

**Heaven Forbid: Interrogating the Right to Discriminate Against Homosexuals under
Article 32 of the Constitution**

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Declaration

I, OTIENO GREGORY JUNIOR, 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: 22/03/2019

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

Signed:..... 

Ms Emmah Senge

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ABSTRACT

Concerns have been raised about the compatibility of religious laws and practices with norms guaranteeing the rights of same-sex couples. Given that some religious teachings declare that same-sex sexual conduct is immoral, and some religions condemn not only same-sex sexual activity but also LGBT individuals, conflicts between the right to freedom from discrimination and the right to manifest one's religion are inevitable. This study considers how conflicts between both rights should be addressed in law. It is particularly concerned with whether religious individuals should be allowed to discriminate in the secular marketplace. It starts from the basis that both these rights are valuable and worthy of protection and contends that a proportionality analysis provides the best method for resolving these conflicts. In particular, it argues that proportionality is a conciliatory method of reasoning because it provides a context-dependent and nuanced answer to these issues, providing scope for re-assessment in future cases. It is also argued that proportionality is advantageous because it inherently demands justification where rights are infringed. The analysis in this study draws primarily upon the recognised sources of Law in Kenya, namely the domestic law of Kenya and the general rules of International law. The study also takes a comparative approach, examining the law in Canada to demonstrate the clash of rights and to compare how these issues have been dealt with by Canadian courts and legislatures.

LIST OF CASES

Kenyan Cases

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

Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others (2013) eKLR.

Nyakamba Gekara v Attorney General & 2 others (2013) Eklr

Mohamed Fugicha v Methodist church in Kenya (suing through its registered trustees) & 3 others (2016) eKLR.

Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others (2017) Eklr

Jacqueline Okuta & another v Attorney General & 2 others (2017) eKLR.

Ndanu Mutambuki & 119 others v Minister for Education & 12 others (2007) eKLR.

United Kingdom Case

Regina v. Secretary of State for Education and Employment and others (Respondents) ex parte Williamson (Appellant) and others (2005), The United Kingdom House of Lords

Human Rights Committee Decisions

Toonen v Australia, CCPR Comm. No. 488/1992 (31 March 1994)

Young v Australia, CCPR Comm. No. 941/2000 (6 August 2003)

United States of America Cases

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

Zarda v. Altitude Express Inc., (2018) United States Court of Appeals for the second circuit

South African Cases

S v Makwanyane and Another (1995), Constitutional Court of South Africa.

Midi Television (Pty) Ltd. and Director of Public Prosecutions (Western Cape) (2007), The Supreme Court of Appeal of the Republic of South Africa.

Canadian Cases

Syndicat Northcrest v. Amselem (2004), The Supreme Court of Canada

Egan v Canada (1995), The Supreme Court of Canada.

Vriend v Alberta (1998), The Supreme Court of Canada.

R. v. Big M Drug Mart Ltd (1985), The Supreme Court of Canada.

R v Oakes (1986), The Supreme Court of Canada

R. v. Crawford (1995), The Supreme Court of Canada.

R. v. Mills (1999), The Supreme Court of Canada.

Trinity Western University v. Law Society of Upper Canada (2018), The Supreme Court of Canada.

Dagenais v. Canadian Broadcasting Corporation (1994), The Supreme Court of Canada.

Reference re Same-Sex Marriage (2004), The Supreme Court of Canada.

R. v. N.S. (2012), The Supreme Court of Canada.

Trinity Western University v. British Columbia College of Teachers (2001), The Supreme Court of Canada.

LIST OF LEGAL INSTRUMENTS

Constitution of Kenya (2010)

International Covenant on Civil and Political Rights (ICCPR)

Title VII of the *Civil Rights Act 1964* (United States of America)

Equality Act 2010 (United Kingdom)

Equal Opportunities Bill (2007)

Employment Act (Cap 226 of the laws of Kenya)

Canadian Charter of Rights and Freedoms (1982)

Canadian Human Rights Act (1985)

Ontario Human Rights Code (1990)

CHAPTER ONE

INTRODUCTION TO THE STUDY

1.1 Background to the Study

In Kenya, same-sex marriage is impermissible under the Constitution, and consensual same-sex sexual activities among adults are criminalised through colonial era legislation.¹ Further, there exists no explicit protections against discrimination on the basis of sexual orientation in Kenya's domestic law. This state of affairs persists despite reports that the population of homosexual people is growing and homosexual activity is practised openly under the nose of Law enforcement authorities.²

Historically, the deep involvement of faith-based organisations, more so Church-affiliated organisations, in the spheres of education, health-care, social welfare and economic training and development began during the first phases of the missionary expansion, was intensified under colonialism, and continued into the era of independence.³ This very social involvement- with its concomitant extensive social influence- continues to this day, and the position of religion is firmly entrenched within the Kenyan national arena. Not surprisingly, a 2010 survey indicated that 82 percent of Kenyans consider religion to be 'very important' in their life and 70 percent attend weekly religious services.⁴

Article 32(2) of the Constitution of Kenya guarantees the right to manifest one's religion or belief whether individually or in community with others, whether in public or private and whether through worship, observance, practice or teaching. Further, Article 32(4) of the constitution provides that a person shall not be compelled to act, or engage in any act that is contrary to that person's belief or opinion. At the same time, the Constitution under Articles 27(4) and 27(5) prohibits direct or indirect discrimination on the basis of a number of grounds, among them sex.⁵

¹ Cap 63 of the Laws of Kenya was enacted in 1948. Sections 162, 163 and 165 criminalise homosexual activity.

² Mukei C and Wainaina E, 'Shock as gays openly seek partners in Nairobi' *The Nairobiian*, 3 March 2014—
<<https://www.sde.co.ke/thenairobi/article/2000114618/shock-as-gays-openly-seek-partners-in-nairobi>> on 1 March 2018.

³ Galia SF, "Church and state in Kenya, 1986-1992: The churches' involvement in the 'game of change'" Volume 96(382) *African Affairs Journal*, 1997.

⁴ Pew Research Center, *Sub-Saharan Africa Religion Database*, 15 April 2010.

⁵ Although sexual orientation is not explicitly included in the list of protected classes, some have argued that 'sex' in articles 27(4) and 27(5) should be interpreted to include sexual orientation, just as has been found with the term 'sex' in the anti-discrimination clauses of various human rights treaties such as the International Covenant on Civil and Political Rights, which Kenya has ratified.

Given both the right to manifest one's religion and the right to be free from discrimination are protected by the Constitution, disagreement often arises between people who believe homosexual practice is acceptable and people who believe it is morally wrong and hence should remain criminalised.

1.2 Statement of the Problem

Religious organisations feature prominently among the major opposers to the recognition and protection of Gay and Lesbian rights.⁶ This is so since the teachings of the prominent religions in Kenya proscribe same-sex unions. A large majority, if not all followers of these religious doctrines and teachings, steadfast in their determination to practise their faith, do not shy away from exhibiting their disapproval of same-sex unions in various spheres of their lives, be it in their professional lives or business activities. Consequently, religious justifications supported by Article 32 of the Constitution have been used to deny same-sex couples basic necessary services, among them health care and education.⁷

The Constitution of Kenya protects both the right to manifest one's religion and the right to be free from discrimination in equal measure. Nonetheless, instances may arise where an individual's assertion to enjoy either of the aforementioned rights brings about friction between both rights. Therefore, the problem this study seeks to investigate is the apparent legal clash between, on the one hand, freedom to manifest religion and, on the other hand, the right to be free from discrimination on the basis of sexual orientation.

⁶ Astraea Lesbian Foundation for Justice, *Kenya LGBTI: Landscape Analysis of Political, Economic & Social Conditions*, 2015, 8.

⁷ Denial has also extended to bed and breakfast or hotel accommodation. See Kenya Human Rights Commission, *The Outlawed Amongst Us*, 2011, 37-40.

1.3 Objectives of the Study

The general research objective of this study is to investigate whether the right of homosexual individuals not to be discriminated against supersedes religious freedom in the constitution. Specifically, this study attempts to:

- i. Assess the scope and limits of the right to manifest one's religion in a bid to find out whether a pious individual can claim a right to discriminate.
- ii. Make recommendations on measures necessary to ensure evasion from possible clashes between the freedom to manifest religion and the right to be free from discrimination on the basis of sexual orientation.

1.4 Hypotheses

This dissertation aims to test the following hypotheses:

- i. That the right to manifest one's religion is not a permissible justification to curtail the right of homosexual individuals to be free from discrimination on the basis of sexual orientation.
- ii. That the right to manifest one's religion may be limited in circumstances where it is necessary to protect the rights and freedoms of others.

1.5 Research Questions

The main question this study asks is; 'To what extent should religious freedom under Article 32 of the Constitution be used as a justification to discriminate against homosexuals in the secular marketplace?' The Secondary research questions are:

- i. What are the limits, if any, on the right to manifest one's religion?
- ii. What are the most suitable measures to take in order to avoid possible clashes between the freedom to manifest religion and the right to be free from discrimination on the basis of sexual orientation?

