² Brkan M, ‘The Concept of Essence of Fundamental Rights in the EU Legal Order: Peeling the Onion to its Core,’ 361.

of the right serves a more significant objective.¹⁰³ Further, the court found that the limitation providing for the complete prohibition of the right to strike for essential workers purports to nullify the right to strike.¹⁰⁴ The Merriam-Webster dictionary describes the term “nullify” as “to deprive of continued existence.”¹⁰⁵ This finding of the court aligns with Dawson’s observation of the application of the exclusionary approach(absolute theory).¹⁰⁶

2.4.2 County Government of Kakamega: Integrative approach

This section aims to show how the integrative approach manifests when determining when the core of a right has been derogated from and will use the court in *County Government of Kakamega & another v Kenya National Union of Nurses & another* as a reference.¹⁰⁷ As previously articulated, the integrative approach posits that any interference with a right may be justified by applying a proportionality test.¹⁰⁸ In ‘*Preserving the ‘Essence’ of Fundamental Rights under Article 52(1) of the Charter: A Sisyphean Task?*’ The author took it as adhering to the exclusionary approach(absolute theory) when the Court of Justice of the European Union attempted to establish what the essence of a right is (and whether it was harmed), and then moved to proportionality, as two separate phases. Conversely, the court would be taken to be adhering to the integrative approach when the court omits any examination of the right’s essence and focuses solely on assessing proportionality. As previously stated, proportionality functions as a doctrinal instrument for the resolution of conflicts between a right and an opposing right or interest, with its central component being the balancing phase, which necessitates a careful weighing of the right against the competing right or interest.¹⁰⁹

The Kenya National Union of Nurses (KNUN) issued strike notices on 11th and 13th January 2016, threatening a strike by all health workers in Kakamega County to commence on 1st February 2016.¹¹⁰ The County Government of Kakamega and the Kakamega County Public

¹⁰³ *Okiya Omtatah Okoiti v Attorney General & 5 others* (2015) eKLR.

¹⁰⁴ *Okiya Omtatah Okoiti v Attorney General & 5 others* (2015) eKLR.

¹⁰⁵ Merriam-Webster Dictionary.

¹⁰⁶ Dawson M, Lynskey O, and Muir E, ‘What is the Added Value of the Concept of the “Essence” of EU Fundamental Rights?’ 772.

¹⁰⁷ *County Government of Kakamega & another v Kenya National Union of Nurses & another* (2017) eKLR.

¹⁰⁸ Scarcello O, ‘Preserving the ‘Essence’ of Fundamental Rights under Article 52(1) of the Charter: A Sisyphean Task?’ 649.

¹⁰⁹ Möller K ‘Proportionality: Challenging the critics’ 710.

¹¹⁰ *County Government of Kakamega & another v Kenya National Union of Nurses & another* (2017) eKLR.

Service Board (the Claimants) filed a Memorandum of Claim on 21st January 2016 seeking injunctions to restrain the KNUN and health workers from engaging in any activities towards the planned strike.¹¹¹ They argued the strike was illegal under section 81(3) of the Labour Relations Act, which prohibits strikes in essential services.¹¹²

After citing the entirety of Article 24 as the legal basis for its decision, of which Article 24(2)(c) is among, the court found that,

“Withdrawal of Hospital Services derogate on the right to life under Article 26, the right to the highest attainable standard of health under Article 43(1) (a) and the right to emergency medical treatment under article 43(2). I think it is not a disputed fact that the withdrawal of medical services is very likely to, and in fact does, lead to loss of life to people who need medical services. The right to life is in a wider sense part of the right to human dignity under Article 28. The withdrawal of health services may therefore lead to cruel, inhuman or degrading treatment of patients and their relatives who do not have the resources to get treatment at private medical facilities and who have to suffer death or watch their loved ones die without medical attention. Freedom from cruelty, inhuman or degrading treatment are part of the rights under Article 25 that cannot be limited or derogated.

From the foregoing the right to strike is inferior to the rights and freedoms that would be denied or derogated by the exercise thereof by workers in the health services sector. To this extent, the limitation thereof is justifiable under Article 24.”¹¹³

2.4.2.1 Court’s application of the integrative approach

The court found that the provisions were justified under the entirety of Article 24, of which Article 24(2)(c) is among after only conducting a proportionality test. This implies that the only test needed to be met for a limitation to be permissible under Article 24, including Article 24(2)(c), is the proportionality test. This integration of the proportionality test with the essence-of-the-right test is the manifestation of the integrative approach.

¹¹¹ *County Government of Kakamega & another v Kenya National Union of Nurses & another* (2017) eKLR.

¹¹² *County Government of Kakamega & another v Kenya National Union of Nurses & another* (2017) eKLR.

¹¹³ *County Government of Kakamega & another v Kenya National Union of Nurses & another* (2017) eKLR.