1.6 Significance of the research

Discrimination on the basis of sexual orientation in the provision of services by a public administrative body has received judicial ventilation in Kenya.⁸ Currently however, debate around the place of religious freedom in provision of private services in Kenya has been minimal. This study is intended to benefit both private business enterprises with religious affiliation and Homosexual individuals. For the pious business owner, this study will assist in explaining the nature of religious freedom and whether the right to manifest religion can be limited. A homosexual individual will benefit through this study's elaboration on the freedom from discrimination on the basis of sexual orientation, and the circumstances in which discrimination, direct or indirect, may arise.

1.7 Theoretical Framework

This study employs religious liberty and equality theories to assess the rights of homosexual individuals to be protected from discrimination.

1.7.1 Religious Liberty

Early arguments in favour of religious liberty, most prominently the writings of John Locke, relied on the desirability of minimising religious conflict as a rationale for religious toleration.⁹ However, the failure of this rationale to place any independent value on religious freedom in itself can result in a very thin layer of protection easily overridden by competing goals; indeed, concerns for preserving religious harmony can mean the minority believer is more readily silenced.¹⁰ Ronald Dworkin highlighted this very point, and argued that 'dignity provides the only available justification for freedom of religious thought and practice'.¹¹ This viewpoint holds that the utilitarianism of democracy should thus be tempered by concerns that the external preferences of citizens, relating to the respect they have for a person or their way of life, should not be counted in determining the State's policies.¹²

⁸ See for example, *Eric Gitari v Non- Governmental Organisations Co-ordination Board & 4 others* (2015) eKLR.

⁹ Locke J, *A Letter Concerning Toleration*, Liberty Fund, London, 2010.

¹⁰ Vickers L, 'Twin Approaches to Secularism: Organised Religion and Society' Volume 32 *Oxford Journal of Legal Studies*, 2012, 202.

¹¹ Dworkin R, *Justice for Hedgehogs*, Harvard University Press, Cambridge, 2011, 376.

¹² Dworkin R, *Taking Rights Seriously*, Duckworth Publishers, London, 1977, 227.

Equally, autonomy principles dictate that individuals should be free to pursue their own goals and to follow their own comprehensive views. As John Rawls observes, ‘In a well-ordered society ... the plans of life of individuals are different in the sense that these plans give prominence to different aims and persons are left free to determine their good’.¹³ From an autonomy perspective, individuals’ ideas of what would be a worthwhile and valuable life should not be coerced by the State, unless this is necessary to prevent harm to others. As such, concern for religious freedom mirrors a strong tradition of liberal thought on how the State should maximise the autonomy of the individual whilst protecting social harmony and personal safety.

This theory will aid in understanding how far religious liberty extends and the degree to which government can legitimately regulate it. In doing so, it assists in understanding how religious liberty weighs against equality and non- discrimination laws.

1.7.2 Theories of Equality and Non- discrimination

This section seeks to outline some basic concepts of equality as a context to the more practically focused discussions of ensuing chapters. It briefly outlines the concepts of formal equality and substantive equality.

Formal equality can be traced back to Aristotle's dictum that ‘things that are alike should be treated alike’.¹⁴ Formal equality involves a moral claim that all persons should be treated equally because they are of equal moral worth. However, a formal equality approach has been criticised as negating the value of difference, since non-discrimination does not create an equal playing field, and has been critiqued as ignoring systematic stereotyping and institutionalised prejudice.

Substantive equality is based upon the recognition that where there is an unequal starting point equal treatment is not enough. This idea of substantive equality is especially active in the context of redressing patterns of racial inequality and in doing so providing group-based remedies. Generally, a commitment to substantive equality imposes positive duties on state actors to amend patterns of disadvantage.¹⁵

¹³ Rawls J, *A theory of Justice*, Oxford University Press, Oxford, 1999, 393.

¹⁴ Aristotle, *Nicomachean Ethics*, Clarendon Press, Oxford, 1925, V3 1131a- 1131b.

¹⁵ Fredman S, *Human Rights Transformed: Positive Rights and Positive Duties*, Oxford University Press, Oxford, 2008, 178.

Equality and non-discrimination theories will assist in identifying the legal threshold for discrimination on the basis of sexual orientation and as a corollary, aid in elaboration of why anti-discrimination laws are important. Most importantly, this study will be able to establish instances where discrimination, direct or indirect, will be held to have taken place.

1.8 Literature Review

This study will achieve its purpose by drawing guidance from earlier writings on two thematic areas. The first thematic area encompasses the protection of freedom from discrimination on the basis of sexual orientation. The second is on the scope and limits of the right to manifest religion.

1.8.1 Protection from Discrimination on the Basis of Sexual Orientation

It is instructive to note that while this study is done in a jurisdiction where same-sex unions are outlawed, reference is occasionally made to writings in jurisdictions where same-sex unions are permissible. Such writings are quoted herein for purely comparative purposes.

Dr Alice Donald and **Dr Erica Howard** contend that there is no ‘right to discriminate’; in respect of claims for religiously-motivated refusals to provide goods or services to same-sex couples, courts have consistently held either that the requirement to provide goods and services to the public in a non-discriminatory way is not an interference with religious freedom, or that such interference is justified by the goal of combating discrimination.¹⁶

Robert Wintemute uses harm analysis to argue that religiously motivated refusals to serve others, for a reason prohibited by anti-discrimination legislation, causes direct harm to others, since the business owner would deny the customer a service, for a prohibited reason, to the customer’s face. He adds that even accommodation would cause indirect harm to others, since the individual would deny the customer a service, for a prohibited reason, behind the customer’s back, even if accommodation would involve minimal cost, disruption or inconvenience.¹⁷

¹⁶ Dr Donald A and Dr Howard E, ‘The right to freedom of religion or belief and its intersection with other rights’ Middlesex University, 2015, 2.

¹⁷ Wintemute R, ‘Accommodating Religious Beliefs: Harm, Clothing or Symbols, and Refusals to Serve others’ Volume 77(2) *The Modern Law Review*, 2014, 240.

1.8.2 Scope and limits of the right to manifest one's Religion

Article 32 of the constitution does not appear to set any limits on the right to freedom of Religion. Nonetheless, this study will look up to International Human Rights treaties which Kenya has ratified, in a bid to find out the internationally acceptable limits on the right.

Wamwara John Joseph argues that in manifesting one's religion, only 'justifiable' interference by the State should be allowed. He contends that in all instances the individual manifesting religion should be the focus of the protection and should not in any way be sacrificed for 'the society', for there is no society without the individual.¹⁸

Dalia Vitkauskaitė-Meurice concludes that the right to freedom of religion is a complex right. He however analyses the freedom of religion clauses in various human rights treaties and establishes that the freedom to manifest one's religion or beliefs may be restricted only to the extent that such limitations are permitted by law and are necessary to protect public safety, order, health or morals, or fundamental rights and freedoms of others.¹⁹

1.9 Research Design and Methodology

This study approaches the subject matter through literature review on both, on the one hand, protection from discrimination on the basis of sexual orientation and on the other hand, the scope and limits of the right to manifest one's Religion. It conducts qualitative analysis in the course of dealing with the subject matter. It uses primary and secondary sources in the review. The Constitution of Kenya 2010, statutes and policies constitute the primary sources which are significant for laying down the legal position in relation to the subject matter in Kenya. Books, journal articles, conference papers and online journals comprise the secondary sources. The secondary sources document the studies on the various areas of interest to this study by various scholars.

¹⁸ Wamwara J, 'Limitations on the Right to Freedom of Religion or Belief under International Human Rights Law' Unpublished LLM Thesis, Emory University, Atlanta, 2014, 35.

¹⁹ Vitkauskaitė-Meurice D, 'The Scope and Limits of the Freedom of Religion in International Human Rights Law' Volume 18(3) *Jurisprudence*, 2011, 846.

1.10 Limitations

In assessing the bearing of religion on anti-discrimination rights, this study is faced by a task that is complicated by at least two levels of diversity. Firstly, there exists a plurality of religions in Kenya, which obviously relate differently to human rights. Secondly, each of the major religious traditions and practices relate to human rights in a variety of ways, meaning the same religion can be invoked to support widely divergent practices, institutions and orientations.

1.11 Chapter Breakdown

This study is divided into five chapters.

Chapter one provides an introduction to the study, sets out the statement of the problem, the literature review, the objectives and questions, the hypothesis, the conceptual framework and the design methodology of the study.

Chapter two describes proportionality analysis in detail. It narrows down on balancing, the main method used by a number of constitutional courts around the world to resolve conflicts of fundamental rights.

Chapter three begins by setting out the nature and scope of both the right to manifest religion and the freedom from discrimination. It then makes use of principles from decided cases to illustrate how a Kenyan Court will resolve a conflict between the aforementioned rights.

Chapter four compares Canada's rights reconciliation framework with Kenya's approach. It is specifically interested in Canada's principles of rights reconciliation and Canada's rights reconciliation framework.

Chapter five takes a holistic view of the topic by summarising the findings and conclusions drawn within the context of the problem statement and research questions that informed the topic. This Chapter also offers recommendations.