2.4.3 An analysis of which approach offers better protection in line with Article 20(3)(b) of the Constitution of Kenya

Recalling the foundational article for this analysis, Article 20(3)(b) of the Kenyan Constitution provides that courts, when applying a Bill of Rights provision, adopt the interpretation that most best safeguards a right or fundamental freedom.¹¹⁴ In this context, the relevant provision is Article 24(2)(c), which stipulates that legislation limiting a right or fundamental freedom must not impair its core or essential content. The right being limited in the two cases analysed is the right to strike. Consequently, the chosen methodology for determining when a derogation from the core of a right occurs should prioritize the approach that most effectively safeguards the right to strike. For the court that applied the integrated approach, the total prohibition of the right to strike for essential services was justified as it was in service to safeguard rights of greater importance. However, for the court that applied the exclusionary approach, the complete prohibition of the right to strike for essential workers was a grave enough interference of the right to strike, unlike the integrative approach, to warrant outlawing the sections that prohibited it. Therefore, the exclusionary approach is the methodology that most effectively protects the core of rights because the total prohibition of a purportedly limited right is considered unlawful without considering whether there are more important rights at stake. The exclusionary approach values a right for its inherent qualities, independent of its utility in protecting other rights, and protects it without regard to proportionality hence rendering the total prohibition of the right is impermissible under this approach.

The protection of the inherent significance of these rights is particularly important because Article 24(1) of the Kenyan Constitution already mandates a proportionality test for assessing limitations on rights, rendering an additional proportionality analysis to evaluate whether a right's core has been infringed redundant and ineffective in enhancing rights protection. In contrast, by avoiding reliance on proportionality, the exclusionary approach provides a more robust safeguard for a right's integrity.

¹¹⁴ Article 20(3)(b) *Constitution of Kenya* (2010).

The integrative approach has the potential to give the government an opportunity to sidestep prioritisation of resources for essential economic sectors. For instance, in the case of *County Government of Kakamega & another v Kenya National Union of Nurses & another* where the court set a precedent for employing the integrative approach, it provided the government with a basis to rationalize restrictions on medical practitioners' right to strike, citing the need to preserve lives, instead of channeling resources to bolster the healthcare system. In contrast, as the exclusionary approach views the complete prohibition of a right as a violation of its core, this framework holds the government equally accountable for protecting the right to life alongside medical practitioners, ensuring that the responsibility for upholding the right to life is not placed exclusively on the right to strike.

2.5 Conclusion

This chapter sought to demonstrate how the Kenyan constitutional framework provides for the exclusionary approach as the most suitable approach for determining whether the core of a right has been derogated from. It achieved this through a contextual analysis of Article 24(2)(c) of the Constitution of Kenya, complemented by a substantive evaluation of which approach most effectively protects rights in line with the directive set forth in Article 20(3)(b) of the Constitution.

CHAPTER THREE

HOW COURTS IN KENYA HAVE EMPLOYED THE INTEGRATIVE APPROACH FOR DETERMINING THE BREACH OF A RIGHT'S CORE

3.1 Introduction

The preceding chapter analysed and determined that the constitutional approach for determining whether the core of a right has been derogated from is the exclusionary approach based. This chapter endeavours to demonstrate how the courts in Kenya have explicitly and implicitly applied the integrative approach in determining whether the core of a right has been derogated from, contrary to the Constitution. However, before undertaking this analysis, it will describe how the integrative approach is used in determining whether the core of a right has been derogated from.

3.2 Literature on the Integrative Approach on the Essence of Rights

The integrative approach provides that the core of a right is deemed derogated from through a proportionality test, in the context of the limitation of human rights.¹¹⁵ This section will reference the parameters identified by scholars regarding how courts have applied the integrative approach and will use these parameters to analyze the Kenyan court's explicit and implicit application of the integrative approach. In Maja Brkan's '*The Concept of Essence of Fundamental Rights in the EU Legal Order: Peeling the Onion to its Core*', the author pointed out the fact that the integrative approach can regularly be found in the case law of the European Court of Human Rights.¹¹⁶ Among them was the case of *Kart v Turkey*, where an immediate conclusion on the interference with the essence was not possible. Therefore, the court sought to verify this interference with the essence by referring to the principle of proportionality.¹¹⁷

¹¹⁵ Scarcello O, 'Preserving the 'Essence' of Fundamental Rights under Article 52(1) of the Charter: A Sisyphean Task?' 649.

¹¹⁶ Brkan M, 'The Concept of Essence of Fundamental Rights in the EU Legal Order: Peeling the Onion to its Core,' 361.

¹¹⁷ *Kart v Turkey* (2009) European Court of Human Rights.

3.3 How the integrative approach has manifested in Kenyan case law

3.3.1 Courts that explicitly applied the integrative approach

3.3.1.1 Joseph Otieno Oruoch v Kenya Medical Practitioners, Pharmacists & Dentists & another(the court)¹¹⁸

The Petitioner sought an injunction barring the Respondents from exercising their rights under Articles 37 and 41(2)(d) of the Constitution of Kenya. Article 37 of the Constitution provides that “Every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities.” Article 41(2)(d) provides that, “Every worker has the right to go on strike.” Their prayer was based on the claim that the strikes undertaken by the respondents resulted in people’s death and the right to life takes precedence over the right to picket and the right to strike. Further, that the strikes also violated their right to freedom from torture and cruel, inhuman or degrading treatment, the right to the highest attainable standard of health, which includes the right to health care services, the right to emergency medical treatment, the right to life and the right that a person shall not be deprived of life intentionally except to the extent authorised by the Constitution or other written law. Their prayer was also based on the fact that health workers, being in the category of essential service providers, should be prohibited from taking industrial action as it had led to the loss of people’s lives. The Petitioner ultimately sought the following orders:

- a) An injunction barring the Respondents or any of their branches from exercising their rights under Articles 37 and 41(2)(d) of the Constitution.
- b) A declaration that the right to life is greater than the right to picket and go on strike and a finding that these rights are inconsistent with the general intent of the Constitution, when applied to the Respondents.