CHAPTER TWO

AN INTRODUCTION TO PROPORTIONALITY AND BALANCING

2.1 Introduction

Chapter one gave an outline of this study. This chapter describes proportionality. Proportionality is “a doctrinal tool for the resolution of conflicts between a right and a competing right or interest, at the core of which is the balancing stage which requires the right to be balanced against the competing right or interest.”²⁰ The most commonly applied approach to addressing cases of rights in tension is premised on the notion of balancing or reconciling rights. Proportionality analysis is thus indispensable to any discourse on competing rights. Indeed, “The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality.”²¹

The Constitution of Kenya in Article 24(1) decrees in part “A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom,” Article 24(1) was influenced by Section 36 of the Constitution of the Republic of South Africa which in *S v Makwanyane* was interpreted as containing the proportionality requirement.²² But what is this proportionality requirement which forms the core requirement of the limitation clause?

According to former President of the Supreme Court of Israel, Aharon Barak, proportionality can be defined as “the set of rules determining the necessary and sufficient conditions for a limitation of a constitutionally protected right by a law to be constitutionally permissible.”²³ Proportionality contains four sub- components according to which a limitation of a constitutional right will be

²⁰ Möller K, ‘Proportionality: Challenging the critics’ 10(3) *International Journal of Constitutional Law*, 2012, 710.

²¹ *S v Makwanyane and Another* (1995), Constitutional Court of South Africa.

²² *S v Makwanyane and Another* (1995), Constitutional Court of South Africa was decided upon consideration of Section 33(1) of the Interim Constitution, which provision assisted with the formulation of Section 36 of the final Constitution of South Africa. The following brief statement in the judgement of the then President of the Court Chaskalson P formed the foundation of future developments as far as the general limitation clause in the final Constitution is concerned:

The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality.

²³ Barak A, *Proportionality: Constitutional Rights and their Limitations*, Cambridge University Press, Cambridge, 2012, 3.

constitutionally permissible if firstly, it is designated for a proper purpose; secondly, the measures undertaken to effectuate such a limitation are rationally connected to the fulfilment of that purpose; thirdly, the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation; and finally there needs to be a proper relation (“proportionality *stricto sensu* ” or “balancing”) between the importance of achieving the proper purpose and the social importance of preventing the limitation on the constitutional right.²⁴ These building blocks of proportionality are briefly elaborated on below.

2.2 Proper Purpose

The first component of proportionality, proper purpose, is explicitly entrenched in the limitation clause proviso “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom...”²⁵ Proper purpose examines whether a constitutional right can be limited to realise the purpose underlying the limiting law.²⁶ In doing so, it recognises the notion that “not every purpose can justify a limitation on a constitutional right.” The question of when the purpose of a law limiting a constitutional right is considered “proper” requires the examination of two related issues. First, the types of purpose that can justify limitations imposed on constitutional rights should be considered. Second, the degree of urgency required in realizing those proper purposes should be taken into account.²⁷

2.3 Rational Connection

The second component of proportionality, rational connection, requires that the means used by the limiting law fits (or is rationally connected to) the purpose the limiting law was designed to fill.²⁸ That is to say, once the interpreter has defined the end that the legislator aimed for and the means that the legislator has designed to obtain such end, then the interpreter must verify if the means are capable of achieving such end.²⁹ The question raised by the rational connection test is not whether

²⁴ Barak, *Proportionality*, 3.

²⁵ Article 24(1), *Constitution of Kenya* (2010).

²⁶ Barak, *Proportionality*, 247.

²⁷ Barak, *Proportionality*, 251.

²⁸ Barak, *Proportionality*, 304.

²⁹ Cianciardo J, ‘The Principle of Proportionality: The Challenges of Human Rights’ *Journal of Civil Law Studies*, 2010, 179—<http://digitalcommons.law.lsu.edu/jcls> on 6 September 2018.

the means are proper and correct, or whether there are other, more proper and correct means; rather, the question is: are the means chosen by the limiting law capable of advancing the law's underlying purpose?³⁰

2.4 Necessity

Thirdly, the necessity test or the requirement of the "less restrictive means"³¹ stipulates that the legislative measure imposing the limitation on the constitutional right is proportional only if the measure's purpose cannot be achieved in any other less restrictive manner. If another means which would intrude less upon the constitutionally protected right exists, "then the state has no good reason to use the more rather than the less intrusive means [when] the less intrusive means serves the citizens' interests better and... just as well."³²

As can be surmised from the foregoing, the necessity test contains a two- part sub test. First, it must be determined whether a hypothetical alternative means that can advance the purpose of the limiting law as well as, or better than, the means used by the limiting law exists, and secondly, whether the hypothetical alternative means limits the constitutional right to a lesser extent than the means used by the limiting statute.³³ It is concluded that the limiting law is necessary if a hypothetical alternative means that equally advances the law's purpose does not exist, or if this alternative means exists but its limitation of the constitutional right is no less than that of the limiting law.

2.5 Proportionality *stricto sensu*

The last test of proportionality is proportionality *stricto sensu*.³⁴ According to proportionality *stricto sensu*, in order to justify a limitation on a constitutional right, a proper relation should exist between the benefits gained by fulfilling the purpose and the harm caused to the constitutional

³⁰ Rivers J, 'Proportionality and Variable Intensity of Review' 65(1) *The Cambridge Law Journal*, 2006, 189.

³¹ Barak, *Proportionality*, 317.

³² Brown J, 'The Doctrine of Proportionality: A Comparative Analysis of the Proportionality Principle Applied to Free Speech cases in Canada, South Africa and the European Convention on Human Rights and Freedoms' Unpublished LLM Thesis, Central European University, Budapest, 2012, 23.

³³ Barak, *Proportionality*, 323.

³⁴ Proportionality *stricto sensu* can also be referred to as commensuration or balancing. See for example, Rivers J, 'Proportionality and Variable Intensity of Review', 190.

right from obtaining that purpose. This test requires a balancing of the benefits gained by the public and the harm caused to the constitutional right through the use of the means selected by law to obtain the proper purpose.³⁵ The limitation on a constitutional right is not proportional *stricto sensu* if the harm caused to the right by the law exceeds the benefit gained by it.

With the concept of proportionality in mind, how then should the Kenyan legal system address a conflict between two constitutional rights? Should one right yield to the other? According to Barak, a conflict between two principle shaped constitutional rights does not affect the validity of both rights or their scope. Instead, such a conflict only affects their realisation.³⁶ To remedy the conflict, Barak proposes an ‘interpretive balance’ which balance he likens, by analogy, to proportionality *stricto sensu*.³⁷ The discourse in this and subsequent chapters will focus primarily on the fourth element of balancing.

2.6 Balancing Conflicting Rights

Balancing denotes a cost- benefit analysis. Rationally therefore, the law on balancing can be broken down into three stages. The first stage involves establishing the degree of non-satisfaction of, or detriment to, a first principle. This is followed by a second stage in which the importance of satisfying the competing principle is established. Finally, in the third stage, it is established whether the importance of satisfying the latter principle justifies the detriment to or non-satisfaction of the former.³⁸ Balancing may either be structured or loose. A distinction between both types is made below.

³⁵ Barak, *Proportionality*, 340.

³⁶ Barak, *Proportionality*, 84.

³⁷ In Barak’s own words:

By using the said balancing, one is not applying the limitation clause. For example, there is no need to examine each of the limitation clause’s components; whether the law has been created to serve a proper purpose is of no importance here. Similarly, the rational connection and necessary means (the “less damaging alternative”) components should also not be considered. The only relevant component of proportionality to the interpretive balancing act is the component of proportionality *stricto sensu*.

See also Alexy R, ‘Balancing, constitutional review and representation’ 3(4) *International Journal of Constitutional Law*, 2005, 572:

In German constitutional law balancing is one aspect of what is required by a more comprehensive principle, namely, the principle of proportionality.

³⁸ Alexy R, ‘Balancing, constitutional review and representation’, 574.

Structured balancing is exemplified by the German notion and practice of proportionality.³⁹ In relation to fundamental rights, structured balancing is useful in determining the scope and the relative strength of rights as applied to certain specific circumstances. On the other hand, loose balancing is merely another name for an economic, or cost-benefit, analysis of law.⁴⁰ One of the major proponents of loose balancing is former Judge Richard Posner, according to whom rights are ‘created’ by engaging in a pragmatic cost-benefit analysis.⁴¹ The analysis herein will draw primarily from structured balancing, although loose balancing will be considered occasionally.

2.7 Reconciling versus Balancing

The terms ‘reconciling’ and ‘balancing’ are often used interchangeably to refer to the exercise of giving content to two seemingly competing rights. Justice Iacobucci has however drawn a distinction between both concepts.⁴² According to him, ‘balancing’ suggests a weighing of rights to determine which one preponderates, while the idea of “reconciling,” aims to harmonise the rights in issue without preferring one over the other.⁴³ Iacobucci argues that ‘balancing’ is better suited for when the state is justifying a limitation on an individual’s rights under Article 24. When reconciling competing Charter rights, on the other hand, a court seeks to reconcile the constitutionally guaranteed rights of one individual with those of another.⁴⁴ In essence, the distinction Iacobucci draws flows partly from the classic dichotomy of “state v. individual” as opposed to “individual v. individual.”

Errol Mendes’ view forms a sharp contrast to Iacobucci’s. Mendes believes there is little meaningful difference between ‘reconciling’ and ‘balancing.’ In both circumstances, according to him, the focus is on reaching a “contextual equilibrium” that puts “rights that seem to conflict into an equilibrium depending on what particular interests are at stake in any particular fact situation.”⁴⁵

³⁹ Zucca L, ‘Conflicts of Fundamental Rights as Constitutional dilemmas’ in Brems E(ed), *Conflicts between fundamental rights*, Intersentia publishers, Antwerp, 2008, 28.

⁴⁰ Zucca, ‘Conflicts of Fundamental Rights as Constitutional dilemmas’, 28.

⁴¹ Posner R, *Not a Suicide Pact: The Constitution in a Time of National Emergency*, Oxford University Press, Oxford, 2006, 31.

⁴² Iacobucci F, “Reconciling Rights” the Supreme Court of Canada 's Approach to Competing Charter Rights’ 20 *The Supreme Court Law Review: Osgoode’s Annual Constitutional Cases Conference*, 2003, 140-143.

⁴³ Iacobucci F, “Reconciling Rights”, 141.

⁴⁴ Iacobucci F, “Reconciling Rights”, 141.

⁴⁵ Mendes E, ‘Reaching Equilibrium between Conflicting Rights’ in Azmi S, Foster L and Jacobs L, *Balancing Competing Human Rights Claims in a Diverse Society*, Irwin Law, Toronto, 2012, 244.

This paper adopts Errol's stance since both concepts share a common goal of "identifying a context specific, non-hierarchical compromise position that allows the fullest possible realization of both rights in tension in the circumstances of the case."⁴⁶

2.8 Conclusion

Despite opposition from certain academics,⁴⁷ balancing offers a rational means of reconciling competing human rights claims. Numerous authors have argued that balancing is both irrational and subjective.⁴⁸ Nonetheless, this paper takes the opposite view for the reasons that firstly, balancing is a necessary means for making analytical distinctions that help identify the crucial aspects in various cases thus ensuring proper arguments. Secondly, the principle of proportionality generally embodies fundamental standards of rationality and has been described correctly as "a very powerful rational instrument." It is thus not unjustified to assume that proportionality may play a role as an element of a common language of global constitutional law.⁴⁹

⁴⁶ McGill J, "Now It's My Rights Versus Yours" Equality in Tension with Religious Freedoms' 53(3) *Alberta Law Review* 2016, 588.

⁴⁷ See for example Tsakyrakis S, 'Proportionality: An assault on human rights?' 7(3) *International Journal of Constitutional Law*, 2009.

⁴⁸ See for example Bendor A.L and Sela T, 'How proportional is proportionality?' 13(2) *International Journal of Constitutional Law*, 2015, 544.

⁴⁹ Klatt M and Meister M, 'Proportionality—a benefit to human rights? Remarks on the I·CON controversy' 10(3) *International Journal of Constitutional Law*, 2012, 708.

CHAPTER THREE

KENYA'S APPROACH TO RIGHTS RECONCILIATION

3.1 Introduction

Chapter 2 defined both proportionality and balancing in detail. It concluded by presenting balancing as a rational means of resolving competing human rights disputes. This chapter begins by setting out the nature and scope of both the right to manifest religion and the freedom from discrimination. It then makes use of principles from decided cases to illustrate how a Kenyan Court will resolve a conflict between the aforementioned rights. It concludes that context is king when resolving rights disputes.

The rights under discussion are not absolute but are subject to constitutional limitation in accordance with both proportionality analysis and balancing as set out in the previous chapter. The High Court in *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others*⁵⁰ adjudging on the conflict between the Right to own property and the right to housing had thus to say:

I do not think the criteria to be adopted demands mathematical precision or scientific exactitude, in developing the interpretation to be accorded to the right to housing. Neither does it demand talismanic formalism in recognising the specific requirements that the right demands. In my view, it requires a sober, liberal, dynamic and broad approach that would require an examination of the normative components of the right to housing generally as well as the nature of the right to adequate housing specifically.

The Court proceeded to set out the components of the right to housing before ultimately finding a violation of the petitioners' right to housing. It is therefore fundamental to encapsulate the building blocks and necessary guarantees of both the right to manifest a religion and the right to be free from discrimination before commencing the balancing exercise.

⁵⁰ (2013) eKLR.

3.2 Nature and scope of the Right to manifest religion

Article 32(2) of the Constitution of Kenya protects the right of individuals to manifest religion or belief through worship, practice, teaching or observance, alone or with other people, be it in public or in private. Noteworthy is that while the freedom to hold a belief as guaranteed by Article 32(1) is absolute, the freedom to manifest belief is qualified.⁵¹ Nonetheless, holding a belief may be intrinsically bound up with manifesting it, for example, through worship, teaching others, the wearing of symbols or of special clothes, or the avoidance of certain foods.⁵²

Generally therefore, everyone is entitled to hold whatever beliefs he wishes. As regards manifestation, both foreign and Kenyan Courts have adopted a personal or subjective conception of freedom of religion. According to this view, claimants seeking to invoke freedom of religion should not need to prove the objective validity of their beliefs in that their beliefs are objectively recognized as valid by other members of the same religion, nor is such an inquiry appropriate for courts to make.⁵³ Emphasis is on sincerity of belief rather than validity of belief.⁵⁴ According to the Court of Appeal in *Mohamed Fugicha v Methodist church in Kenya (suing through its registered trustees) & 3 others*⁵⁵:

A person's religious convictions need not make sense to us in order for us to accord them the necessary respect and space for them to flourish. An issue that may appear trifling to

⁵¹ *Regina v. Secretary of State for Education and Employment and others (Respondents) ex parte Williamson (Appellant) and others* (2005), The United Kingdom House of Lords as quoted in *Nyakamba Gekara v Attorney General & 2 others* (2013) eKLR. See also, Equality and Human Rights Commission, *Human Rights Review 2012: How fair is Britain? An assessment of how well public authorities protect human rights*, 2012, 314.

⁵² Equality and Human Rights Commission, *Human Rights Review 2012: How fair is Britain? An assessment of how well public authorities protect human rights*, 2012, 314.

⁵³ Per Iacobucci J in *Syndicat Northcrest v. Amselem* (2004), The Supreme Court of Canada:

It is the religious or spiritual essence of an action, not any mandatory or perceived-as-mandatory nature of its observance, that attracts protection. An inquiry into the mandatory nature of an alleged religious practice is not only inappropriate, it is plagued with difficulties.

⁵⁴ *Syndicat Northcrest v. Amselem* (2004), The Supreme Court of Canada. See also *Regina v. Secretary of State for Education and Employment and others (Respondents) ex parte Williamson (Appellant) and others* (2005), The United Kingdom House of Lords where Lord Nicholls of Birkenhead expresses the view:

But, emphatically, it is not for the court to embark on an inquiry into the asserted belief and judge its 'validity' by some objective standard such as the source material upon which the claimant founds his belief or the orthodox teaching of the religion in question or the extent to which the claimant's belief conforms to or differs from the views of others professing the same religion. Freedom of religion protects the subjective belief of an individual.

⁵⁵ (2016) eKLR. See also *Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others* (2017) eKLR where the Court of Appeal is of the opinion:

Because religion is essentially a matter of personal faith and belief, the court can only embark on a limited inquiry into the genuineness of a person's professed belief.

'Genuineness' as used hereinabove is likened to validity by the author.

one may be of monumental value to another in the realm of religious beliefs. Their validity and the right of their holders to hold religious beliefs are not dependent on general acceptance or majority vote. They are personal to the individual in accordance with their own inner light and must be respected because they are clear, not to the observer, but to the believer.

Thus, at the first stage of a religious freedom analysis, an individual advancing an issue premised upon a freedom of religion claim must show the court that firstly, he or she has a practice or belief, having a nexus with religion, which calls for a particular line of conduct, either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual's spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials; and secondly, he or she is sincere in his or her belief. Only then will freedom of religion be triggered.⁵⁶

3.3 Nature and Scope of the freedom from discrimination

The Constitution of Kenya contains a non-discrimination clause that provides 'The state shall not discriminate directly or indirectly against any person on any ground, including race, sex...'⁵⁷ Article 27(5) of the same Constitution prohibits both natural and legal persons from discriminating directly or indirectly against another person on any of the grounds *specified* or *contemplated* in Article 27(4). Noteworthy is that Article 27(4) does not expressly list sexual orientation as a protected characteristic. Nonetheless, a three-judge bench of the High Court in *Eric Gitari v Non-Governmental Organisations Co-ordination Board & 4 others*⁵⁸ (*Eric Gitari*), judging on the freedom of association of gay and lesbian persons, held that the list of protected classes is not closed 'and is subject to interpretation to include such grounds as the context and circumstances demonstrate are a ground of discrimination.'⁵⁹

⁵⁶ *Syndicat Northcrest v. Amselem* (2004), The Supreme Court of Canada.

⁵⁷ Article 27(4), *Constitution of Kenya* (2010).

⁵⁸ (2015) eKLR.