¹¹⁸ *Joseph Otieno Oruoch v Kenya Medical Practitioners, Pharmacists & Dentists & another* (2017) eKLR.

c) A declaration limiting the rights under Articles 37 and 41(2)(d) for the Respondents as outlined in Article 24(1).

The court concluded that the two substantive issues it had to determine were balancing the right to life and the right to industrial action for workers in the health sector, and the limitation of the right to industrial action for health workers. However, the court analysed these issues under one heading: *Balancing and Limitation of rights*.

Under that heading, the court first restated the Petitioner’s case, which argued that the right to life is superior to the right to participate in industrial action. Furthermore, the Petitioner argued that health workers, being essential service providers, should be prohibited from taking industrial action as it has led to loss of life. An essential service means a service whose interruption would probably endanger the life of a person or health of the population or any part of the population.¹¹⁹ The court begins its analysis of the two issues by noting that the right to industrial action is not absolute and is subject to limitation under Article 24(1) of the Constitution. Although the court only explicitly references Article 24(1), which does not address the core of a right, it implicitly incorporates Article 24(2)(c)—which does—in its conclusion by stating that, “*Looking at the right to go on strike against the right to life and applying the principles of Article 24 of the Constitution, we are persuaded that an outright prohibition of the right to go on strike for members of the 1st and 2nd Respondents would derogate from the core of that right, which in our view, is not what the Constitution contemplates.*” The court pointed out that derogating the core of a right is not what the Constitution contemplates. The only provision in the Constitution that does not contemplate a derogation of the core of a right is under Article 24(2)(c) of the Constitution. Therefore, although the court did not begin its analysis of the limitation on the right to strike by explicitly referring to Article 24(2)(c) as part of the provisions that would play a role in its analysis, it implicitly incorporates it by making a finding on whether the core of the right was derogated from. It was important to point out that the fact that the court used Article 24(2)(c) in its analysis as it forms the basis for arguing that the court should have applied the exclusionary approach.

¹¹⁹ Section 81(1) *Labour Relations Act* (No. 14 of 2007).

Drawing on the parameters established by scholars for identifying the integrative approach, Maja Brkan recognised the use of the approach when the court in *Kart v Turkey* could not immediately determine whether the essence of the right in question had been interfered with, therefore, the court sought to verify whether this interference had occurred by referring to the principle of proportionality.¹²⁰

Similarly, in the case being analysed in this section, the court faced a dilemma concerning whether the limitation on the right to strike under Sections 78(1)(f) and 81(3) of the Labour Relations Act (LRA) derogated from the core of the right to strike. This dilemma was observed based on the fact that the court referred to two cases from the Employment and Labour Relations Court which had opposing views as to whether the two sections of the LRA referred to, derogate from the core of the right to strike. The first source of the dilemma the court referred to was the court in *Okiya Omtatah Okoiti v The Attorney General & 5 others [2015] eKLR* where the court stated that,

*“Sections 78 and 81 of the Labour Relations Act, whose effect is to prohibit workers employed in essential services from going on strike derogate from the core content of the right to strike as provided under Article 41(2)(d).”*¹²¹

The court then immediately referred to a paragraph from the court in the *County Government of Kakamega and another v Kenya National Union of Nurses and another*. This analysis will refer to the part of the paragraph relevant to it:

“It is my opinion that the limitations under Section 81 of the Labour Relations Act meet the tests set under Article 24(1).”

After the court cites both authorities, the court asks, *“What then is the correct position on this issue?”* However, at this point in the judgement, one would wonder what issue or dilemma the court is referring to. Is the issue about whether the limitation under Sections 81(3) and 78(1)(f)

¹²⁰ Brkan M, ‘The Concept of Essence of Fundamental Rights in the EU Legal Order: Peeling the Onion to its Core,’ 361.

¹²¹ *Okiya Omtatah Okoiti v The Attorney General & 5 others* (2015) eKLR.

derogate from the core of the right to strike (from the court in *Okiya Omtatah Okoiti v The Attorney General & 5 others*) or whether the limitation meets the standard under Article 24(1) which is not related to the core of a right (from the court in *County Government of Kakamega and another v Kenya National Union of Nurses and another*)?

The court's issue is made clear at the conclusion of the judgement, when it states that, "Looking at the right to go on strike against the right to life and applying the principles of Article 24 of the Constitution, we are persuaded that an outright prohibition of the right to go on strike for members of the 1st and 2nd Respondents would derogate from the core of that right..." This statement highlights the court's dilemma. Therefore, the dilemma faced by the court, illustrated by the two referenced courts, was whether the limitation under Sections 81(3) and 78(1)(f) of the LRA derogates from the core of the right to strike. Although the court does not take note of the fact that the court in *County Government of Kakamega & another v Kenya National Union of Nurses & another* referred to Article 24(1) rather than the entirety of Article 24, which would encompass a discussion on whether the core of a right has been derogated from, its difficulty in determining whether the core of the right to strike was violated can be deduced from a holistic reading of the judgement.¹²²

The court's challenge as to whether the core of the right to strike is derogated from by the prohibition on the right to strike for essential services workers, particularly, medical practitioners, shows that the court does not have an immediate conclusion as to whether the core of the right to strike had been interfered with in line with the observation in *Kart v Turkey*.¹²³ The court then goes on to conduct a proportionality test to determine whether the core of the right to strike has been interfered with in line with the previously mentioned parameters for identifying the use of the integrative approach.