⁵⁹ Notably, some Courts and tribunals around the world have held that sex encompasses sexual orientation. For example, in the framework of the International Covenant on Civil and Political Rights (ICCPR), the Human Rights Committee (HRC) in *Toonen v Australia*, CCPR Comm. No. 488/1992 (31 March 1994) found that reference to "sex" in articles 2, paragraph 1, and 26 of the ICCPR is to be taken as including sexual orientation. In 2003, the HRC ruling

The Kenyan Constitution also provides for an equal protection stipulation entailing that ‘every person is equal before the law and has the right to equal protection and equal benefit of the law.’⁶⁰ In *Eric Gitari* the words ‘every person’ were interpreted to include all persons living within the republic of Kenya despite their sexual orientation. Today, legal scholars understand a constitutional guarantee of equality in two broad ways- formal equality and substantive equality.⁶¹

Formal equality, or equality as consistency requires that all persons who are in the same situation be accorded the same treatment. Formal equality forms the conceptual basis of the legal concept, direct discrimination.⁶² Substantive equality on the other hand, attempts to ensure that laws or policies do not reinforce the subordination of specifically, groups already suffering social, political or economic disadvantage. In addition, it requires that laws treat individuals as substantive equals, recognising and accommodating peoples’ differences.⁶³ With the emphasis on the impact of laws or policies and the move beyond consistency to substance, the substantive equality approach incorporates indirect discrimination in its analysis.⁶⁴

In the provision of goods, facilities or services therefore, a person (“A”) concerned with the provision to the public or a section of the public of goods, directly discriminates against another (“B”) if, on grounds of the sexual orientation of B or any other person except A, A treats B less favourably than he treats or would treat others (in cases where there is no material difference in the relevant circumstances).⁶⁵ On its part, indirect discrimination occurs where a person (“A”) applies to B a provision, criterion or practice which puts B at a disadvantage compared to some or all persons who are not of his sexual orientation and which practice A cannot reasonably justify by reference to matters other than B’s sexual orientation.⁶⁶

in *Young v Australia*, CCPR Comm. No. 941/2000 (6 August 2003) solidified this position by explaining that individuals had a more general right to be guaranteed equal protection under the laws with respect to sexual orientation. Kenya is a state party to the ICCPR. Similarly in the United States, both *Hively v. Ivy Tech Community College of Indiana*, (2017) United States Court of Appeals for the seventh Circuit and *Zarda v. Altitude Express Inc.*, (2018) United States Court of Appeals for the second circuit interpreted sex as used in Title VII of the *Civil Rights Act* to include sexual orientation.

⁶⁰ Article 27(1), *Constitution of Kenya* (2010).

⁶¹ See for example Yap P-J, ‘Four Models of Equality’ 27(1) *Loyola of Los Angeles International and Comparative Law Review*, 2005, 63.

⁶² Smith A, ‘Equality constitutional adjudication in South Africa’ 14(2) *African Human Rights Law Journal*, 2014, 612.

⁶³ Smith A, ‘Equality constitutional adjudication in South Africa’, 613.

⁶⁴ Smith A, ‘Equality constitutional adjudication in South Africa’, 613.

⁶⁵ Section 13, *Equality Act 2010* (United Kingdom).

⁶⁶ Section 19(2), *Equality Act 2010* (United Kingdom).

It is important to note that unlike other modern jurisdictions, Kenya does not have specific legislation to combat discrimination in the provision of goods and services.⁶⁷ Discriminatory conduct is only expressly prohibited in employment policies and practices vide Section 5 of the *Employment Act* and even so, sexual orientation is not explicitly recognised as a protected characteristic.⁶⁸

3.4 Balancing the freedom of Religion and the freedom from discrimination

The preceding sections elaborated on the nature and scope of both the freedom of religion and the freedom from discrimination. It should be understood that a conflict of rights situation will arise only where the claims asserted by the litigants fall within the respective bounds of both rights. Only after establishing so can the decision-maker legitimately commence the balancing process. Balancing entails a cost-benefit analysis as explained in the previous chapter. A permanent 'weight' is not allocated to each conflicting principle since all protected rights have equal value.⁶⁹ Instead, balancing is a complex process that takes into account the legal and moral values to which a society adheres, both by tradition and in actual fact, and also the relevant case law.⁷⁰ The balancing exercise must take notice of the principles briefly discussed hereunder.

Firstly, both the freedom of religion and the freedom from discrimination are not absolute and can be limited in accordance with the stipulations of Article 24 of the Constitution. Indeed, like many other rights, neither of the rights under discussion is included in the short list of fundamental freedoms that may not be limited.⁷¹ Most rights are subject to limitations that are necessary and reasonable in a democratic society for the realization of certain common goods such as social justice, public order and effective government or for the protection of the rights of others.⁷² So, for example, the freedom of expression is limited by a prohibition against inciting violence against a

⁶⁷ See for example the *Equality Act 2010* of the United Kingdom, the *Canadian Human Rights Act* and the proposed *Equality Bill* of the United States of America.

⁶⁸ The *Equal Opportunities Bill (2007)* was an unsuccessful attempt to promote equality of opportunity and to counteract direct and indirect discrimination in not only employment but also a wide range of both public and private facilities.

⁶⁹ See Barak, *Proportionality*, 346 and *Midi Television (Pty) Ltd. and Director of Public Prosecutions (Western Cape)* (2007), The Supreme Court of Appeal of the Republic of South Africa.

⁷⁰ Schlink B, 'Proportionality (1)' *The Oxford Handbook of Comparative Constitutional Law*, 2012, 725 — <<https://global.oup.com/academic/product/the-oxford-handbook-of-comparative-constitutional-law-9780199578610?cc=us&lang=en&>> on 08 January 2019.

⁷¹ See Article 25, *Constitution of Kenya* (2010).

⁷² *Jacqueline Okuta & another v Attorney General & 2 others* (2017) eKLR.

specific individual or group⁷³ and freedom of movement is quite properly limited by traffic rules, by rules relating to lawful detention and imprisonment and by immigration rules.

Likewise, the freedom to manifest religion may be limited where it is necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.⁷⁴ In the same vein, it is not discrimination for an individual or a religious organisation not to carry out, attend or take part in a marriage of a same sex couple.⁷⁵ The possibility of limitations means that a claimant's rights might not actually extend as far as he or she alleges, and it will be up to the decision-maker to determine, as a threshold issue under the balancing framework, whether the alleged rights infringement in fact properly falls within the ambit of a protected right.⁷⁶

Secondly, the balancing exercise must have careful regard to the full context of the case, including the relevant facts and constitutional principles involved. This means that context is king and rights contests cannot be resolved in the abstract. As an example, a Kenyan Court should consider that although Article 27 does not identify sexual orientation as a protected ground, the list of protected classes is not exhaustive and therefore can be interpreted to include sexual orientation.⁷⁷ The Court must however proceed on such a course with caution, bearing in mind that it is not the place of the Judiciary to infuse the constitutional text with a new or unconventional meaning that was not intended at promulgation. In addition, it may be worth considering the prevailing social attitudes toward recognition and enjoyment of gay and lesbian rights.⁷⁸ Essentially, the meaning and content of rights are not defined in abstraction, but rather in the particular factual matrix in which they arise.

Thirdly, in a competing rights scenario, a court must, in the balancing exercise, have regard to the extent or severity of the interference with each right. This was aptly demonstrated in *Jacqueline Okuta & another v Attorney General & 2 others*,⁷⁹ a petition that brought into sharp focus the constitutionality of the offence of criminal defamation created under the provisions of section 194 of the Penal Code. Following an analysis of comparative and international jurisprudence, Justice

⁷³ Article 33(2), *Constitution of Kenya* (2010).

⁷⁴ Article 9(2), *Convention for the Protection of Human Rights and Freedoms* (4 November 1950) ETS 005 as quoted in *Nyakamba Gekara v Attorney General & 2 others* (2013) eKLR.

⁷⁵ See for example Schedule 23 (2), *Equality Act 2010* (United Kingdom).

⁷⁶ McGill J, "Now It's My Rights Versus Yours", 590.

⁷⁷ Paragraph 132 of *Eric Gitari v Non-Governmental Organisations Co-ordination Board & 4 others* (2015) eKLR.

⁷⁸ <http://www.pewglobal.org/2013/06/04/the-global-divide-on-homosexuality/> on 23 September 2018.

⁷⁹ (2017) eKLR.

Mativo found that the offence of criminal defamation was not reasonably justifiable in a democratic society. He reached this conclusion by taking into account two considerations: firstly, the consequences of criminalizing defamation, and secondly, whether there is an appropriate and satisfactory alternative remedy to deal with the mischief of defamation.

Justice Mativo took into account the practical consequences of a complaint in criminal defamation, which included investigation, threat of arrest, charge, prosecution, remand, the rigorous ordeal of a trial, and legal fees. He concluded that this had a stifling or chilling effect on freedom of expression. He went on to note that this chilling effect was exacerbated by the “drastic” maximum sentence of two years in prison. He also highlighted the fact that there was an alternative civil remedy for defamation, and this was a compelling reason to find the offence of criminal defamation unnecessary and not reasonably justifiable.