In showing how the court applied the proportionality test, the test set out in establishing it from the court in *Kenya Human Rights Commission v Communications Authority of Kenya & 4 others*

¹²² *Joseph Otieno Oruoch v Kenya Medical Practitioners, Pharmacists & Dentists & another* (2017) eKLR.

¹²³ *Kart v Turkey* (2009) European Court of Human Rights.

(2018), *eKLR* will be used.¹²⁴ To restate, the four-part test of proportionality includes the following:

- a. Does the legislation (or other government action) establishing the right's limitation pursue a legitimate objective of sufficient importance to warrant limiting a right?
- b. Are the means in service of the objective rationally connected (suitable) to the objective?
- c. Are the means in service of the objective necessary, that is, minimally impairing of the limited right, taking into account alternative means of achieving the same objective?
- d. Do the beneficial effects of the limitation on the right outweigh the deleterious effects of the limitation?

To show that the prohibition of the right to strike for the medical practitioners in the case, under Sections 78(1)(f) and 81(3) of the LRA, derogates from the core of the right to strike, the court shows that the alternative limitation on the right to strike, the minimum services requirement, that does not derogate from the core of the right. The following section will illustrate how the court used the proportionality test in determining that the core of the right was derogated from by the complete prohibition of the right to strike:

Part (a) of the test: *Does the legislation (or other government action) establishing the right's limitation pursue a legitimate objective of sufficient importance to warrant limiting a right?*

The Judiciary is the organ establishing the limitation in this case, but the central issue in this test is whether the alternative limitation the court endorses—the minimum services requirement—in its judgement pursues a legitimate objective of sufficient importance to warrant limiting a right. The court seems to be aware of this part of the test because it makes reference to international law on labour law making reference to when the right to strike may be limited. The court makes reference to the International Labour Organisation(ILO) in the Digest of Decisions of the Freedom of Association Committee of the Governing Body on when the right to strike may be restricted or prohibited:

a) In the public service only for public servants exercising authority in the name of the State; or

¹²⁴ *Kenya Human Rights Commission v Communications Authority of Kenya & 4 others* (2018), eKLR.

b) In essential service in the strict sense of the term meaning, services the interruption of which would endanger the life, personal safety or health of the whole or part of the population.

The court seems to endorse part (b) of when the ILO finds it appropriate to limit the right to strike based on its reference to the European Social Charter (The Charter). The Charter permits restriction of the right to go on strike only in cases of protection of public interest, the rights and freedoms of others, national security, public morality and health. Therefore, the legitimate objective of sufficient importance that warrants limiting the right to strike is the need to protect public health.

Part (b) of the test: *Are the means in service of the objective rationally connected (suitable) to the objective?*

After the court illustrates the legitimate objective sought to be pursued, that is, protecting public health, the court endorses an alternative limitation (means in service of the objective) on the right to strike from the courts of different jurisdictions, that is, South Africa and Canada. This alternative limitation is the minimum services requirement. The minimum services requirement is a limitation on the right to strike that is intended to allow certain workers in an industry designated as an essential service to go on strike while at the same time maintaining a level of service at which the life, personal safety or health of the whole or part of the population will not be endangered. Hospital services are designated as an essential service under the Labour Relations Act.¹²⁵ Therefore, the question is whether the minimum services requirement—the means in service of the objective—is rationally connected to the objective of making sure that the life, personal safety or health of the whole or part of the population will not be endangered. This would need an examination into the properties of the minimum services requirement. The South African court the court referenced, provided for a breakdown of what the minimum services requirement entails:¹²⁶

a) Taking into account employees' constitutional right to participate in industrial action, which ought to be balanced against the general public interest;

¹²⁵ Fourth Schedule, *Labour Relations Act* (No. 14 of 2007).

¹²⁶ *In National Union of Mineworkers v Essential Services Committee and Others* (2019) Labour Court of South Africa.

- b) An examination of specific critical or necessary services required within an essential services designation, that must be maintained at acceptable levels during the course of industrial action, to ensure that life, personal safety or health of the whole or part of the population is not endangered;
- c) An assessment of whether a service is superfluous or critical to the overall objective of minimum service through an examination of whether the core business of the entity/service consists of components which are/are not intertwined or interdependent;
- d) If the business components of an entity are interdependent, an assessment is to be made as to whether a determination of minimum service will achieve its objectives by attaching significance to any individual business component to the exclusion of any relationship with other components, or whether a composite assessment of the components would be necessary in order to achieve those objectives.

Therefore, which of these aspects of the minimum services requirement meet the requirement that the minimum services requirement—the means in service of the objective—is rationally connected to the objective of making sure that the life, personal safety or health of the whole or part of the population will not be endangered? This study suggests that part (b) of the properties of the minimum services requirement do.