From the foregoing, it becomes clear that determination of the extent of interference with each conflicting right forms the very core of the balancing or reconciliation process, especially because such analysis contributes to a well-reasoned and justifiable outcome. The decision maker in the tension between the freedom of religion and the freedom from discrimination therefore has an obligation to find out for example, the possible effects of castigation, ridicule and denial of sometimes essential services on the party alleging discrimination and whether the same party could be able to receive the same services from a different provider willing to serve sexual minorities. As regards the party asserting religious freedom, it may be fundamental to ask whether the manifestation (through refusal to serve) forms an essential part of the religion in terms of doctrine.⁸⁰

3.5 Conclusion

As the discourse on equality and non-discrimination in Kenya intensifies, issues of competing human rights claims arising from diversity are bound to increase. This chapter has defined the scope of both rights under discussion and has elaborated on fundamental principles applicable when resolving rights tensions. Of pertinence is that there is no hard and fast method of reconciling rights in tension since “rights are contextual. They represent recognition of the complexity of

⁸⁰ See *Ndanu Mutambuki & 119 others v Minister for Education & 12 others* (2007) eKLR.

human interaction and activity which is both individualistic and communal.”⁸¹ The principles highlighted above should guide the rights reconciliation process. Where possible, a clash between rights should be approached by reconciling the rights through reasonable accommodation.

⁸¹ Hughes P, “The Reconciliation of Legal Rights” in Azmi S, Foster L and Jacobs L (eds) *Balancing Competing Human Rights Claims in a Diverse Society*, Irwin Law Inc., Toronto, 2012, 273.

CHAPTER FOUR

COMPARING THE KENYAN AND CANADIAN MODELS OF RIGHTS RECONCILIATION

4.1 Introduction

The previous chapter explained the Kenyan approach to balancing rights in tension. It was noted that there exists a dearth of cases specifically pitting religious freedom arguments against freedom from discrimination claims. Nonetheless, a number of fundamental principles from decided rights tensions cases were identified as useful guides, to be referred to when resolving tensions between the rights currently under discussion. This chapter now considers the rights reconciliation framework in Canada- a jurisdiction with a relatively higher number of relevant rights conflict cases.

4.2 Canada

Canada is a country located in the northern part of the continent of North America.⁸² It is an independent, sovereign federal state comprising 10 largely self-governing provinces and three territories with a lesser degree of self-government.⁸³ In Canada's system of government, the power to govern is vested in the Crown but is entrusted to the government to exercise on behalf and in the interest of the people.⁸⁴ As such, the country is a constitutional monarchy. Her Majesty Queen Elizabeth II is the current Queen of Canada and Canada's Head of State.⁸⁵ Just like most modern countries, Canada has three branches of government at the national level: the executive, legislature and judicial branches.⁸⁶

⁸² – <https://en.wikipedia.org/wiki/Canada> on 19 January 2019.

⁸³ Forsey E, *How Canadians Govern Themselves*, 8th ed, Library of Parliament, Canada, Ottawa, 2012, 1. The provinces are, in alphabetical order: Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island, Quebec, and Saskatchewan. The three territories are Northwest Territories, Nunavut, and Yukon.

⁸⁴ – <https://www.canada.ca/en/canadian-heritage/services/crown-canada/about.html> on 20 January 2019.

⁸⁵ – <https://www.canada.ca/en/canadian-heritage/services/crown-canada/about.html> on 20 January 2019.

⁸⁶ – <https://www.studycountry.com/guide/CA-government.html> on 20 January 2019.

4.3 Canada's Human Rights Framework

In Canada, human rights are protected by federal, provincial and territorial laws.⁸⁷ The two main pieces of human rights legislation at federal level are the *Canadian Charter of Rights and Freedoms* and the *Canadian Human Rights Act*. The *Canadian Charter of Rights and Freedoms* forms part of Canada's Constitution, ensuring that a core set of human rights are entrenched under Canadian law.⁸⁸ It is important to note that the charter applies to governments, but not to organisations, businesses or people.⁸⁹ On its part, the *Canadian Human Rights Act* protects people in Canada from discrimination when they are employed by or receive services from the federal government, First Nations⁹⁰ governments or private companies that are regulated by the federal government such as banks, trucking companies, broadcasters and telecommunications companies.⁹¹ The Canadian Human Rights Commission administers the *Human Rights Act* and deals with complaints under it.⁹²

In addition to the federal laws highlighted above, each province and territory of Canada has its own human rights legislation.⁹³ These laws are distinct from the Canadian Charter of Rights and Freedoms in that the scope of human rights provisions contained within the provincial acts are limited to preventing and addressing cases of discrimination, harassment, and a lack of accommodation in the workplace.⁹⁴ For example, the province of Ontario enacted the *Ontario Human Rights Code*, the first provincial human rights code in Canada, in 1990.⁹⁵ This code is

⁸⁷ – http://unimelb.libguides.com/human_rights_law/national/canada on 23 January 2019.

⁸⁸ See generally Part I, *The Constitution Act*, 1982 (Canada). The Charter guarantees broad equality rights and other fundamental rights such as the freedom of expression, freedom of assembly and freedom of religion.

⁸⁹ Section 32, *Canadian Charter of Rights and Freedoms* (1982). See also http://unimelb.libguides.com/human_rights_law/national/canada on 24 January 2019.

⁹⁰ First Nations – also known as Natives and Native Canadians – are an Aboriginal group in Canada and one of the country's original inhabitants. There are currently 634 registered First Nations communities in Canada, with more than half of them in British Columbia and Ontario.

⁹¹ See generally, *Canadian Human Rights Act* (1985). See also http://unimelb.libguides.com/human_rights_law/national/canada on 24 January 2019.

⁹² Section 27(1), *Canadian Human Rights Act* (1985). The Commission may refer complaints to the Canadian Human Rights Tribunal, which can order remedies and award damages. Of pertinence is that the Canadian Human Rights Commission does not enforce the Charter or accept complaints under the Charter. Complaints under the Charter must be filed in a court.

⁹³ http://unimelb.libguides.com/human_rights_law/national/canada on 24 January 2019.

⁹⁴ Szurlej C, 'Reconciling Competing Human Rights in Canada' 47(1-2) *The Canadian Journal of Peace and Conflict Studies*, 2015, 180.

⁹⁵ <http://www.ohrc.on.ca/en/ontario-human-rights-code> on 24 January 2019.

administered by the Ontario Human Rights Commission.⁹⁶ The discourse herein will primarily focus on human rights protection at the national and provincial levels.

4.4 Protection of the freedom from discrimination and the right to manifest religion in Canada

The Canadian Charter of Rights and Freedoms does not expressly forbid discrimination on the basis of sexual orientation.⁹⁷ Nonetheless, in *Egan v Canada*,⁹⁸ Section 15 of the Canadian Charter of Rights and Freedoms was interpreted to include the 'analogous' ground of sexual orientation. *Egan* was closely followed by an Act of Parliament with the sole purpose of adding sexual orientation to the list of protected classes in Section 2 of the Canadian Human Rights Act.⁹⁹ Almost two years later, the Supreme Court adjudging in *Vriend v Alberta*¹⁰⁰ held that provincial human rights legislation that excluded from protection the ground of sexual orientation violated section 15(1) of the charter. Nowadays, Canada is often referred to as one of the most gay-friendly countries in the world.¹⁰¹ A global survey conducted in March 2013 showed that 80% of Canada's general population (87% among Canadians aged between 18 and 29) favoured social acceptance of homosexuality.¹⁰²

As regards religious freedom, the preamble of the Canadian Charter stipulates that Canada is founded upon principles that recognize the supremacy of God. The charter then identifies the freedom of religion and conscience as a fundamental freedom.¹⁰³ Even though the freedom of religion, like all charter rights, is not absolute, it has historically received a broad, purposeful interpretation as evidenced by supreme court decisions such as *R. v. Big M Drug Mart Ltd*¹⁰⁴ and

⁹⁶ Section 29, *Human Rights Code of Ontario* (1990).

⁹⁷ See Section 15(1), *Canadian Charter of Rights and Freedoms* (1982).

⁹⁸ (1995), The Supreme Court of Canada.

⁹⁹ Chapter 14, *Statutes of Canada* (1996).

¹⁰⁰ (1998), The Supreme Court of Canada.

¹⁰¹ See for example <https://www.businessinsider.com/worlds-most-gay-friendly-countries-2013-3?IR=T#belgium-followed-suit-and-passed-gay-marriage-in-2003-2> on 29 January 2019 and <https://www.contiki.com/six-two/lets-take-second-recognise-worlds-lgbt-friendly-countries/> on 29 January 2019.

¹⁰² Pew Research Center, *The Global Divide on Homosexuality*, 2013, 6.

¹⁰³ Section 2(a), *Canadian Charter of Rights and Freedoms* (1982). It has been argued that the appearance of the freedom of religion as the first fundamental freedom in the charter speaks to its primacy as a value of Canadian Society. See for example Billingsley B, 'Walking the Tightrope: The Struggle of Canadian Courts to Define Freedom of Religion under the Canadian Charter of Rights and Freedoms' in Babie P and Rochow N (eds) *Freedom of Religion under Bills of Rights*, University of Adelaide Press, Adelaide, 2012, 325.

¹⁰⁴ (1985), The Supreme Court of Canada.