Part (b) provides that an examination of specific critical or necessary services required within an essential services designation be done, that must be maintained at acceptable levels during the course of industrial action, to ensure that life, personal safety or health of the whole or part of the population is not endangered. The minimum services requirement requires that an examination be done into the medical services which are critical and necessary. This seems to be connected to the objective of making sure that the life, personal safety or health of the whole or part of the population will not be endangered as the services being offered are only the most critical ones which would be the ones likely to endanger the life, personal safety or health of the whole or part of the population.

Part (c) of the test : *Are the means in service of the objective necessary, that is, minimally impairing of the limited right, taking into account alternative means of achieving the same objective?*

After the court pointed out the fact that the right to strike should only be limited in cases of protection of public interest, the rights and freedoms of others, national security, public morality and health, the court went on to provide for the facts relevant to this test. The court cited the South African case of *Eskom Holdings Ltd v National Union of Mineworkers and Others* which held that not all the workers employed in an industry declared to be an essential service need to be precluded from participating in a strike for that service to continue to operate at an acceptable level.¹²⁷ The court made reference to this decision before introducing the minimum services requirement. In comparison to the limitation under Sections 81(3) and 78(1)(f) which prohibits all workers in essential services from going on strike, among whom are medical practitioners, the minimum services requirement only requires a number of medical practitioners to remain on duty when a strike is ongoing. The minimum services requirement, which the court endorses, then seems to impair the right to strike minimally compared to the limitation under Sections 81(3) and 78(1)(f) of the LRA.

Part (d) of the test: *Do the beneficial effects of the limitation on the right outweigh the deleterious effects of the limitation?*

At the conclusion of the judgement, the court finds that an outright prohibition of the right to strike for the medical practitioners in the case would derogate from the core of the right to strike. However, the court also finds that the right to strike should be limited through the minimum services requirement to ensure that there is no danger to the life or health of members of the public. The court, at this point, illustrated that the right to life and healthcare services outweigh the restriction on the right to strike by the minimum services requirement.

After having illustrated that the minimum services requirement is a limitation that is proportionate to the objective of safeguarding the people's life and health, the court concludes that the outright prohibition of the right to strike for medical practitioners derogates from the

¹²⁷ *Eskom Holdings Ltd v National Union of Mineworkers and Others* (2011) Supreme Court of Appeal of South Africa.

core of the right to strike. The court having done only a proportionality test before making this conclusion illustrates that they employed the integrative approach in determining whether the core of the right was derogated from. This conclusion is corroborated by the court's statement under paragraph 66:

“Looking at the right to go on strike against the right to life and applying the principles of Article 24 of the Constitution, we are persuaded that an outright prohibition of the right to go on strike for members of the 1st and 2nd Respondents would derogate from the core of that right.”

Although it is uncertain which principles the court might have been referring to under Article 24 of the Constitution, the only principle the court applied in its judgement is the principle of proportionality. Further the court stated, *“Looking at the right to go on strike against the right to life”* before concluding that an outright prohibition of the Respondents' right to strike, who are medical practitioners, undermines the core of that right. This statement set the foundation for the court's conclusion. The court effectively weighed these rights and determined that while the right to strike cannot be entirely restricted for all medical practitioners, it should be limited to safeguard the more critical right to life and the health of the population, revealing a balancing test, characteristic of the principle of proportionality.

3.3.2 Courts that implicitly applied the integrative approach

3.3.2.1 County Government of Kisii v Kenya Medical Practitioners Pharmacists & Dentists Union (KMPDU)¹²⁸

The respondents(KMPDU) directed their members to go on strike, which commenced on 4th March 2024 after deliberations with the claimant to reach an agreement on the welfare of their members failed. The claimant argued that the strike was illegal and unprotected. The court eventually found that:

“In my view, the prohibition of strikes in an important sector such as the health sector, is reasonable and justifiable, as to allow strikes would have the effect of prejudicing the rights and

¹²⁸ County Government of Kisii v Kenya Medical Practitioners Pharmacists & Dentists Union (KMPDU) & another (2024) eKLR.

fundamental freedoms of the general public....I therefore return that Section 81 of the Labour Relations Act, which prohibits strikes in essential services, meets the threshold set under Article 24 of the Constitution on limitation of rights and fundamental freedoms, and amounts to a reasonable limitation to the right to strike.”

The court found that the prohibition of the right to strike for essential services workers, among whom hospital workers include, meets the threshold set under the entirety of Article 24, which includes Article 24(2)(c), after only conducting a proportionality test.¹²⁹ The court therefore implies that the test under Article 24(2)(c), as to whether the core of a right has been derogated, was determined through a proportionality test. The court implicitly merges the test of the derogation of the core of a right with the proportionality test, following the integrative approach, which Article 24 of the Constitution does not contemplate as shown in Chapter 2 of the study.

Similarly, the courts in *County Government of Makueni & another v Kenya Union of Clinical Officers (KuCO) & 6 others(2021)*, *County Government of Kakamega & another v Kenya National Union of Nurses & another (2017)* and *County Government of Machakos v Kenya Union of Clinical Officers (2024)* also implicitly applied the integrative approach in determining whether a right’s core has been derogated from.

3.4 Conclusion

In conclusion, this chapter aimed to show how the courts in Kenya have explicitly and implicitly applied the integrative approach in finding whether the core of a right has been derogated from. The first part of the chapter illustrated how this identification would be made for the courts that applied the approach explicitly.

The second part of the chapter then analysed how the court in *Joseph Otieno* explicitly used the proportionality test in finding that the core of the right to strike had been derogated from while the final section of the chapter showed how courts in Kenya have implicitly applied the

¹²⁹ *County Government of Kisii v Kenya Medical Practitioners Pharmacists & Dentists Union (KMPDU) & another (2024) eKLR.*

integrative approach, contrary to Article 24 of the Constitution of Kenya as illustrated in chapter 2 of the study.

The exclusionary approach is important in determining whether the core of a right has been interfered with because it promotes the enforcement of the right more than the integrative approach does in line with Article 20(3)(b) of the Constitution. The integrative approach is a replication of the proportionality test under Article 24(1) of the Constitution of Kenya, as shown in this chapter, and its duplication does not protect rights any further than the proportionality test does under Article 24(1). Therefore, a justification for applying the integrative approach on the basis that it protects more important rights like the right to life fails because the proportionality test under Article 24(1) already performs that function.

Further, the proportionality test does not disqualify a limitation of a right upon discovery that it completely prohibits the rights for right holders unlike the exclusionary approach. For instance, where the integrative approach was explicitly employed, by the court in *Joseph Otieno*, the complete prohibition of the right to strike was not wrong because it attempted to render the right non-existent for medical practitioners but rather because the limitation was disproportionate. The exclusionary approach would consider the limitation wrong because it purported to render the right non-existent for medical practitioners, as found by the court in *Okiya Omtata v Attorney General & 5 others*.¹³⁰

¹³⁰ *Okiya Omtatah Okiiti v Communication Authority of Kenya & 8 others* (2018) eKLR.

CHAPTER FOUR
ALTERNATIVES TO THE INTEGRATIVE APPROACH IN KENYAN
JURISPRUDENCE

4.1 Introduction

The previous chapter endeavoured to show that the courts in Kenya have applied the integrative approach of determining when the core of a right is violated both implicitly and explicitly contrary to Article 24(1) and 24(2) of the Constitution, read together.¹³¹ This chapter will show what the courts should or could have done in order to avoid this inconsistency with the Constitution based on what other courts in Kenya have done, faced with similar circumstances.

4.2 Solution for courts that explicitly applied the integrative approach

The courts in the following cases, like the court in Joseph Otieno, found a particular limitation on a right to be disproportionate to its objective. However, they did not ultimately conclude that the core of the right in question had been derogated from but rather, that the right was either violated or breached. The term “violated” is sufficient to communicate that the particular measure is unconstitutional while simultaneously not implying that the inquiry into whether a measure has derogated from the core of a right is synonymous with a proportionality test, following the integrative approach. The following cases found that particular rights had been violated as opposed to their core faced with similar circumstances as the court in Joseph Otieno:

*4.2.1 Okiya Omtatah Okoiti v Communication Authority of Kenya & 8 others*¹³²

In January 2017, the Communications Authority of Kenya (CAK) notified the country's mobile service providers about the implementation of a new system called the Device Management System (DMS). This system involved the installation of a communication surveillance system on mobile networks, which was said to provide access to specific subscriber information, such as call data records. CAK justified the introduction of the DMS by stating it was intended to “monitor and identify stolen handsets, counterfeit phones, and devices that had not been type-approved by the regulator.”

¹³¹ Article 24, *Constitution of Kenya* (2010).

¹³² *Okiya Omtatah Okoiti v Communication Authority of Kenya & 8 others* (2018) eKLR.

The Petitioner, Okiya Omtatah, then filed a petition to the High Court in Nairobi. Among the arguments levelled is that the installation of the DMS would enable the government to “snoop” on anything the unsuspecting population transacts through their mobile phones, and Kenyans would no longer enjoy the right to privacy over the use of their mobile phones. The Petitioner sought an order, among others, prohibiting the Respondents from proceeding to implement the DMS or acting in any way to interfere with the privacy of Kenyan citizens through the use of communications surveillance technologies.

The main issue before the court was to determine whether the DMS system threatens or violates the right to privacy of mobile service subscribers. The court referred to a letter sent by CAK informing the mobile service providers that the DMS would be used to access their customers' information. It held that this access would only be lawful if it fell within the permitted parameters established by legislation and met the standards set by the general limitations clause under Article 24 of the Constitution of Kenya. The court noted that the CAK's argument that the DMS was necessary to aid in combating illegal mobile devices had to be examined in light of the rationality and reasonableness/proportionality tests. To determine reasonableness(which the court used interchangeably with proportionality), the court noted that it had to consider two factors. First, it had to consider whether there was a “valid, rational connection” between the way in which DMS limits the right to privacy and a legitimate public interest. Second, it ought to consider whether there were alternative ways in which the CAK could achieve that public interest goal. There was a rational connection between the access to information the DMS would enable and the public interest objective of combating illegal mobile devices. However, the court found that there were a number of less restrictive measures that could have been adopted to achieve the purpose relied on by the CAK. For instance, as the illegal devices were not manufactured in Kenya, laws and regulatory bodies responsible for overseeing the importation of goods could be relied on to prevent the importation of such illegal devices into Kenya. The court ultimately found that the measure out in place to access mobile network subscribers' information(DMS) was a breach of the right to privacy.