Syndicat Northcrest v. Amselem.¹⁰⁵ In more recent times however, there have been concerns that firstly, the free exercise of religion is continuously being stifled in the name of equality.¹⁰⁶ Secondly, it has been argued that courts have often unfairly relegated religion to the private sphere and precluded religious principles, values, and ideas from the realm of legal disputes and public policy.¹⁰⁷ Of relevance is that the number of Canadians with no religious affiliation has been rising, and attendance at religious services has been dropping.¹⁰⁸

4.5 A brief comparison of the Rights Frameworks adopted by Kenya and Canada

To begin with, the Constitutions of both countries contain limitation of rights clauses.¹⁰⁹ These clauses are nearly identical, with the Kenyan provision being more elaborate. Both clauses require a limitation on a right to be reasonable and justifiable in a free and democratic society. As such, the first component of proportionality, proper purpose, is explicitly entrenched in both constitutions. The judiciaries of both countries employ proportionality analysis to assess the legality of limitations on constitutional rights.¹¹⁰

A few differences between Kenyan and Canadian human rights laws can be pointed out. Firstly, unlike Kenyan laws, Canadian laws expressly prohibit discrimination on the basis of sexual orientation.¹¹¹ Secondly, Kenya does not have dedicated legislation to combat any form of discrimination in the provision of Services. Canada has the Canadian Human Rights Act and numerous provincial and territorial laws. Thirdly, the Canadian province of Ontario has a policy on competing human rights that guides individuals and organisations as they deal with competing rights scenarios. The national government of Canada has been urged to come up with a similar

¹⁰⁵ (2004), The Supreme Court of Canada.

¹⁰⁶ Especially in light of *Trinity Western University v. Law Society of Upper Canada* (2018), The Supreme Court of Canada.

¹⁰⁷ See for example <https://www.cardus.ca/comment/article/is-there-room-for-religion-in-canadian-law/> on 29 January 2019.

¹⁰⁸ For further statistics on Canada's religious landscape see Pew Research Center, *Canada's changing religious landscape*, 27 June 2013, 1.

¹⁰⁹ See Article 24(1) *Constitution of Kenya* (2010) and Section 1, *Canadian Charter of Rights and Freedoms* (1982).

¹¹⁰ Canada is often cited as one of the principal sources of proportionality analysis. In 1986 (shortly after the enactment of the Charter) the Supreme Court of Canada adjudging in *R v Oakes* set out a four-part proportionality test for determining whether a restriction on a right is justified under section 1.

¹¹¹ Section 3(1), *Canadian Human Rights Act* (1985).

document. Unfortunately, the same cannot be said for Kenya. These differences are of particular relevance to this study since they provide vital context to the comparative analysis herein.

4.6 Canada's approach to reconciling the free exercise of religion with non-discrimination concerns

Like Kenya, Canada does not have a clear formula or analytical approach for dealing with competing rights. Nonetheless, courts have provided some guidance. Legal decisions have identified a number of fundamental principles that provide direction when dealing with competing rights claims.¹¹² These principles are nearly identical to the Kenyan principles discussed in Chapter 3.

With a view of providing clear, user-friendly guidance on how to assess, handle and resolve competing rights claims, the Ontario Human Rights Commission (OHRC) in 2012 launched a policy on competing human rights. This policy, though not binding on other Canadian provinces, provides useful insight into Canada's rights reconciliation process.¹¹³ This section begins by highlighting Canada's principles of rights reconciliation. It then describes Canada's rights reconciliation process.

4.7 Canada's principles of rights reconciliation

Canadian decision makers refer to eight key principles of rights reconciliation. Firstly, the Supreme Court has constantly asserted that no *charter* right is absolute. In *R. v. Crawford*¹¹⁴ the Court explained "Charter rights are not absolute in the sense that they cannot be applied to their full extent regardless of context." This sentiment is echoed in *R. v. Mills*¹¹⁵ where the Court stated all human rights must "be defined in light of competing claims." In the context of freedom of belief or religion, the "freedom to hold beliefs is broader than the freedom to act upon them" where to act would interfere with the rights of others.¹¹⁶

¹¹² Ontario Human Rights Commission, *Policy on Competing Human Rights*, 2012, 18.

¹¹³ It has been argued that Ontario's rights reconciliation framework bears similarities to the approach taken by the Supreme Court of Canada.

See https://www.casselsbrock.com/CBNewsletter/How_to_Balance_Competing_Rights on 4 February 2019.

¹¹⁴ (1995), The Supreme Court of Canada.

¹¹⁵ (1999), The Supreme Court of Canada.

¹¹⁶ *Trinity Western University v. Law Society of Upper Canada* (2018), The Supreme Court of Canada.

Closely related to the aforementioned principle of Charter interpretation is the idea that there is no hierarchy of rights in the Charter, nor should one be inferred from Charter jurisprudence.¹¹⁷ This seminal statement of law was made by Lamer C.J. in *Dagenais v. Canadian Broadcasting Corporation*.¹¹⁸

A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the Charter and when developing the common law. When the protected rights of two individuals come into conflict, as can occur in the case of publication bans, Charter principles require a balance to be achieved that fully respects the importance of both sets of rights.

The third principle recognises that rights may not extend as far as claimed.¹¹⁹ This principle creates a necessary distinction between “legal rights and values, interests or individual preference.”¹²⁰ As will be learnt from the first stage of Canada’s rights reconciliation process, a genuine claim must engage a genuine legal right. The fourth principle entails consideration of the full context, facts and constitutional values concerned.¹²¹ According to Justice Iacobucci:

The key to rights reconciliation, in my view, lies in a fundamental appreciation for context. Charter rights are not defined in abstraction, but rather in the particular factual matrix in which they arise.¹²²

Fifthly, the extent of interference on each right must be determined.¹²³ If the “harmful effect” is trivial or minimal for one party, yet substantial for the other, the former’s rights are unlikely to receive protection.¹²⁴ The next key principle is “core of right more protected than periphery.”¹²⁵ In *Reference re Same-Sex Marriage*¹²⁶ the Court stated “The further the activity is from the core elements of the freedom, the more likely the activity is to impact on others and the less deserving

¹¹⁷ Iacobucci F, “Reconciling Rights”, 140.

¹¹⁸ (1994), The Supreme Court of Canada.

¹¹⁹ Ontario Human Rights Commission, *Policy on Competing Human Rights*, 2012, 20.

¹²⁰ Szurlej C, ‘Reconciling Competing Human Rights in Canada’, 185.

¹²¹ Ontario Human Rights Commission, *Policy on Competing Human Rights*, 2012, 22.

¹²² Iacobucci F, “Reconciling Rights”, 140.

¹²³ Ontario Human Rights Commission, *Policy on Competing Human Rights*, 2012, 25.

¹²⁴ See for example *Syndicat Northcrest v. Amselem* (2004), The Supreme Court of Canada where in the Court’s view, the effect on the Jewish family was substantial while the effect on the co-owners was “at best, minimal,” and therefore limiting religious freedom could not be justified.

¹²⁵ Ontario Human Rights Commission, *Policy on Competing Human Rights*, 2012, 26.

¹²⁶ (2004), The Supreme Court of Canada.

the activity is of protection.”¹²⁷ The Court noted that commercial enterprise is at the “periphery” of freedom of religion, and therefore, the religious rights had to give way to the right to be free from sexual orientation discrimination.

The seventh principle requires respect for the importance of both sets of rights.¹²⁸ As will also be learnt from the second stage of Canada’s rights reconciliation process, “constructive compromises” are part of the reconciliation process. These compromises “may minimise apparent conflicts ... and produce a process in which both values can be adequately protected and respected.”¹²⁹ Lastly, defences found in legislation may restrict rights.¹³⁰ Often, statutory defences have been created to protect collective rights.¹³¹ For instance, religious officials may be exempted from conducting marriage ceremonies contrary to their religious beliefs. Such exemptions attempt to reduce competing rights conflicts.

4.8 Canada’s rights reconciliation process

In addition to a set of key legal principles used to reconcile competing human rights complaints, Canada has a three-stage process for recognising and reconciling competing human rights claims.¹³² Stage one entails recognising the competing rights claims. This first stage is indispensable since “Many disputes in which there appears to be a conflict of rights will be revealed, upon closer examination, to be situations in which the resolution of the dispute is not contingent upon the complex process of balancing.”¹³³ Indeed, the Supreme Court in *Trinity Western University v. British Columbia College of Teachers*¹³⁴ noted “this is a case where any potential conflict should be resolved through the proper delineation of the rights and values involved. In essence, properly defining the scope of the rights avoids a conflict in this case.”

¹²⁷ To understand core of a right analysis, consider two scenarios. The first requires religious officials to perform same-sex marriages contrary to their religious beliefs while the second entails allowing a religious business operator to refuse to offer his printing services to a same-sex organisation. The first situation engages the freedom of religion more strongly as compared to the second scenario.

¹²⁸ Ontario Human Rights Commission, *Policy on Competing Human Rights*, 2012, 27.

¹²⁹ *R. v. N.S.* (2012), The Supreme Court of Canada.

¹³⁰ Ontario Human Rights Commission, *Policy on Competing Human Rights*, 2012, 28.

¹³¹ Ontario Human Rights Commission, *Policy on Competing Human Rights*, 2012, 28.

¹³² Ontario Human Rights Commission, *Policy on Competing Human Rights*, 2012, 32.