Other courts that have deemed a right violated by virtue of a measure limiting a right being disproportionate is the court in *Kenya Human Rights Commission & others v Koome Nchebere*

Law Society of Kenya 2 others (Interested Parties) where the court not only found that the decision to suspend the rights to strike for the essential service workers in the case was in contravention of Article 24 but also that it violated the right to strike in the process.¹³³

4.2.1.1 How the solution would be applied to the court that explicitly applied the integrative approach

The courts in these cases have shown that after finding that a measure limiting a right was disproportionate to its objective, they found the particular right being limited having been breached or violated.

Similarly, in the case of *Joseph Otieno Oruoch v Kenya Medical Practitioners Pharmacists & Dentists Union & another*; the court found that the measure of totally prohibiting the right to strike for the essential service workers in the case was disproportionate. Following the solution under this section, rather than the court in *Joseph Otieno* improperly concluding that the core of the right to strike had been derogated, the court would have found that the right to strike had been breached or violated. This leaves room for the requirement of the limitation not to breach the core of the right to strike, based on the exclusionary approach, to be explored as it does not specify that the core of the right has been violated.

4.3 Solution for courts that implicitly applied the integrative approach

4.3.1 Kenya Human Rights Commission 8 others v Koome Nchebere Law Society of Kenya 2 others (Interested Parties)¹³⁴

On 14 April 2024, the respondent, the Inspector General of the National Police in Kenya, purported to suspend the KMPDU members' right under articles 36, 37 and 41 of the Constitution, more particularly, the KMPDU members' right to strike, assemble, protest, or picket peaceably and unarmed. On the material date, the Respondent published a statement providing, among others, that they had information that non-medics with intention to cause havoc and terror to the public intended to join the ongoing processions, a move that posed a

¹³³ *Kenya Human Rights Commission 8 others v Koome Nchebere Law Society of Kenya 2 others* (2024) KLR.

¹³⁴ *Kenya Human Rights Commission 8 others v Koome Nchebere Law Society of Kenya 2 others* (2024) KLR.

threat to public safety and security. The Applicant then sought an order of Certiorari quashing the Respondent's decision to suspend Articles 36, 37 and 41 of the Constitution which had the effect of cancelling medics' right to strike and to picket peaceably and unarmed. Article 41, relevant to this analysis, provides that every worker has the right to go on strike. The court found that:

"If at all the respondent had any information that "non-medics" intended to join the strike to cause havoc and terror, it was incumbent upon him to arrest such elements and foil any attempts to cause the alleged havoc or terror without necessarily interfering with the KMPDU members' rights under articles 36,37 and 41 of the Constitution...Under our constitution, it is possible for the respondent and the police under his command to maintain law and order even as the citizens exercise their rights under articles 36, 37 and 41 of the Constitution."

To tie this all up, at its conclusion the court held that, *"the decision violated the rights provided for under Article 36, 37 and 41 of the Constitution. Accordingly, the decision was not justifiable in terms of article 24(1) of the Constitution."*

The court found that the Respondent did not need to suspend the medical practitioner's right to strike in order to avoid "non-medics" who intended to join the strike to cause havoc and terror as it was within the Respondent's responsibility to prevent any efforts to cause the alleged havoc or terror. Therefore, the measure provided for by the Respondent, that is, to suspend the medical practitioners' right to strike, was disproportionate to the objective of avoiding "non-medics" who intended to join the strike to cause havoc and terror. This proportionality assessment is consistent with the court's conclusion in finding that *"the decision was not justifiable in terms of article 24(1) of the Constitution."* "The decision" being the Respondent's decision to suspend the medical practitioners' right to strike. The court here limited its finding on the violation of the principle of the proportionality to Article 24(1) as opposed to finding a violation of Article 24(1) and 24(2)(c), which would imply that the tests under subarticle (1) and (2)(c) of Article 24 are the same. This implicitly honours the distinction that Article 24(1) and (2)(c) creates between the proportionality test and the requirement not to derogate the core of a right. Although the court does not implicitly state that the exclusionary approach should be used in determining whether Article 24(2)(c) has been violated, its reference to the fact that only Article 24(1)(the

proportionality test) was violated implicitly illustrates that that is the only proportionality test to consider under Article 24.

4.3.1.1 How the solution would be applied to courts that implicitly applied the integrative approach

The case referenced in this section has been used to demonstrate that courts have distinguished between the tests established under Article 24(1) and 24(2)(c). The conclusion that courts in the preceding chapter implicitly adopted the integrative approach when assessing whether a right's core was derogated stems from their invocation of the entirety of Article 24 while deeming a limitation disproportionate. This suggests that the courts equated the determination of whether a right's core has been derogated with a proportionality analysis, consistent with the integrative approach, which diverges from the framework envisioned by Article 24. To address this, it is proposed that courts clarify that a measure's disproportionality pertains solely to Article 24(1), thereby aligning with the constitutional intent.¹³⁵

4.4 Conclusion

This chapter aimed to show that despite the absence of a legal establishment as to the core of rights, the validity of the exclusionary approach of determining when the core of rights have been violated pursuant to Article 24(1) and 24(2)(c) of the Constitution read together can be maintained. Specifically, the chapter endeavoured to provide a remedy for the implicit application of the integrative approach of determining when the core of rights have been derogated from while part three endeavoured to provide the remedy for its explicit application.

¹³⁵ Article 24, Constitution of Kenya (2010).

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.1 Conclusion

The main objective of this study was to show how courts in Kenya have failed to employ the constitutionally valid approach in determining whether the core of a right has been derogated from. It also sought to do this through illustrating the constitutionally valid approach through which the core of a right is considered derogated from, that is, the exclusionary approach. In order to achieve these objectives, the study undertook desk research that mainly relied on published materials. It referenced material on the international and national legal frameworks. Specifically, general comments by the Committee on Economic, Social and Cultural Rights and the Constitution of Kenya to find out Kenya's as well as other jurisdictions' position on the concept of the core of human rights. Review of articles, journals, as well as case law on the concept was also undertaken. The study comprises five chapters, each addressing different aspects as outlined in the objectives of the study.

Chapter one provided a brief background on the concept of the core of rights based on the Committee on Economic, Social and Cultural Rights(CESCR), the supervisory body responsible for monitoring the implementation of the International Covenant on Economic, Social and Cultural Rights(ICESCR). While some authors trace the concept's origins to the European Court of Human Rights, the courts use the term vaguely. The CESCR introduced the concept of the core of a right to aid in the realisation of socio economic rights, asserting that states are obligated to provide the minimum essential levels of a right, characteristic of the absolute theory(exclusionary approach). The concept's use has extended beyond a positive obligation on the state to a negative obligation, requiring states not to deprive individuals of the core of their rights even when limiting them, as seen in general limitation clauses in some countries. The chapter ultimately aimed to elucidate on the origin of the concept of the core of a right, the theories for determining the breach of a right's core, and the literature on the same.

Chapter 2 of the study endeavoured to illustrate that the approach that ought to be used in determining whether the core of a right has been derogated from based on Kenya's Constitutional

framework is the exclusionary approach, also referred to as the exclusionary approach. The chapter argued for the exclusionary approach based on two premises. Firstly, a contextual one, based on Article 24(1) and 24(2)(c) of the Constitution of Kenya, which, read together, separate the proportionality test and the requirement for a limitation not to derogate from the core of a right. Secondly, a substantive argument, based on Article 20(3)(b) of the Constitution of Kenya which provides that, in applying a provision of the Bill of Rights, which Article 24(2)(c) is among, a court shall adopt the interpretation that most favours the enforcement of a right or fundamental freedom. Interpreting Article 24(2)(c) to apply the exclusionary approach favours the enforcement of the rights and freedoms.

Chapter three demonstrated how the Kenyan courts have implicitly and explicitly applied the integrative approach in determining whether the core of a right has been derogated from and the effect of applying this approach to the rights being limited. In illustrating how the courts have explicitly applied the integrative approach, a four part test for determining when a proportionality test was used. In illustrating how the courts implicitly applied the integrative approach, the study found that the courts would conclude that a limitation met the test under the entirety of Article 24 after only conducting a proportionality test. This implies that the only test necessary to be conducted under Article 24 of the Constitution is a proportionality test including the test as to whether the limitation has derogated the core of the right. The application of the integrative approach results in establishing a constitutionally invalid precedent for its use, while simultaneously undermining the rights whose core has been defined through this approach.

Chapter four aimed to offer solutions to the courts' use of the integrative approach. The first solution addressed courts that explicitly applied the integrative approach. This first solution identified Kenyan courts that, like the court that explicitly applied the integrative approach, found the limitation on a particular right to be disproportionate to its purpose. However, instead of concluding that the core of the limited right was derogated from, these courts determined that the right had been violated. This solution suggests that determining whether the core of a right has been derogated from is a distinct inquiry, separate from the proportionality test. The second solution suggested that, for courts that implicitly applied the integrative approach, instead of suggesting that the entirety of Article 24 of the Constitution proffers a proportionality test and

thereby incorporating Article 24(2)(c)—on whether the core of a right has been derogated from— in this analysis, the court could have stated that the proportionality test is limited to Article 24(1).

5.2 Recommendations

This study recommends that the courts maintain the inquiry as to whether a measure derogates from the core of a right as a distinct test contemplated by Article 24(1) and 24(2)(c) of the Constitution of Kenya, following the exclusionary approach.

The courts' persistent application of the integrative approach over time gives legal legitimacy to it, following the approach of legal realism. Accordingly, this study recommends that the judiciary promptly acknowledge these precedents establishing the integrative approach, so as to prevent its entrenchment in the legal system. This urgency arises from the integrative approach's incapacity, unlike the exclusionary approach, to safeguard rights beyond the scope of a proportionality test when limitations are imposed on them.

The requirement for a limitation not to derogate from the core of right under Article 24(2)(c) is meant to be a check on the proportionality test by virtue of its phrasing, “despite clause 1.” Consequently, employing the same methodology in determining whether the core of a right has been derogated from undermines the protective function of Article 24(2)(c), which is intended to operate independently from the proportionality test. Therefore, this study recommends that the courts maintain the requirement that a limitation should not derogate from the core of a right as independent from the proportionality test so it functions as a check on balancing rights further than they ought to be.

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