¹³³ Wray BJ, ‘Balancing Conflicting Rights: Towards an Analytical Framework’ Ontario Human Rights Commission, 2005, 4 —<http://www.ohrc.on.ca/en/balancing-conflicting-rights-towards-analytical-framework> on 30 January 2019.

¹³⁴ (2001), The Supreme Court of Canada.

Therefore, as a necessary starting point before proceeding to the balancing process, Canadian decision makers give careful consideration to the following three key questions:¹³⁵

1. Are the rights claims characterised appropriately?
2. Are valid, legally recognised rights at stake?
3. Are the needs of both parties truly in conflict?

A ‘no’ response to any one of these questions will mean that wading into the murky territory of balancing conflicting rights is not required. Instead, the competing claims will either be dismissed as inappropriate or invalid, or conflict management will occur through informal accommodation.¹³⁶ Stage one basically focuses on establishing whether there exists a genuine case of competing human rights.

Stage two centres on reconciling the competing rights.¹³⁷ This stage explores options to “reduce or eliminate interference and allow full or at least ‘substantial’ exercise of the rights of all parties within the given context.”¹³⁸ According to the Supreme Court “Competing rights claims should be reconciled through accommodation if possible, and if a conflict cannot be avoided, through case-by-case balancing.”¹³⁹ Creative solutions could be employed in attempts to eliminate the conflict.¹⁴⁰ While the goal is to strive for an “ideal” reconciliation where neither party relinquishes a substantial part of their right, there may be cases where reaching the ideal is not possible. In such cases a “next best” solution is sought through constructive compromise that least impairs both rights.¹⁴¹ At worst, it may be necessary to limit enjoyment of a right. Any limitation on a right should consider human rights values including respect for human dignity, inclusion of all, community and social harmony, and the collective interests of minority or marginalized groups.¹⁴²

The third stage is the decision-making stage. Challenges can arise leading up to this stage. These challenges may seriously complicate the reconciliation process and include scenarios where one of the parties has not fully engaged in the process, the parties fail to agree on a solution, the case

¹³⁵ Wray BJ, ‘Balancing Conflicting Rights: Towards an Analytical Framework’, 4.

¹³⁶ Wray BJ, ‘Balancing Conflicting Rights: Towards an Analytical Framework’, 4.

¹³⁷ Ontario Human Rights Commission, *Policy on Competing Human Rights*, 2012, 37.

¹³⁸ Ontario Human Rights Commission, *Policy on Competing Human Rights*, 2012, 37.

¹³⁹ *R. v. N.S.* (2012), The Supreme Court of Canada.

¹⁴⁰ Szurlej C, ‘Reconciling Competing Human Rights in Canada’, 189.

¹⁴¹ Szurlej C, ‘Reconciling Competing Human Rights in Canada’, 189.

¹⁴² Ontario Human Rights Commission, *Policy on Competing Human Rights*, 2012, 38.

lacks merit overall etc.¹⁴³ If these challenges are absent or can be overcome, the decision maker may choose to render a decision regarding how to reconcile the competing rights or reach an appropriate compromise based on the evidence presented and discussed during the previous two stages.¹⁴⁴ Any decision made must be consistent with human rights and other laws, court decisions and human rights principles.

4.9 Conclusion

Both Kenya and Canada adopt a principle-based approach to rights reconciliation. However, Canada's approach is generally more detailed due to two key reasons. Firstly, the jurisdiction has the advantage of extensive jurisprudence on resolving competing rights claims. Secondly, Canada has attempted to codify the principles and process of rights reconciliation. The Canadian approach is thus desirable since it is more clear and predictable. Its emphasis on an "ideal" reconciliation and "constructive compromise" or accommodation makes it even more attractive.

¹⁴³ Szurlej C, 'Reconciling Competing Human Rights in Canada', 189.

¹⁴⁴ Szurlej C, 'Reconciling Competing Human Rights in Canada', 189.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This research sought to find out how the law addresses conflicts between the freedom of religion and the freedom from discrimination. The Constitution of Kenya does not expressly outlaw sexual orientation discrimination. In recent years however, sexual minority individuals and groups have been actively engaging the judicial system with a view of at least gaining legal recognition. These persons have been making minimal but steady gains. As such, this paper took a largely prospective stance, anticipating conflicts and attempting to deal with them before they arise. The scope of the research was limited to private provision of goods and services in the secular marketplace.

5.2 Conclusion

This research was guided by two research questions. The first was, what are the limits, if any, on the right to manifest one's religion? Second, what are the most suitable measures to take in order to avoid possible clashes between the freedom to manifest religion and the right to be free from discrimination on the basis of sexual orientation?

In addition, the study sought to test two hypotheses, namely, first, that the right to manifest one's religion is not a permissible justification to curtail the right of homosexual individuals to be free from discrimination on the basis of sexual orientation and second, that the right to manifest one's religion may be limited in circumstances where it is necessary to protect the rights and freedoms of others.

As was seen in this study's Chapter two, balancing is the main method used by a number of constitutional courts around the world to resolve conflicts of fundamental rights. This chapter described the sub-components of proportionality in detail. Importantly, it likened by analogy the last test of proportionality, proportionality *stricto sensu*, to balancing. Balancing denotes a cost-benefit analysis. Chapter Two concluded by presenting balancing as a rational means of resolving competing human rights disputes.

Chapter three directly responded to the issues raised by the research questions. It began by setting out the nature and scope of both the right to manifest religion and the freedom of discrimination. As regards manifestation, emphasis is on sincerity of belief rather than validity of belief. This chapter proceeded to acknowledge the dearth of Kenyan cases specifically pitting the freedom of religion against the freedom from discrimination. It also noted that Kenya does not have a hard and fast method of reconciling rights in tension. Nevertheless, it made use of principles from decided cases to illustrate how a Court will resolve a conflict between both rights.

In relation to the first research question, Chapter 3 found that while the freedom to hold beliefs of one's choosing is absolute, the freedom to manifest religion is not absolute. As such, the freedom to hold beliefs is necessarily broader than the freedom to act upon them. Manifestation may be limited where it is necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others. Importantly, the freedom of religion is not included in the short list of fundamental freedoms that may not be limited.¹⁴⁵ These findings validate the hypothesis of the study that the right to manifest one's religion may be limited in circumstances where it is necessary to protect the rights and freedoms of others.

Chapter four compared Canada's rights reconciliation framework with Kenya's approach. It found that both jurisdictions adopt a principle-based approach to rights reconciliation. Canada's approach is however more clear and predictable and its emphasis on an "ideal" reconciliation and "constructive compromise" or accommodation makes it even more attractive. In relation to the second research question, chapter four found that through creation of defences and/or exemptions to general rules, legislation can be used to reduce competing rights conflicts. For instance, religious officials may be exempted from conducting marriage ceremonies contrary to their religious beliefs. Such an exemption attempts to reduce competing rights conflicts through an express legislative delineation of the bounds of religious freedom.

The second hypothesis was that the right to manifest one's religion is not a permissible justification to curtail the right of homosexual individuals to be free from discrimination on the basis of sexual orientation. This study elaborated on the principles of rights reconciliation. As compared to a rigid analytical or mechanistic approach, principles allow for flexibility in resolving claims on a case

¹⁴⁵ Article 25, *Constitution of Kenya* (2010).

by case basis. Different situations will likely lead to different outcomes since both the freedom of religion and the freedom from discrimination are to receive equal protection according to the non-hierarchical approach to human rights. All in all, context is king when resolving competing rights claims.

5.3 Recommendations

When compared to the Canadian model, Kenya's approach to reconciling competing rights was found to be slightly deficient. This deficiency stems primarily from legal handicaps. This paper proposes the following recommendations.

Firstly, the Kenyan legislature is advised to pass a law expressly outlawing discrimination in the provision of goods and services. Article 27 of the Constitution and the *Employment Act* are simply not enough. An Act of Parliament, just like Canada's *Human Rights Act* would help clarify the extent of protection. In doing so, Parliament should consider that sexual minorities are also worthy of equal protection of the law.

Secondly, the state of Kenya is advised to develop a policy on competing human rights similar to Ontario's. Such a policy would provide the guidance necessary to allow members of the public to better understand the content and scope of their rights, while providing organisations with the tools required to effectively resolve competing rights. The policy will help facilitate the resolution of competing rights at the interpersonal and organisational levels, reserving review by courts for exceptionally complex cases. This would yield a number of benefits for society, including the conservation of public resources, improving morale in the workplace, and empowering individuals to resolve their own conflicts through a human rights framework.¹⁴⁶

5.4 Conclusion

As the discourse on equality and non-discrimination in Kenya intensifies, issues of competing human rights claims arising from diversity are bound to increase. Many countries are extending legal protections to sexual minorities. In Kenya, religious arguments are often used to justify denial of such protections. Religious freedom arguments do not necessarily have to clash with anti-

¹⁴⁶ Szurlej C, 'Reconciling Competing Human Rights in Canada', 192.

discrimination concerns. Legal and policy measures can be used to achieve equality. Where possible, a clash between rights should be approached by reconciling the rights through reasonable accommodation. The Constitution protects all regardless of sexual orientation.

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